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1 [The R.M.C. 803 session was called to order at 1104,
2 12 February 2018.]

3 MJ [Col SPATH]: All right. Good morning. These
4 commissions are called to order.

5 Mr. Miller, do you want to go through the parties
6 that are present for the prosecution?

7 TC [MR. MILLER]: Good morning, Your Honor. Thank you.
8 First, Your Honor, these proceedings are being transmitted via
9 CCTV to the locations in the United States identified in the
10 commission's order.

11 Present for the United States are Brigadier General
12 Mark Martins; myself, Mark Miller; Colonel John Wells; Major
13 Michael Pierson. Also present at the government table,
14 Mr. Forrest Parker Smith; Master Sergeant Vanessa Pichon; and
15 also present in the courtroom, Staff Sergeant Kevin Creel and
16 LN2 Valerie Johnson.

17 Present here today, Your Honor, from the FBI are
18 special -- Supervisory Special Agent Mary Boese, Staff
19 Operations Specialist Joseph Castellano, and Evidence
20 Technician Norlishia Norris. Thank you, Your Honor.

21 MJ [Col SPATH]: Thank you.

22 Defense Counsel?

23 DDC [LT PIETTE]: Good morning, Your Honor.

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1 MJ [Col SPATH]: Good morning.

2 DDC [LT PIETTE]: Good morning. Your Honor, present for
3 the defense is myself, Lieutenant Piette. Also present today
4 is Ms. Brandi Janes, Mr. Marc Dolphin, and Ms. Kristina Hon.
5 And also present from the MCDO is Colonel Aaron.

6 MJ [Col SPATH]: Thanks.

7 DDC [LT PIETTE]: Thank you.

8 MJ [Col SPATH]: Colonel Wells.

9 MATC [COL WELLS]: Sorry, Your Honor. He did not account
10 for the presence of the other detailed civilian counsel.

11 MJ [Col SPATH]: I understand. We'll talk about it.
12 They're not present here, as has been an ongoing issue.

13 Mr. al Nashiri, let me talk to you about the normal
14 rights I go through with you on our first day together. I'm
15 going to talk to you about your right to be present and your
16 right to waive your presence at any time during this hearing.

17 You have the right, of course, to be present during
18 all sessions of the commission. If you request to be absent,
19 such absence must be voluntary and of your own free will.

20 Your voluntary absence from any session of the commission is
21 an unequivocal waiver of your right to be present during the
22 session. Your absence from any session may negatively affect
23 the presentation of the defense in your case. Your failure to

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1 meet with and cooperate with your defense counsel may also
2 negatively affect the presentation of your case.

3 Under certain circumstances your attendance at a
4 session can be compelled regardless of your personal desire
5 not to be present. The proceedings today constitute one of
6 those occasions, as we're going to be discussing the -- well,
7 that's it. First time you need to be here each time.

8 Do you understand what I have explained to you thus
9 far?

10 ACC [MR. AL NASHIRI]: Yes, I understand everything.

11 MJ [Col SPATH]: Thank you. And then, as always, I ask
12 you if you want me to take breaks for prayer time. Do you
13 want me to take breaks for prayer time? That's a negative?

14 ACC [MR. AL NASHIRI]: It's good to continue.

15 MJ [Col SPATH]: Okay. Thank you.

16 I do note that the three detailed counsel, three
17 civilian detailed counsel are not here, again, which is pretty
18 good reason for Lieutenant Piette not to account for their
19 presence since they continue not to arrive to represent their
20 client, despite multiple findings from this court and no
21 finding from any superior court to the contrary, but -- all
22 right.

23 Let's first deal with the two DoD civilians. I asked

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1 the government last time to work to secure their attendance to
2 testify. That process got underway. While that was going on,
3 we got third-party filings, which I accepted the first time
4 where the civilians through counsel made various arguments to
5 either quash the subpoena or alter the attendance requirements
6 or something like that.

7 It was pretty clear by the end of the session that I
8 wanted them to come and testify, as was made absolutely clear
9 when I issued the docketing order. The docketing order I
10 think was a fair indication that I'm not granting any motion
11 to quash. I am certainly amenable to working on their
12 schedule to have them come testify by VTC to a point, but they
13 need to be here.

14 In response to the docketing order, we received
15 proposed third-party filings that, frankly, were a
16 cut-and-paste from the original third-party filings with the
17 very same arguments, so I'm not accepting those. I've already
18 seen them. There's nothing new. So there's going to be no
19 new briefing order, no new briefing cycle. We've already
20 covered this.

21 And so, Trial Counsel, any updates on -- to -- are
22 they going to show up at the Mark Center? Do we need to
23 subpoena them again?

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1 MATC [COL WELLS]: Your Honor, briefly, we have no
2 indication from the individuals that they will comply with the
3 subpoenas which are, as written, to appear at the Mark Center
4 to be ready to testify at 10:00 tomorrow, Tuesday, with the
5 change in events. You were not scheduled to convene at that
6 time until 1300. But I think a reasonable interpretation is
7 to be ready at the Mark Center and wait further instructions
8 to be ready to testify. That's where we are.

9 Maybe a further inquiry with their supervisor would
10 be important. Also with Lieutenant Piette, since you have not
11 released any of the defense counsel, he should know where they
12 are, and if he needs to, he should communicate with them and
13 find out exactly what their plans are.

14 Sir, about these third-party filings, 393, I
15 understand that you're not going to accept them, but I do
16 believe there is new information in there that should concern
17 the commission. They have attached an agreement of
18 responsibilities to that which neglects to include the two
19 required provisions that are specified in the regulation: one
20 is to follow all rules and regulations, and number two, to
21 comply with all orders of this commission.

22 So that agreement is something that the prosecution
23 has not seen, other components of the government have not

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1 seen. This is within the MCDO files and seems to be out of
2 compliance with the regulation for their qualifications. And
3 so an appropriate inquiry with them personally would be
4 prudent, and the reason why they should appear as witnesses.
5 And then number two, also with their supervisory chain. So I
6 think that is more concerning, and the government would like
7 an opportunity to make that on the record ----

8 MJ [Col SPATH]: You all are welcome -- you all are
9 welcome to file whatever you think is appropriate. I will
10 accept your filings as a party standing by. But as for any
11 more third-party -- third party filings with the same
12 arguments that we've already spent a whole session discussing,
13 I'm not interested.

14 If there's a reason to quash the subpoena, i.e., it's
15 oppressive in some manner to have them travel to the Mark
16 Center close to where they work, I'd be interested. But I
17 haven't heard any of that. I just keep hearing the same
18 thing, I don't have the authority, which I do. And the
19 defense community can unilaterally act and it's unreviewable,
20 even though I disagreed with that. And again, not a single
21 appellate court has said differently yet. They have been
22 remarkably silent, so ----

23 MATC [COL WELLS]: Yes, sir. And to comment on that point

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1 then, this filing in 393 from Ms. Eliades and Spears where the
2 requested relief is that you accept that filing in lieu of
3 their appearance to discuss good cause on the record, you've
4 rejected that, will not accept those filings.

5 You want them personally to appear. We've issued a
6 subpoena. They should appear at the Mark Center at 10:00
7 tomorrow. We've requested that the VTC suite be made
8 available. If the commission gives us other orders and
9 directions about their appearance time, we will modify that
10 appropriately.

11 MJ [Col SPATH]: I think -- it appears tomorrow there's
12 going to be some use of this facility by another court
13 proceeding. And so kind of two things: 10:00 tomorrow is
14 what the subpoena says. It's reasonable for them to be there
15 at 10 in accordance with the subpoena, even though we
16 shouldn't have to subpoena DoD employees that taxpayers pay
17 for. But separate from that whole effort, it's reasonable
18 they'll be there at 10:00 tomorrow. I imagine we won't get to
19 them until sometime after 10 because the schedule for tomorrow
20 is that other proceeding to be here from 8 to 10. So however
21 long it takes to get them out and get us in, hopefully by 11,
22 we'll get started.

23 MATC [COL WELLS]: Okay, sir.

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1 MJ [Col SPATH]: If they're not there, different issue,
2 and then we can talk through our next steps, which we've been
3 down this road before. If that's the next step, that's the
4 next step.

5 MATC [COL WELLS]: All right, sir. Thank you.

6 MJ [Col SPATH]: All right. All right, Colonel Aaron, if
7 you could, could we chat for a few minutes? Same as last
8 time, I just -- I want to get some updates and make sure I
9 understand where we're going.

10 I assume you're still the Acting Defense Counsel --
11 Chief Defense Counsel in this case?

12 DCDC [COL AARON]: I am, Your Honor. Before we start, I
13 would like to start, again, by saying that I'm here
14 voluntarily to answer what questions I feel that I can answer
15 from the court. But I renew my objection to the court's
16 opinion that it can order me to be here and would ask the
17 court to state on the record the basis upon which it believes
18 it can order me to be here.

19 MJ [Col SPATH]: I would do this. If you don't think I
20 have the authority, don't show up. Orders are -- orders are
21 presumed to be lawful. That's -- I think we learned that
22 early on in our military careers. They're presumed to be
23 lawful. And you violate them at your own risk. So if you

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1 don't want to be here, leave. We'll figure out what happens.

2 DCDC [COL AARON]: Your Honor, I'm trying to cooperate
3 and ----

4 MJ [Col SPATH]: Right.

5 DCDC [COL AARON]: ---- assist the court in understanding
6 the situation.

7 MJ [Col SPATH]: Right. And that's why I said last time,
8 it's not meant to be -- I'm not going to explain, justify, and
9 debate why I think I have authority as a commissions judge to
10 compel the attendance of somebody who has supervisory
11 responsibilities over this team. If there comes a point where
12 you think I'm wrong and it's worth taking that risk, then
13 don't show. I wouldn't advise it, but I'm not your lawyer.
14 I'm doing the best I can with the tools I have or I don't
15 have, so ----

16 DCDC [COL AARON]: I understand your position, Judge.

17 MJ [Col SPATH]: With regard to Ms. Eliades and
18 Ms. Spears, I assume you're familiar with civilian witnesses
19 in government employ and their requirements to make themselves
20 available for this process and their supervisor's role in that
21 process.

22 DCDC [COL AARON]: I am.

23 MJ [Col SPATH]: And so are you assisting the

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1 prosecution -- and them, frankly -- in understanding -- I
2 didn't write 13-4, and I didn't write those rules. But are
3 you helping communicate that particular issue to these two
4 counsel?

5 DCDC [COL AARON]: Your Honor, I think there's room for
6 interpretation as to what 13-4 provides, and I certainly
7 disagree with what I think is a superficial reading and
8 understanding of that that Colonel Wells has proffered.

9 The issue is -- is significantly more difficult when
10 dealing with a situation such as this where the witnesses are
11 unwilling to appear, have sought, through a legal process, to
12 have that subpoena quashed, and are represented by counsel in
13 that effort. There's a number of employment-related legal
14 issues that greatly complicate the simplistic approach that I
15 can simply order them to be here and the concept that my order
16 would have any significance, whatsoever, on their intention of
17 what to do.

18 MJ [Col SPATH]: No, and I appreciate that. Mine wasn't a
19 request for you to order them. I mean, again, I think you can
20 read this a few ways, but it does say, "Civilian employees of
21 the United States can be required to testify incident to their
22 employment with appropriate travel orders issued for this
23 purpose," and you don't need a subpoena.

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1 DCDC [COL AARON]: And, Your Honor, I have provided for
2 travel orders to be issued for them and to have them put on
3 the manifest on the flight down here. Obviously, they have
4 not done so.

5 MJ [Col SPATH]: No, I appreciate that. That helps. So
6 it seems to me you are, within the rules, at least, trying to
7 communicate to them what their requirements may be.

8 Colonel Wells?

9 MATC [COL WELLS]: Your Honor, if I could, I don't think
10 there's been an inquiry whether or not he's communicated with
11 them.

12 MJ [Col SPATH]: Well, and I'm walking a cautious line. I
13 don't want to get too much into what the communications may or
14 may not be yet.

15 The other is, as a supervisory attorney -- we all
16 have these rules. As the supervisory attorney with
17 responsibilities over anyone, so if you have supervisory
18 responsibilities over Lieutenant Piette, for example, as the
19 chief defense counsel, do you agree one of those
20 responsibilities is that he conforms, or any of those who work
21 for you conform with their Rules of Professional
22 Responsibility?

23 DCDC [COL AARON]: I would say so, yes.

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1 MJ [Col SPATH]: All right. It appears the Army Rules of
2 Practice -- or the Army Rules of Professional Responsibility,
3 your bar rules, Ms. Eliades' and Ms. Spears' bar rules all say
4 the same thing, word for word, so I think yes. And I've been
5 through the when ordered by a tribunal to continue
6 representation or to be somewhere, Rule 1.16, which is the
7 same for everybody, whether you like it or not, you're
8 supposed to show up.

9 So -- and I get they're not coming. But part of that
10 responsibility, when you read through that is, if you are
11 released, or believe you don't have to be there, you have some
12 requirement to work some kind of turnover with the people who
13 you've left behind. Ms. Yaroshefsky said as much. It doesn't
14 contemplate you just walk away and never return a phone call.

15 And so have you communicated to them their need to be
16 working a turnover with Lieutenant Piette -- because, like it
17 or not, he's here, they're not -- and to make sure that they
18 are doing what they can to assist him, because he's still here
19 representing Mr. al Nashiri.

20 DCDC [COL AARON]: I believe they understand their
21 responsibilities in that regard.

22 MJ [Col SPATH]: As their supervisory attorney in relation
23 to this case, have you ensured they understand their

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1 responsibilities?

2 DCDC [COL AARON]: I would say that I have.

3 MJ [Col SPATH]: Have you detailed any other defense
4 counsel to this case yet?

5 DCDC [COL AARON]: I have not detailed any counsel.

6 MJ [Col SPATH]: And, I don't know, what are we, four
7 months into this? Are you going to detail any counsel, or are
8 you just going to leave Lieutenant Piette sitting there?

9 DCDC [COL AARON]: Judge, it is the longstanding practice
10 of chief defense counsel before me and myself in this case to
11 fulfill our responsibility to make resources available to the
12 team. I have made resources available. And consistent with
13 the longstanding approach of the organization, it is the
14 learned counsel's responsibility and right to determine
15 whether or not they want counsel detailed and when and what
16 counsel they want.

17 And without learned counsel, the most important
18 resource that is necessary for the continuation of this
19 capital case, we are not in a position to determine whether or
20 not counsel should be detailed or not. Those resources are
21 available and, upon learned counsel indicating their desire, I
22 stand prepared to detail counsel to the case.

23 MJ [Col SPATH]: Well, I guess my question would be that I

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1 recognize that with learned counsel here, they have unique --
2 they have a unique role to play under the rules. Mr. Kammen
3 didn't excuse Ms. Eliades or Ms. Spears. General Baker
4 decided to excuse Ms. Eliades and Ms. Spears.

5 I mean, the way it could have been done for those
6 two, pretty clearly, was Mr. Kammen could have excused those
7 two and then, at least in his world, asked General Baker to
8 excuse him. But instead what happened is the three of them
9 went to General Baker, and they were all three excused. Not
10 by learned counsel.

11 Again, for the two DoD civilians -- I know you
12 recognize that distinction -- they were excused, no matter how
13 the learned counsel felt, because he never told us how he
14 felt. And those three walked away. And two military lawyers
15 at least, and another, I think, civilian were still detailed
16 to this case. So you just told me that learned counsel would
17 be the ones to undetail them, and you undetailed them.

18 DCDC [COL AARON]: Sir, learned counsel indicate their
19 desire when we provide -- make resources available, if they
20 would like them detailed. The chief defense counsel, yes,
21 signs the memo detailing or undetailing them, but in
22 accordance with the wishes and desires and the stated
23 preference of the learned counsel.

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1 MJ [Col SPATH]: Well, I understand, but after the learned
2 counsel left and said he had no more responsibilities in this
3 case, are you saying he then communicated that you should
4 undetail the two detailed military defense counsel and the
5 civilian?

6 DCDC [COL AARON]: Judge, the situation ----

7 MJ [Col SPATH]: No, I just want to understand. You told
8 me learned counsel decide. Okay. He was gone. And when he
9 left, in his wake there were other counsel detailed to this
10 case.

11 DCDC [COL AARON]: And I had no way of knowing, without
12 learned counsel, whether those counsel would be acceptable on
13 the case. And in order to maintain the status quo, and not to
14 allow the court to lock the defense team in by requiring their
15 appearance, I undetailed them.

16 Your Honor, I have an independent responsibility to
17 exercise my judgment to determine which members -- which
18 attorneys would best constitute a team for this client, and by
19 ordering attorneys who had not yet met with the client and
20 entered into an attorney-client relationship with the client,
21 you were thereby interfering with my ability to exercise my
22 independent judgment as to what attorneys would best
23 constitute the team for this client.

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1 MJ [Col SPATH]: Well, did you consult with the learned
2 counsel to see if this is the best idea?

3 DCDC [COL AARON]: Your Honor, as you know, I don't have
4 learned counsel to consult with.

5 MJ [Col SPATH]: Right. So learned counsel need to be
6 there to figure out whether or not you're going to detail them
7 or keep them. But without any consultation with learned
8 counsel or any -- did you make an effort to consult with legal
9 counsel? I've said he's still detailed. So did you pick up
10 the phone, send him an e-mail and tell him, what do I do here?
11 You've walked away and left me with nobody. What do I do
12 here?

13 DCDC [COL AARON]: Your Honor, we obviously have a
14 difference of opinion as to the status of Mr. Kammen.

15 MJ [Col SPATH]: Colonel Aaron, stop that. We do have a
16 difference of opinion. But the way court systems work is
17 judges rule and then people follow those rulings, or they go
18 and appeal, and then an appellate judge or judges agree or
19 disagree with me, and then we respond to those.

20 The way court systems do not work anywhere in the
21 United States, and, frankly, almost every other country -- the
22 way court systems don't work is when parties disagree with the
23 judge, they say I disagree. Thanks for your input. We don't

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1 agree. And they just march on in that direction without
2 something else. That's why we have 62 appeals. That's why we
3 have courts that we can appeal to. That's why we have
4 higher-level courts.

5 I mean, so the fact that you and I disagree is
6 irrelevant to the conversation. My conversation is, you told
7 me you need learned counsel to figure out what to do with this
8 stuff for every decision, even though, again, that's not
9 exactly what the law says in many jurisdictions, but okay.

10 I'm just trying to figure out when you made the
11 decision to undetail them, all of the resourcing for the team
12 except for Lieutenant Piette and the mitigation specialist who
13 we know is here helping. Unlike mitigation specialists, when
14 you undetailed those three attorneys, did you consult with
15 learned counsel to figure out if that was a good plan or not?

16 DCDC [COL AARON]: I did not feel I had a learned counsel
17 with which -- whom I could consult, Your Honor.

18 MJ [Col SPATH]: Okay.

19 MATC [COL WELLS]: Your Honor, if the prosecution could be
20 heard on that point?

21 MJ [Col SPATH]: You'll be heard, I promise. I'm just
22 trying to figure out the lay of the land. It certainly seems
23 obvious to me, but that's where we're at.

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1 Okay, Colonel Aaron, as always, I appreciate you
2 coming to chat. Thank you.

3 Trial Counsel, come on up.

4 MATC [COL WELLS]: Your Honor, the prosecution would
5 request that you inquire of Colonel Aaron again on this point.
6 The defense filing, AE 389 Attachment C, is a letter from
7 Brigadier General Baker to the convening authority explaining
8 that Mr. Kammen would remain on the case and available for the
9 transition of other learned counsel and that he may bill for
10 that. So it cannot be that the defense is without learned
11 counsel.

12 Additionally, you have ruled that they are not
13 released until they have a discussion with you about good
14 cause, and that's what you're seeking from Ms. Eliades,
15 Ms. Spears, and from Mr. Kammen. So it seems to be an
16 inconsistent position from Colonel Aaron. And maybe he's
17 uninformed that General Baker has filed this with the
18 convening authority indicating that learned counsel will still
19 remain. Additionally, it seems to be that the current
20 military defense counsel, Lieutenant Piette, has learned
21 counsel available to him to consult and advise him about the
22 approach.

23 So it's clear that the approach, at least from

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1 Colonel Aaron, if he believed that he made an independent
2 decision, is to gut the defense of any other military defense
3 counsel to assist and he is blocking communications and
4 failing to communicate with learned counsel.

5 Sir, do you have any questions of me on that?

6 MJ [Col SPATH]: I don't. For the record, I mean, yes,
7 that appears obvious to the court. I've made comments before.
8 It appears to be a strategic decision to under-resource and
9 make it appear as if this team is under-resourced.

10 But let me ask this for the government. I view my
11 responsibility to be neutral, most importantly, and to attempt
12 to move a process fairly through any -- whatever justice
13 process we're in. If I'm, you know, home station through a
14 courts-martial, if I'm here through the commission, fairly --
15 right? -- and judiciously, and the fair administration of
16 justice -- and that's the charter, and we all know that. So
17 I'm trying to do that.

18 But I've got to tell you I feel like I'm in the
19 wilderness on the -- fighting this particular issue because
20 it's not my fight. I am attempting to do what I can, but
21 really, what are you all doing to -- what are you all doing to
22 make sure the people who are doing this are held responsible?
23 I can't do it, that's clear. And again, is it in my lane?

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1 How much is in my lane?

2 And I'll be very open with both sides. I went home.
3 I was trying to review -- I mean, obviously I'm spending a lot
4 of time reviewing my cases to figure out my options. I
5 watched the military judge in a courts-martial, Hassan, take
6 on a battle that was not his, right, the beard issue, and
7 ultimately have to recuse himself.

8 And so a judge's responsibility is, one, right,
9 recuse yourself if you have to. But the responsibility is to
10 remain with the case and not recuse yourself if you don't have
11 to, whether you like it or not, right? The presumption is
12 non-recusal unless there's a reason to recuse yourself. And
13 that is for a good purpose, because otherwise, if judges don't
14 like a process they'll just walk away. I'm going to recuse
15 myself. And in the spirit of full disclosure, there are days,
16 right, where this is tough work. And it would be a lot easier
17 for me to say I'm going home, which is exactly, by the way,
18 what happened on this side, which is so frustrating: I'm
19 going home.

20 MATC [COL WELLS]: Yes, sir.

21 MJ [Col SPATH]: So what are you all doing?

22 MATC [COL WELLS]: Yes, sir. What the response to that
23 would be, number one, always the interest of the accused to

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1 have proper counsel. The court must remain neutral, detached,
2 and objective. I think that you are on pace with everything
3 that you've done to make the appropriate inquiries and put in
4 place the appropriate mechanisms to request voluntary
5 compliance by civilian counsel and learned counsel.

6 And as you do that, new information comes out. For
7 example, in the filings from Ms. Eliades and Ms. Spears, they
8 present their agreement of responsibilities, which indicates
9 pretty shocking and appalling mismanagement by the MCD0 chain
10 of command by not having them obligated with two essential
11 requirements to appear in front of this court, is to comply
12 with rules, regulations, and with orders and directives from
13 this commission as to the conduct of proceedings.

14 So with that, I think it's dawning on us since last
15 Friday in that filing that supervisors, Mr. Koffsky, perhaps
16 the Navy JAG, and others, should take a closer look, as the
17 prosecution is interested in getting to the evidence of the
18 case. We have an obligation for the family members and the
19 victims, and for justice. We have an obligation to make sure
20 that the accused has proper counsel that's required under the
21 law. So we should not rush to judgment. We should proceed at
22 the proper pace.

23 And we also know that the individuals involved, the

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1 learned counsel and the two civilian counsel, have options to
2 pursue collaterally, which they've indicated that they would.
3 There are other options that this commission has, considering
4 their failure to respond to the subpoena. I know the chief
5 prosecutor and the trial counsel in our matter will have a
6 discussion with the convening authority's office and, if need
7 be, to the Office of General Counsel to talk to the next
8 higher superior.

9 So all of these are going forward to implement the
10 commission's instructions and directives. But there seems to
11 be a fundamental defect in the Military Commission Defense
12 Organization that they believe they do not have to follow the
13 orders. General Baker spoke in front of this commission and
14 said, "I am not an enforcement mechanism," but clearly the
15 rules and regulations place that on the whole organization and
16 its members, including the chief defense counsel.

17 But here you have a writing now in 2015, as early as
18 that, that General Baker should have reviewed, and it clearly
19 neglects to include that provision. So I think we have some
20 professional mismanagement, and inquiry is appropriate.

21 Sir, that's all I can say at this point.

22 MJ [Col SPATH]: Well, I think they're important
23 inquiries, because I think we all know if we don't resolve

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1 these issues this time, even if we get another -- another --
2 because the other learned counsel is still detailed to this
3 case, based on my rulings and the lack of any other court
4 saying differently, it seems obvious.

5 But when we get another learned counsel, we all know
6 what can happen six, seven, eight months in, middle of trial,
7 day before trial starts, we do this again. And we sit around
8 and we talk about how we are -- you know, defense counsel is
9 looking into other options. How long are we going to look?
10 This case has been pending for years.

11 And so as I've said, we are moving forward. If I
12 were the defense community, I would resource the team. If I
13 were the defense community, I would recognize my obligations.

14 MATC [COL WELLS]: Sir ----

15 MJ [Col SPATH]: But I have to stay in my lane, too. How
16 much can I order it? I ordered detailed counsel to make an
17 appearance, and you saw what happened. They undetailed
18 them ----

19 MATC [COL WELLS]: Yes, sir.

20 MJ [Col SPATH]: ---- without consulting learned counsel.

21 MATC [COL WELLS]: Well, yes, sir, and I think that's
22 their choice.

23 MJ [Col SPATH]: And in a federal filing -- looking at it,

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1 I forgot -- in a federal filing, the defense community told a
2 federal judge, We can have learned counsel assigned to the
3 case in 30 days. That's in a federal filing to a federal
4 district judge. We're 120 days out. I wonder if they've gone
5 back and amended the filing to let the judge know, well, when
6 we said 30, we meant probably a year because that's since, of
7 course, come to pass.

8 MATC [COL WELLS]: Sir, we will look at that point.

9 MJ [Col SPATH]: There are many out there. Again, I can't
10 refer a case to DoJ. If I could, I would, because walking
11 away from your representational responsibilities wholesale,
12 after being paid the kind of money that somebody was paid,
13 seems to me to be something I'd look into. But again, I can't
14 refer a case. I work really hard to stay in my lane.

15 MATC [COL WELLS]: Yes, sir. I think at this point the
16 commission is still in a fact-finding mode, requesting the
17 three counsel to show cause on the record and have a
18 discussion. Some of their bases for withdrawal may be
19 incorrect.

20 You've already heard testimony from Professor
21 Yaroshefsky that she was not advised that there was an
22 outstanding ruling or request from the defense to use the
23 courtroom or other parts of the ELC to conduct attorney-client

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1 meetings. It seems that that was pivotal and material,
2 because she said he had no further options based on the
3 information presented to her. But if she had had knowledge of
4 that other option, she might not have walked down the analysis
5 of a mandatory withdrawal, but a voluntary withdrawal.

6 At the end of the day, though, if you disagree with
7 commission rulings and you do have an ethical conflict, the
8 rules do say if the commission issues an order that you are
9 retained, then you are retained; and there's strong case law
10 that provides the attorneys protections against claims of
11 unethical conduct in that circumstance.

12 So we are doing everything we can first and foremost
13 to save the learned counsel and the DoD civilian counsel from
14 an adverse finding of fact that they've walked away and
15 abandoned their client. So the prosecution would suggest
16 we're still in that process, sir. And ultimately, I believe
17 if they will not participate, you will be bound to make
18 specific findings of fact as to their conduct before this
19 commission.

20 We have made a filing suggesting that there's ways to
21 disqualify them and bar them from further proceeding here, and
22 that would be adverse. And we've suggested that in that case,
23 to preserve objectivity, you would refer that to the chief

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1 judge. I don't think we're there at that point yet; that's
2 just a procedural suggestion. You're still doing
3 fact-finding. After all, nobody knows this case better than
4 the attorney who has served Mr. Nashiri for eight years,
5 Mr. Kammen, going forward.

6 So while we pause to have MCDO explore their ability
7 to create dysfunction in the commission by their conduct, you
8 should maintain the course that you're doing right now and
9 make the appropriate inquiries of both the defense and the
10 government and the prosecution pointedly and directly, and we
11 will respond to them, sir.

12 MJ [Col SPATH]: Just a couple points. Just for the
13 withdrawal in this case, I just want to be clear that I have
14 made more than one factual finding: Not only was there not a
15 basis for withdrawal in this case, but that there was no
16 intrusion into attorney-client conversations in this case.
17 That's not a conversation on any other case pending down here.
18 I have no idea. I don't care, frankly.

19 In this case, having access to everything, classified
20 and unclassified, I've made a finding that there's no
21 intrusion. Now, fake news. If you don't want to listen, I
22 can't help, right? I mean, I can only say it. If you don't
23 believe findings of fact from a court and you think I'm part

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1 of the -- part of the effort, well, I can't fix that. But
2 I've made those findings. They're clear.

3 So I think my question -- yes, there are some
4 mechanisms for me. But again, I'm trying to maintain my own
5 impartial and neutral and objective behavior. And if I --
6 clearly, if -- you've seen me withhold moving into contempt
7 proceedings with the civilians, DoD, and the learned counsel.
8 And I think and it's obvious why I am doing that, because that
9 will cause a conflict likely with their client and a conflict
10 between -- a perceived conflict between the bench and those
11 counsel, and that can lead to recusal.

12 There's federal case law about judges who engage in
13 contempt proceedings, about lawyers appearing in front of them
14 in the middle of the trial, even if there's not the actual,
15 right, lack of fairness from the judge, the public may
16 perceive, because it's adversarial. And so you're right,
17 that's why I'm really trying to walk slowly through the
18 process. But it's also why there's some responsibility on
19 your side to be taking whatever actions you believe are
20 appropriate to make this move.

21 Because I agree, slow, steady, working through this
22 process makes sense. But I know that if I am the public or a
23 family member or an alleged victim, or, frankly, the accused,

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1 we've had slow, steady progress for a long time.

2 MATC [COL WELLS]: Yes, sir.

3 MJ [Col SPATH]: And so there's always going to be
4 appropriate progress, but we need to continue to make
5 progress, because that is important to the administration of
6 justice. It is.

7 And the only other point I make is for
8 Ms. Yaroshefsky, I haven't finished some findings of fact I'm
9 going to make, but she did testify that even if the facts were
10 different, her opinions, frankly, were her opinions and she
11 may not have changed it, for what it's worth.

12 MATC [COL WELLS]: Yes, sir.

13 MJ [Col SPATH]: It's interesting testimony.

14 MATC [COL WELLS]: From the prosecution's perspective, we
15 believe we're still at the process and procedure to explore
16 good cause on the record for withdrawal, whether it's
17 mandatory or voluntary. Contempt proceedings or disbarment
18 from the commission is not really before you at this point.

19 MJ [Col SPATH]: Not yet.

20 MATC [COL WELLS]: We -- we -- there could be explanations
21 from counsel as to their belief and their good faith belief.
22 Could be some misunderstanding from Ms. Eliades and
23 Ms. Spears. If they signed the agreement that was presented

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1 to them by the chief defense counsel or others in there, then
2 they have a right to rely on that. But you would also think
3 that they would read the rules and the regulations and the
4 preamble to the Model Rules of Ethical and Professional
5 Conduct, which say that you do comply with the commission's
6 rulings. It does ----

7 MJ [Col SPATH]: It's Rule 1.16(d) in both of their
8 jurisdictions, Indiana and Illinois, in mine, I think probably
9 in all of ours, frankly, but the ones that matter, the same
10 rule.

11 MATC [COL WELLS]: Sir, and so the underlying matter about
12 their problem with a meeting place to exchange confidential
13 information here at Guantanamo and the chief defense counsel's
14 letter that they seem to rely on, you know, the answer to that
15 with Ms. Yaroshefsky is, did not know that they had requested
16 for another location, said that it exhausted.

17 But the answer to that would be: Your Honor, we
18 cannot meet at the location that the Joint Task Force has
19 provided us. We cannot exchange information with our client
20 in that environment. We need your assistance to help
21 otherwise.

22 And you have authority, which could include to the
23 government: I am not going forward. We are abating these

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1 proceedings until that is fixed, which could -- is an option
2 for you. I'm not suggesting that that would be appropriate in
3 that circumstance at this point.

4 I do believe that the location for attorney-client
5 meetings has been changed in JTF, and the commander has
6 designated a new location, which I believe that Lieutenant
7 Piette and his client have used and met. It's in addition to
8 the option at AV-34, so there's another location. So that
9 underlying problem seems to have been resolved.

10 MJ [Col SPATH]: If there was -- well, let me make sure,
11 because my understanding is the underlying problem was more of
12 a perception of concern. If you all have any evidence of
13 intrusions into attorney-client meetings that have occurred,
14 I'm confident, as officers of the court, you'd be
15 communicating that to me.

16 MATC [COL WELLS]: Sir, absolutely.

17 MJ [Col SPATH]: Okay.

18 MATC [COL WELLS]: My comments are as to the problem as
19 the defense has articulated in their latest filing from
20 Ms. Eliades and Spears, it was their perception of ----

21 MJ [Col SPATH]: I just want to make sure we're clear. I
22 know you all know your obligations, like the defense
23 community. If you all are aware ----

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1 MATC [COL WELLS]: Yes, sir.

2 MJ [Col SPATH]: ---- of intrusions into attorney-client
3 matters, and especially any intrusions you are aware of or
4 received, you would let me know.

5 MATC [COL WELLS]: Sir, absolutely. The -- we need the
6 counsel here to converse with you and discuss all issues.

7 Sir, that's all we have.

8 MJ [Col SPATH]: All right. Thank you.

9 MATC [COL WELLS]: Thank you.

10 MJ [Col SPATH]: Lieutenant Piette, I've just got a couple
11 questions, if you don't mind. Mine has to do with just
12 training. I know self-help leads, again, people who don't
13 take the time to understand the proceedings to chuckle and
14 think that's funny. I don't think it's funny.

15 Self-help, of course, in the case law, as opposed to
16 just some whim where I've made up the words, has to do with a
17 lawyer who is in an untenable position, whether they like it
18 or not, working to take care of the issues at hand. And
19 again, the public -- I suggest it all the time, I take the
20 time to actually read the cases that are relevant before I
21 comment on them, but that won't happen.

22 So have you made any efforts to go to training?

23 DDC [LT PIETTE]: Yes, Your Honor. As you know, I have an

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1 ethical obligation to do that, and it's just a moral
2 obligation as well, so yes. This court can expect, probably
3 before the next hearings, to have a motion regarding that,
4 since some of the trainings conflict with some of our
5 scheduled times, absolutely.

6 MJ [Col SPATH]: And that's what I was going to recommend
7 to you. I am amenable, as you continue to get ready -- I
8 recognize you don't agree with it, but you seem to
9 recognize -- agree or not, we seem to be moving forward.

10 So if there are courses -- so I went out and looked.
11 I know there's the Fundamentals of Federal Capital Defense
12 Practice in Atlanta April 30th to May 2nd. National Capital
13 Voir Dire Training in Boulder in May. So there's a whole host
14 of them.

15 So what I offer to you is -- you might not agree with
16 the comment, but if MCDO is just not going to resource you and
17 leave you to work with your mitigation specialist and your
18 paralegal and nobody else, or whatever other experts you have,
19 I'm amenable to taking off some time for training. So I know
20 you'll let us know what courses and things those would be.

21 Without -- without telling me any conversations -- I
22 know you know that -- have you reached out to Mr. Kammen or
23 Ms. Eliades to receive assistance from them? And I pick

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1 Ms. Eliades particularly because she appears to be capitally
2 qualified. So have you reached out to Mr. Kammen or
3 Ms. Eliades particularly to receive assistance in this case
4 turnover to you?

5 DDC [LT PIETTE]: Yes, Your Honor, they've been available
6 for turnover.

7 MJ [Col SPATH]: Okay. And I'm not going to ask. I would
8 suggest communicating with MCD0. Maybe you are. But they
9 seem to have a lot of lawyers. I know al Hadi has quite a few
10 who have managed to come down here on island.

11 So if you want more help, even outside the courtroom,
12 the resources exist, and that organization has the resourcing
13 requirement for you. So just -- I would take advantage of it.

14 DDC [LT PIETTE]: Yes, Your Honor. And I can speak to
15 that briefly, because it seems a lot of what's on the record
16 about resourcing and how we use it on the al Nashiri defense
17 team is just a lot of speculation.

18 As Colonel Aaron said, he's made resources available,
19 and resources are available, so -- and we are utilizing those
20 resources; however, there's a difference between using even
21 other counsel as resources and having them detailed. The --
22 and frankly, because of the way things are right now,
23 essentially I am acting or de facto team lead, so nobody gets

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1 detailed or undetailed without kind of my say-so right now.

2 And the response of undetailing the attorneys, to
3 your order, while it's been portrayed as kind of a strategic
4 decision because it -- to some people, I guess think it maybe
5 looks better to have me sitting here alone as some sort of
6 strategy, when, in fact, it might look better to have four
7 military attorneys in the uniforms of three different
8 services, all of them standing behind the position that we
9 cannot take a position until we have learned counsel. If
10 anything, that would look better.

11 So the -- this isn't a strategic decision. I think
12 no attorney, no lawyer would trade the presumption of
13 innocence for the standard of review in post-conviction for
14 nothing more than the appearance of unfairness. That's
15 absurd. So the response of undetailing those attorneys was,
16 rather than getting into sort of a sideshow issue about
17 whether or not you can order them to appear in court, it was
18 easier to just undetail them and avoid that.

19 But we still do have the resources, and no attorneys
20 who are not capitally qualified are going to be detailed until
21 we have somebody actually on the case, not just on turnover,
22 but actually on the case who can advise and assist
23 Mr. al Nashiri, as is statutorily required from a learned

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1 counsel perspective.

2 MJ [Col SPATH]: Again, I've ruled on that. And I've
3 ruled -- first, there are jurisdictions that disagree with
4 you, you know that.

5 DDC [LT PIETTE]: Uh-huh.

6 MJ [Col SPATH]: Flat out. There are jurisdictions that
7 frankly do not buy into this ABA requirement -- a policy
8 group -- this ABA requirement -- and it's not even a
9 requirement, a guideline of capitally qualified counsel.
10 There are jurisdictions who believe that is not helpful for a
11 variety of reasons, many of them political, frankly, and you
12 know that.

13 Here I have told you I don't read the statute the way
14 you do. I read it the way it's written. But most
15 importantly, I've ruled on it. So you're making your decision
16 in the face of a ruling that has yet to have any success by
17 any appellate court telling me I've read it wrong or I've
18 implemented it wrong.

19 And what I have said to you is we're going forward,
20 and we're going forward right now with evidentiary matters
21 that any trial lawyer understands because it's real evidence.
22 At some point that's going to change, as you can tell by my
23 scheduling order.

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1 And so in the face of that, you continue to opt to
2 hang your hat on capitally qualified learned counsel are
3 required; and I've told you they're not. And so that's why,
4 yes, it appears strategic, because I've already ruled on it.
5 If you disagree, get some help and go get a stay. Get some
6 help and get a writ filed. Get some help and get an appellate
7 judge to step in.

8 So far those efforts seem to have met with silence --
9 seem to have been met with silence, and that's why I believe
10 your decision is, one, strategic -- and again, that's a
11 finding, and I'm going to continue to make it; and two, it's
12 in the face of a ruling adverse to you. So if you don't -- if
13 you don't want more assistance in the courtroom, that -- and
14 you believe that's your decision as lead counsel, okay.

15 All right. Well, we've certainly talked about this
16 enough. We've gone an hour without a witness, so we're going
17 to get to that next.

18 Trial Counsel, let me just ask government one other
19 thing. We had to deal with the declassification, to the
20 extent possible, of the issue surrounding this alleged
21 intrusion. Are we working to declassify this information with
22 the appropriate authorities?

23 MATC [COL WELLS]: Your Honor, we are.

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1 MJ [Col SPATH]: Okay.

2 MATC [COL WELLS]: We're in discussions with them. I
3 would say that this depends on the specific facts and that you
4 would find -- we would like an opportunity at the appropriate
5 stage to make suggested findings of fact to the commission.

6 I would, as I stand here at the podium, suggest that
7 perhaps the classified information that's been alluded to is a
8 red herring because there is no intrusion. You found it. You
9 reviewed everything that affects this accused in the location
10 that the command had designated for him to have
11 attorney-client meetings.

12 To the extent that the defense objects to that, the
13 command has responded and provided them a new location that
14 may be to their liking.

15 MJ [Col SPATH]: No, I understand. But again, part of
16 this is in this spirit of full disclosure, right, the openness
17 of the process. My hope is, again, to the -- first off, the
18 government has a duty anyway, right, to the extent possible,
19 declassify information.

20 MATC [COL WELLS]: That can be used at trial or the
21 commission.

22 MJ [Col SPATH]: Here I'm looking in relation to this
23 issue ----

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1 MATC [COL WELLS]: Yes, sir.

2 MJ [Col SPATH]: ---- for the public, more is better ----

3 MATC [COL WELLS]: Sir ----

4 MJ [Col SPATH]: ---- on this specific issue.

5 MATC [COL WELLS]: Understood. As you know, the chief
6 matter that arose related to another detainee and another
7 location that did not involve the command designation, and it
8 was nested in the AE 369 series with Mr. al Darbi. And so the
9 prosecution's view is that this issue was raised in that
10 series by the defense to avoid the cross-examination of
11 Mr. al Darbi and have to confront him while he is still
12 available and he isn't serving the rest of his sentence with
13 the Kingdom of Saudi Arabia.

14 So he is available for that purpose ----

15 MJ [Col SPATH]: You've already -- you already got to my
16 last note that I had to ask: Is Mr. al Darbi still here and
17 available for cross-examination?

18 MATC [COL WELLS]: Yes, sir.

19 MJ [Col SPATH]: Lieutenant Piette, if you decide you want
20 to engage in any cross-examination this week, just need to let
21 us know.

22 DDC [LT PIETTE]: Understood, Your Honor.

23 MATC [COL WELLS]: Sir, nothing further.

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1 MJ [Col SPATH]: Okay. Thanks. All right.

2 Don't go far, Colonel Wells. I want a timeline. I
3 think three witnesses today is the plan; is that correct?

4 MATC [COL WELLS]: That's correct, sir.

5 MJ [Col SPATH]: And do you -- and about how long? I
6 think you communicated with the staff, but ----

7 MATC [COL WELLS]: Sir, we expect about 30 to 40 minutes,
8 no longer than an hour, so three hours complete, you know,
9 given cross-examination, which they're always available to do.
10 We stand ready.

11 We would like a short administrative break before we
12 start with the witnesses to make sure that we're ready to go.

13 MJ [Col SPATH]: And the first witness is by VTC?

14 MATC [COL WELLS]: No, sir.

15 MJ [Col SPATH]: No? Okay.

16 MATC [COL WELLS]: It's just that this witness is only
17 available today. All three of them are here in person.

18 MJ [Col SPATH]: Perfect. Then let's take that witness
19 first. We will take 15 minutes, and then we will come back.
20 See you then. We're in recess.

21 [The R.M.C. 803 session recessed at 1158, 12 February 2018.]

22 [END OF PAGE]

23

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1 [The R.M.C. 803 session was called to order at 1219, that
2 12 February 2018.]

3 MJ [Col SPATH]: These commissions are called to order.
4 Same parties who were present at our last session are again
5 present.

6 Mr. Miller, call your first witness.

7 TC [MR. MILLER]: Your Honor, first, two housekeeping
8 matters before we begin, if the court would indulge me. The
9 first matter is -- is the government preadmit motions start
10 with obviously AE 207, but then it's followed by 283, which
11 are the pictures and videos; 224, which is the truck and
12 trailer; 225, which is YM1 -- 3 -- excuse me, 325; 326 is YM4;
13 and then 336 is YM2.

14 The witnesses are ----

15 MJ [Col SPATH]: Hang on. 325 is YM1, 326 is 4 ----

16 TC [MR. MILLER]: 4.

17 MJ [Col SPATH]: ---- and 327 is ----

18 TC [MR. MILLER]: 3 -- okay. Go ahead. All right.

19 MJ [Col SPATH]: I just want to make sure I've got it
20 right.

21 TC [MR. MILLER]: The -- what will be occurring, Your
22 Honor, is the witnesses will be speaking to all of those,
23 simply as a matter of just efficiency and expense and getting

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1 them here. So they will be referring to all the exhibits
2 during that time.

3 MJ [Col SPATH]: All right. Thank you.

4 TC [MR. MILLER]: And it makes sense because, just in a
5 global sense, Your Honor, they're going to be talking about
6 the various sites in and around Aden Harbor, and they all were
7 involved; there's a lot of overlap into -- they went to, so
8 rather than bringing them back three or four times.

9 The second matter, before we call Mr. McKenzie, Your
10 Honor, is the court made inquiry of Lieutenant Piette
11 regarding whether or not he was going to cross-examine
12 Mr. al Darbi. As the court is aware, that cross-examination
13 in the Hadi case took place over the last couple of days. His
14 counsel are present and available. However, if they're not
15 going to be -- if he's not going to be cross-examining --
16 cross-examined, I think they would like to leave island and
17 take care of other cases and other matters pressing back in
18 the United States.

19 So if Lieutenant Piette could just let us know that
20 it's okay to release his attorneys because there will be no
21 cross-examination, it would be helpful.

22 MJ [Col SPATH]: All right. Let me know as the day goes
23 on. Ask him on the next break, and let me know what the plan

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1 is.

2 TC [MR. MILLER]: All right. I'll speak with him.

3 MJ [Col SPATH]: All right. I would -- for what it's
4 worth, the cross-examination wasn't very long. I noticed
5 that. I heard -- I saw Colonel Rubin. I didn't ask him about
6 the details of it because I watched the direct here, but I
7 just asked, "Why are you leaving so early?" And he said cross
8 was only a few hours ultimately. So, okay, you may proceed.

9 TC [MR. MILLER]: Thank you, Your Honor. The government
10 calls Garrett McKenzie. Would you remain standing, sir.
11 Would you raise your right hand, please.

12 **GARRETT J. MCKENZIE, civilian, was called as a witness for the**
13 **prosecution, was sworn, and testified as follows:**

14 **DIRECT EXAMINATION**

15 **Questions by the Trial Counsel [MR. MILLER]:**

16 Q. Have a seat, please. And would you state your name
17 for the record?

18 A. My name is Garrett McKenzie.

19 Q. And you are the same Garrett McKenzie who testified
20 here previously; is that correct?

21 A. Yes, sir, I am.

22 Q. And by way of reintroduction, you are a retired FBI
23 agent, correct?

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1 A. Yes, sir.

2 Q. And you retired in what year?

3 A. I retired in 2016.

4 Q. Let me ask you a series of questions today about some
5 of the work that you did during the COLE investigation. Just
6 to refamiliarize, you did travel to Aden; is that correct?

7 A. Yes, sir, I did. I deployed with a team out of both
8 the Washington and New York Field Offices that left on
9 October 12th, the same day of the incident.

10 Q. And again, to refamiliarize His Honor, you have
11 training in the area of photography; is that correct?

12 A. Yes, sir, I do.

13 Q. And you have taken crime scene photos -- you had
14 taken crime scene photos prior to the incident in -- on the
15 COLE in 2000 of October?

16 A. Yes, sir. I have participated in numerous search
17 warrants and other crime scene investigations where I took
18 photographs.

19 Q. And had you ever received any specialized training in
20 the area of preparing sketches?

21 A. Yes, sir, I had.

22 Q. And prior to the COLE in October of 2000, had you
23 prepared sketches of various crime scenes?

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1 A. Yes, sir, I have.

2 MJ [Col SPATH]: Slow down just a little.

3 TC [MR. MILLER]: Sorry.

4 MJ [Col SPATH]: No worry.

5 Q. Directing your attention to October of 2000, what
6 were your first duties when you arrived there regarding the
7 collection of evidence or the processing of the crime scene?

8 A. My first duties on the first day on scene were in the
9 role of a photographer, and I took several photographs of both
10 the dolphin, the dock that the ship was tied up to, and the --
11 I took some outside photographs of the hull and surrounding --
12 the entire surrounding area.

13 Q. Did you remain on the COLE or assist in processing
14 the COLE your entire time there?

15 A. Yes, sir, I did. Throughout the entire time, each
16 day was different, and I would go wherever the most help was
17 needed. Some days I was on the ship. Other days I was going
18 to the offsite or land-based scenes that we were
19 investigating.

20 Q. I now want to ask you about the land searches. You
21 were chosen to help conduct those searches?

22 A. Yes, sir, I was.

23 Q. And do you know why you were requested?

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1 A. Because of my training and skill sets, and those
2 skill sets were not needed on the ship at the time. There
3 were other people who were doing those.

4 Q. Do you remember any of the agents with whom you were
5 working?

6 A. Yes, sir, I do. On the shore or the land or just in
7 general?

8 Q. On the land. I'm sorry, during the land searches.

9 A. On the land search, as I recall we had -- Lisa
10 LoCascio was there. I'm sorry, I'm drawing a blank on some of
11 the names.

12 Q. All right. As we go through it, if you recall any,
13 please ----

14 A. Yes, sir.

15 Q. ---- please let me know.

16 Do you remember the first place that you searched?

17 A. The first place that we searched was a place I think
18 we referred to as Site 1, and it was a fairly primitive site.
19 Almost looked like it was still under construction, but
20 cinderblock walls around, cinderblock buildings inside.

21 Q. And was that site called Madinat Al-Shaab?

22 A. I'm not -- I don't recall the exact name, sir.

23 Q. If we showed you a photograph, would you recall it?

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1 A. Yes, I would.

2 Q. If we could see ----

3 TC [MR. MILLER]: Permission to use the ELMO, Your Honor?

4 MJ [Col SPATH]: Yes.

5 TC [MR. MILLER]: Waiting for it to come up.

6 [Pause.]

7 Q. If you look at your monitor, please.

8 A. Yes.

9 Q. Before you is a photograph, Prosecution Exhibit 724
10 for Identification. Do you recognize that, sir?

11 A. I do, sir. It is the -- the first site.

12 Q. And what were your duties and what were your
13 responsibilities at the first site?

14 A. At the first site I was essentially doing general
15 searching. No specific tasks. I was not the sketch artist or
16 the photographer here. We had other photographers and other
17 sketch artists.

18 Q. Is that a fair and accurate depiction of the site
19 that you searched?

20 A. Yes, sir. I particularly remember the blue door.

21 Q. And was it a walled -- what I would call a walled
22 compound?

23 A. Yes, sir, it was. In fact, that's the outside wall.

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1 MJ [Col SPATH]: Slow down.

2 Q. Were you able to observe the inside of the compound
3 from the outside of those walls?

4 A. Only when the door was open as it is here, sir.

5 TC [MR. MILLER]: Move for the admission of Prosecution
6 Exhibit 70 -- 724, Your Honor.

7 MJ [Col SPATH]: I understand.

8 Q. Did you then proceed to a second site?

9 A. Not that day, but it was the next day, sir.

10 Q. And could you describe that second site, please?

11 A. Well, the second site was also a walled -- a walled
12 facility but it was a more developed house on the inside, more
13 finished. I think in -- in U.S. terms we would call it a
14 ranch-style house with a couple of bedrooms. Fairly large,
15 all -- but typical Middle Eastern construction, mostly
16 block-type construction. There were some plants on the
17 outside. The wall around the outside provided a courtyard,
18 a -- actually, a fairly yard size -- large-sized yard. And in
19 there were different plants and other -- everything from
20 pretty plants to rubbish.

21 Q. All right. Let me direct your attention first to the
22 initial arrival. How did you get to the site, the second
23 site?

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1 A. The second site, sir?

2 Q. Yes, sir.

3 A. We drove -- we drove in our vehicles, vehicles that
4 we had brought with us as part of the deployment package.
5 We -- we drove from the hotel to the -- to the site in a
6 multi-vehicle convoy.

7 Q. All right. Convoy. And when you arrived there, were
8 there any other persons at the site?

9 A. Yes, sir. There were some Yemeni officials. I don't
10 know myself what agency or branch they were of. They were
11 uniformed officials, though.

12 Q. And did anyone from the FBI or from your contingent
13 speak with them?

14 A. Yes, sir. Some of our leadership was out. I was --
15 I remained in the van while these conversations were taking
16 place, but I could see through the windows that they were.

17 TC [MR. MILLER]: If you could, please, Prosecution
18 Exhibit 765.

19 Q. I am going to show you a photograph, Prosecution
20 Exhibit 765 for Identification. Do you recognize that
21 photograph, sir?

22 A. Yes, sir, I do. That's the street on one side of the
23 second site, recognized by the red metal door there.

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1 Q. All right. Is that an entryway into the compound,
2 what I will call the compound?

3 A. Yes, sir. In fact, you would say that that metal
4 door there is right on the edge, and everything beyond that
5 little wall that juts out becomes a different, the next door
6 neighbor's place. And that van was, looks like it was one of
7 our vans as part of the convoy.

8 TC [MR. MILLER]: 767.

9 Q. And do you recognize Prosecution Exhibit 767, which
10 has now been placed on the monitor?

11 A. Yes, sir.

12 Q. And what do you recognize that to be?

13 A. That's a farther-back shot of looking towards the
14 compound. That tree would be straight through the -- through
15 the -- where that tree is in the center, beyond the brown --
16 or the beige Toyota is -- was the house that we were looking
17 at.

18 Q. Could you circle it with your finger?

19 A. Yes, sir.

20 TC [MR. MILLER]: And 776 please -- 766 please.

21 Q. Again, if I could, do you recognize 766, Prosecution
22 Exhibit 766 for Identification?

23 A. That's the -- that's the street outside the compound.

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1 Q. Now, in all of those photographs ----

2 TC [MR. MILLER]: And Your Honor, the government would
3 move for the admission of 765, 767, and 766.

4 MJ [Col SPATH]: I understand.

5 Q. Those are all fair and accurate depictions of how it
6 appeared on the day that you conducted the search, correct?

7 A. Yes, sir, they are.

8 Q. And there were a number of vehicles there. Were
9 those all vehicles that were part of your convoy?

10 A. No, sir, those all look like those were local
11 vehicles.

12 Q. Now, were you assigned certain duties at the scene?

13 A. Yes, sir, I was. I was assigned to generate the
14 sketch of the scene.

15 Q. And who had assigned you that particular
16 responsibility?

17 A. The team leader there, sir.

18 Q. And I think you had testified previously, had you
19 made sketches before?

20 A. Yes, sir, I've made sketches in several -- several
21 crime scenes and searches.

22 Q. Now, when you make a sketch ----

23 A. Yes, sir.

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1 Q. ---- do you work with any other persons of the search
2 team?

3 A. Yes, sir. We work closely in conjunction with the
4 photographer. The overall intent of making a sketch, or
5 actually of what the crime scene team is trying to do is to
6 preserve the crime scene in as many possible media as we can
7 do it. You'll take photographs with it, you'll take sketches
8 of it, or make sketches of it, and even verbal descriptions of
9 the area. And we want those all to match up, so that my
10 sketch that I made would corroborate and put into perspective
11 the photographs that the photographer was taking.

12 So, for example, when we go through early on, we'll
13 label each room with a letter or some other designator. And
14 then when the photographer takes a picture of Room C, for
15 example, we can look at my sketch and see where Room C was
16 relative to the rest of the house and everything else.

17 Q. So the sketch gives some context sometimes to the
18 photographs?

19 A. Exactly, and vice versa, sir.

20 Q. And how do you go about making a sketch?

21 A. Well, the first thing that I will do when making a
22 sketch is just walk around, take a general survey of the scene
23 that I am going to be sketching. Helps put it in your mind

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1 what you're going to be sketching, how you want to put it on
2 the paper, how big to make certain things. If you just start
3 drawing up in the left-hand corner as you enter the place, you
4 realize there's ten acres behind you that you don't have room
5 for on the paper. So you walk around, get a sense of where
6 things are, how they're going to be placed relative to each
7 other. And then once you've got a feel for that, then start
8 essentially -- not free-handing but starting to do the sketch.

9 The important thing about the sketch is the sketch is
10 not to scale, but we put measurements in it, again, so that
11 when the draft artist -- draftsmen and other artists come back
12 through relative, they can take my sketch, the photographer's
13 photographs, marry those two together, and then generate a
14 depiction of the scene that is to scale.

15 Q. And is it important to -- is it important to ensure
16 that in your sketch the various things depicted show the
17 proper relationship between them?

18 A. Yes, exactly. Because they're -- they're
19 frequently -- they're -- depending on the types of crime scene
20 or whatever that you're doing, it depends -- sometimes it's as
21 simple as whether you can see something or not from where we
22 believe a person was standing or, you know, how far something
23 away was from another thing can affect the entire timeline and

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1 the theories that are being developed for what happened at the
2 scene.

3 Q. Do you take actual measurements when you do these?

4 A. Yes, sir, and that's how we generate the measurements
5 on the sketch. So I would have another assistant working what
6 we'd call the dumb end of the tape, would take it down; and
7 then I'd look at it and enter those onto the sketch,
8 particularly important since the sketch is not to scale. But
9 the draftsman can generate that.

10 TC [MR. MILLER]: Permission to approach the witness, Your
11 Honor?

12 MJ [Col SPATH]: You may.

13 Q. You indicated that you did -- you were assigned
14 sketch duty in this particular case, correct?

15 A. Yes, sir.

16 Q. And did you, in fact, prepare sketches?

17 A. Yes, sir, I did.

18 Q. Did you prepare a sketch of the exterior?

19 A. Yes, sir, I did.

20 Q. Did you prepare a separate sketch of the interior?

21 A. I did, sir.

22 TC [MR. MILLER]: If I could have the ELMO for just a
23 second? Permission to use it, Your Honor.

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1 MJ [Col SPATH]: You may.

2 Q. I'm placing -- I'm placing on the ELM0 Prosecution
3 Exhibit 696 for Identification. Do you recognize that, sir?

4 A. Yes, sir, I do. That's the sketch of the interior of
5 the house.

6 Q. That's Site No. 2, correct?

7 A. Yes, sir.

8 Q. Now I'm placing on the -- let me see if this helps.
9 I'm placing on the ELM0 Prosecution Exhibit 697 for
10 Identification, sir. And do you recognize that?

11 A. Yes, sir. This is the sketch of the exterior of the
12 entire compound.

13 Q. Now, normally when you draw -- excuse me, when you
14 draw sketches, what type of paper or material do you use?

15 A. Well, if I have it available, I'm going to use a
16 large piece of graph paper, something to help me essentially
17 draw straight lines if I need to. But in this particular case
18 I used the two government mailing envelopes that we had on
19 file -- or had in the box with us, because we didn't have any,
20 any of the large graph paper. So this was the -- these two
21 documents were the largest and most sturdy piece of paper that
22 I could find.

23 TC [MR. MILLER]: Move for the ----

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1 Q. And do both -- are both representative of the --
2 starting with the exterior, representative of the items in and
3 around the house and their relationship to each other?

4 A. Yes, sir.

5 Q. And the same for the interior sketch, 696 for
6 Identification? Does that fairly -- fairly show the
7 relationships of the various rooms and things and items in the
8 rooms to each other?

9 A. Yes, sir, it does.

10 TC [MR. MILLER]: Your Honor, the government would move
11 for the admission of 696 and 697.

12 MJ [Col SPATH]: Thank you.

13 Q. For the record, placing -- I'm sorry.

14 First, we've placed on the monitor in front of you
15 Prosecution Exhibit 697A for Identification. Is that an exact
16 duplicate of Prosecution Exhibit 697?

17 A. Yes, sir, it is. It is a replica or exact replica of
18 my sketch.

19 Q. All right.

20 TC [MR. MILLER]: And if we could pull up, please,
21 Prosecution Exhibit 696A.

22 Q. Now we've placed on the monitor in front of you
23 Prosecution Exhibit 696A for Identification. Is that an exact

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1 duplicate of Prosecution Exhibit 696?

2 A. Yes, sir, it is.

3 Q. I want to start first with Prosecution Exhibit 697A,
4 which is the ----

5 TC [MR. MILLER]: Pull that up.

6 And we would move for the admission of 696A and 697A,
7 Your Honor.

8 MJ [Col SPATH]: Thank you.

9 Q. I would like to start first with Prosecution
10 Exhibit 697A. Permission to approach the easel?

11 MJ [Col SPATH]: You may.

12 TC [MR. MILLER]: If you would come down, please.

13 MJ [Col SPATH]: He doesn't have a traveling
14 microphone ----

15 TC [MR. MILLER]: Oh, you need a traveling microphone?

16 MJ [Col SPATH]: ---- which is going to cause a problem.

17 I assume we have that capability. I know we have used it
18 before, so let's do this. We'll just take a break, get it set
19 up. We'll keep moving. We're in recess.

20 [The R.M.C. 803 session recessed at 1241, 12 February 2018.]

21 [The R.M.C. 803 session was called to order at 1250,
22 12 February 2018.]

23 MJ [Col SPATH]: Commission is called back to order. All

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1 the parties are present that were present before. The witness
2 remains on the stand. Just remember you're still under oath.

3 Mr. Miller, you may proceed.

4 Q. I wanted to start with the exterior. You have before
5 you a blowup, is that correct, of the exterior sketch?

6 A. Yes, sir.

7 Q. And I believe that sketch number is -- hold on. The
8 blowup of Prosecution Exhibit 697; is that correct?

9 A. Yes, sir.

10 Q. All right. Now I want to show you a series of
11 photographs. You have in your hand a green permanent marker;
12 is that correct?

13 A. Yes, sir.

14 Q. As you're describing what's in the photographs, if
15 you would, put the number of the photograph, put AE, whatever
16 it is, on the chart so the court has a notion of where that
17 photograph or what that photograph represents.

18 A. Yes, sir.

19 Q. I want to start first with Prosecution Exhibit 526
20 for Identification. Do you recognize that photograph coming
21 up on the screen ----

22 MJ [Co] SPATH]: It will publish. Hold on.

23 Q. Do you recognize that, sir?

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1 A. Yes, sir. That's a view from the exterior of the
2 compound looking towards Site 2.

3 Q. All right. If you would, please, just mark AE 526 on
4 the photograph -- on the chart, please, from the angle from
5 which we're doing it.

6 A. 526, sir?

7 Q. Yes, sir.

8 A. AE?

9 Q. Yes.

10 A. Alpha, echo?

11 Q. You can put AE on all of them, yes -- or PE. Excuse
12 me, PE. PE.

13 A. I'm sorry, 5 ----

14 Q. 526.

15 A. 526.

16 Q. Fair and accurate depiction of the house as it
17 appeared that day?

18 A. Yes, sir.

19 TC [MR. MILLER]: All right. Would you like me to move
20 for the admission of them all at once, Your Honor, or just one
21 at a time?

22 MJ [Col SPATH]: Let's do it all at once.

23 TC [MR. MILLER]: All right.

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1 MJ [Col SPATH]: Keep track of the numbers and that will
2 work great.

3 TC [MR. MILLER]: I will.

4 Q. 527, please, for Identification. Do you recognize
5 that photograph, sir?

6 A. Yes, sir. It's the same -- same view but with a
7 slightly different angle, probably from over here. What was
8 the number?

9 Q. It is 527, sir.

10 That appears to be a gate; is that correct?

11 A. Yes, sir.

12 Q. And did it allow entry into any -- what did it allow
13 entry into?

14 A. It allowed entry into the compound, sir, up in this
15 corner, which would be one of the -- southwest corner. And it
16 was a double -- double-wide metal gate large enough to --
17 large enough to take a vehicle through.

18 Q. 528, please. Do you recognize that, sir?

19 A. Yes, sir, I do. It's on the other corner of the
20 compound, and that's an image of the garage.

21 Q. All right. 528, if you would mark it, please.

22 A. [Did as directed.]

23 TC [MR. MILLER]: 756, please.

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1 [Pause.]

2 TC [MR. MILLER]: Your Honor, please, 756.

3 Q. Do you recognize that photograph, sir?

4 A. Yes, sir. It's a similar view of the garage as the
5 last photograph.

6 Q. And I'm interested in this particular photograph.
7 There appears to be several individuals. Are those some of
8 the Yemeni forces that were there?

9 A. Yes, sir.

10 Q. All right. I take it they were in and around the
11 compound?

12 A. They were, sir. There were none of them on the
13 inside of the compound while we were function -- while we were
14 working. They were all outside.

15 Q. And if you could mark on the ----

16 A. That was 756, right?

17 Q. 756, sir.

18 A. [Did as directed.]

19 Q. Prosecution 523 for Identification, please. Do you
20 recognize Prosecution Exhibit 523 for Identification, sir?

21 A. Yes, sir, I do.

22 Q. All right. What is that a photograph of?

23 A. That's a photograph of the backside of the compound.

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1 My guess -- or it looks like the photographer is standing up
2 here on this wall.

3 Q. And does that give a fair and accurate depiction of
4 the back of the compound area?

5 A. Yes, sir, it does.

6 Q. If you could just mark it, the photograph, somewhere.

7 A. I'm sorry, the number was?

8 Q. That number was 523.

9 A. **[Did as directed.]**

10 Q. Just so the court understands, at least from the
11 street, the front view, were you able to see into the
12 compound?

13 A. No, sir.

14 Q. All right. Prosecution Exhibit 754 for
15 Identification. Do you recognize that photograph, sir?

16 A. Yes, sir. That's the same side of the house, only
17 down on the ground inside the compound, a little bit more
18 towards the other end.

19 Q. Fair and accurate depiction of it?

20 A. Yes, sir.

21 Q. If you would, please, mark photograph 5 -- excuse me,
22 754.

23 A. 754, yes, sir. **[Did as directed.]**

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1 Q. Prosecution Exhibit 521 for Identification, do you
2 recognize this photograph, sir?

3 A. Same side of the house, sir, a different angle.

4 Q. All right. Now, there appears to be two structures
5 in this photograph; is that correct?

6 A. Yes, sir.

7 Q. What are the two -- are those structures part of the
8 same compound?

9 A. Yes, sir. The nearest structure -- or in the image,
10 the farthest-most right one would be the actual house itself.
11 And then off to the left of the image is the backside of the
12 garage. You'll note the pile of cinderblocks here that I've
13 marked on the sketch behind it.

14 Q. If you would mark that, please, Prosecution Exhibit
15 521.

16 A. **[Did as directed.]**

17 Q. Prosecution 519, please. Do you recognize that
18 photograph, sir?

19 A. Yes, sir. That would be in the same compound in the
20 back with your back to the house facing the chain-link fence
21 depicted in the -- in the sketch.

22 Q. All right. If you would put the number down at the
23 bottom, please. That would be Prosecution Exhibit 519.

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1 A. [Did as directed.]

2 Q. Prosecution 518, please. This is Prosecution
3 Exhibit 518 for Identification. Do you recognize this, sir?

4 A. Yes, sir. That's going to be essentially here
5 [pointed], looking back towards the chain-link fence that's in
6 view. And depicted on there, on the sketch, there's the pile
7 of cinderblocks. So it's essentially the photographer is here
8 looking back that way [pointed.]

9 Q. If you would mark it.

10 A. And that was 518, sir?

11 Q. Yes.

12 A. [Did as directed.]

13 Q. Prosecution Exhibit 522, do you recognize that
14 photograph, sir?

15 A. Yes, sir.

16 Q. All right. Could you describe for His Honor, please,
17 what's depicted in that photograph?

18 A. That would be, again, another elevated image here
19 where the photographer got on the roof of a nearby building,
20 which, looking at the image, would be the neighbor's -- the
21 neighboring house over here on this side looking towards --
22 with the principal piece being the pile of lumber, or the
23 woodpile.

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1 Q. Mark that on the ----
2 A. What was that number, sir?
3 Q. 522, sir.
4 A. [Did as directed.]
5 Q. Prosecution 5 -- 751 for Identification, please. Do
6 you recognize that photograph, sir?
7 A. Yes, sir. That -- that one soldier there in the back
8 is back -- there's one standing on the cinderblock wall and
9 the other one is very close to the juncture between the
10 cinderblock and the chain-link fence, which would put it right
11 here [pointed.]
12 Q. If you would just mark that, that's 751.
13 A. [Did as directed.]
14 Q. I'm assuming, again, you felt the presence of the
15 Yemeni ----
16 A. Yes, sir.
17 Q. ---- forces there?
18 Prosecution Exhibit 520 for Identification.
19 A. That would be in the foreground, the pile ----
20 Q. Excuse me. Let me stop you for a second.
21 A. Yes, sir.
22 TC [MR. MILLER]: Prosecution 520, please.
23 Q. I've placed on the screen ----

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1 MJ [Col SPATH]: Yes.

2 Q. ---- Prosecution 520 for Identification. Do you
3 recognize that, sir?

4 A. Yes, sir, I do.

5 Q. All right. And what do you recognize that to be?

6 A. That's an image with the perspective of essentially
7 back in this corner of the courtyard facing up along this side
8 of the house.

9 Q. I have two -- a couple of questions. Was that side
10 of the house significant, at least for the search purposes?

11 A. Well, the significant feature for -- that we noted
12 there was the new -- relatively new construction of that
13 corrugated metal fencing that runs along the upper third of
14 the -- of the image that would go left to right or right to
15 left along the cinderblock wall. The cinderblock wall being
16 about two feet in height, the cinder -- the corrugated metal
17 bringing that up to a much higher level.

18 Q. And did that block anything, block any view?

19 A. Yes, sir, it did. It -- it doesn't really perceive
20 well in this image from this angle because we can see the
21 neighboring house from where we are, but that, that corrugated
22 metal, did block view from that house into everything forward
23 of the house.

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1 Q. And you indicated that it appeared to be new. What
2 gave you the impression that it was new?

3 A. Well, if you could see in the image, sir, it was
4 relatively shiny; there wasn't corrosion on it. Yemen is a
5 very corrosive environment, so after a few years in place,
6 even corrugated, galvanized metal is still going to take some
7 sort of corrosion to it.

8 Q. Could you show His Honor where that photograph is --
9 where that wall is?

10 A. Yes, sir. The metal essentially starts here at this
11 corner and runs down here where I've depicted with the
12 squiggly line on the sketch and ends around this, this area
13 right here, a little more than halfway back to the wall.

14 Q. If you would, please, mark that Prosecution Exhibit
15 520.

16 A. **[Did as directed.]**

17 Q. If you would, please, Prosecution Exhibit 517 for
18 Identification. Do you recognize that, sir?

19 A. Yes, sir. It's looking in the same general area but
20 an angle moved a little bit more towards the center of the
21 compound.

22 Q. Fair and accurate depiction as it looked that day?

23 A. Yes, sir. And that was 520?

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1 Q. This is 517.

2 A. 517.

3 Q. Prosecution Exhibit 513 for Identification, please.
4 Do you recognize that photograph, sir?

5 A. Yes, sir. That's the end of the -- end of the house.
6 The corrugated metal fencing or wall that we just described
7 would be immediately to the left of camera. So you're
8 looking from the front of the house towards the back, again,
9 right down this, this shot here.

10 Q. It appears on the photograph that the metal wall is
11 at least providing some shade for that side of the house
12 because the back of it isn't; is that correct?

13 A. Yes, sir.

14 Q. All right. If you would, please, mark that
15 Prosecution Exhibit 513.

16 A. **[Did as directed.]**

17 Q. Prosecution 514 for Identification, please. Do you
18 recognize Prosecution 514, sir?

19 A. Yes, sir. That's the same angle, just from a
20 perspective a little bit farther back, much closer to the
21 gate.

22 Q. All right. The corrugated wall would be to the left;
23 is that correct?

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1 A. Yes, sir. It's just barely in the image.

2 Q. All right. Fair and accurate depiction?

3 A. Yes, sir.

4 Q. If you could mark it on there, 514.

5 A. [Did as directed.]

6 Q. Prosecution Exhibit 515 for Identification. Do you
7 recognize that, sir?

8 A. Yes, sir, I do.

9 Q. What do you recognize that to be?

10 A. That's a closer image of the same image, of the
11 previous image we looked at. Again, it's still on this side
12 of the house. The prominent feature there is the water tank,
13 which was a fabricated piece of metal sheet -- or sheet metal
14 that was filled with water.

15 Q. Now, on the left is the corrugated wall that you have
16 spoken about; is that correct?

17 A. Yes, sir.

18 Q. Would any activity, or at least from where you --
19 when you were drawing this sketch, between -- any activity
20 between the house and that corrugated wall, would that be
21 blocked from view?

22 A. Yes, sir.

23 Q. All right. So that would be -- anything that was

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1 going on in there, at least from your vantage point, was
2 private?

3 A. Yes, sir.

4 Q. And was there any evidentiary significance to taking
5 the photograph of this water tank and the two pieces of wood
6 there?

7 A. Yes, sir. We -- in looking at it, it looked
8 consistent with the -- with a method for testing outboard
9 motors.

10 Q. 516, Prosecution 516 for Identification, please.

11 A. I'm sorry, I did not mark that one.

12 Q. Oh, I'm sorry -- 515, if you would, that would be
13 fine.

14 A. 515?

15 Q. I'm sorry, sir.

16 A. **[Did as directed.]**

17 Q. Prosecution 516, do you recognize that photograph,
18 sir?

19 A. Yes, sir. That would be a close-up image of the
20 water tank.

21 Q. Would you mark that on the chart, please, or on the
22 sketch?

23 A. I'm sorry, that's '16?

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1 Q. 516, sir.

2 A. [Did as directed.]

3 Q. Prosecution Exhibit 525 for Identification, do you
4 recognize that photograph, sir?

5 A. Yes, sir. That would be the opposite side of the
6 house, over here, looking back towards the back.

7 Q. All right. Would you please mark that Prosecution
8 Exhibit 516.

9 A. The last one was 516.

10 Q. Should be 525. 525, I apologize.

11 A. [Did as directed.]

12 Q. Prosecution Exhibit 524 for Identification, please,
13 do you recognize that photograph, sir?

14 A. Yes, sir, the opposite angle of the image we just
15 took. So going back and looking in the opposite direction.

16 Q. Please mark it on the chart, Prosecution 524.

17 A. [Did as directed.]

18 Q. Please, Prosecution 585 for Identification, do you
19 recognize that room, sir ----

20 A. Yes, sir. That's the ----

21 Q. ---- or picture.

22 A. ---- the back of the garage. So that corner that's
23 center of the image would be right here. You can also observe

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1 the pile of cinderblocks that are right here.

2 Q. If you would mark it, please.

3 A. Sure. And that was ----

4 Q. Prosecution 585.

5 A. **[Did as directed.]**

6 Q. Prosecution 529 -- Prosecution Exhibit 529 for
7 Identification. Do you recognize this photograph, sir?

8 A. Yes, sir, that would be the man gate.

9 Q. When you say "man gate," what do you mean by that?

10 A. Pedestrian gate for entering in and out. There
11 were -- the other gate would have been a vehicle gate, the big
12 double-wide.

13 Q. And where was this entry?

14 A. Right here, sir.

15 Q. Would you mark it, please?

16 A. What was the number?

17 Q. Prosecution Exhibit 529.

18 A. **[Did as directed.]**

19 Q. Other than hopping a fence, that would have been the
20 way in, correct?

21 A. Yes, sir.

22 Q. Prosecution Exhibit 758. Do you recognize this
23 photograph, sir?

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1 A. Yes, sir. That's an image basically looking back
2 towards the general area where the door is. This side of the
3 building you can see the screened-in porch.

4 Q. All right. If you would mark that, please,
5 Prosecution Exhibit 758.

6 A. **[Did as directed.]**

7 Q. Prosecution 530 for Identification, please. Do you
8 recognize that, sir?

9 A. Yes, sir. Looking back towards the corrugated metal
10 gate -- or wall.

11 Q. Does that -- does this one, Prosecution 530, give you
12 a better perspective how much that blocked the view from the
13 house?

14 A. It does, sir. You can see the neighboring house on
15 the other side of the wall, and all you can see is the gable.

16 Q. All right. If you would, please, mark that
17 Prosecution Exhibit 530.

18 A. **[Did as directed.]**

19 Q. Prosecution Exhibit 531 for Identification. Do you
20 recognize that photograph, sir?

21 A. Yes, sir. The opposite angle looking back with the
22 retaining wall that's in the map -- the -- or in the sketch,
23 the screened-in porch and then the block wall behind it.

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1 Q. All right. If you could mark that, please,
2 Prosecution Exhibit 531 for Identification.

3 A. [Did as directed.]

4 Q. Prosecution 532 for Identification, please. Do you
5 recognize that, sir?

6 A. Yes, sir.

7 Q. What do you recognize that ----

8 A. Back on the other side, looking back more closely on
9 the corner here, so the center of the image would be right
10 here in the corner of this house.

11 Q. If you would, please, mark it 532.

12 A. [Did as directed.]

13 Q. Prosecution 533 for Identification, do you recognize
14 that, sir?

15 A. Yes, sir. That's the front porch with a view of the
16 interior door to the house.

17 Q. Mark it, please.

18 A. I'm sorry, the number was what, sir?

19 Q. 533.

20 A. [Did as directed.]

21 Q. Prosecution Exhibit 534, do you recognize that, sir?

22 A. Yes, sir. That's an image inside the screened-in
23 porch looking on the sketch from right to left.

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1 Q. Mark it, please.

2 A. And that was what number, sir?

3 Q. 534.

4 A. [Did as directed.]

5 Q. And lastly as to the exterior, Prosecution
6 Exhibit 535 for Identification, do you recognize that, sir?

7 A. Yes, sir. That's, again, inside the screened-in
8 porch.

9 Q. If you would mark that, please.

10 A. Sure. And that was 535, sir?

11 Q. 535.

12 A. [Did as directed.]

13 Q. Now, the various photographs that we have discussed
14 since you've been -- since you've been testifying here, have
15 all of those -- were they fair and accurate depictions of what
16 was found in the photograph?

17 A. Yes, sir, they are a fair and accurate representation
18 of what I saw that day.

19 Q. All right. None of them distorted anything that you
20 had viewed?

21 A. No, sir.

22 Q. All right.

23 TC [MR. MILLER]: Your Honor, at this time the government

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1 would move for the introduction of Prosecution Exhibits for
2 Identification 526, 527, 528, 756, 523, 554, 521, 519, 518,
3 522, 751, 520, 517, 513, 514, 515, 516, 525, 524, 585, 529,
4 758, 530, 531, 532, 533, 534, and 535. Excuse me. I said a
5 554, Your Honor. I meant 754.

6 MJ [Col SPATH]: 754?

7 TC [MR. MILLER]: Yes, sir.

8 MJ [Col SPATH]: Not 554. Okay, noted.

9 Q. We are now placing on the easel a diagram. Do you
10 recognize that?

11 A. Yes, sir, I do.

12 Q. Or sketch?

13 A. Yes, sir. It's the sketch that I made of the
14 interior of the house.

15 Q. And that would be an exact duplicate or a blow-up of
16 Prosecution Exhibit 696?

17 A. Yes, sir.

18 Q. Is that correct?

19 A. Yes, sir, it is.

20 Q. Again, for the record, that is something that you
21 prepared?

22 A. Yes, sir, it is. I can recognize it by my name and
23 initials.

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1 Q. All right. And you went inside, took the
2 measurements, drew the relationships between the various
3 rooms?

4 A. Yes, sir, and the orientation is the same as the
5 exterior sketch that we just saw with the same end of the
6 house up at the top of the sketch.

7 Q. And I think, as it's indicated on that, you've signed
8 your name to the bottom; is that correct?

9 A. Yes, sir, I did. Those are my initials.

10 Q. All right. I want to take you through a series of
11 photographs of the inside or the interior, if we could.

12 Again, before we talk about that, though, did you
13 work the relationships and the -- I guess, the numbering and
14 identification marks in there with the photographer?

15 A. Yes, sir, all done in conjunction with the
16 photographer.

17 Q. 771, please. Do you recognize Prosecution
18 Exhibit 771 for Identification, sir?

19 A. Yes, sir, I do. That's -- that's an image from
20 essentially what would be the living room or the great room
21 here in Room B looking back at the table that I've depicted
22 here in the sketch.

23 Q. If you would, please, mark it on the sketch.

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1 A. And the number was, sir?

2 Q. 771.

3 A. **[Did as directed.]**

4 Q. Prosecution Exhibit 540, sir, do you recognize that?

5 A. Yes, sir. Same thing from a slightly different
6 angle. 77 ----

7 Q. That's 540.

8 A. **[Did as directed.]**

9 Q. 541, sir, do you recognize that?

10 A. Yes, sir. Generally the same -- same main shot,
11 different angle.

12 Q. And the red drapes, I take it they were ones that
13 were present when you conducted the search; is that correct?

14 A. Yes, sir.

15 Q. All right. That was 540 -- 541.

16 536 for Identification, please, recognize that, sir?

17 A. Yes, sir. That's going back from the table now and
18 looking into the living room.

19 Q. Mark that, please, 536.

20 A. **[Did as directed.]**

21 Q. 537, sir.

22 A. Same thing, sir.

23 Q. Yes. When you say "same thing," for the record ----

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1 A. It's the same thing as the previous image, just a
2 slightly different angle.

3 Q. So it's looking from the table that was in the
4 corner ----

5 A. Yes, sir.

6 Q. ---- looking into the main part of the -- I guess
7 I'll call it living room?

8 A. Yes, sir.

9 Q. Mark it, please.

10 A. And that was 537, sir?

11 Q. 537.

12 A. [Did as directed.]

13 Q. Prosecution 542, sir, do you recognize that?

14 A. Yes, sir. That would be also in this living room
15 here where the chairs are depicted.

16 Q. Mark it, please.

17 A. And that was 542, sir?

18 Q. 542.

19 A. [Did as directed.]

20 Q. I'm taking it from just these photographs, this
21 living room looked lived in?

22 A. Yes, sir, very much so.

23 Q. Prosecution Exhibit 538 for Identification, please,

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1 do you recognize that?

2 A. Yes, sir. That would be an image of that couch right
3 there and the two chairs behind it.

4 Q. Mark it on the ----

5 A. I'm sorry, the number was, sir?

6 Q. 538, sir.

7 A. **[Did as directed.]**

8 Q. Prosecution 539 for Identification. Do you recognize
9 that, sir?

10 A. Yes, sir. Same angle or a different angle of the
11 same area looking back towards the door over here.

12 Q. All right. Where is the door, sir?

13 A. **[Pointed.]**

14 Q. All right. Mark it, please, 539.

15 A. **[Did as directed.]**

16 Q. Prosecution 534, please, for Identification -- excuse
17 me, 543 for Identification. Do you recognize that photograph,
18 sir?

19 A. Yes, sir. It's still looking at the same door
20 shooting straight back this way.

21 Q. If you would, please, mark that 543.

22 A. **[Did as directed.]**

23 Q. Prosecution 544 for Identification, sir. Do you

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1 recognize that?

2 A. I believe that's closer -- that's closer to the door
3 that we saw in the last two images, sir, but now you can look
4 through it, and clearly you can see the double door that I
5 have depicted in the sketch behind.

6 Q. Would you mark that, please, Prosecution 544?

7 A. **[Did as directed.]**

8 Q. Prosecution 790 for Identification, recognize that,
9 sir?

10 A. A closer image of the same. The photographer has
11 taken one or two steps forward.

12 Q. All right.

13 A. And that was what number, sir?

14 Q. 790.

15 A. **[Did as directed.]**

16 Q. Leaving -- leaving that room, Prosecution
17 Exhibit 551, sir, do you recognize that?

18 A. Yes, sir. That's the kitchen.

19 Q. All right.

20 A. Looking in -- looking on the sketch, you can see the
21 sink that's in the main center of the photograph and a little
22 bit to the left of that on the left, lower left edge of the
23 image, you can see the stove.

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1 Q. I see dishes and pots and pans around. Again, did it
2 appear to have been in use?

3 A. Yes, sir.

4 Q. All right. If you would, please, mark that
5 Prosecution Exhibit 551.

6 A. 551, sir?

7 Q. Yes, sir.

8 A. **[Did as directed.]**

9 Q. Prosecution 552, sir, do you recognize that, sir?

10 A. Yes, sir. Still in the kitchen looking at the back
11 door that's here to the left of the sink.

12 Q. Would you mark that, please?

13 A. I'm sorry, the number, sir?

14 Q. That was 552.

15 A. **[Did as directed.]**

16 Q. 549, sir.

17 A. Another angle of the kitchen. And that was 542, sir?

18 Q. 549.

19 A. 549.

20 Q. I take it in that photograph there's pots and pans
21 and things in the various storage areas under the sink?

22 A. Yes, sir.

23 Q. Were they present there, or did you all put them

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1 there, or were they already there?

2 A. No, sir. They were already there.

3 Q. Prosecution 550 for Identification. Do you recognize
4 that, sir?

5 A. Yes, sir, another angle of the stove in the kitchen.

6 Q. If you would mark it, please.

7 A. And that was '49, sir?

8 Q. 550.

9 A. 550.

10 Q. Prosecution Exhibit 555, do you recognize that, sir?

11 A. Yes, sir. With your -- very close to the stove, the
12 photographer is looking back towards the refrigerator on the
13 other side of the kitchen.

14 Q. Was that a working refrigerator?

15 A. I don't recall, sir.

16 Q. All right. If you could mark it, please, 555.

17 A. **[Did as directed.]**

18 Q. 553, and do you recognize that, sir?

19 A. Yes, sir. The refrigerator that we just showed in
20 the previous image is on the right side of the screen. This
21 is the pantry that was in the center, and then the back door
22 of the kitchen, again more to the left.

23 Q. Would you mark that, please, 553?

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1 A. [Did as directed.]

2 Q. I see the refrigerator. You didn't smell any rotting
3 food or anything of that nature in there, did you? If you can
4 recall.

5 A. It had a general smell of rotting things, sir.

6 Q. Okay, the entire house?

7 A. Yes, sir.

8 Q. Okay. 554, please, do you recognize that, sir?

9 A. Yes, sir. That's a closeup of the same image we just
10 saw. That's the pantry in the kitchen.

11 Q. All right. Mark it, please.

12 A. Yes, sir. I'm sorry, the number?

13 Q. 554.

14 A. [Did as directed.]

15 Q. Prosecution 556 for Identification.

16 A. Another view of the kitchen, sir, the joint of the --
17 of the counters.

18 Q. All right. 556, if you would.

19 A. I'm sorry, sir, what?

20 Q. 556.

21 A. [Did as directed.]

22 Q. There appear to be drink containers or soda
23 containers on the table or desk that's in there; is that

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1 correct?

2 A. Yes, sir.

3 Q. All right. 557, please. Recognize that, sir?

4 A. Yes, sir. Another closeup image or closer image of
5 the same thing.

6 Q. Again, showing various items, kitchen items in the
7 cabinets; is that correct?

8 A. Yes, sir.

9 Q. 557, please?

10 A. **[Did as directed.]**

11 Q. And lastly, 558. Do you recognize that?

12 A. Yes, sir. That's looking back towards the door of
13 the kitchen that leads into the, not the outside door but the
14 interior door leading back to the house.

15 Q. Mark it, please.

16 A. Yes, sir.

17 Q. Moving out of the kitchen, Prosecution Exhibit 563,
18 please, do you recognize that, sir?

19 A. Yes, sir. That's one of the bedrooms, the bedroom on
20 the front side of the house. It would be this one right here
21 **[pointing]**. And I can identify that by looking through the
22 window and seeing the corrugated wall we talked about
23 beforehand.

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1 Q. Okay.

2 A. So you're looking through this window here
3 [pointing].

4 Q. Is it a window on the -- I'll call it the left part
5 of the photograph. The curtains are drawn, correct?

6 A. Yes, sir.

7 Q. Is that the corrugated wall you're talking about?

8 A. Yes, sir.

9 Q. All right. If you would, please, mark it.

10 A. I'm sorry, the number was, sir?

11 Q. 563.

12 A. [Did as directed.]

13 Q. Prosecution Exhibit 562, please. Do you recognize
14 that, sir?

15 A. Yes, sir. Same room looking back towards the closet.

16 Q. Mark it, please.

17 A. And the number was, sir?

18 Q. That was 562.

19 A. [Did as directed.]

20 Q. Prosecution 777, recognize that, sir?

21 A. Yes, sir. It's the same bedroom. This bedroom had a
22 sink in it and a chest of drawers and a bureau.

23 Q. All right. Mark it, please.

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1 A. Yes, sir. 5 ----

2 Q. 777.

3 A. 777?

4 Q. Yes, sir.

5 A. [Did as directed.]

6 Q. 564, sir, for Identification. Prosecution 564 for
7 Identification, do you recognize that?

8 A. Yes, sir. That would be this corner up here with the
9 sink and the bed, and that was -- what was the number on that
10 one, sir, 7?

11 Q. 564, sir.

12 A. 564.

13 Q. 565 for Identification, please, do you recognize
14 that?

15 A. Yes, sir. Same room, slightly different angle.

16 Q. There appear to be clothes and other items in there;
17 is that correct?

18 A. Yes, sir.

19 Q. All right. So again, did this bedroom appear to have
20 been lived in?

21 A. Yes, sir, it did.

22 Q. All right. If you would, please, 565.

23 A. [Did as directed.]

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1 Q. Prosecution 566?

2 A. Same room. Again slightly different angle looking
3 more into the corner.

4 Q. And again the items that were in the room were there
5 when you all conducted your search; correct?

6 A. Yes, they were. And that was 567?

7 Q. 566, sir.

8 A. **[Did as directed.]**

9 Q. 567? Do you recognize that?

10 A. Yes, sir. That's the bureau of -- the door that you
11 could see there is the door leading into the room or out to
12 the rest of the house.

13 Q. There appears one of the drawers is open; is that
14 correct?

15 A. Yes, sir.

16 Q. Do you recall whether or not there were clothes or
17 items of clothing in it?

18 A. I do not, sir.

19 Q. All right, if you would please mark it 567.

20 A. **[Did as directed.]**

21 Q. Prosecution 560, please, do you recognize that?

22 A. Yes, sir.

23 Q. What's that?

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1 A. Same room, same bureau or chest facing back to the
2 door of the room.

3 Q. Go ahead and mark it, please.

4 A. **[Did as directed.]**

5 Q. 561, please, Prosecution 561 for Identification, do
6 you recognize that?

7 A. Yes, sir. That would be the closet in that same
8 room.

9 Q. All right. Mark it.

10 A. That it was 561, yes?

11 Q. Yes, sir.

12 A. **[Did as directed.]**

13 Q. Prosecution Exhibit 546 for Identification, sir?

14 A. Closeup of the closet.

15 Q. Mark it, please.

16 A. Yes, sir. Again, the number, sir?

17 Q. 546.

18 A. **[Did as directed.]**

19 Q. Prosecution 545 for Identification, please?

20 A. Bottom of the closet.

21 Q. And those items were there when the search was
22 conducted; is that correct?

23 A. Yes, sir.

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1 Q. All right. Mark it, please, 545.

2 A. [Did as directed.]

3 Q. Prosecution Exhibit 568 for Identification -- all
4 right, moving out of that room into -- I guess this is a
5 bathroom; is that correct?

6 A. Yes, sir.

7 Q. All right. Do you recognize that bathroom?

8 A. Yes, sir. That would be the bathroom here marked
9 Room G.

10 Q. All right. If you would, please, mark that 568.

11 A. [Did as directed.]

12 Q. Moving into the bathroom now, Prosecution Exhibit 569
13 for Identification. If you rotate it, please.

14 Do you recognize Prosecution 569, sir?

15 A. Yes, sir. That's the bathtub and sink in that
16 bathroom marked G.

17 Q. All right. Mark it, please.

18 A. [Did as directed.]

19 Q. Prosecution Exhibit 570 for Identification, please.

20 Do you recognize that, sir?

21 A. Yes, sir, a closeup of the sink and medicine cabinet.

22 Q. And I take it those items were in the medicine
23 cabinet?

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1 A. Yes, sir.

2 Q. And ----

3 A. Our standard practice would be when the photographer
4 goes through, he goes through and takes his images before
5 anybody actually starts searching or doing anything, so ----

6 Q. All right. Although maybe in need of some cleaning,
7 does it appear that somebody -- that this was being used?

8 A. Yes, sir.

9 Q. All right.

10 A. I'm sorry, what was the number on that, sir?

11 Q. 570, sir.

12 A. **[Did as directed.]**

13 Q. 571 for Identification, please.

14 A. That was a toilet in the same room, sir.

15 Q. Mark it, please.

16 A. **[Did as directed.]**

17 Q. Prosecution Exhibit 572 for Identification, do you
18 recognize that?

19 A. Yes, sir. That's the shower.

20 Q. All right. Mark it, please.

21 A. **[Did as directed.]**

22 Q. Prosecution Exhibit 574 for Identification?

23 A. Same shower, yes, sir.

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1 Q. It appears that there's a bottle of Head & Shoulders
2 in that particular photograph, correct?

3 A. Yes, sir.

4 Q. An indication to you that somebody was using it?

5 A. Yes, sir.

6 Q. All right. Prosecution Exhibit 575 for
7 Identification. Do you recognize that, sir? If not, we'll
8 just move on.

9 A. I can't say with confidence, sir.

10 Q. All right. We'll move to 584, please. Do you
11 recognize that, sir?

12 A. Yes, sir. That's the other toilet, the other water
13 closet, marked H.

14 Q. Would you mark that, please?

15 A. And that was 575, sir?

16 Q. No, 584.

17 A. 584, yes, sir.

18 Q. Prosecution Exhibit 548, please, for Identification.
19 Do you recognize that?

20 A. I don't recognize that, sir.

21 Q. Yeah, we're going to go to 548, please. Do you
22 recognize Prosecution Exhibit 548 for Identification, sir?

23 A. Still not ----

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1 Q. Oh, I'm sorry.

2 A. Not on screen, sir.

3 Q. I was looking at my screen. I wasn't looking at
4 yours. I'm sorry. There you go, sir.

5 A. Yes. That would be looking back into the kitchen,
6 sir. You can see the same stove. It actually puts into
7 perspective the relationship between the toilet and the
8 kitchen. So one is standing here -- the photographer is here
9 looking back in this direction from that angle. He's looking
10 at both the kitchen on the right and the water closet on the
11 left.

12 Q. If you would, please, mark it 548.

13 A. **[Did as directed.]**

14 Q. 559, sir, do you recognize that photograph?

15 A. No, sir, I can't.

16 Q. All right.

17 A. I can't pick that out.

18 Q. Fair enough. Prosecution Exhibit 579 for
19 Identification, do you recognize that, sir?

20 A. Yes, sir.

21 Q. All right. What is that?

22 A. That's -- that's the room I've depicted in the -- in
23 the sketch with the bed, Room H.

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- 1 Q. Room H? All right.
- 2 A. Yes, sir.
- 3 Q. Mark it, please.
- 4 A. And the number was what, sir?
- 5 Q. Was 579.
- 6 A. **[Did as directed.]**
- 7 Q. Prosecution Exhibit 578, please, do you recognize
- 8 that, sir?
- 9 A. Yes, sir.
- 10 Q. What is that? What does it show?
- 11 A. Just the same room with items on the floor.
- 12 Q. And appear that it had been lived in?
- 13 A. Yes, sir.
- 14 Q. If you would mark it, please.
- 15 A. And it was '78, sir?
- 16 Q. '78.
- 17 A. **[Did as directed.]**
- 18 Q. Prosecution 580, please, do you recognize that, sir?
- 19 A. Yes, sir. Same room showing a better angle of the
- 20 two beds coming together.
- 21 Q. Is the second bed in that room?
- 22 A. Yes.
- 23 Q. All right. If you would, please, mark it.

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1 A. That was '80, sir?

2 Q. That was Prosecution Exhibit 580.

3 A. [Did as directed.]

4 Q. So between the two rooms, F and H, there are three
5 people -- there were three beds, rather?

6 A. Three beds, yes, sir.

7 Q. Prosecution Exhibit 581 for Identification, that
8 is -- 581 is what?

9 A. That's the same room there, sir.

10 Q. Okay. It's the second bed? If you would mark it on
11 the sketch, please.

12 A. [Did as directed.]

13 Q. Prosecution Exhibit 582 for Identification, recognize
14 that, sir?

15 A. Yes, sir. That would be the -- that's in the same
16 room. I recognize the bed. It's the room with the little --
17 I don't know whether you would call that a vanity or a
18 cosmetic place, desk.

19 Q. And it has various items, pieces of -- there are
20 various items in, on, and around it, correct?

21 A. Yes, sir.

22 Q. All right. Mark that in the room, please,
23 Prosecution Exhibit 582.

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1 A. [Did as directed.]

2 Q. Prosecution Exhibit 583 for Identification, please.

3 Do you recognize that, sir?

4 A. Yes, sir. The closet in that room.

5 Q. All right. Could you point that out for His Honor,
6 please.

7 A. [Did as directed.]

8 Q. All right. And you're marking that on the sketch,
9 correct?

10 A. Yes, sir.

11 Q. 577 for Identification, sir, do you recognize that?

12 A. Yes, sir. That's back in the room with only the
13 one -- the one bed, I believe.

14 Q. If you're unsure ----

15 A. I am unsure. I could go back and look and see what
16 the carpet looked like in the room.

17 Q. We can skip -- go ahead.

18 A. Okay. Yes, sir.

19 Q. 576, do you recognize that?

20 A. It's clearly the entrance to the room, sir.

21 Q. All right. Room H?

22 A. Yes.

23 Q. All right. Can you mark it, please?

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1 A. 5 -- what was the number, sir?

2 Q. 576.

3 A. [Did as directed.]

4 Q. Go back to 577. Is that the same carpet?

5 A. Yes, sir, it is.

6 Q. So that would be Room H?

7 A. Yes, sir.

8 Q. Mark it, please, 577.

9 A. [Did as directed.]

10 Q. All right. Are all the photographs that you've
11 described as to the interior, your interior diagram that
12 you've testified regarding -- are all those fair and accurate
13 depictions of the rooms as they appeared on the date in
14 October of 2000, when the search was conducted?

15 A. Yes, sir.

16 Q. Any distorting features about any of the photographs?

17 A. No, sir.

18 TC [MR. MILLER]: All right. Your Honor, at this time the
19 government would move for the admission of the following:
20 Prosecution Exhibits 771, 540, 541, 536, 537, 542, 538, 539,
21 543, 544, 790, 551, 552, 549, 550, 555, 553, 554, 556, 557,
22 558, 563, 562, 577 -- oh, no, excuse me, 777, 764, 7 -- excuse
23 me, I'm getting them backwards -- 777, 564, 565, 566, 567,

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1 560, 561, 4 -- 546, 545, 568, 569, 570, 571, 572, 574, 584,
2 548, 579, 578, 580, 581, 582, 583, 577, 576, and 577 [sic],
3 sir.

4 MJ [Col SPATH]: All right, noted. Thank you.

5 TC [MR. MILLER]: And I may have skipped 555, Your Honor.
6 I'd also move for the admission of that.

7 MJ [Col SPATH]: Okay.

8 TC [MR. MILLER]: And I may have skipped 552, also. So I
9 will take care of those.

10 MJ [Col SPATH]: 552 and 555.

11 TC [MR. MILLER]: All right. You may be seated.

12 Q. I take it the search was occurring as you were
13 drawing your sketches, correct?

14 A. Yes, sir. Two of the longest critical paths, as it
15 were, as far as a timeline, is going to be the photography and
16 the sketch. So while I'm doing the sketch, the rest of the
17 search is taking place.

18 Q. And had there been -- if you were aware, had there
19 been a protocol established for how the search was going to be
20 conducted?

21 A. Well, we followed our normal protocol, which was the
22 team leader would do a site survey, and then after that the
23 sketches and the photographs will start just to show the

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1 general -- show and capture the general description of the --
2 of the scene.

3 Once a photographer is done with doing a sketching --
4 or doing his photographs, then the searching party will come
5 in behind him. So as he finishes a room and moves on to the
6 next room, then they'll start their searches and call him back
7 with any evidence that they find, et cetera.

8 Q. And again, you didn't seize any evidence after ----

9 A. I did not seize any evidence. Once I finally
10 finished with my sketch, they were in the closing stages of
11 the search, and I assisted with some of the packaging of items
12 that other people had searched and the preservation of it.
13 But I did not actually seize anything.

14 Q. Did you conduct or were you involved in any of the
15 other searches that may have been occurring in and around Aden
16 Harbor?

17 A. Yes, sir, I participated in several of the searches
18 on the land.

19 Q. Do you remember, just briefly, what those locations
20 were?

21 A. What I participated in, as we've already discussed,
22 Site 1 and Site 2. I participated in searches of the vehicle
23 and trailer at a police station. I participated in a search

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1 of the launch site where the boat was put into the harbor.
2 And then I also participated in a search at the lookout on the
3 other side of -- an apartment in an elevated position on the
4 opposite side of the harbor from the ship and the dolphin with
5 a good angle to view.

6 TC [MR. MILLER]: I have no further questions of this
7 witness, Your Honor.

8 MJ [Col SPATH]: Thank you.

9 Defense Counsel, you may cross-examine.

10 DDC [LT PIETTE]: Your Honor, at this time defense takes
11 no position.

12 MJ [Col SPATH]: Mr. McKenzie, let me give you a couple
13 orders. You'll remember the order from before. I don't want
14 you to discuss anything you've testified to until we resolve
15 this matter. It's going to be a while before we resolve this
16 matter, clearly. So just keep that order in mind.

17 And I've said this to the other witnesses: I
18 appreciate the time it takes to come down here and testify. I
19 know the people who are observing appreciate it as well. So
20 truly, thank you for doing that.

21 WIT: Yes, sir.

22 MJ [Col SPATH]: You're excused.

23 WIT: Yes, sir.

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

3 MJ [Col SPATH]: I'm not going to belabor the point when
4 defense counsel says that. I have belabored it and belabored
5 it. I'm surprised by it. Every time I look at the military
6 commission rules, I look at the Manual, it says the defense
7 counsel must represent their clients zealously; defense
8 counsel's bar rules say it; everything else says it.

9 I've made it as clear as I can. I think it is an
10 incredibly poor decision, which is why it looks strategic,
11 especially when you look at everything else that has
12 surrounded what is going on here and the months to get here,
13 to ask simple questions about evidence admission. But that's
14 defense counsel's choice.

15 We'll call the next witness in ten. We'll take ten.
16 We're in recess.

17 [The R.M.C. 803 session recessed at 1347, 12 February 2018.]

18 [The R.M.C. 803 session was called to order at 1400,
19 12 February 2018.]

20 MJ [Col SPATH]: Commissions are called back to order.
21 The same parties who were present for the last session are
22 again present.

23 Mr. Miller, call your next witness.

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1 TC [MR. MILLER]: Thank you, Your Honor. Government calls
2 Steven Krueger.

3 STEVEN T. KRUEGER, civilian, was called as a witness for the
4 prosecution, was sworn, and testified as follows:

5 DIRECT EXAMINATION

6 Questions by the Trial Counsel [MR. MILLER]:

7 Q. Please be seated and state your name for the record.

8 A. My name is Steven Krueger.

9 Q. And you are a former member of the Federal Bureau of
10 Investigation; is that correct?

11 A. Yes, that's correct.

12 Q. And you are the same Steven Krueger that previously
13 testified before this commission?

14 A. Yes.

15 Q. Just by way of reintroduction, back in October of
16 2000 you had occasion to travel to Aden; is that correct?

17 A. Yes, that's correct.

18 Q. And if you could just briefly, in what capacity?

19 A. In the capacity of being part of the Rapid Deployment
20 Team and in specifically the laboratory complement of that
21 team, to help collect evidence.

22 Q. And one of your jobs was to take swabs and samples of
23 various things to check for presence of explosives; is that

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1 correct?

2 A. That's correct.

3 Q. And did you do that on the USS COLE?

4 A. I did.

5 Q. Subsequent to taking swabs on the USS COLE, did you
6 remain on the COLE the entire time you were in Yemen?

7 A. No, I did not.

8 Q. All right. What else did you do?

9 A. Subsequent to doing some of the work on the COLE,
10 other sites on land were identified for searches. And then I
11 was part of -- I was part of a team to go out and do some of
12 those searches.

13 Q. All right. And did you have any sort of general
14 notion of what your duties and responsibilities were going to
15 be at these various sites?

16 A. I was there largely to help advise and collect
17 explosive-related evidence.

18 Q. Do you remember the first site that you went to to
19 search?

20 A. Yes.

21 Q. Could you just generally describe it, please.

22 A. So it was -- it was kind of an unfinished structure.

23 It was a mason block structure that had a few doors with no

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1 roof. It was an open -- kind of an open-air and dirt floors.
2 I think some of the rooms had cement floors, other rooms had
3 dirt floors.

4 Q. If you saw a photograph of it, do you think you would
5 recall it?

6 A. Yes.

7 Q. If you would, please, Prosecution Exhibit 344 for
8 Identification.

9 TC [MR. MILLER]: Permission to use the ELMO and the
10 monitors, Your Honor?

11 MJ [Col SPATH]: You may, sure. It's on this TV screen, I
12 think.

13 TC [MR. MILLER]: Okay.

14 MJ [Col SPATH]: He should have both. There they go.

15 Q. Before you on the monitor is Prosecution Exhibit 344
16 for Identification. Do you recognize that, sir?

17 A. Yes, that's the first site we went to.

18 Q. All right. Fair and accurate depiction of how it
19 appeared?

20 A. Yes.

21 Q. All right.

22 TC [MR. MILLER]: Move for the admission of Prosecution
23 Exhibit 344, Your Honor.

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1 MJ [Col SPATH]: Noted. Thanks.

2 Q. So you were there as sort of a trace evidence or
3 explosives expert, correct?

4 A. Correct.

5 Q. Did anything unusual happen? Did you have any -- let
6 me ask it this way. Did you have any interaction with any
7 Yemenis at the site?

8 A. Yeah, at the very beginning before we started the
9 search, the brigadier general of the Yemeni military had --
10 had come and introduced himself to me, and he grabbed my hand,
11 and we walked through that -- we walked through the opening of
12 that blue door on the picture.

13 Q. Could you circle it on the photograph, please?

14 A. This door right here. It was open ----

15 TC [MR. MILLER]: Can we save it, a picture of that, Your
16 Honor, for the record?

17 MJ [Col SPATH]: Hold on.

18 TC [MR. MILLER]: I apologize. I just learned we could do
19 that.

20 MJ [Col SPATH]: All right, we can. We'll talk with the
21 court reporters. Do you want to mark that as a prosecution
22 exhibit or as an appellate exhibit?

23 TC [MR. MILLER]: Let me get some help here, Your Honor.

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1 As an appellate exhibit.

2 MJ [Col SPATH]: All right, so I will get with the court
3 reporters, we'll get our next appellate exhibit, and I'll just
4 identify these either later today or tomorrow. He's already
5 saved it.

6 Okay. Don't let me forget. I know the court
7 reporters won't either. You may proceed.

8 TC [MR. MILLER]: Thank you.

9 Q. So you went through that door, and what did this
10 individual say to you?

11 A. So it was interesting, because he -- he alluded, he
12 pointed out to the open room. Just inside that door there was
13 an open room with a dirt floor. And in the center of that
14 room was a -- was a tissue paper, a blue tissue paper that had
15 a brown-orange powder in it. And he pointed to it and he said
16 there's your sample, or there's your evidence, or whatever it
17 was that he said.

18 And I asked him -- I said, "Well, what is it?"

19 And he said, "Well, that's your -- that's your
20 explosive material."

21 I said, "Okay," and we packaged it up. Once the
22 search started, then we packaged it up.

23 It was interesting because I never experienced an

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1 introduction to a search site similar to that.

2 Q. Were you speaking to him in English?

3 A. I was speaking to him in English. He was speaking in
4 broken English.

5 Q. All right. He certainly pointed something out to
6 you; is that correct?

7 A. Yes.

8 Q. All right.

9 TC [MR. MILLER]: If we could, prosecution photograph
10 PE -- excuse me, Prosecution Exhibit 352 for Identification.

11 Q. Do you recognize Prosecution Exhibit 352 for
12 Identification, sir?

13 A. Yes, I do.

14 Q. All right. Do you recognize what looks like --
15 appears to be a blue door?

16 A. Yes.

17 Q. All right. Is that the same blue door that you
18 circled in the previous picture?

19 A. Yeah, this is the inside of the door, though.

20 Q. All right. Is there anything significant in that
21 photograph?

22 A. Yeah, in the bottom right -- on my bottom right of
23 this picture is the blue tissue with the orange-brownish

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1 powder that's in it.

2 Q. Again, I guess -- well, let's for the record circle
3 that, because there are various pieces of ----

4 A. Right here [pointed].

5 Q. That was the item that he took you to?

6 A. Yes.

7 TC [MR. MILLER]: All right. Again, I guess we would make
8 this an appellate exhibit, Your Honor?

9 MJ [Col SPATH]: We can do that. We can -- let's see, the
10 first picture you did is going to be Appellate Exhibit 395.
11 This one, as soon as our court reporter saves it, is going to
12 be 395A. Take your time.

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

14 MJ [Col SPATH]: And up to you. We certainly can save
15 these as appellate exhibits, or we can identify where the
16 marks are on the photographs and not save them as appellate
17 exhibits. Either way, I just want to make sure we keep it
18 clear.

19 So this one that's on the screen now is 395A. Wait
20 until the court reporter tells us he's ready and then we will
21 go. We're ready; go.

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

23 Q. And that item was eventually seized; is that correct?

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1 A. Yes.

2 Q. All right. Prosecution Exhibit 279A ----

3 TC [MR. MILLER]: Permission to use the ELM0, Your Honor?

4 MJ [Col SPATH]: You may.

5 Q. I show you what has been -- I've placed a photograph
6 on the ELM0, Prosecution Exhibit 279A for Identification. Do
7 you recognize that photograph, sir?

8 A. Yeah, that looks like the blue tissue.

9 Q. And was that blue tissue eventually seized by Special
10 Agent Miller?

11 A. Yes.

12 Q. How long did you remain at that particular site?

13 A. Oh, for the better part of the day, until later in
14 the afternoon was when we finished up.

15 Q. All right. I'm going to show you a series of -- I
16 take it you seized various items there; is that correct?

17 A. Yes.

18 Q. All right.

19 TC [MR. MILLER]: Prosecution 276. It's going to be an
20 exhibit. If you could, please, provide the witness with
21 Prosecution Exhibit 276.

22 Q. What's been placed before you as Prosecution
23 Exhibit 276, do you recognize that, sir ----

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1 A. I'd have to open up the -- open up the bag to see the
2 plastic -- or the paper bag.

3 TC [MR. MILLER]: Can we do that, please?

4 A. Okay, yes. My -- "Recovered by," it has my name on
5 it with my handwriting. And the description and/or location,
6 it says "yellow plastic container with" ----

7 Q. ---- I guess my question is: Did you seize that
8 item ----

9 A. Yes.

10 Q. ---- Prosecution Exhibit 276 for Identification?

11 A. Yes.

12 Q. All right. I'm placing ----

13 TC [MR. MILLER]: Permission to use the ELM0, Your Honor?

14 MJ [Col SPATH]: You may.

15 Q. Placing on the ELM0 a photograph which we'll identify
16 as Prosecution Exhibit 276 for Identification. Is that the
17 same item that's contained in the bag, 276?

18 A. K32. 276, yes.

19 Q. Okay. So the photograph 276A, that photograph, is it
20 the same item that's in that bag ----

21 A. That's in this bag, yes.

22 Q. ---- 276? All right.

23 Is there a K number on the photograph, Prosecution

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1 Exhibit 276A?

2 A. It looks like K32.

3 Q. All right. Is there a K number on the bag that you
4 have in your hand, Prosecution Exhibit 276?

5 A. Yes, K32.

6 Q. All right. So they match?

7 A. Yes.

8 Q. If you again would look at the bag. You indicated
9 that you seized it? You seized the item in there?

10 A. Yes.

11 Q. You have to answer yes or no.

12 A. Yes. Correct.

13 Q. And how do you know that you did so, sir?

14 A. Because I wrote on the bag, I sealed the bag, and
15 then I handed it to Joe McNamara on the 17th of October to
16 start the chain of custody.

17 Q. And what did you write on the bag, sir?

18 A. I wrote "yellow plastic container with" -- may I open
19 this? Open it. "Yellow plastic container with green cap,
20 Room A, east wall."

21 Q. And you recognize that as your handwriting?

22 A. That's my handwriting, yes.

23 Q. Now, you indicated that you handed it off to Joe

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1 McNamara?

2 A. That's correct.

3 Q. Was he a special agent with the Federal Bureau of
4 Investigation?

5 A. He was the evidence custodian at that search site.

6 Q. Could you explain to His Honor, please, what you mean
7 by "evidence custodian at the search site"?

8 A. So the procedure at the time that we had was that at
9 a search site where the -- where we would end up collecting
10 evidence, we would identify one individual to be the collector
11 of all the -- all the evidence that was seized. So all the
12 searchers would bring their evidence, they would seal it up
13 and they would hand it to the evidence custodian, and that
14 individual would be the one who would start the chain of
15 custody.

16 Q. And you indicated that was standard operating
17 procedure?

18 A. Yes.

19 Q. If you had been back home doing a search of a drug
20 house or a bank robbery scene or a murder scene, would you
21 have used the same procedure?

22 A. That's correct, yes.

23 Q. Is there a green -- what we call a green sheet or

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1 chain-of-custody form there with the exhibit?

2 A. Yes.

3 Q. And do you recognize that, sir, that -- that form?

4 A. Yes.

5 Q. Now, if you would, again, looking at the bag, does
6 the bag have a YM number on it?

7 A. YM1-106.

8 Q. All right. Does it have a 1B number?

9 A. 1B? The outer bag has 1B47.

10 Q. All right. Looking at that chain-of-custody form,
11 are you able to associate that chain-of-custody form before
12 you with that exhibit, Exhibit 276?

13 A. Yes, the chain of custody shows 1B47 as well as
14 YM1-106.

15 Q. All right. Now, did you sign that particular green
16 sheet?

17 A. I did not.

18 Q. All right. And who signed it as the person doing the
19 collecting?

20 A. Joe McNamara.

21 Q. And would that have been standard procedure at the
22 time?

23 A. Yes.

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1 Q. I am now placing on the ELM0 Prosecution Exhibit 276B
2 for Identification. Do you recognize -- let me make it a
3 little smaller. Do you recognize that, sir?

4 A. Yes. That's the -- that's the cover or the face of
5 the paper bag that's in this bag.

6 Q. Fair and accurate depiction of it?

7 A. Yes.

8 Q. All right. I'm placing on the ELM0 Prosecution
9 Exhibit 276C for Identification. And do you recognize that?

10 A. That's the tape seal of the paper bag.

11 Q. Is there any significance as to your collection in
12 that photograph?

13 A. No, that's initialed by -- those aren't my initials.

14 Q. They are?

15 A. They are not.

16 Q. Oh, they are not. All right. But fair and accurate
17 depiction of the back of the bag?

18 A. Yes.

19 TC [MR. MILLER]: All right. Move for the admission at
20 this time, Your Honor, of Prosecution Exhibit 276A, 276B,
21 276C, and I will -- we will move for the admission of 276D
22 through Mr. McNamara.

23 MJ [Col SPATH]: Noted. Thank you.

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1 TC [MR. MILLER]: If you would place before the witness
2 Prosecution Exhibits 280, 281, and 282, please.

3 Q. Do you recognize what's been placed before you?

4 A. Yes, I do.

5 Q. And you had occasion to look through that bag last
6 night, correct?

7 A. Yes.

8 Q. All right. Do you recognize those items that are
9 contained in that bag?

10 A. Yes.

11 Q. All right. And what do you recognize them to be?

12 A. They're various containers and bottles and plastic
13 containers that were identified and seized in one of the rooms
14 in the search site.

15 Q. All right. Is there a spray can, Prosecution
16 Exhibit 280, contained in that bag?

17 A. Yes. There's a WD-40 can.

18 Q. All right. And is there another spray can in there,
19 also, a second can?

20 A. Can I get it out of here?

21 Yeah, there's two cans. There's two spray cans and a
22 paintbrush and another can of thinner, lacquer thinner.

23 Q. Are there also -- if you could, Prosecution

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1 Exhibit 281 -- a page of decals?

2 A. Yes.

3 Q. All right. In fact, there's two pages of decals, 281
4 and 282, is that correct?

5 A. That's correct, two pages of decals.

6 Q. Did you collect all these items together?

7 A. Yes.

8 Q. And do you recall where you collected them?

9 A. They were all collected from Room B.

10 Q. All right. And how do you know that you collected
11 them?

12 A. Because I wrote it on the -- on the bag with my name
13 and my handwriting and what it contained and where I picked it
14 up from.

15 Q. I'm going to place on the ELMO Prosecution
16 Exhibit 280A. Does that show all of those items in it?

17 A. Yes.

18 Q. And does that have a -- if I can zero in on it -- a K
19 number? Does it have a K number?

20 A. K42.

21 Q. All right. Now, the items in those bags, are
22 those -- again, in the entire bag, match all the ones in the
23 photograph, Prosecution Exhibit 280A?

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1 A. Yes.

2 Q. Does the items in there, 280, 281, and 282, do they
3 have a K number on them, also?

4 A. Yes, K42.

5 Q. All right. So it matches the K number in the
6 prosecution exhibit, Prosecution Exhibit 280A; is that
7 correct?

8 A. Yes.

9 Q. Now, you indicated that you seized those items?

10 A. That's correct.

11 Q. All right. And do you recognize your handwriting on
12 the evidence bags?

13 A. Yes.

14 Q. And could you read into the record what it is you
15 wrote on those bags -- on that bag?

16 A. "Recovered by SSA Steven Krueger." The description
17 and/or the location I wrote, "Miscellaneous bottles, cans, and
18 plastic containers from Room B."

19 Q. What did you do with those items after you had seized
20 them?

21 A. I packaged them up inside this brown paper bag. I
22 annotated the bag, and then I handed it to Joe McNamara, the
23 evidence custodian.

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1 Q. Is there a chain-of-custody form associated or
2 attached to that exhibit?

3 A. Yes.

4 Q. I'm placing on the ELM0 Prosecution Exhibit 280C for
5 Identification. Do you -- do you recognize that form, sir?

6 A. Yes, I do.

7 Q. And what do you recognize it to be?

8 A. That's the green sheet, the chain of custody sheet
9 for this -- for this evidence.

10 Q. All right. And are you able to associate that green
11 sheet with the bag, the package of evidence?

12 A. Yes.

13 Q. All right. And how are you able to do that?

14 A. They both -- they both show the 1B number as well as
15 the YM1-120.

16 Q. And that was for 280. I'm placing on the ELM0
17 Prosecution Exhibit 281C. Again, do you recognize that, sir?

18 A. Yes.

19 Q. All right. And are you able to associate that with
20 the exhibit, Prosecution 281?

21 A. Yes.

22 Q. And how are you able to do that?

23 A. They both have the same 1B number and the same 1 --

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1 or YM1 number.

2 Q. Now, again, I am placing on the ELMO Prosecution
3 Exhibit 282C. Again, are you able to associate that with the
4 exhibit, Prosecution Exhibit 282?

5 A. Yes.

6 Q. And how are you able to do that, sir?

7 A. They have consistent 1B numbers and YM1 numbers.

8 Q. In all of those exhibits, 280C, 281C, and 282C, it
9 contains a signature other than yours as collection; is that
10 correct?

11 A. Yes.

12 Q. And who signed for it?

13 A. Joe McNamara.

14 Q. Again, that was standard procedure at the site?

15 A. The evidence custodian, yes.

16 Q. All right. Now I'm placing lastly on the ELMO
17 Prosecution Exhibit No. 280B for Identification. Do you
18 recognize that, sir?

19 A. Yes, I do.

20 Q. What do you recognize that to be?

21 A. That's the front of the paper bag that I filled out
22 that held the evidence initially.

23 TC [MR. MILLER]: Your Honor, the government would move

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1 for the admission of Prosecution Exhibit 280A, 280B, and 280C,
2 281C, and 282C.

3 MJ [Col SPATH]: Noted. Thank you.

4 TC [MR. MILLER]: All right. If we could pull up on the
5 screen, please, Prosecution Exhibit 363, photograph.

6 Q. Sir, before you on the screen is Prosecution
7 Exhibit 363, 3-6-3, for Identification. Do you recognize that
8 photograph, sir?

9 A. That's a photograph of the search site where the --
10 where that evidence that we just talked about was found.

11 Q. And is that the condition in which you saw it?

12 A. Yes.

13 Q. All right. Fair and accurate depiction of the
14 evidence as it appeared that day?

15 A. Yes.

16 TC [MR. MILLER]: All right. We would move for the
17 admission of Prosecution Exhibit 363, Your Honor.

18 MJ [Col SPATH]: Noted. Thank you.

19 TC [MR. MILLER]: Prosecution -- if you could hand the
20 witness, please, Prosecution Exhibit 283. If you would go
21 back to the ELM0, please.

22 Q. Before you is Prosecution Exhibit 283 for
23 Identification. Do you recognize that, sir?

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1 A. Yes, I do.

2 Q. What do you recognize it to be?

3 A. It's another piece of evidence that I collected from
4 the -- from the search site on the 17th of October.

5 Q. Placing on the ELMO Prosecution Exhibit 283A for
6 Identification. Do you recognize that, sir?

7 A. Yes.

8 Q. And is that the same item that's contained in the
9 package in front of you, Prosecution Exhibit 283?

10 A. Yes.

11 Q. And does the photograph, Prosecution Exhibit 283A,
12 have a number, a -- what I call a K number?

13 A. It's K43.

14 Q. Does the exhibit, Prosecution Exhibit 283, have a K
15 number?

16 A. Yes, it's labeled as K43.

17 Q. All right. So it would be a -- it would match the K
18 number in Prosecution Exhibit 283A?

19 A. That's correct.

20 Q. All right. And you indicated that you seized that
21 item?

22 A. Yes.

23 Q. And how do you know that you seized that item, sir?

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1 A. Because my writing and my name is on the -- is on the
2 paper bag where I wrote and signed my name, as well as the
3 location of the recovery was in Room B.

4 Q. All right. You packaged it?

5 A. Yes.

6 Q. And what did you do with it once you packaged it?

7 A. Once it was packaged up, then I handed it to Joe
8 McNamara for the evidence custodian.

9 Q. Is there a chain-of-custody form attached to that
10 exhibit, with that exhibit?

11 A. Yes.

12 Q. And does it contain a 1B number?

13 A. 1B80.

14 Q. And a YM number?

15 A. YM1-121.

16 Q. All right. Does the Government Exhibit 283 for
17 Identification have a YM1 number? Would it be helpful to open
18 the bag?

19 A. YM1-121.

20 Q. All right, does it have a 1B number, if you can see
21 it?

22 A. 1B80.

23 Q. All right. Are you able to associate the green sheet

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1 in front of you with the Exhibit 283?

2 A. Yes.

3 Q. All right. And how are you able to do that?

4 A. They both carry the same consistent 1B number and YM1
5 number.

6 Q. All right. Placing on the ELM0 Prosecution
7 Exhibit 283D. Do you recognize that?

8 A. Yes, I do.

9 Q. And is that the exact duplicate of the green sheet
10 you just described?

11 A. Yes.

12 Q. Placing before you Prosecution Exhibit 283C for
13 Identification. Do you recognize that, sir?

14 A. Yes, I do.

15 Q. And what do you recognize that to be?

16 A. That's my handwriting, my name, and the location that
17 it was recovered, as well as -- just above that picture is the
18 description of the item.

19 Q. Fair and accurate depiction of the bag that contained
20 the evidence?

21 A. Yes.

22 Q. Lastly, do you recognize Prosecution Exhibit 283B
23 for -- 283B for Identification?

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1 A. That's just the picture of the piece of evidence from
2 the top looking down.

3 Q. All right. And it has a K number, also, correct?

4 A. K43.

5 TC [MR. MILLER]: Your Honor, at this time the government
6 would move for the admission of Prosecution Exhibit 283A,
7 283B, and 283C. And we will move for the admission of D
8 through Mr. McNamara.

9 MJ [Col SPATH]: Thank you. Noted.

10 TC [MR. MILLER]: If we could provide the witness
11 Prosecution Exhibit 292.

12 Q. Do you recognize that, sir?

13 A. Yes, I do.

14 Q. And what do you recognize Prosecution Exhibit 292 for
15 Identification to be?

16 A. This is a piece of evidence that I seized from
17 Room B. It's a can labeled "Pure Vegetable Oil" on the 17th
18 of October 2000.

19 Q. Placing on the ELM0 Prosecution Exhibit 292A for
20 Identification. Do you recognize what's in that photograph?

21 A. Yes, I do.

22 Q. Is it the same item that's contained in the evidence
23 bag, Prosecution 292?

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1 A. Yes.

2 Q. Does 292A, if you can see it, have a K number? If
3 you can make it out. If you can't, say so.

4 A. I can't make it out.

5 Q. All right. Neither can I. All right.

6 Looking at the bag, 280 -- Prosecution Exhibit 292,
7 you indicated that you seized it. How do you know that you
8 seized it?

9 A. Because in my handwriting with my name and the
10 description.

11 Q. All right. And it says "Recovered by Steven
12 Krueger." And where was it?

13 A. In Room B.

14 Q. All right. Is there a chain-of-custody form attached
15 to that exhibit?

16 A. Yes, there is.

17 Q. All right. If you could, looking at the evidence bag
18 itself, does it have a YM1 number on it?

19 A. The evidence bag has YM1-127.

20 Q. Does it have a 1B number on it?

21 A. 1B86.

22 Q. Looking at Prosecution Exhibit 292, do you recognize
23 that form, sir?

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1 A. Yes, that's a chain of custody.

2 Q. Okay. And I may have misspoke. That's Prosecution
3 Exhibit 292C. Do you recognize that as the chain-of-custody
4 form for Prosecution Exhibit 292?

5 A. Yes.

6 Q. Are you able to associate -- how are you able to
7 associate that chain-of-custody form to the Exhibit 292?

8 A. They both have the same 1B number, 1B86, and the same
9 YM1 number, 127.

10 Q. And it shows that it was collected by somebody other
11 than you. And who was that?

12 A. Joseph McNamara.

13 Q. All right. You would have surrendered the item to
14 him?

15 A. Yes, that's correct.

16 Q. And was it standard operating procedure at that time
17 again for you to do that?

18 A. Yes.

19 Q. Placing on the ELM0 Prosecution Exhibit 292B for
20 Identification, sir. And do you recognize that?

21 A. Yes. That's the front of the brown paper bag.

22 Q. Fair and accurate depiction of it?

23 A. Yes.

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1 TC [MR. MILLER]: Your Honor, the government would move at
2 this time for the introduction of Prosecution Exhibit 292A and
3 Prosecution 292B. We'll move for 292C through Joseph
4 McNamara.

5 MJ [Col SPATH]: Understand. Noted. Thank you.

6 TC [MR. MILLER]: Prosecution Exhibit Number 296, please.

7 Q. Sir, you've been handed Prosecution Exhibit 296. Do
8 you recognize that?

9 A. Yes, I do.

10 Q. All right, Agent. And if you could, please, tell us
11 whether or not that was an item that you seized.

12 A. Yes, I seized it with -- I signed the brown paper
13 bag. The description says "Metal Drum Cap" and "seized from
14 Room B."

15 Q. All right. And do you recognize your handwriting on
16 the evidence bag?

17 A. Yes.

18 Q. I'm placing on the ELM0 Prosecution Exhibit 296A and
19 ask you do you recognize that, sir? Let me get a closeup.

20 A. Yes, that's the drum cap that's in this bag.

21 Q. All right. The same exact one?

22 A. Yes.

23 Q. It has a Q tag, also -- or a K tag on it, also? I

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1 take it you're unable to make out that number; is that
2 correct?

3 A. That's correct.

4 Q. All right. Looking at the exhibit itself, 296,
5 again, if you could read into the record what you wrote on
6 that bag.

7 A. "Recovered by" and I wrote my name. "Description
8 and/or location," I wrote "Metal Drum Cap, Room B."

9 Q. And what did you do with it?

10 A. I then sealed it into the paper bag, and then I
11 handed it to Joe McNamara to start the chain.

12 Q. Does that evidence bag have a K -- a YM number on it?
13 Would it be helpful to open the bag?

14 TC [MR. MILLER]: If we could, please, open the bag.

15 A. So YM1-177.

16 Q. Does it have a 1B number on it?

17 A. 1B101.

18 Q. All right. And I think we indicated that there was a
19 chain-of-custody form, correct ----

20 A. Yes.

21 Q. ---- talked about?

22 Is that a -- excuse me. Are you able to associate it
23 with -- that chain-of-custody form, associate it with the

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1 Exhibit 296?

2 A. Yes. They both have the same YM1 and 1B numbers.

3 Q. Placing on the ELM0 Prosecution Exhibit 296C for
4 Identification. Is that the chain-of-custody form about which
5 you have just testified?

6 A. Yes.

7 Q. All right. And is that an exact duplicate of it?

8 A. Yes.

9 Q. Lastly, I'm going to show you Prosecution
10 Exhibit 296B. Do you recognize that, sir?

11 A. Yes.

12 Q. What do you recognize that to be?

13 A. That's the front page -- or the front part of the
14 brown paper bag, evidence bag, for this exhibit.

15 Q. Fair and accurate depiction of it?

16 A. Yes.

17 TC [MR. MILLER]: Your Honor, we would move for the
18 admission of Prosecution Exhibit 296A, 296B. We'll move for
19 296C through Mr. McNamara.

20 MJ [Col SPATH]: All right. Thank you. Noted.

21 Q. All right. And then you moved from that particular
22 site to Site Number 2; is that correct?

23 A. Yes. It was either the next day or the day after.

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1 Q. And again, what were your general duties and what
2 were your responsibilities going to be?

3 A. To assist the search scene, specifically, with the
4 collection of evidence related to explosives.

5 Q. And did you go there alone or were there other agents
6 with you?

7 A. There was several other agents with us -- with me on
8 the search team.

9 Q. When you first arrived there, what, if anything, did
10 you do at the second site?

11 A. Well, when we first arrived we identified what it was
12 that we needed to do and the size of the site. And we
13 organized ourselves, and we began to do the search.

14 Q. What did you do?

15 A. Specifically, I took some swabs of the -- of the site
16 on locations where we wouldn't be able to seize evidence. So
17 I swabbed some doors and some handles and some faucets, and
18 then I sealed them up, and those swabs went back to D.C. for
19 analysis.

20 Q. They went back almost immediately; is that correct?

21 A. Very quickly, yes.

22 Q. And did you receive word back regarding those swabs?

23 A. Yes. So some of those swabs came back positive for

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1 the existence of explosives.

2 Q. All right. Was there anything about what came back
3 as far as the test results that made you, as a professional, a
4 little uneasy?

5 A. So one of the -- one of the swabs, which was a
6 control of myself, also came back for the presence of
7 explosives. So in order to -- in order to address the
8 possibility of cross-contamination in that case, we ended up
9 going back to the site a few days later and seized a couple --
10 a couple items that would be -- that would not have -- that I
11 would not have affected. My presence would not have affected
12 it.

13 Q. Let's stop there so that we have a better idea. When
14 you went in and take swabs, you said you swabbed doorknobs,
15 things of that nature, correct?

16 A. That's correct.

17 Q. Do you swab yourself, also? Could you explain to the
18 court why you swab yourself?

19 A. So the idea is to swab the examiner to make sure that
20 the examiner is clean of any explosive residue. And in this
21 case, the fact that I had walked throughout the -- throughout
22 the scene, I -- I also had explosive residue on me by being in
23 the scene.

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1 Q. So whatever explosive residue was on you, you picked
2 up at the scene?

3 A. That's correct.

4 Q. But it would have contaminated -- may have
5 contaminated any other swabbing that you did?

6 A. That's correct.

7 Q. In addition to the swabs, did you seize any evidence
8 at the site the first trip?

9 A. Yes.

10 TC [MR. MILLER]: All right. If we could, please, provide
11 the witness with Prosecution Exhibit 483.

12 Q. I have placed before you Prosecution Exhibit 483. Do
13 you recognize that, sir?

14 A. Yes, I do.

15 Q. All right. And what do you recognize it to be?

16 A. This is a -- this is a 50-pound flour bag which was
17 found in the back -- in the back shed, in the back room.

18 Q. That was something that you seized?

19 A. That's correct.

20 Q. And how do you know that you seized it?

21 A. My handwriting, my signature, as well as the
22 description in my handwriting.

23 Q. I'm placing on the ELM0 Prosecution Exhibit 843 for

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1 Identification, and ask you do you recognize -- oh, excuse
2 me -- 483A for Identification. Do you recognize that, sir?

3 A. Yes, that's the bag that's inside this bag.

4 Q. All right. And you indicated that you know that you
5 seized it how?

6 A. With my handwriting and signature and the description
7 on the evidence bag.

8 Q. So I take it after you found it, you packaged it?

9 A. I packaged it in this brown paper bag and sealed it
10 up and handed it to Joe McNamara.

11 Q. And could you read into the record, please, what you
12 wrote on that bag?

13 A. I wrote the date, which was 10/18/2000. Recovered by
14 myself, SSA Steven Krueger. "Description and/or location,
15 50-pound flour bag found in back shed, back room."

16 Q. And Prosecution Exhibit 483, does it have a YM2
17 number?

18 A. Yes, YM2-201.

19 Q. Does it also have a 1B number?

20 A. 1B233.

21 Q. Does it have a chain-of-custody form attached to it?

22 A. Yes.

23 Q. All right. And does it show your signature as

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1 collection?

2 A. It's Joe McNamara as collecting it.

3 Q. Was it -- were you employing the same procedure at
4 Site 2 that you had employed at Site 1?

5 A. Yes.

6 Q. Are you able to associate that particular green sheet
7 with the exhibit, Prosecution Exhibit 483?

8 A. Yes, they both have the same 1B number and the same
9 YM2-201 number.

10 Q. Placing on the ELM0 Prosecution Exhibit 483C. Is
11 483C an exact duplicate of the green sheet you've just
12 described?

13 A. Yes.

14 Q. I'm also placing on the ELM0 -- or now placing on the
15 ELM0 Prosecution Exhibit 483B for Identification. Do you
16 recognize that, sir?

17 A. Yes, that's the -- that's the same front part of the,
18 the brown paper evidence bag.

19 Q. Fair and accurate depiction of it?

20 A. Yes.

21 TC [MR. MILLER]: Your Honor, the government would move
22 for the admission of Prosecution Exhibit 483A and 483B. We
23 will move for 483C through Mr. McNamara.

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1 MJ [Col SPATH]: All right. Thank you.

2 TC [MR. MILLER]: If you could provide the witness with
3 Prosecution Exhibit 484.

4 Q. Do you recognize Prosecution Exhibit 484, sir?

5 A. Yes, I do.

6 Q. And how are you able to recognize it?

7 A. With my handwriting, signature on the evidence bag.

8 Q. Did you seize these items?

9 A. Yes, I did.

10 Q. After you seized them, what did you do with them?

11 A. I placed them inside this brown -- a brown paper bag
12 and then sealed it up and turned it over to Joe McNamara.

13 Q. Could you describe the items?

14 A. Several glass bottles and jars that -- that had
15 different chemicals and stuff, medicines, and hydrogen
16 peroxide.

17 Q. Placing on the ELM0 Prosecution Exhibit 484A for
18 Identification. Do you recognize that, sir?

19 A. Those are some of the bottles that are in this bag.

20 Q. All right. And does it have a K number, sir?

21 A. K181.

22 Q. And these are, you said, some of the same bottles in
23 the Exhibit 483 -- 484, correct?

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1 A. Yes.

2 Q. Placing on the ELM0 Prosecution Exhibit 484B. Do you
3 recognize that, sir?

4 A. Yes.

5 Q. What do you recognize that to be?

6 A. More of the bottles that are in here.

7 Q. Again, does it have a K number?

8 A. Yes, K181.

9 Q. Now, you indicated that you seized those items. Did
10 you write anything on the bags?

11 A. Yes. In the item description I wrote "Bottles and
12 jars from back shed, back room," with a date 10/18/2000, and
13 my -- my signature, SSA Steven Krueger.

14 Q. After you bagged the evidence, what did you do with
15 it?

16 A. I handed it over to Joe McNamara.

17 Q. Is there a green sheet attached to that exhibit?

18 A. Yes, there is.

19 Q. First off, as to the exhibit itself, 484, does it
20 have a 1B number?

21 A. 1B266.

22 Q. Does it have a YM2 number?

23 A. Y -- YM2-233.

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1 Q. And does it have a K number?

2 A. K181.

3 Q. All right. The K number, K181, is the same number in
4 Prosecution Exhibits 484A and B; is that correct?

5 A. Yes.

6 Q. Are you able to associate the green sheet you've just
7 talked about with the exhibit, Prosecution Exhibit 484?

8 A. Yes.

9 Q. And how are you able to do that, sir?

10 A. They have consistent 1B numbers and consistent
11 YM2-233 numbers.

12 Q. Placing on the ELM0 Prosecution Exhibit 484F for
13 Identification. Do you recognize that, sir?

14 A. Yes. That's the chain of custody for this evidence.

15 Q. All right. It's an exact duplicate of it; is that
16 correct?

17 A. Yes.

18 Q. I'm also going to place on the ELM0 Prosecution
19 Exhibit 484C for Identification. Do you recognize that, sir?

20 A. Those are more of the bottles that are in this bag.

21 Q. All right. And Prosecution Exhibit 484D, do you
22 recognize that?

23 A. Yes.

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1 Q. And what is that?

2 A. Four more of the bottles that are in this package.

3 Q. Lastly, placing on the ELMO Prosecution Exhibit 484E
4 for Identification. Do you recognize that, sir?

5 A. Yes. That's the front of the evidence bag.

6 Q. Fair and accurate depiction of it?

7 A. Yes.

8 TC [MR. MILLER]: Your Honor, the government would move
9 for the admission of Prosecution 484A, B, C, D, and E. We
10 will move for the admission of F through Mr. McNamara.

11 MJ [Col SPATH]: Noted. Thank you.

12 Q. Now, you indicated you took a second trip to the --
13 this particular site, Site Number 2?

14 A. Yes. After discovering that several of the swabs
15 came back positive, there's -- the fact that the swab for the
16 examiner came back positive, then you've got an issue of
17 cross-contamination you have to deal with. So we decided to
18 go back to the site to find or seize some evidence that would
19 discount the examiner, something that the examiner would not
20 have affected with his presence. And so we ended up taking
21 sink traps from the kitchen and a bathroom, as well as some
22 PVC piping that was a drain pipe out the back of the kitchen.

23 Q. Let me stop you there. First off, I take it you did

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1 not go back to the site alone?

2 A. That's correct.

3 Q. You were not the evidence custodian at the site,
4 correct?

5 A. That's correct.

6 Q. When you went there, did you take any precautions to
7 minimize the issue of cross-contamination?

8 A. Yeah. So before entering the site, myself and
9 another agent donned the Tyvek suits and the gloves and the
10 masks, and then we went in and took the sink traps.

11 Q. Again, for the record, could you describe to the
12 court what a Tyvek suit is and what -- why it is important for
13 you to have used that at this time?

14 A. So the Tyvek suit creates a barrier for the examiner
15 to -- to ensure that he's -- that he's clean from any
16 explosive residue, and then he enters the -- you enter the
17 search site and you seize the evidence, and then you make sure
18 you're clean before you go in.

19 Q. Why did you pick traps and drains?

20 A. So with sink traps and with drain pipes, the
21 probability that an examiner would contaminate inside of a
22 sink trap is -- is insignificant. So one would think that if
23 you could grab those sink traps, as well as the inside of a

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1 drain, the chances that -- any cross-contamination issue would
2 be discounted, if they were, in fact, positive.

3 Q. How did you go about taking these drains? How --
4 what did you do? Explain the procedure. When you went to the
5 site, what did you do?

6 A. So in the kitchen there was a -- there was a sink
7 trap, and then the sink trap actually extended out to the
8 bottom -- to the floor and then out through the back door. So
9 it actually didn't drain into a drain; it drained into the
10 backyard. And then the other -- in the bathroom, it was just
11 a sink trap with plumbing.

12 So we hacksawed -- I hacksawed the trap off. And
13 then -- there's water inside the trap. And then I transferred
14 the water from the trap into a glass vial that was -- that I
15 brought that was clean and then sealed that up as a separate
16 item along with the sink trap itself.

17 Q. Did you go anywhere else other than the sink traps?

18 A. The back -- out the backyard there was an extension
19 of PVC pipe that is -- the sink drain continued out into the
20 backyard.

21 Q. Did you go into any of the bathrooms?

22 A. Yes, the second -- the second trap was in the -- was
23 in the bathroom.

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1 TC [MR. MILLER]: If we could put up, show these
2 photographs, Prosecution Exhibit 389, please -- excuse me, how
3 did I get that? It should be Prosecution 549. 549, I'm
4 sorry.

5 Q. 549, do you recognize that, sir?

6 A. Yes, that's the kitchen sink.

7 Q. Is that the sink that you dismantled, so to speak?

8 A. The underneath, yeah, the trap.

9 TC [MR. MILLER]: All right. I think we previously moved
10 for its admission, Your Honor.

11 MJ [Col SPATH]: You did, and noted again. Thanks.

12 Q. 551, please. Prosecution Exhibit 551 for
13 Identification. Do you recognize that photograph?

14 A. Yes. That's the same kitchen sink.

15 Q. And as you took it apart, what did you do with the
16 items that you were sawing or unscrewing or ----

17 A. So as I -- as I removed the trap and I poured the
18 water into the vial, I handed the trap to one of the teammates
19 that was on the search site.

20 Q. All right. Prosecution Exhibit 568, please. Again,
21 do you recognize the photograph, Prosecution 568?

22 A. Yes, that's the bathroom sink.

23 Q. All right. And is that one of the ones where you

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1 were trying to get samples?

2 A. Yes.

3 Q. All right. 569, please -- Prosecution 569 for
4 Identification. And again, do you recognize the underneath of
5 the sink?

6 A. Yes.

7 Q. Is that one of the areas that you were searching?

8 A. Yes.

9 TC [MR. MILLER]: And again, Your Honor, we would move for
10 the admission of 551, 568, and 569. We do so again.

11 MJ [Col SPATH]: Understand. Noted.

12 TC [MR. MILLER]: If we could, please, provide the witness
13 with prosecution 506. We're going to be switching to the
14 ELMO.

15 Q. Do you recognize 506?

16 A. I can't see into the bag ----

17 Q. Okay.

18 A. ---- but I'm assuming that this is the sink trap.

19 Q. We'll open it.

20 WIT: Can you open that, too?

21 A. Okay. Yes.

22 Q. Do you recognize that?

23 A. This is -- yes, this is the sink trap.

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1 Q. All right. And is that the one -- what did you do
2 with it after you had cut it off?

3 A. After I cut it off and drained the water out, I
4 handed it to another team member to package and seal up.

5 Q. All right. So it would have been their
6 responsibility to do that, correct?

7 A. That's -- yes, correct.

8 Q. All right. That's 506, just for the record.

9 I'll show you Prosecution Exhibit 506A on the ELM0.
10 Is that, in fact, the same trap contained in the Exhibit 506?

11 A. Yes.

12 TC [MR. MILLER]: If you could show the witness, please,
13 Prosecution Exhibit 507.

14 Q. I have placed before you Prosecution Exhibit 507. Do
15 you recognize that, sir?

16 A. Yes, I do.

17 Q. All right. And what is that, sir?

18 A. This is part of the piping underneath the kitchen
19 sink.

20 Q. Part of the piping that you took for testing?

21 A. Yes.

22 Q. Placing on the ELM0 Prosecution Exhibit 507A. Is
23 that the same -- a picture of the same pipe?

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1 A. Yes.

2 Q. Was it warm in that Tyvek suit?

3 A. Yes.

4 TC [MR. MILLER]: If you could hand the witness, please,
5 Prosecution Exhibit 508.

6 Q. Do you recognize Prosecution Exhibit 508?

7 A. Yeah, this is more of the elbow piping underneath the
8 kitchen sink.

9 Q. Is there tape on those items?

10 A. There's black tape on it.

11 TC [MR. MILLER]: For the record, I'm placing on the ELMO
12 Prosecution Exhibit 508A.

13 Q. Is that a photograph of that piping?

14 A. Yes.

15 Q. I take it both 507 and 508 that's in this photograph,
16 you would have handed those items to somebody?

17 A. Yes.

18 TC [MR. MILLER]: If we could hand the witness, please,
19 Prosecution Exhibit 509.

20 Q. If you would, please, sir, take a look at Prosecution
21 Exhibit 509.

22 A. Okay.

23 Q. If you need to open it, please tell us.

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1 TC [MR. MILLER]: Open it for him, please. Thank you.

2 Q. Agent Krueger, have you had a chance to look at
3 Prosecution Exhibit 509?

4 A. Yes. This is the -- this is the sink trap from the
5 bedroom sink.

6 Q. I show you what has been -- what is Prosecution
7 Exhibit 509A. Is that a photograph of the plumbing that you
8 took from Prosecution Exhibit 509, is it?

9 A. Yes, it is.

10 Q. Again, did you package it?

11 A. I did not.

12 Q. Did you hand that off to the evidence custodian?

13 A. I handed it off to the evidence custodian at that
14 site, yes.

15 Q. I'm going to place on the -- excuse me.

16 TC [MR. MILLER]: If you could hand to the witness
17 Prosecution Exhibit 510, please.

18 Q. Sir, do you recognize Exhibit 510?

19 A. This is the -- this is the can that contained the
20 vial that contained the water in the trap.

21 Q. All right. And did you package that initial sample?

22 A. I poured the water in the vial, yes.

23 Q. And you got the water out of the trap?

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1 A. Sink trap, yes.

2 Q. And what did you do with it after you poured it into
3 the glass jar?

4 A. Then I sealed up the glass jar and I handed it to the
5 evidence custodian.

6 Q. Placing on the ELM0 Prosecution Exhibit 510A. Is
7 that one of the glass jars that you were using?

8 A. Yes.

9 Q. All right. And does that glass jar have a K number?

10 A. K382.

11 Q. And once you had gotten that sample, what did you
12 next do with it?

13 A. I sealed it up, and I put it in this bag, and I
14 turned it over to the evidence custodian.

15 Q. And was it then forwarded to the laboratory?

16 A. Yes.

17 Q. Is there a K number on that bag?

18 A. K382.

19 Q. Is that the same number that's contained in the
20 photograph, Prosecution Exhibit 510A?

21 A. Yes.

22 Q. Does the evidence bag itself have a YM2 number?

23 A. YM2-250.

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1 Q. Does the evidence bag itself, Prosecution
2 Exhibit 510, also have a 1B number?

3 A. 1B275.

4 Q. Is there a chain-of-custody form attached to that
5 exhibit?

6 A. Yes.

7 Q. Could you look at that, please?

8 A. Yes.

9 Q. And are you able to associate that particular form,
10 that green -- green sheet, with the Exhibit 510?

11 A. Yes. It has the same 1B number and the same YM2
12 number.

13 Q. All right. Does it have your signature on it?

14 A. Yes, it does.

15 Q. All right. And where is your signature?

16 A. My signature is the -- I identify myself as the
17 individual who collected it and then turned it over to the
18 individual that was the evidence custodian.

19 Q. All right, and it looks like you did that within an
20 hour and 15 minutes of collecting it; is that correct?

21 A. Yes.

22 Q. Placing on the ELM0 Prosecution Exhibit Number 110G
23 [sic]. Do you recognize that, sir?

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1 A. Yes, that's the green sheet for this evidence.

2 Q. An exact duplicate of it; is that correct?

3 A. Yes, it is.

4 Q. Placing on the ELM0 Prosecution Exhibit 110B [sic]
5 for Identification. Do you recognize that, sir?

6 A. Yes, that's the same front of the brown paper bag for
7 the evidence.

8 Q. Fair and accurate depiction of it?

9 A. Yes.

10 Q. All right. Also for the record, I show you some
11 photographs of the can itself. Showing you Prosecution
12 Exhibit 510F. Do you recognize that, sir?

13 A. That's consistent with the can that that vial would
14 have been in.

15 Q. All right. Prosecution 510E, do you recognize that?

16 A. Yeah, it's consistent with the can that's in here.

17 Q. And Prosecution 510D.

18 A. Yes, and that -- that has the YM2-250 annotation on
19 it, on the cap.

20 Q. Lastly 510C, that bag, do you recognize that as part
21 of the exhibit?

22 A. That's inside this bag. Yes.

23 Q. All right, it has the same K number, also; is that

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1 correct?

2 A. The same K number and the same lab number on it.

3 TC [MR. MILLER]: Your Honor, at this time ----

4 Q. I'm not sure I asked you, but I'll ask you again. Is
5 this a fair and accurate depiction of the evidence bag,
6 Prosecution Exhibit 510B?

7 A. Yes.

8 TC [MR. MILLER]: Your Honor, the government would move at
9 this time for the admission of Prosecution Exhibit 510A, B, C,
10 D, E, F, and G.

11 MJ [Col SPATH]: Noted. Thank you.

12 TC [MR. MILLER]: Hand the witness, please, Prosecution
13 Exhibit 511.

14 MJ [Col SPATH]: Mr. Miller, let me just -- how much more
15 do you have with this witness?

16 TC [MR. MILLER]: Probably five, ten minutes.

17 MJ [Col SPATH]: Okay, let's see if we can get there.

18 TC [MR. MILLER]: Okay.

19 Q. Do you recognize Exhibit 511, sir?

20 A. Yes, I do.

21 Q. All right. And what do you recognize it to be?

22 A. It's the -- another liquid sample from a trap that I
23 collected.

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1 Q. And you know you collected it how?

2 A. With my -- my signature and the date of receiving it
3 and then turning it over to the evidence custodian.

4 Q. I show you a photograph, Prosecution Exhibit 511A.
5 Do you recognize that, sir?

6 A. That would -- that would be the glass vial that's
7 inside this paint can.

8 Q. Does it have a K number?

9 A. K383.

10 TC [MR. MILLER]: And if you could open it for him,
11 please.

12 Q. You indicated that you seized this evidence, correct,
13 or packaged it?

14 A. Yes. Yes.

15 Q. All right. And from where did you get it?

16 A. From the sink trap in bedroom, Room F.

17 Q. And it's described as what, sir?

18 A. It's the water inside the sink trap.

19 Q. I think you indicated, but, if not, does this
20 photograph, Prosecution Exhibit 511A, have a Q number?

21 A. It has a K number.

22 Q. Or, excuse me, a K number. Thank you.

23 A. K383.

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1 Q. Is there a K number on the exhibit itself, 511?

2 A. Yes, K383.

3 Q. So they match?

4 A. Yes.

5 Q. Show you a couple other photographs. Prosecution
6 Exhibit 511E, do you recognize that, sir?

7 A. Yes. That's the -- that's the paint -- aluminum
8 paint can that's inside this bag.

9 Q. All right. And that would be to store the evidence,
10 correct?

11 A. Yes.

12 Q. Placing in front of you Prosecution Exhibit 511D. Do
13 you recognize that, sir?

14 A. Yes. That's the paint can -- that's the top of the
15 paint can that's in this bag.

16 Q. Lastly, Prosecution Exhibit 511C, do you recognize
17 that?

18 A. That's the glassine plastic bag that contains the
19 evidence.

20 Q. Also has a K number on it, does it not?

21 A. K383.

22 Q. Is there a chain-of-custody form attached to that
23 exhibit?

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1 A. Yes.

2 Q. And are you able to associate it with -- the
3 chain-of-custody form with the exhibit, Prosecution
4 Exhibit 511?

5 A. Yes. They have consistent YM2 numbers.

6 Q. All right. Placing before you Prosecution
7 Exhibit 511F for Identification. Is that an exact duplicate
8 of the chain-of-custody form you've just described?

9 A. Yes, it is.

10 Q. And does it show who collected the item?

11 A. It shows myself signing for collection on the 22nd of
12 October and then turning it over to the custodian on the same
13 day.

14 Q. Placing on the ELMO Prosecution Exhibit 511 -- 511B.
15 Do you recognize that picture?

16 A. Yes, that's a -- that's a picture of the brown paper
17 evidence bag.

18 Q. Fair and accurate depiction?

19 A. Yes.

20 TC [MR. MILLER]: Your Honor, the government would move at
21 this time for the admission of Prosecution Exhibit 511A, B, C,
22 D -- hold on -- C, D, E, and F.

23 MJ [Col SPATH]: Noted. Thank you.

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1 TC [MR. MILLER]: We have one more, Your Honor, and then
2 we'll be done with this witness.

3 MJ [Col SPATH]: All right.

4 TC [MR. MILLER]: If we could provide the witness with
5 Prosecution Exhibit 512, please.

6 [Pause.]

7 TC [MR. MILLER]: Your Honor, if you would like to take
8 the break, because we have a short witness afterwards and we
9 can get this thing unwrapped.

10 MJ [Col SPATH]: That works. Let's do this. A couple
11 things just for planning purposes. Not a critique; a little
12 off on your estimates today for the witnesses, but they've
13 been so much spot-on before that that's okay. We'll work
14 through it.

15 For tomorrow, the subpoenas say 10:00 and I recognize
16 that. So if the witnesses are working with you, you can let
17 them know, based on moving people to and from the courtroom
18 and the security here and the like, it's easier if we don't
19 try to move more than one person at a time and we already know
20 there's another group here tomorrow.

21 And so it was just mentioned to me if we could keep
22 our 1300 start time that would be beneficial so that people
23 who are trying to get off island and such can do that. I'm

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1 amenable to that. And again, seems pretty straightforward to
2 me, if you're subpoenaed to be there at 10:00 you can get
3 there at 10:00 and wait until 1:00, or you all can engage them
4 and let them know they can show up a little before 1:00, if
5 they're going to show up. If they're not going to show up, it
6 doesn't make a difference. But I know you all know what I am
7 telling you.

8 I don't need them to sit there from 10:00 in the
9 morning until 1:00 in the afternoon. I do need them to get
10 there, because they have been subpoenaed. But you can let
11 them know, though, it will be closer to 1:00, to make it more
12 convenient for them, so -- that way we don't have any more
13 administrative matters at the end of the day.

14 We'll take ten minutes and we'll come back and finish
15 up this witness and the next. Thanks. We're in recess.

16 [The R.M.C. 803 session recessed at 1518, 12 February 2018.]

17 [The R.M.C. 803 session was called to order at 1531,
18 12 February 2018.]

19 MJ [Col SPATH]: This commission is called back to order.
20 All the parties who were present before we recessed are again
21 present. The witness remains on the stand. Remember you're
22 still under oath.

23 Mr. Miller.

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

2 DIRECT EXAMINATION CONTINUED

3 Questions by the Trial Counsel [MR. MILLER]:

4 Q. I've placed before you Prosecution Exhibit 512. Do
5 you recognize that, sir?

6 A. Yes, I do.

7 Q. And what do you recognize that to be?

8 A. It's the PVC piping that extended from the kitchen
9 drain out the backyard.

10 Q. And is that something that you cut off?

11 A. Yes.

12 Q. And what did you do with it after you cut it off?

13 A. I handed it to the evidence custodian.

14 Q. All right. I show you a series of photographs,
15 Prosecution Exhibit 510 -- excuse me, 512A. Do you recognize
16 that, sir ----

17 TC [MR. MILLER]: Oh, I'm sorry. Permission to use the
18 ELMO?

19 MJ [Col SPATH]: You may.

20 TC [MR. MILLER]: Thank you.

21 Q. Do you recognize that, sir?

22 A. Yes.

23 Q. What do you recognize 512A to be?

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1 A. It's a section of piping that was seized.

2 Q. All right. Fair and accurate depiction of it?

3 A. Yes.

4 Q. I'm showing you 512B. Do you recognize that?

5 A. Yes, that's the sticker, the evidence tag that's on
6 the pipe itself.

7 Q. All right. Has a K number; is that correct?

8 A. K384.

9 Q. All right. I'm showing you Prosecution Exhibit 512C.
10 Do you recognize that, sir?

11 A. Yes, that's -- that's another evidence sticker right
12 on top of it.

13 Q. Prosecution 12 -- 512C, do you recognize that, sir?

14 A. Yes, same sticker.

15 Q. Prosecution Exhibit -- that was 512C. I show you
16 Prosecution Exhibit 512D. Do you recognize that, sir?

17 A. Yes, same evidence sticker that's on the PVC pipe.

18 Q. 512E, or do you re you recognize that?

19 A. Yes. Another sticker that's on the same pipe,
20 adjacent to the other stickers.

21 Q. 512F?

22 A. Yes, same sticker.

23 Q. 512G?

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1 A. Yes, same sticker.

2 Q. Lastly, 512H, do you recognize that?

3 A. Yes.

4 Q. All the evidence tags that are on there, correct, or
5 variations of them?

6 A. That's correct.

7 Q. Fair and accurate depictions of them?

8 A. Yes.

9 Q. And after you cut this pipe off, what did you do with
10 it again?

11 A. I handed it to the evidence custodian to package up
12 and seal up.

13 Q. Did you seize any other evidence, or do you recall
14 doing any other investigative tasks while you were at the
15 house the second time?

16 A. Not that I recall.

17 Q. Did you -- were you involved in any further searches
18 outside of the COLE itself?

19 A. Yes.

20 Q. And where was that, sir?

21 A. There was a search of a -- at a police station where
22 they had -- at the station was other additional evidence that
23 we were there to seize.

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1 Q. You were not the evidence custodian at that site,
2 correct?

3 A. No.

4 TC [MR. MILLER]: All right. Your Honor, the government
5 would move for the admission of Prosecution's 512A through H
6 at this time.

7 MJ [Col SPATH]: Noted. Thank you.

8 TC [MR. MILLER]: No further questions of this witness,
9 Your Honor.

10 MJ [Col SPATH]: Defense Counsel?

11 DDC [LT PIETTE]: Your Honor, the defense moves to
12 continue the proceedings until such time as defense counsel
13 can become qualified as learned counsel and competent on the
14 facts of this case or, in the alternative, until learned
15 counsel is appointed by the convening authority and becomes
16 competent on the facts.

17 MJ [Col SPATH]: Your motion for a continuance is denied.
18 We'll have some more comments for that tomorrow. You are
19 qualified under the rules. Again, I didn't write them. And
20 learned counsel is available; he refuses to be here.

21 Are you going to ask any questions?

22 DDC [LT PIETTE]: Your Honor, the defense takes no
23 position.

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1 MJ [Col SPATH]: So probably you -- if you don't remember
2 my earlier order, I'll just remind you. I don't want you to
3 discuss your testimony with anybody until we resolve these
4 matters. I know there are other witnesses around, you can
5 certainly talk to them and all that. Just don't talk about
6 the substance of your testimony. But I also know you
7 recognize it may be a while before this matter is resolved, as
8 we've already demonstrated, so be patient.

9 And then finally, as I said last time and I will say
10 anytime, I appreciate you coming down in person to testify. I
11 know the people involved in this proceeding appreciate the
12 time it takes to come here. So thank you. You're excused.
13 [The witness was warned, excused, and withdrew from the
14 courtroom.]

15 MJ [Col SPATH]: All right. And again, Lieutenant Piette,
16 I am amenable to continuances -- hold on, be right with you,
17 no worries. I am more than amenable to as we move forward,
18 but these proceedings have been scheduled for weeks. That
19 request could have been made in writing at any time prior to
20 getting here, and it is preadmission of simple evidentiary
21 real evidence, as it remains.

22 Call your next witness, Mr. Miller.

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

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1 government calls David Hackmeyer. This will be our last
2 witness of the day, Your Honor.

3 MJ [Col SPATH]: I understand.

4 TC [MR. MILLER]: Raise your right hand and remain
5 standing, please.

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

8 **DIRECT EXAMINATION**

9 **Questions by the Trial Counsel [MR. MILLER]:**

10 Q. If you would be seated, sir, and state your name for
11 the record.

12 A. David L. Hackmeyer.

13 Q. And, sir, what is your present employment?

14 A. I'm retired, sir.

15 Q. All right. Were you formerly a special agent with
16 the Federal Bureau of Investigation?

17 A. Yes, sir, I was.

18 Q. Briefly, sir, I'd like to go into a little bit of
19 your background. You attended university; is that correct?

20 A. Yes, sir.

21 Q. If you could, please, tell His Honor where you went
22 to school, what your degree was and what year you graduated.

23 A. Texas A&M University, degree in marketing, and

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1 graduated in 1976.

2 Q. Were you a member of the ROTC while you were at A&M?

3 A. Yes, sir, I was.

4 Q. After your time at A&M in 1976, upon your graduation
5 what did you do?

6 A. I was commissioned as an officer in the United States
7 Marine Corps.

8 Q. And what were your general duties in the Marine
9 Corps?

10 A. I was infantry officer, sir.

11 Q. And your rank at separation, sir?

12 A. I was a captain.

13 Q. You indicated you were in the Marine Corps until what
14 -- until when?

15 A. Until July of 1984.

16 Q. And after you left the Marine Corps, what did you do?

17 A. I became a special agent with the FBI.

18 Q. I take it you went to Quantico?

19 A. Yes, sir.

20 Q. Did you go to Basic Agent School?

21 A. Yes, sir.

22 Q. And did you receive training in basic evidence
23 collection in the processing of crime scenes?

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1 A. Yes, sir, I did.

2 Q. After Quantico, where did you go?

3 A. My first office was Richmond, Virginia.

4 Q. And what did you do there?

5 A. I was on a general crime -- a reactive squad, the
6 Bureau refers to, doing bank robberies, fugitives, violent
7 crime.

8 Q. I take it you had occasion to search various crime
9 scenes?

10 A. Yes, sir.

11 Q. How long did you remain at Richmond?

12 A. For two and a half years, sir.

13 Q. And where did you go from there?

14 A. I was ordered to the Washington Field Office in
15 Washington, D.C.

16 Q. How long did you remain there?

17 A. Six months.

18 Q. What did you next do?

19 A. Next was assigned to the Bureau's Hostage Rescue
20 Team, Quantico, Virginia.

21 Q. And what year did you join them?

22 A. Would have been January of 1987.

23 Q. And the Hostage Rescue Team, is that something that

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1 you're transferred into, or is that something that you have to
2 qualify for?

3 A. You have to qualify for it, sir.

4 Q. And how long did you remain with the Hostage Rescue
5 Team, sir?

6 A. Until October of 2005.

7 Q. And what did you do at that time?

8 A. Retired from the FBI and I began working for a
9 company called Oak Ridge Associated University, a contractor
10 who was supporting the FBI.

11 Q. How long did you remain in that position?

12 A. I was there for three years, and then transferred up
13 to the Washington, D.C. area.

14 Q. What did you do then?

15 A. Began managing part of the office, supporting various
16 agencies within the D.C. area.

17 Q. While you were with HRT, were you a supervisor or
18 team leader?

19 A. A team leader a couple times, and eventually became a
20 supervisor.

21 Q. And did you become a special agent bomb tech at any
22 time?

23 A. Yes, sir, I did.

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1 Q. And when was that, sir?

2 A. Would have been in 1989.

3 Q. And how did you qualify to become a bomb tech? What
4 did you have to do?

5 A. You're sent down to Redstone. The Bureau runs a
6 joint school with the Army there at Redstone. It's a six-week
7 school. And upon successful completion of the school you're
8 certified as a hazardous devices technician.

9 Q. I want to take you back to October of 2000. Did you
10 have occasion to travel to Aden, Yemen?

11 A. Yes, sir, I did.

12 Q. And what was your purpose in traveling there?

13 A. Traveling as a member of the detachment of the team
14 that was providing security for the evidence -- the FBI
15 Evidence Response Teams that were responding to Aden for the
16 bombing.

17 Q. Were you one of the what I call supervisors?

18 A. I was a supervisor at the time, yes, sir.

19 Q. And how did you get to Yemen?

20 A. We flew by Air Force aircraft from Andrews to
21 Ramstein, stopping there, and then eventually moving forward
22 to Aden.

23 Q. When you travel to do these sort of security details,

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1 do you take anything with you?

2 A. Yes, sir. We have normal packages that we take,
3 depending on what the mission set is that we're doing. Here
4 we're providing security, so it would have been weapons,
5 everything from first aid equipment to supplies, not knowing
6 exactly where we were going to stay.

7 Q. Do you remember how many persons from the HR -- or
8 how many HRT personnel went?

9 A. I want to say roughly 15 to 16. I couldn't give you
10 an exact number, sir.

11 Q. Anything unusual happen when you arrived in Aden?

12 A. The aircraft landed, the doors opened, and there were
13 Yemeni security personnel and vehicles surrounding the plane.
14 So there -- I guess there were some discussions between the
15 FBI higher-ups, the embassy personnel, and the Yemenis to
16 allow us to get off the plane. But we were on the plane for
17 probably 30 to 45 minutes before we were allowed off.

18 Q. After you were able to exit the aircraft, where did
19 you go?

20 A. We exited the aircraft, assembled on the tarmac, sat
21 there for probably another hour, and then were transported to
22 a local hotel.

23 Q. And at the hotel, what was your duties? What was

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1 your responsibility, sir?

2 A. As part of the HRT staff, to integrate with the New
3 York FBI Field Office staff that were located there in the
4 hotel with us and perform normal staff functions, coordination
5 of whatever the teams were going to do the next day in
6 preparation for evidence recovery.

7 Q. And if you could briefly describe for His Honor what
8 it is the HRT does and what it is you're responsible for when
9 you travel to places like Aden and support an ERT team.

10 A. In this particular instance, sir, we were providing
11 security for the evidence -- the agents that were coming to
12 the scene. So we get multitasked a lot of times. But the
13 primary function was security; that could range also to
14 logistics support, if needed.

15 Q. Did you have occasion to accompany any of the
16 Evidence Response Team to any sites?

17 A. Yes, sir, on one occasion.

18 Q. And if you could briefly describe for the court what
19 it was that -- the place that you went to?

20 A. It was a residence that we were assigned to go to to,
21 again, transport the ERT team there to conduct their search.
22 Prior to allowing them to go in, we conducted a security sweep
23 of the particular residence. I was tasked with providing an

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1 EOD sweep to see if there were any things that might be
2 harmful to the agents there.

3 Q. All right. You say a security sweep. Could you
4 describe what it is that you do when you -- you get to the
5 site, you are with other agents who aren't HRT. What do they
6 do? What do you do?

7 A. Other agents would be sequestered to the side while
8 the team members would go in and do a security sweep. For the
9 courtroom here, we would come in and sweep through it to see
10 that there was nothing hazardous to the particular agents.
11 And my particular task would have been focused on explosives
12 or other types of improvised explosives devices, or other
13 types of devices that might have been harmful.

14 Q. Are you looking for evidence when you go through?

15 A. No, sir.

16 Q. If you see evidence, what do you do?

17 A. If we saw something, once we had the building secure
18 and we were ready to allow those agents to come in, we would
19 point out to them anything that we might have seen of
20 interest -- or we think might be of interest to them where
21 they might be, and then allow them to go ahead and conduct
22 their evidence search.

23 Q. After the initial sweep is done, security sweep, and

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1 you give it the all clear, what do you and other members of
2 the HRT do?

3 A. We might have kept one or two -- if I was the team
4 leader, one or two folks there in the residence just to be
5 there standing to the side. In my case, went out and just did
6 a perimeter search of the residence there.

7 Q. When you did the perimeter search of the residence,
8 was there anything of interest that you found?

9 A. The one thing I found of interest, sir, was outside.
10 It was on the backside of the building, were a couple of what
11 I would describe as disposable razors, plastic razors that
12 were outside, I believe it was the bathroom window there in
13 the building.

14 Q. I'm sorry. You found it where?

15 A. Just out on the ground, outside a window. I believe
16 it was a bathroom window there.

17 TC [MR. MILLER]: If you could, please, could you provide
18 the witness with Prosecution Exhibit 497.

19 Q. Sir, we have placed before you Prosecution
20 Exhibit 497. Do you recognize that, sir?

21 A. I recognize my handwriting on the packet inside, sir.

22 Q. All right. And what does -- you say that's your
23 handwriting?

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1 A. Yes, sir.

2 Q. What does it say?

3 A. It's got, I believe, a file number, YM2-166, with my
4 initials on it. Underneath that, 262-NY, for New York,
5 277013.

6 MJ [Col SPATH]: Stop.

7 DDC [LT PIETTE]: Your Honor, I've been informed that the
8 feed from the translators has been cut off.

9 MJ [Col SPATH]: Okay. Could you let them know? Maybe
10 they already know.

11 INT: We are on, Your Honor; we fixed it.

12 MJ [Col SPATH]: All right. It's fixed. Thanks. It's
13 better.

14 Q. You had indicated -- do you recognize the handwriting
15 on the bag?

16 A. Yes, sir.

17 Q. And whose handwriting is it?

18 A. And that's my handwriting, sir.

19 Q. And what did you write on that bag?

20 A. "YM2-166" with my initials. Underneath that is
21 "262-NY-277013, disposable shaver," the date 10/18/2000, dash,
22 1200 noon. "Outside of bathroom window on the ground,
23 immediately below window, SSA David L. Hackmeyer."

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1 Q. Is there a K number on the bag?

2 A. Yes, sir. K220.

3 Q. All right. I'm placing on the ELM0 --

4 TC [MR. MILLER]: Permission to use the ELM0 with this
5 witness, Your Honor.

6 MJ [Col SPATH]: Yes.

7 TC [MR. MILLER]: Thank you, sir.

8 Q. I'm placing on the ELM0 a photograph, Prosecution
9 Exhibit 497A. Do you recognize that, sir?

10 A. That appears to be the same razor that's in the bag
11 here, sir.

12 Q. And does the razor have a -- does the -- excuse me,
13 the photograph, Prosecution Exhibit 497A, have a K tag on it?

14 A. Yes, sir. K220.

15 Q. Does that number match the number on the bag, 497?

16 A. Yes, sir. It does.

17 Q. Did you package this evidence?

18 A. I would have carried that -- put it in a bag and
19 carried it to the central control point that was collecting
20 evidence.

21 Q. And I'm going to ask you to see is there a
22 chain-of-custody form attached to that?

23 A. Yes, sir. There is.

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1 Q. And I'm going to ask you to look at that, if you
2 would, please. Is there a YM2 number on it, chain-of-custody
3 form?

4 A. YM2-166.

5 Q. And does it have a 1B number?

6 A. 1B199, sir.

7 Q. If you could look at the Prosecution Exhibit 497. Do
8 those numbers match?

9 A. Yes, sir.

10 Q. Excuse me?

11 A. I believe they do, yes, sir.

12 Q. All right. So you can -- can you associate,
13 therefore, the green sheet with the exhibit, Prosecution
14 Exhibit 497?

15 A. Yes, sir.

16 Q. On the green sheet itself, it indicates that a
17 certain individual accepted the evidence. Is that your
18 signature?

19 A. My signature is not on it, sir.

20 Q. All right. Is there any reason why it would be
21 someone else's signature?

22 A. It would be the person who was collecting evidence
23 and processing it.

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1 Q. Would that be standard operating procedure?

2 A. Yes, sir.

3 Q. I'm placing on the ELM0 Prosecution Exhibit 497C and
4 ask you, sir, is that the ----

5 MJ [Col SPATH]: Mr. Miller, I think that -- it says A at
6 the top right.

7 TC [MR. MILLER]: Oh, I'm sorry, Your Honor. I left the
8 other one on there.

9 MJ [Col SPATH]: Thank you. Let me just see the bottom.
10 I just want to make sure. Perfect. Thank you.

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

12 Q. Prosecution Exhibit 497A, sir, do you recognize that?

13 A. Yes, sir.

14 Q. Is that a duplicate ----

15 MJ [Col SPATH]: I confused you now.

16 TC [MR. MILLER]: Now you've confused me. Okay. I'll
17 start all over.

18 Q. I'm placing on the ELM0 Prosecution Exhibit 497C. Do
19 you recognize that, sir?

20 A. Yes, sir.

21 Q. Is Prosecution Exhibit 497C an exact duplicate of the
22 green sheet that you have just related to us?

23 A. Yes, sir. It is.

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1 Q. I'm placing on the ELMO Prosecution Exhibit 497B, as
2 in boy. Do you recognize that, sir?

3 A. Yes, sir.

4 Q. And what do you recognize it to be?

5 A. It's the same as what I have in my hand here. It's
6 my handwriting for the evidence bag.

7 Q. Is it a fair and accurate depiction of the bag,
8 Prosecution Exhibit 497?

9 A. Yes, sir, it is.

10 TC [MR. MILLER]: Your Honor, the government would move
11 for the admission of Prosecution Exhibit 497A, 497B, and 497C.

12 MJ [Col SPATH]: Noted. Thank you.

13 Q. You did not seize or pick up any other evidence at
14 that site; is that correct?

15 A. No, sir.

16 TC [MR. MILLER]: I have no further questions, Your Honor.
17 Thank you.

18 MJ [Col SPATH]: I understand.

19 Defense Counsel, any questions?

20 DDC [LT PIETTE]: Defense takes no position.

21 MJ [Col SPATH]: So let me give you a couple instructions;
22 we'll get you on your way.

23 WIT: Yes, sir.

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1 MJ [Col SPATH]: Don't discuss your testimony with anyone
2 until we resolve this matter. You probably can guess that
3 that may be some time, given how long it's taken us to work
4 through these matters. So that order will be in place for a
5 while. I know there are other agents on island and such, so I
6 don't mind if you talk to them, of course. I just don't want
7 you to talk about your testimony. Pretty standard.

8 And then, as I've said to the other witnesses, I
9 appreciate you took the time to come down here in person to
10 testify. I recognize the time it takes. I know all the
11 people involved in the process appreciate that. Thank you.

12 WIT: Yes, sir.

13 MJ [Col SPATH]: You're excused.

14 WIT: Thank you.

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

17 MJ [Col SPATH]: Mr. Miller?

18 TC [MR. MILLER]: Just briefly, Your Honor, I had the
19 occasion to speak with Lieutenant Piette during the break. He
20 was gracious enough to let us know that he was not going to be
21 doing any cross-examination of Mr. al Darbi. And so the other
22 attorneys could go back to the States and take care of their
23 other business. We appreciate it.

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1 MJ [Col SPATH]: And at least right now, what is the
2 projected departure date for Mr. al Darbi, approximately?

3 TC [MR. MILLER]: 20 February, Your Honor, still.

4 MJ [Col SPATH]: Okay. Months of time to consult and talk
5 to other people about that before he departs. I'm sure there
6 will be lots of findings about it.

7 How many witnesses tomorrow, Mr. Miller? Or Colonel
8 Wells? He probably has it.

9 TC [MR. MILLER]: We have between three and four, Your
10 Honor. It depends who ----

11 MJ [Col SPATH]: If the civilians show up, certainly I
12 know we'll add to our numbers.

13 TC [MR. MILLER]: Right.

14 MJ [Col SPATH]: And then I know Wednesday we have a
15 number of witnesses.

16 TC [MR. MILLER]: And actually we're moving -- I know we
17 went over a little bit today, but we will have the two longer
18 witnesses tomorrow. They'll take -- they're sort of like
19 Mr. McKenzie was, that sort of a length, maybe one other after
20 that, a short witness. And then the rest I think Wednesday --
21 I fully anticipate we will not meet on Friday.

22 MJ [Col SPATH]: That we will ----

23 TC [MR. MILLER]: Will not.

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1 MJ [Col SPATH]: Will not be done.

2 TC [MR. MILLER]: I think we'll probably -- if we continue
3 at this pace where's there's no -- and I think we're going to
4 be have having the courtroom, the full courtroom -- I mean
5 full days. So I will keep the court apprised and your staff
6 apprised.

7 MJ [Col SPATH]: Please do. And then just make sure that
8 you keep Lieutenant Piette apprised of who ----

9 TC [MR. MILLER]: We will.

10 MJ [Col SPATH]: ---- is coming so he can endeavor to
11 again cross-examination on preadmission matters of real
12 evidence. I think I've said it enough. Okay.

13 Anything else from the government?

14 TC [MR. MILLER]: I'd also like to thank your staff.
15 They've been very helpful to me. I'm still a novice of how
16 these things work as far as marking evidence is different than
17 what I'm used to, and I appreciate it.

18 MJ [Col SPATH]: Thanks. And again, 1300 tomorrow.

19 Lieutenant Piette, anything else?

20 DDC [LT PIETTE]: Yes, Your Honor. Briefly, just
21 confirming what Mr. Miller said, we, Defense, will not be
22 cross-examining Mr. al Darbi. We won't take a position on
23 that.

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1 And I'd like to emphasize that that is, at least, if
2 not the government's only, it's certainly a very important
3 identification witness. One could even identify this person
4 as the government's star witness. I don't think there's any
5 way that we could argue that that isn't something that
6 wouldn't be handled by learned counsel. And so defense will
7 not be taking a position on that.

8 That's, without a doubt, a critical witness, if not
9 the most critical witness of the government's case in their
10 attempt to kill Abdul Rahim al Nashiri. And that is why
11 defense will not be taking a position and will not be cross
12 examining Mr. al Darbi until a competent, qualified death
13 penalty attorney is on the case.

14 MJ [Col SPATH]: All right. Lieutenant Piette, I
15 empathize. Again, there are multiple rulings that don't favor
16 your position. I've interpreted the law differently than you.
17 I've told you this. You have the ability to consult with your
18 experts, mitigation specialists, other lawyers, get on the
19 phone with Mr. Kammen. You were here for the direct. He was
20 here for the direct. You are making a decision -- if you do
21 your cross-examination and it's poor, maybe you are
22 ineffective. You're making a choice, and you're making a
23 choice in the face of rulings to the contrary.

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1 And so while I have great empathy, I'm pretty
2 clear -- I believe it's pretty clear that a finding of fact
3 that it is a strategic decision is going to be reviewed for an
4 abuse of discretion. I don't think that's a conclusion of
5 law. I think it's a finding of fact, easily supported by the
6 evidence.

7 Soon after I said have everyone here who's detailed
8 to the case make an appearance, the MCDO undetailed them all.
9 The evidence is legion, and I only need a little bit of
10 evidence to support a finding of fact, because abuse of
11 discretion is a wide lane to drive down.

12 I keep opening up the Military Commissions Act and I
13 see places in there where it says "qualified counsel," and you
14 are defined as a qualified counsel, whether you like it or
15 not. You and learned counsel have those roles. Only one
16 qualified counsel has to be here, learned counsel or military
17 counsel. And in those same rules it says "you shall" do
18 things.

19 So the way I interpret the law may well be a
20 conclusion of law. I recognize what deference I get there.
21 But as for the underlying facts surrounding the issue, if
22 they're supportable in the record, it's an abuse of discretion
23 standard. I have great empathy. I'm not going to give

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1 advice. It's not in my lane.

2 I'll see everybody tomorrow at 1300. We're in
3 recess.

4 [The R.M.C. 803 session recessed at 1558, 12 February 2018.]

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