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1 [The R.M.C. 803 session was called to order at 0900,
2 13 November 2017.]

3 MJ [Col SPATH]: The commission is called to order. For
4 the government all the parties who were present last are again
5 present. General Martins is not here again, and he was not
6 here for our last session.

7 And for the defense, the one counsel is present, the
8 detailed defense counsel. Learned counsel and the two
9 civilians continue to refuse to appear, despite a hearing that
10 had been scheduled for months and despite not having been
11 released because no good cause was shown on the record.

12 I'll again point out I reviewed all the classified
13 and unclassified evidence -- we'll talk about it in a little
14 while -- and no good cause was shown to excuse counsel. But
15 despite that General Baker purported to excuse them and also
16 refuses to fix what is an unlawful order.

17 Mr. al Nashiri is not here today.

18 Trial Counsel, do you have a witness to address that?

19 TC [MR. MILLER]: Yes, Colonel Wells will be handling that
20 matter, sir.

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

22 And are we transmitting the proceedings?

23 TC [MR. MILLER]: We are, sir. And in addition there is

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1 an additional FBI personnel in the gallery -- here today,
2 rather, Matthew Pezzulo. He has the necessary clearances,
3 sir.

4 MJ [Col SPATH]: All right. Thanks.

5 MATC [COL WELLS]: Your Honor, the witness is the
6 assistant staff judge advocate who was previously called in
7 this case and who was sworn. Please take your seat.

8 Your Honor, may I approach the witness?

9 MJ [Col SPATH]: You may. Yes, I recognize him as the
10 person who testified last week about this.

11 MAJOR, U.S. Army, was called as a witness for the prosecution,
12 was previously sworn, and testified as follows:

13 DIRECT EXAMINATION

14 Questions by the Managing Assistant Trial Counsel [COL WELLS]:

15 Q. Major, I have handed you an exhibit. What is the
16 exhibit number?

17 A. This is Appellate Exhibit 375E.

18 MATC [COL WELLS]: Last week we handed an exhibit to you
19 which was designated 388, I believe. But, Your Honor, I've
20 talked with the court reporters and we should designate this
21 series under the 375 series. So the previous form we used in
22 Mr. Nashiri's absence should be designated as Appellate
23 Exhibit 375D, three pages, and we will make that

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1 administrative change, with your permission.

2 MJ [Col SPATH]: You may. Thank you.

3 Q. This form is marked as Appellate Exhibit 375E. It is
4 three pages, do you have three pages?

5 A. I do have three pages.

6 Q. And did you meet with the accused this morning?

7 A. I did meet with the accused this morning.

8 Q. And did you use this form when you advised him of his
9 right to be here?

10 A. This is the form that I used.

11 Q. Can you tell us what happened, please.

12 A. So the interpreter and I met with Mr. al Nashiri and
13 he was in his cell. Introduced myself, advised him that he
14 had a commission this morning. He indicated that he knew that
15 he had a commission. I asked him if he would be attending.
16 He indicated he did not want to attend, he wanted a day off.
17 I told him, okay, I would read the statement of understanding.

18 I handed him the Arabic version and he followed along
19 as I read the English version to him. And when I finished
20 reading the statement of understanding, I asked him if he had
21 any questions. He indicated he had no questions.

22 And then he signed the English version and then
23 handed it to me and I signed the English version.

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1 Q. On the second page of that exhibit, does your
2 signature appear?

3 A. It does.

4 Q. And then there's another signature there. Whose
5 signature is that?

6 A. That is the accused's signature. I watched him sign
7 and date that form.

8 Q. And he did that in your presence?

9 A. He did that in my presence.

10 Q. Okay. Did you have a belief that he understood what
11 you were saying?

12 A. It was my belief that he understood everything that I
13 advised him.

14 Q. Did you use an interpreter?

15 A. There was an interpreter there, and he didn't have
16 any questions for the interpreter; Mr. al Nashiri didn't. He
17 didn't have any questions for me.

18 He asked me why do we always have to read the form.
19 And I told him because the judge ordered us to read the form
20 every single day, so that's why we have to read the form. He
21 indicated he understood what was in the form before I started
22 reading it.

23 Q. Did he indicate -- again, if I missed this -- why he

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1 did not want to attend today?

2 A. He simply said he wanted a day off.

3 MATC [COL WELLS]: Your Honor, may I approach the witness?

4 MJ [Col SPATH]: You may.

5 [Conferred with courtroom personnel.]

6 MATC [COL WELLS]: Your Honor, I retrieved Appellate
7 Exhibit 375E, returned it to the court reporters, and now
8 they've passed it to you.

9 Sir, I have no further questions.

10 MJ [Col SPATH]: Thank you.

11 Defense Counsel, any questions?

12 DDC [LT PIETTE]: No, Your Honor.

13 MJ [Col SPATH]: All right. I don't have any questions.
14 Thank you again for your testimony. You're excused.

15 [The witness was excused and withdrew from the witness stand.]

16 MJ [Col SPATH]: I find that Mr. al Nashiri has
17 voluntarily and knowingly waived his right to be present at
18 this pretrial proceeding today.

19 I know we have a witness ready to go by VTC. Let me
20 just go through a few administrative notes from the weekend,
21 and then we will go from there.

22 I've already commented on the absence of appointed
23 outside legal learned counsel who remains detailed to this

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1 case, remains a part of this case, and has voluntarily
2 abandoned representing his client, despite multiple orders,
3 and the two DoD civilians.

4 You all should see two orders today. One relates to
5 the 045 series, Appellate Exhibit 045, and it is going to
6 rescind the need to give monthly updates. We've been through
7 59 of them. We don't have a trial scheduled as of yet, and so
8 there's no need to continue. And you'll see that today.

9 There's also an order forthcoming in the 120 series,
10 closing out 120. And if we find additional discovery related
11 to the Rendition Program, just submit it, of course, for
12 review; but we'll do it under a separate AE number. 120 is
13 finished. You won't have to give any more updates under that
14 series as well.

15 Soon I'm hoping to get a written order out to the
16 defense community to provide updates biweekly, twice a week,
17 on what they're doing to get appointed learned counsel added
18 to this case. I'm not releasing Mr. Kammen, but the defense
19 community has indicated they're adding another learned counsel
20 on top of the multiple counsels and experts that they already
21 have. And so we need to find out how that's coming along, and
22 we need to do so expeditiously.

23 And again, I'm not ordering them to provide a second

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 learned counsel, that's their choice. But since they're doing
2 it, I want to know how they're doing it and when. So you
3 should see that written order, I hope before we get off
4 island.

5 For the government, I don't want to do this in
6 writing; I'm going to do it verbally. And it has to do with
7 the classified information in 389. And so to the extent
8 possible, I want the OCAs to declassify what they can. I want
9 you all to work with them. I know I can't order it. I know I
10 can't order it disclosed. But I am ordering you to work with
11 the OCAs to declassify, to the extent possible, information
12 related to this alleged intrusion, and, frankly, the complete
13 lack of evidence of intrusion in this case for this accused.

14 And so if you could do that, Colonel Wells, or Major
15 Pierson.

16 ATC [Maj PIERSON]: Yes, Your Honor, acknowledged.

17 MJ [Col SPATH]: All right, thank you. Colonel Wells, you
18 wanted to say something?

19 MATC [COL WELLS]: Your Honor, we would like to caucus
20 here with the prosecution; however, I believe that specific
21 information is best to identify to the OCAs, so we will work
22 as a team here to identify that information.

23 MJ [Col SPATH]: Yes.

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1 MATC [COL WELLS]: All right.

2 MJ [Col SPATH]: And again, we can't make them do it; I
3 recognize that. But in the interest of transparency and,
4 frankly, what allegedly went on, it would be nice to tell
5 people, particularly in relation to this particular accused,
6 because that's the one I'm worried about.

7 MATC [COL WELLS]: Yes, sir. Thank you.

8 MJ [Col SPATH]: Additionally, 11 December, if you would
9 make a note on your calendar, there is a hearing scheduled
10 down here, Hadi currently. I don't know if that's going to go
11 or not. But what I'm hoping to do is add a couple days that
12 week for us to come down here and deal with the outstanding
13 issues related to absent counsel. And also the one witness
14 who has refused so far to appear and testify, we'll deal with
15 those issues as well if we don't resolve them this week.

16 But, I mean, everybody should recognize this. I'm
17 waiting for a federal district judge to let me know what my
18 authority is or isn't. And so I'm hoping we have some
19 resolution on that, both in Indiana and in D.C., so that I can
20 move forward, or not, in relation to three lawyers, frankly,
21 who remain voluntarily absent from their client, one of them
22 after a nine-year relationship with the client.

23 So again, if you would make a note, 11 December,

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1 we're going to try to come down here for a day or two. If
2 Hadi is in session, we'll work around it; if Hadi is not in
3 session, we'll use the courtroom.

4 All right. One of the witnesses I know by VTC has
5 appeared in response to a request I made to the government to
6 get two witnesses who had provided some information related to
7 this issue of counsel. I see one of them is here by VTC.

8 Trial Counsel, could you identify the witness, swear
9 the witness in, and then I'll ask some questions.

10 ATC [Maj PIERSON]: Your Honor, Mr. Miller is going to
11 handle the direct examination. Just prior to that, as to the
12 second witness, we did want to provide an update to the
13 commission. The chief prosecutor signed a subpoena, and it is
14 going to be served this afternoon, in discussions with
15 Ms. Yaroshefsky's counsel. And the subpoena directs
16 Ms. Yaroshefsky to attend a session of the commission via VTC
17 at the Mark Center on -- 0900 on Friday, the 17th of November.

18 MJ [Col SPATH]: Thank you. All right. Mr. Miller?

19 TC [MR. MILLER]: Ma'am, would you stand up, please, and
20 raise your right hand.

21 [END OF PAGE]

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1 EMILY OLSON-GAULT, civilian, was called as a witness for the
2 military commission, was sworn, and testified as follows:

3 **DIRECT EXAMINATION**

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

5 Q. Would you state your name for the record, please.

6 A. It's Emily Olson-Gault.

7 Q. All right. And where are you presently located?

8 A. I'm in Alexandria, Virginia.

9 Q. At the Mark Center?

10 A. Yes.

11 Q. Thank you.

12 TC [MR. MILLER]: Your Honor.

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

14 **Questions by the Military Judge [Col SPATH]:**

15 Q. Ms. Olson-Gault, can you hear me?

16 A. Yes, I can hear you fine.

17 Q. Please take a seat. I'm sorry. Am I saying your
18 name correctly, Olson-Gault?

19 A. That is correct, yes.

20 Q. I want to make sure. And I mean this, thank you very
21 much for agreeing to come in and testify and provide some
22 information about the issue that we're discussing. I know you
23 heard some comments about that a moment ago. I appreciate it

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1 very much.

2 A. You're very welcome.

3 Q. So let's get some background first, if you would.

4 A. Sure.

5 Q. What is your current job title or position?

6 A. So my official title is senior attorney to chief
7 counsel to director, which I don't use all of all the time,
8 but I am director and chief counsel of the American Bar
9 Association Death Penalty Representation Project.

10 Q. How long have you been in that job?

11 A. Well, I've been with the project for coming up on ten
12 years now. I've been in my current position for about two and
13 a half years.

14 Q. So prior to that, kind of the seven and a half years
15 or so ----

16 A. Uh-huh.

17 Q. ---- what were you doing at the ABA then?

18 A. I was still with the Death Penalty Representation
19 Project. I was a senior staff attorney before I was the
20 director.

21 Q. And so for the two and a half years now that you're
22 in your current position, what, basically, does your job
23 entail?

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1 A. It's a combination of management of all the project's
2 activities, directing our programmatic work, and also serving
3 as an expert on the standard of care for capital
4 representation. So sometimes it is working with agencies and
5 lawmakers who are trying to set up their own capital counsel
6 systems, sometimes it's training.

7 I do training of both capital defenders and pro bono
8 attorneys handling capital cases, and I also do a fair amount
9 of recruitment of pro bono counsel to take on capital cases,
10 and that's almost exclusively in the post-conviction context.

11 Q. So in this case, I know you were -- you were
12 contacted by somebody apparently to get an affidavit.

13 A. Yes.

14 Q. Do you remember who reached out to you?

15 A. So originally it was a member of my steering
16 committee, Eric Freedman, who is a professor at Hofstra Law
17 School. He's the reporter for the guidelines and he pretty
18 frequently contacts me when someone needs information about
19 the guidelines or an opinion on the guidelines. And he
20 reached out to me and said there was an attorney who needed an
21 opinion.

22 Q. Did they identify the attorney?

23 A. Yes. That was Michel Paradis.

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1 Q. And what did they -- what did they ask you for?

2 A. I basically was asked to put together an affidavit
3 talking about the requirement to have qualified counsel; what
4 qualification requirements are under the guidelines; what the
5 training requirements are under the guidelines; and to talk a
6 bit about the need to have counsel at every stage of the
7 capital case, which is something that the guidelines discuss.

8 Q. Were you provided any information about what was
9 going on in this case?

10 A. Very minimal background. My -- all I was told was
11 that it was obviously a military commissions case, that there
12 had been learned counsel working on the case, that they had
13 withdrawn for ethical reasons -- I was not given the details
14 about what that was -- and that the remaining attorney on the
15 case was a younger lawyer who did not have any capital
16 litigation experience or training. And that was the extent of
17 what I was told.

18 Q. Okay. And the person who provided you that was
19 Michel Paradis?

20 A. Yes. Yes. That came from him.

21 Q. Okay. And other than that attorney, Mr. Paradis,
22 have you talked to any other attorneys connected with the
23 case?

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1 A. I have not, no.

2 Q. I'm just curious: For the military commissions, are
3 you familiar with kind of what they are and what the process
4 is?

5 A. Vaguely, yes. It's certainly not my area of
6 expertise, but I have a general idea.

7 Q. Okay. The information on the military commissions, I
8 assume just what you've either read or seen publicly?

9 A. Yes, Your Honor. It's really just a -- what I've
10 seen publicly. I'm familiar with them to the extent that the
11 authorizing act does discuss the guidelines, and so to that
12 extent it's something that I've been professionally involved
13 with a tiny bit. But beyond that it's just what I've seen in
14 the news.

15 Q. And so for the case here related to Mr. al Nashiri,
16 are you familiar with the specifics of this case?

17 A. Very little. I'm aware that it has to do with the
18 USS COLE bombing. That is, I think, the extent of my
19 knowledge about it.

20 Q. Are you aware of what stage we're at in the
21 proceedings?

22 A. Yes. I understand that you're at the pretrial stage.

23 Q. How about the procedural history involved?

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1 A. That, I don't -- I don't know anything about.

2 Q. Okay. So let's talk about capital-qualified defense
3 counsel.

4 A. Sure.

5 Q. In your affidavit you discuss minimum requirements
6 for it. Just, in general, can you tell us what are those
7 requirements?

8 A. So the guidelines have kind of three very broad
9 categories of qualification standards, or kind of a three-part
10 qualification standard. The first, obviously you have to be
11 admitted to practice; the second is that you've demonstrated a
12 commitment to zealous advocacy and high-quality
13 representation; and the third is really that you have
14 fulfilled the training requirements of -- under the
15 guidelines.

16 So those training requirements are much more
17 extensive and go into detail about having completed a training
18 program specifically in defense of death penalty cases that
19 covers a number of substantive areas that are related to
20 capital defense.

21 Q. And for the guidelines -- and tell me -- I know you
22 will, but tell me if you don't agree. I assume we can all
23 agree that they're qualitative rather than quantitative?

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1 A. The qualification standards, absolutely, that's
2 correct. That was a change that was made in the 2003
3 guidelines specifically.

4 Q. So at least -- again, I recognize the need for
5 learned counsel. Clearly it's part of our statute. We'll
6 talk about that.

7 A. Uh-huh.

8 Q. But fair -- is this hypothetical fair: A dedicated
9 defense counsel with training in criminal defense may -- and
10 "may" being the important word in that -- may perform better
11 than a capitally qualified counsel?

12 A. I think if that person has training in capital cases,
13 I think it depends on what you mean by capitally qualified
14 versus experience in criminal cases. But I think if the
15 person has training, certainly that may be.

16 Q. I guess I would -- recognizing that capitally
17 qualified counsel go through training, I think we can agree --
18 and again, I know you'll let me know if you don't ----

19 A. Uh-huh.

20 Q. ---- there's different levels of competence even when
21 somebody is capitally qualified?

22 A. Certainly.

23 Q. And so a really good criminal defense attorney might

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1 bring some skills to the table that a capital qualified
2 defense counsel doesn't have?

3 A. I certainly think that a very good criminal defense
4 attorney could have skills that a capital defense attorney
5 doesn't have, but they might not have the knowledge about the
6 specific capital aspects of the case that are necessary. And
7 that's why the guidelines talk about a capital-specific
8 training program that's required.

9 Q. That capital-specific training program, can you give
10 me an idea of what's involved in that?

11 A. Sure. So what we're talking about here, it's
12 often -- you know, I attend these frequently, these capital
13 training programs, probably two or three a year that I'm
14 involved with, often as one of the faculty members teaching
15 there.

16 And we're talking about usually a multi-day
17 continuing legal education course that is going to talk
18 about -- I mean, sometimes they're specific to trial,
19 sometimes they're specific to post conviction; but if we are
20 talking about a Trial Level 1 here that talks about developing
21 relationships with your client, about mitigation, about
22 developing an integrated theory of the case, about jury
23 selection, about dealing with mental health experts, other

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1 expert witnesses, forensic experts, things like that.

2 Q. Now, here -- I know -- and again, I recognize for the
3 affidavit you're provided information, of course, and then
4 prepare an affidavit. So I recognize that part of that is,
5 you know, you've got to rely on the information you're given.
6 Fair?

7 A. Right. Yes. Fair.

8 Q. So here in the affidavit I know you referred to
9 Lieutenant Piette as the sole counsel currently representing
10 Mr. al Nashiri. Hypothetically, if Mr. al Nashiri has seven
11 other detailed appointed defense counsel ----

12 A. Uh-huh.

13 Q. ---- how does that impact your affidavit?

14 A. If those counsel are working on his case and if one
15 or more of them is capitally qualified, then that would affect
16 my conclusions about whether he is receiving qualified counsel
17 under the guidelines. But that was -- again, my affidavit was
18 based on the information I was provided, which is that those
19 other lawyers were not working on his case.

20 Q. And in this case the capitally qualified defense
21 counsel, are you aware that he was in an attorney-client
22 relationship with Mr. al Nashiri for nine years?

23 A. Yes, I think I did see that.

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1 Q. Did anybody give you any information as to how many
2 hours he had invested in the case?

3 A. No, Your Honor.

4 Q. I'm not even going to attempt public math. I know
5 the total amount he's been paid, so -- and I know the rate.
6 It's the federal rate; it was \$183 an hour.

7 A. Uh-huh.

8 Q. So I know it's almost \$2 million, so whatever that
9 translates into it. It sounds like a lot of hours have been
10 invested, fair? If those facts are true?

11 A. If those facts are true, yes, Your Honor.

12 Q. Are you aware that the learned counsel who is still
13 detailed to this case has filed literally hundreds of motions
14 in relation to this case?

15 A. I was not aware of that.

16 Q. In this case, are you aware of why capitally
17 qualified counsel refuses to be here?

18 A. My -- the only information I have is that there is
19 some ethical conflict that they have asserted. That is the
20 extent of my knowledge.

21 Q. Are you aware that, in response to that, I ordered
22 them to continue to represent their client?

23 A. Yes, I did see that. I think I saw that in the news.

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1 Q. Yes, I think many people did, unfortunately, I
2 guess -- so here's a question about that: At least reviewing
3 the New York Bar rules or the Connecticut Bar rules or the
4 Indiana Bar rules, where he's from, as I got ready for this,
5 in the bar rules it indicates that even if you have good cause
6 not to represent your client, if a tribunal orders you to be
7 there, you still represent your client. I assume that's
8 pretty standard?

9 A. That is really outside of my area of expertise.

10 Q. I understand.

11 Now, in regard to the ABA Guidelines, fair that a
12 good part of it is focused on or discusses mitigation in
13 capital cases?

14 A. That's a very important part of it, yes.

15 Q. And in this case are you aware of whether Mr. Nashiri
16 has access to mitigation specialists and consultants?

17 A. I -- I'm not aware of whether or not he does.

18 Q. And if he does -- again, hypothetically -- I
19 recognize again you're kind of -- you get what information you
20 get from everybody, and I recognize that. But hypothetically,
21 if he's got multiple mitigation specialists and consultants
22 who, again, have invested hundreds of hours, that's an
23 important step to working with those guidelines, I assume?

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. It certainly is, to the extent that or in the sense
2 that the mitigation specialists are an integral part of the
3 defense team along with the lawyers under the guidelines.

4 Q. And so when they came to you for the affidavit, did
5 they let you know how many hours or numbers of mitigation
6 specialists or the effort they've made on the case thus far?

7 A. No, Your Honor.

8 Q. For the ABA Guidelines, do they contemplate
9 withdrawal or leaving a case by a capitally qualified defense
10 counsel?

11 A. There is a guideline -- there is a guideline in
12 the -- what I call the performance standards. Those are the
13 10 series of standards that talks about the duty to facilitate
14 the work of successor counsel. So in that sense they do
15 contemplate withdrawal and they talk about maintaining records
16 and not -- and cooperating, excuse me, with successor counsel.
17 So in that case they contemplate it.

18 Q. And for the guidelines, I assume they contemplate,
19 then, if you're going to withdraw and be permitted to
20 withdraw, there's going to be an effort to work with the
21 successor counsel?

22 A. That is correct, yes.

23 Q. In a -- in a capital case -- and if it's outside your

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 area of expertise, it's fine.

2 A. Uh-huh.

3 Q. But do you have an opinion you can offer on how a
4 capitably qualified counsel should withdraw in a case where
5 they've been representing someone for nine years?

6 A. The -- in addition to what I already said, no, I
7 don't have anything beyond that. The guidelines simply
8 instruct the duty to maintain records and cooperate.

9 Q. Do you have an opinion on the risks to a client if a
10 capitably qualified counsel abandons their client after
11 multiple years of litigation?

12 A. Certainly there is a risk to the client any time you
13 have attorney abandonment, and the U.S. Supreme Court has
14 addressed that in a few different cases recently. I don't
15 have -- there's nothing specific in the guidelines that talks
16 about that. It's more affirmative, talking about the need to
17 affirmatively have counsel there rather than what happens if
18 they disappear.

19 Q. And I think we've covered this, but the best practice
20 for substitution of capitably qualified counsel -- I know in
21 your affidavit you talk about Bell, United States v. Bell.

22 A. Yes, Your Honor.

23 Q. I assume a best practice would be some kind of

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 turnover between the outgoing released learned counsel and the
2 incoming capitally qualified counsel?

3 A. I think that's right, yes.

4 Q. So here, of course, we've got the Military
5 Commissions Act, which -- you know, the statute that kind of
6 sets us up, as passed by Congress and signed by the President.
7 I think we watched the same news reports. I found out that we
8 were just made up, but okay.

9 Assuming that Congress and the President speak with
10 some knowledge and I have to follow it, as is my task, in
11 there they have this language about "to the extent
12 practicable," for a capitally qualified counsel. Are you
13 familiar with that in the Military Commissions Act?

14 A. I believe so. I'm not -- I'm certainly not an expert
15 on the Military Commissions Act. I know that there's language
16 in there that talks about as soon as practicable that counsel
17 should be appointed. If there's language "to the extent
18 practicable," I might have to review that. I'm not
19 specific -- familiar with that specific.

20 Q. And so hypothetically -- I mean, again, if it says to
21 the greatest extent practicable an accused is to be
22 represented by learned counsel -- again, that's a
23 hypothetical.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. Uh-huh.

2 Q. Any opinion on what that means?

3 A. I don't. That's really outside my expertise.

4 Q. I guess as a best practice, would you think that
5 outgoing counsel -- again, regardless of why, but would you
6 assume that outgoing counsel would make some effort to
7 introduce new counsel to their client?

8 A. I guess I -- under the guidelines that's not
9 something that's really discussed. And I do want to just
10 clarify, and you may not be specifically asking about the
11 guidelines. But the guidelines aren't intended to be best
12 practices, just to make a clarifying point there; that the
13 guidelines are really supposed to be the -- the minimum that
14 is required, which I think that there can be a pretty wide
15 gulf between the minimum requirements and a best practice.

16 Now, in an ideal world, if we're talking about that
17 as a best practice, sure, you would want your outgoing
18 client -- or your counsel to be able to facilitate starting a
19 new relationship with new counsel.

20 Q. Now, understand -- and agreed. I think we talked
21 about that earlier, kind of the breadth of capability by
22 defense counsel. Cases like Strickland show us the courts
23 tolerate pretty poor performance even after a conviction.

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1 Fair?

2 A. Under the Strickland standard you can have very poor
3 performance and the conviction or sentence sometimes is not
4 set aside. That is true.

5 Q. And believe me, I understand -- we all have feelings
6 about it. I -- as I say so often, I'm stuck with the law they
7 give me, as hopefully you'll appreciate when I work through
8 it.

9 All right. Let me see if counsel have any questions
10 for you. Hold on for just a second.

11 A. All right. Sure.

12 MJ [Col SPATH]: Trial Counsel -- or let me check.
13 Defense Counsel, do you have any questions? Please.

14 **CROSS-EXAMINATION**

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

16 Q. All right. Good morning.

17 A. Good morning.

18 Q. So again, I'll do kind of similar to what the judge
19 did and pose sort of what would be considered as
20 hypotheticals.

21 So let's say you have, on a capital case, an attorney
22 who has no capital experience and has attended one capital
23 training program, let's say the National College of Criminal

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1 Voir Dire in Boulder, Colorado. Is -- under the guidelines,
2 is that counsel qualified to make litigation decisions in a
3 capital case against a -- or on behalf of a capital accused?

4 A. In your hypothetical it's a voir dire training?

5 Q. Yes.

6 A. Then I would say no, because the training
7 requirements require a comprehensive capital training, and
8 voir dire is just one component of that.

9 Q. Okay. And so building on that, and let's say that
10 same attorney has tried a dozen trials, none of them involving
11 capital issues, and conducted 50 cross-examinations. Is that
12 counsel then qualified to make litigation decisions on behalf
13 of the capital accused?

14 A. Not under the guidelines, no.

15 Q. Okay. Say under the guidelines that attorney also
16 has -- in addition to everything I've said before, has
17 practiced, you know, hundreds of instances of laying
18 foundation or of challenging foundation or of just observing
19 foundation being laid. Does that attorney then -- is that
20 attorney then qualified, under the ABA guidelines, to make any
21 litigation decisions on behalf of a capital accused?

22 A. No, he is not.

23 Q. What if that attorney, with all those qualifications,

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1 also has four -- or let's say three other attorneys working
2 with him, none of whom have any capital experience and none of
3 whom have attended any capital litigation training? Is that
4 attorney, or any of those attorneys then qualified, under the
5 ABA guidelines, to make any litigation decisions on behalf of
6 a capital accused?

7 A. No, they are not.

8 Q. Now, what if those four attorneys also have a
9 mitigation specialist who is there to assist them and to
10 gather mitigation? Are those attorneys then qualified to make
11 litigation decisions on behalf of a capital accused?

12 A. No, they are not.

13 Q. Okay. And if they were -- if they were to make
14 litigation decisions and participate in the trial without a
15 learned counsel present, is it fair to say that they would be
16 failing to live up to the minimum requirements laid out by the
17 guidelines, the ABA guidelines, for a capital representation?

18 A. I think that's a fair statement, yes.

19 Q. Okay. And just to be clear, these ABA guidelines
20 exist to protect the rights of a capital accused, correct?

21 A. That's correct.

22 DDC [LT PIETTE]: All right. Thank you. I have no
23 further questions.

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1 MJ [Col SPATH]: Trial Counsel?

2 **CROSS-EXAMINATION**

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

4 Q. Ma'am, have you ever tried a capital case?

5 A. At the trial level, no. I have been on
6 post-conviction capital teams.

7 Q. So the answer is you've never tried a capital case?

8 A. At the trial level, no, I have not.

9 Q. And what is it that you teach at these trial schools?

10 A. The ABA guidelines, the minimum requirements for
11 effective defense representation.

12 Q. I think you indicated that the -- in response to the
13 judge's question, that the best lawyer on the case might not
14 necessarily be the death penalty qualified counsel; is that
15 correct?

16 A. No, that wasn't what I intended to say.

17 Q. Is the learned counsel always the best person on the
18 case, best lawyer on the case?

19 A. I think it depends on how you define "best."

20 Q. All right. Well, would you agree that learned
21 counsel may not always be the cross-examiner on a defense
22 team?

23 A. Again, it depends on how you define "best."

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1 Q. "Best," the one who's the best at it. Fairly
2 straightforward concept.

3 A. If that lawyer does not have training in capital
4 cases, then he doesn't know what information to elicit, so in
5 that case I would not consider him to be the best lawyer on
6 the case to conduct the cross-examination.

7 Q. Do you think that it takes special capital training
8 to cross-examine a witness about, let's say, DNA evidence?

9 A. It might, yes.

10 Q. How?

11 A. It is one of the specific areas ----

12 Q. How?

13 A. ---- that's one of the -- that's one of the specific
14 areas that you need to have training on, how DNA forensic
15 evidence should be used in capital cases.

16 Q. Lawyers talk about DNA in all types of cases, don't
17 they?

18 A. Certainly DNA comes up in different ----

19 Q. And a noncapital-trained lawyer would know how to
20 attack DNA evidence; isn't that correct?

21 A. I don't -- I'm not sure that they would or not. They
22 might.

23 Q. And couldn't a noncapitally trained lawyer question a

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1 witness in a capital case about the recovery of shell casings
2 at a murder scene?

3 A. I would say not if they are serving as lead counsel
4 in that case, no.

5 Q. I'm not asking about lead counsel, ma'am. I'm just
6 talking about a lawyer who's tried a number of cases to
7 question a police officer about the recovery of shell casings
8 at a crime scene. Do you need to be capitally trained to do
9 that?

10 A. You need to be part of a team that has a lawyer
11 directing it who is capitally trained so to direct what is
12 being elicited in that cross-examination.

13 Q. And what would the capital experience elicit? What
14 would that -- in what way could the capitally trained lawyer
15 help that person question a police officer about the recovery
16 of shell casings?

17 A. The idea is that there needs to be an integrated
18 theory, from start to finish, of your defense. There also
19 needs to be an awareness of the complex rules that are going
20 to come up to deal with waiver, evidentiary rulings, things
21 like that.

22 To the extent that someone is conducting a
23 cross-examination on any topic, whether it be shell casings or

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1 mitigation, they need to have an understanding of that theory
2 of the case, they need to have an understanding of those
3 rules, they need to have an understanding of what is
4 happening, what may happen on appeal. And that's why we make
5 sure that everything is done as a team in the capital case.

6 Q. What about the ability of a witness to make an
7 identification based on the lighting at the time? Do you need
8 to be capitally trained to cross-examine the witness about
9 their ability to see?

10 A. I would have the exact same answer as to your
11 previous question.

12 Q. So you must cover all these things in the training
13 that you give?

14 A. Me personally? No, I don't talk ----

15 Q. The training that you put on.

16 A. ---- about those things.

17 Q. The training that you put on.

18 A. A comprehensive training program would cover things
19 like that, yes.

20 Q. The ability to cross-examine a witness about the
21 lighting at a crime scene, you train on that?

22 A. Cross-examination ----

23 Q. You train on that?

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1 A. Cross-examination ---- me personally? No.

2 Q. All right. So it's your opinion that there are no
3 matters in a death penalty case that are noncapital in nature?

4 A. I think that's correct, yes.

5 Q. What about the ability to determine whether or not a
6 chain of custody was followed in a case?

7 A. Someone can have that ability, but that isn't a
8 noncapital aspect of it.

9 Q. Witness A picks up a piece of evidence, gives it to
10 the custodian of evidence who then puts it in the evidence
11 locker. Does it take any specialized capital training in
12 order to question that chain of custody?

13 A. Again, it's not that ----

14 Q. Yes or no, ma'am. Yes or no. Does it take any
15 specialized training to do that?

16 A. To ask the question? No. To do it properly? Yes.

17 Q. So in every other noncapital case in the
18 United States, lawyers are making mistakes asking those
19 questions?

20 A. I'm not saying that every other case -- every other
21 case in the United States they're making mistakes. What I'm
22 saying is that the guidelines are very specific, that every
23 single task in a capital case is more complex and more

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1 difficult and requires a higher standard of performance by
2 virtue of the fact that it is in a capital case.

3 Q. But we go back to the fact that sometimes the
4 noncapital lawyer may be the better cross-examiner, correct?
5 That lawyer may be the better arguer. That better -- that
6 lawyer may be the better researcher, correct?

7 A. And again, I'm not saying that they might not have
8 certain skills or abilities that are greater, but I would not
9 call them the better person for that if they don't have
10 capital training or experience.

11 Q. So it's your testimony here that the capital case
12 lawyer is -- or the capitally-trained lawyer has to do every
13 aspect of the case?

14 A. No, that's not what I'm saying.

15 Q. So you're suggesting that an experienced trial
16 lawyer, not capitally trained but assigned to a capital case,
17 needs to be counseled by learned counsel regarding whether a
18 photograph is a fair and accurate depiction of something?

19 A. I'm saying Guideline 10.4 makes lead counsel, who in
20 this context would be learned counsel, responsible for
21 everything that every member of the capital team does; and
22 that would fall within that, yes.

23 Q. Now, you were contacted about this affidavit by an

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1 Eric Freedman; is that correct?

2 A. That's correct.

3 Q. From Hofstra University?

4 A. Yes.

5 Q. Do you know if he knows Mrs. Yaroshefsky? Do you
6 know who I am talking about?

7 A. I do. I believe she is also a professor at Hofstra,
8 so I would guess so, but I don't know personally if he does or
9 not.

10 Q. All right. And when he contacted you, what did he
11 ask of you?

12 A. To provide information about the ABA Guidelines and
13 what they say about counsel qualifications and the need to
14 have counsel at every stage of the capital case.

15 Q. And did he provide you with any information as to
16 what the case -- the nature of the case?

17 A. He's told me what case it was for and gave me the
18 name of the attorney, as I was telling the judge earlier,
19 Michel Paradis.

20 Q. That's not a person on this case, is it?

21 A. I don't know.

22 Q. Well, didn't you think it was important to find out?

23 A. I knew that Mr. Paradis was filing something in U.S.

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1 District Court on behalf of the accused in this case. That
2 was sufficient information for me.

3 Q. Did you bother to find out who the counsel of record
4 were in the case?

5 A. No, it wasn't relevant to my opinion.

6 Q. It wasn't relevant to your opinion to find out what
7 had -- actually had occurred in the case?

8 A. No, because the guidelines say what they say. And
9 that's all I was being asked. I was not being asked to opine
10 on anything that has happened in this case. I was simply
11 being asked to give an opinion about what the guidelines say
12 on this subject, which is what I did.

13 Q. But you made factual representations in your
14 affidavit, ma'am.

15 A. Only to the extent that they were -- only based on
16 the limited information that I had been provided.

17 Q. Right. And didn't you think it was important to find
18 out whether or not that information was accurate?

19 A. No, because I didn't make those factual
20 representations based on my own personal knowledge. I
21 explained what my understanding was and what ----

22 Q. Well, no, that's not what you did. You indicated --
23 you didn't say that the information came from somebody else.

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1 You said this is the way it was.

2 A. If you have a copy of my affidavit, I'm happy to look
3 at it. But I'm fairly certain I said "it is my understanding
4 that" if there were any factual representations made.

5 Q. Here's your representation to the court: It is my
6 understanding, correct, that Lieutenant Piette, sole counsel
7 currently representing Mr. al Nashiri, and that he has no
8 capital case experience.

9 Now, did you talk to Lieutenant Piette to confirm
10 that?

11 A. I did not, no.

12 Q. Did you talk to Mr. Kammen?

13 A. I did not. I've never spoken to him.

14 Q. Did you talk to Ms. Eliades?

15 A. I did not.

16 Q. Did you talk to Ms. Spears?

17 A. No, I did not.

18 Q. Did you ever determine whether or not he was, in
19 fact, the sole attorney?

20 A. Again, no. It was only based on that limited
21 information.

22 Q. All right. And you've learned today that the
23 information that you had was false?

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1 A. I don't think I've learned that today, no.

2 Q. Well, you understand that there are other attorneys
3 assigned to the case, correct?

4 A. I don't understand that any other attorneys are
5 working on the case, which is what's relevant to the
6 guidelines.

7 Q. You said the sole counsel representing him. That
8 would be persons assigned to the case, correct, ma'am?

9 A. Not as far as the guidelines are concerned, no.

10 Q. All right. So you didn't talk to any of the other
11 persons, any of the other number of attorneys who are assigned
12 to the case, correct?

13 A. No, I did not.

14 Q. Now that you know that there are other persons
15 assigned to the case, do you think you should file an amended
16 affidavit to be candid with the court?

17 A. No.

18 Q. No? Well ----

19 A. That doesn't change -- unless those people are
20 actively working on the case and are capitally qualified, it
21 doesn't change any of what I said.

22 Q. What about the mitigation experts that they have?
23 Does that not change anything, ma'am?

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1 A. That does not, no.

2 Q. Is this just sort of a form affidavit that you file
3 in a number of cases throughout the country?

4 A. No, this is -- I wrote this specifically based on the
5 subject matter, the specific subject matter that was requested
6 here, and the limited facts that I had been provided.

7 Q. Don't you think it's important, as a lawyer, to find
8 out all the facts, not just the limited facts that you're
9 provided?

10 A. Not as a subject matter expert on the guidelines;
11 that's not necessary and that's not my role, to determine the
12 underlying facts.

13 Q. Well, if he was, in fact, capitably qualified, you
14 wouldn't need to file an affidavit, correct? So wouldn't it
15 be important to find that fact out?

16 A. If he was, in fact, capitably qualified, then all of
17 my assertions about the guidelines remain true.

18 Q. There wouldn't be a need for an affidavit and it
19 would make your affidavit a little less important, correct?

20 A. I think it would, yes.

21 Q. And as we're talking about the guidelines, the
22 guidelines are just one factor that courts consider, correct?

23 A. It depends on where -- what you're talking about.

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1 There are jurisdictions that have adopted them.

2 Q. All right.

3 A. But in other jurisdictions they're just instructive,
4 yes.

5 Q. In fact, that's what the United States Supreme Court
6 has said?

7 A. The U.S. Supreme Court has said that in the context
8 of a post-conviction claim looking at ineffective assistance
9 of counsel, yes.

10 Q. All right. And I didn't see that cited in your
11 affidavit, correct?

12 A. I believe Wiggins v. Smith is in there.

13 Q. I'm talking about Bobby v. Van Hook.

14 A. Van Hook merely repeated the language from Wiggins,
15 so no, I did not specifically cite back to Van Hook as well.

16 Q. And you didn't cite Cullen v. Pinholster, correct,
17 which again said that your guidelines are nothing more than
18 one factor to be considered, correct?

19 A. I did not cite Pinholster, I don't think so.

20 Q. All right. In fact, you were trying to leave in your
21 affidavit the impression that courts generally accept these as
22 gospel.

23 A. I don't think I ever used the word "gospel," no.

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1 Q. But that's what you were trying to be -- the notion
2 that you were trying to leave with your affidavit, isn't it?

3 A. No, I don't think so at all. They are guides to
4 reasonable performance.

5 Q. You didn't cite these other cases, did you?

6 A. Again, those cases cite back to Wiggins v. Smith
7 which is the case that I cited.

8 Q. What about Anderson v. Secretary Florida Department
9 of Corrections where it states, "The Supreme Court has
10 explicitly rejected such an implication. In Van Hook the
11 court reversed the Sixth Circuit per curiam for erroneously
12 substituting the ABA Guidelines for local contemporary
13 professional norms."

14 A. Van Hook involved a very specific issue where the
15 court applied guidelines from 2003 to counsel performance that
16 happened in the early 1980s. What the court was upset about
17 there was that the Sixth Circuit had not even considered
18 whether those 2003 guidelines represented the prevailing
19 professional norms in the '80s. That's what happened in
20 Van Hook. It did not reject the idea that the guidelines are
21 guides to counsel performance.

22 Q. So Anderson was another case you failed to cite,
23 correct?

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1 A. I did not cite it. That's correct.

2 Q. All right. And you failed to cite the fact that the
3 military justice system has specifically rejected your
4 guidelines, correct, in United States v. Loving, and then
5 repeated again in United States v. Witt.

6 A. Well, my understanding is that that is a separate --
7 while this is all the military system, cases that proceed
8 under the UCMJ have, yes, rejected the idea of adopting the
9 guidelines. However, they have drawn the distinction -- and I
10 believe it's U.S. v. Akbar that drew the distinction between
11 that and the military commissions, where Congress has given
12 specific direction to, A, have learned counsel, and B, be
13 guided by the guidelines.

14 Q. And Akbar also rejected them, correct?

15 A. For UCMJ cases, yes.

16 Q. But you didn't cite those cases in your affidavit
17 either, correct?

18 A. They were not commissions cases, so I did not, no.

19 Q. You indicated that the guidelines now apply to
20 military proceedings by way of court-martial and military
21 commission tribunal or otherwise. But again, you failed to
22 cite Loving and Witt, correct?

23 A. That language you just quoted is from the guidelines

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1 themselves, yes.

2 Q. Do you know of any reason why Lieutenant Piette could
3 not cross-examine a witness about evidence that was seized on
4 the USS COLE?

5 A. Under the guidelines, I know that if -- if my
6 understanding is correct and he is not part of a capital team
7 with learned counsel, then he's not qualified to do that under
8 the guidelines.

9 Q. In a nondeath-penalty case, could he do it?

10 A. I don't know, because I don't know in detail his
11 nondeath penalty qualifications.

12 Q. If he was able to do it in a nondeath-penalty case,
13 don't you think he could do it in a death-penalty case, ma'am?

14 A. No, that's specifically what -- the guidelines reject
15 that idea, that just because you can do it in a
16 nondeath-penalty case, you can do it in a death-penalty case.

17 Q. So there is a heightened -- let me understand this.
18 The ability to cross-examine a witness about basic
19 foundational issues is different in a death-penalty case than
20 it is in a nondeath-penalty case?

21 A. The guidelines say that every representation ----

22 Q. I'm not asking about the guidelines. I'm just
23 talking about as a practical matter.

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1 A. My expertise is on the guidelines. That's what I can
2 tell you about.

3 TC [MR. MILLER]: Nothing further. Thank you, Your Honor.

4 MJ [Col SPATH]: Thanks. Defense Counsel, any follow-up?

5 DDC [LT PIETTE]: No need, Your Honor.

6 **REDIRECT EXAMINATION**

7 **Questions by the Military Judge [Col SPATH]:**

8 Q. Ms. Olson-Gault, just a couple follow-up questions
9 and then I think we can get you on your way.

10 A. All right.

11 Q. I think we both agree, the guidelines are that,
12 they're guidelines, not prescriptive?

13 A. That the ABA has no power to prescribe anything and
14 they were not intended as such, no.

15 Q. And then they are guidelines for minimal standards in
16 capital cases?

17 A. That's correct, yes.

18 Q. Fair to say nothing in the guidelines contemplates a
19 hypothetical like learned counsel of nine years simply walks
20 out the door and refuses to come to court and represent his
21 client? Fair?

22 A. The guidelines really aren't about what counsel --
23 they don't contemplate that specific hypothetical, no. I will

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1 say that. They are there to cover the -- to make sure that
2 the accused is receiving zealous representation. And so
3 they're designed to cover not just one or two hypotheticals.

4 Q. Right.

5 A. I think they're designed to cover any hypothetical.

6 Q. And certainly the guidelines aren't intended to give
7 learned counsel the ability to just stop litigation in capital
8 cases, making a trial impossible? That's not their goal?

9 A. Certainly not, no.

10 Q. Their goal, I assume, is to promote ethical,
11 competent, zealous lawyers in representing their clients?

12 A. Their goal is to ensure that the accused receives
13 that, yes.

14 Q. And at least here, again, we have this -- this
15 language in the Act where we're to have learned counsel to the
16 greatest extent practicable. Fair that the guidelines have a
17 different opinion on that? I mean, the guidelines, the
18 position would be you have to have learned counsel for
19 everything?

20 A. That is correct. That's what the guidelines say.

21 Q. Cases like Van Hook -- and I recognize you did cite a
22 case in there that I read, but following up with Van Hook,
23 Van Hook does make clear the guidelines are not some kind of

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1 talismanic, you know, prescriptive demand, but, in fact, are
2 guidelines that, you know, if you can follow them, of course,
3 you would?

4 A. What the court has always said, and this is from
5 Wiggins, is that they're guides to reasonable counsel
6 performance. I think that does change when a jurisdiction has
7 adopted the guidelines or otherwise by statute, by court rule,
8 by indigent defense board, promulgation of rule has decided to
9 make the guidelines carry more weight; and that has certainly
10 happened throughout the country.

11 But as a general matter, when we're not talking about
12 one of those jurisdictions, what the court has said is that
13 the guidelines are guides to reasonable counsel performance.

14 Q. And so in the military, good example -- I know we
15 talked about it -- clearly they have not adopted those
16 guidelines yet. And so while it would be nice maybe if they
17 would -- we can talk about that outside of a courtroom --
18 we're where we're at in the UCMJ.

19 Fair, that at least right now, if you're tried in a
20 UCMJ court-martial, they do not have to comply with those
21 guidelines?

22 A. That is my understanding, yes.

23 Q. And if you're in a jurisdiction that either has

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1 rejected them or not adopted them, certainly, again, while we
2 may all hope you'd follow the guidelines, they don't have to?

3 A. There's -- they are not mandatory, that's right.

4 Q. Okay. And so at least here, again hypothetically, if
5 the statute says "learned counsel to the greatest extent
6 practicable," I mean, that's something that a commission or a
7 trial judge has to figure out, right, what that means? How do
8 we do this?

9 A. Certainly that's something that the judge has to
10 figure out. I do think it's relevant here that the -- since
11 we're talking about the -- what the commissions act says, that
12 Congress specifically talked about our guidelines and wanting
13 the Secretary of Defense to be -- give weight to those
14 guidelines when promulgating rules. So I think they do carry
15 slightly more weight in that context than it would if it was
16 silent about them.

17 MJ [Col SPATH]: All right. I think -- let me make sure.

18 Defense Counsel, any follow-up?

19 DDC [LT PIETTE]: No, Your Honor.

20 MJ [Col SPATH]: Trial Counsel, any follow-up?

21 TC [MR. MILLER]: Nothing. Thank you, Your Honor.

22 MJ [Col SPATH]: All right. Ms. Olson-Gault, I really do
23 mean it. I thank you very much for coming in and testifying.

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1 I recognize getting to the Mark Center is no easy task and
2 getting through there is no easy task. So getting down here
3 is difficult; getting in there is difficult. So I really do
4 appreciate you taking the time to come and talk to us, and I
5 appreciate your efforts in your work. Thank you very much.

6 WIT: You're very welcome. Thank you.

7 MJ [Col SPATH]: All right. We'll disconnect. Thanks.

8 **[The witness was excused, and the VTC was terminated.]**

9 MJ [Col SPATH]: All right. I didn't ask her questions
10 about ethics. I'm saving that for the ethics professor, since
11 she would have expertise in that area.

12 I think when I was speaking about declassification
13 and I issued that order, I said 389. I meant 369. But I
14 think everybody recognizes what we're talking about; it has to
15 do with these alleged intrusions. I just want to make sure we
16 work through those.

17 In my effort to get up to speed, what, four years ago
18 now, three and a half years ago, I have some recollection of
19 an AE series where Mr. Paradis was conflicted off of this
20 case. So I need to look into that, as do you all.

21 I remember seeing the name. I remember it being that
22 name. And I remember there were filings with Judge Pohl at
23 the time related specifically to a conflict.

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1 And so I think it's important to figure out if that
2 exists. Again, I reviewed it three and a half years ago. I
3 spend more time on some filings than others. That wasn't one
4 that at the time meant much to me because I hadn't heard his
5 name.

6 But over the last two weeks his name has come up more
7 than once. And so I sure would like to know, if there was
8 such a filing, what Judge Pohl did. And I'll look, too. And
9 then if he is conflicted, what's he doing?

10 So yet another issue we can deal with the ethics
11 professor with when we have testimony from her. If it exists.
12 Again, there are a lot of materials I've read over the last
13 three and a half years, but I do specifically remember going
14 through that.

15 Defense Counsel, is Major Robinson still here on the
16 island?

17 DDC [LT PIETTE]: Yes, Your Honor.

18 MJ [Col SPATH]: Have you made any effort to introduce him
19 to your client?

20 DDC [LT PIETTE]: No, Your Honor.

21 MJ [Col SPATH]: Is Major Fewell -- did she come down over
22 the weekend by any chance?

23 DDC [LT PIETTE]: No, Your Honor.

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1 MJ [Col SPATH]: And I'm assuming Ms. Eliades, Ms. Spears
2 and Mr. Kammen have continued to leave you here without
3 appearing on the island this weekend. Fair?

4 DDC [LT PIETTE]: Yes, Your Honor.

5 MJ [Col SPATH]: All right. I know we have two witnesses
6 dealing with -- oh, Mr. Miller.

7 TC [MR. MILLER]: One, Your Honor.

8 MJ [Col SPATH]: One. Okay. We'll take a break before we
9 call them, but who is the witness?

10 TC [MR. MILLER]: It's the Assistant Director, John Adams.

11 MJ [Col SPATH]: And how many exhibits is he dealing with?

12 TC [MR. MILLER]: Seven or eight photographs and one
13 physical real evidence, one item of real evidence.

14 MJ [Col SPATH]: All right. So what we'll do in a moment,
15 we'll take a recess. We'll come back in 15, if that works.
16 If it's going to take longer, let the bailiff know, and we'll
17 finish up again before lunch.

18 I would again point out we are on a reasonable pace
19 and giving the defense counsel's significant time to prepare
20 cross-examination questions about real, physical evidence, an
21 issue you deal with in every single trial. And I do
22 appreciate Ms. Olson-Gault's testimony, and I do appreciate
23 the work she does. I hope that came across.

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1 I think it's important here that we are in a pretrial
2 stage cross examining witnesses as opposed to in front of
3 members. There's no jury here that's going to sort this out
4 right now. There's no court members. There's no plan yet to
5 even get them here. We're just dealing, frankly, with
6 blocking and tackling in any trial that any lawyer can do.

7 And, frankly, Mr. Kammen should be on the phone with
8 you, at the very least, Lieutenant Piette. I again have great
9 empathy, I do. I'm doing the best I can interpreting the law
10 I'm given. I've obviously interpreted "to the extent
11 practicable" as meaning if you voluntarily abandon your role
12 and walk away and leave your client after nine years, not only
13 is your behavior completely unethical and unreasonable, but
14 you've made a strategic call to do that.

15 I think trial counsel referred to it as the nuclear
16 option. I think that's a pretty fair description of the
17 efforts underway by the defense community in this case.

18 Hopefully, again, for anyone watching, if you've got
19 an agenda, I can't help you. If you don't, you should be
20 appalled by the conduct and remain so.

21 All right. Fifteen minutes, we'll come back. We're
22 in recess.

23 [The R.M.C. 803 session recessed at 1001, 13 November 2017.]

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1 [The R.M.C. 803 session was called to order at 1018,
2 13 November 2017.]

3 MJ [Col SPATH]: This commission is called back to order.
4 All of the parties who were present at our last session remain
5 present.

6 Mr. Miller, call your witness.

7 TC [MR. MILLER]: Thank you, Your Honor. The government
8 calls Assistant Director John Adams. Raise your right hand to
9 be sworn, sir.

10 JOHN ADAMS, civilian, was called as a witness for the
11 prosecution, was sworn, and testified as follows:

12 **DIRECT EXAMINATION**

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

14 Q. State your name for the record, please.

15 A. John Adams.

16 Q. And your occupation, sir?

17 A. I am a special agent with the Federal Bureau of
18 Investigation.

19 Q. And where are you presently assigned?

20 A. I'm assigned to FBI Headquarters in Washington, D.C.

21 Q. Sir, I want to go into some of your background. I
22 want to start first with your education. You attended
23 university; is that correct?

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1 A. That's correct.

2 Q. And where did you go to college?

3 A. I went to the East Tennessee State University in
4 Johnson City, Tennessee.

5 Q. And did you graduate from that school?

6 A. I did. I attained a Bachelor of Science degree in
7 microbiology.

8 Q. In what year did you graduate?

9 A. 1990.

10 Q. Did you do any graduate work subsequent to your
11 obtaining your degree?

12 A. I did. I did a -- one year of graduate work at the
13 University of Tennessee in Knoxville in forensic anthropology.

14 Q. And what sort of training or course work did you do
15 in forensic anthropology?

16 A. So forensic anthropology is the study of human
17 remains in an effort to identify individuals from skeletal
18 remains and determine potentially how they died, and it's the
19 study of decomposition of the body. So also a lot of
20 instruction in training in recovering human remains.

21 Q. Did you obtain work as a law enforcement officer?

22 A. I did. During my training at the University of
23 Tennessee I participated in an internship program with the

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1 Tennessee Bureau of Investigation, and they recruited me and
2 offered me a job in the Tennessee Crime Lab.

3 Q. And when did you go, first go to work for the
4 Tennessee Bureau of Investigation?

5 A. 1994.

6 Q. Now, prior to actually being an agent with the --
7 I'll call it the TBI, did you have to go through some sort of
8 schooling or training?

9 A. So when I was hired, I was brought in as a forensic
10 scientist -- special agent forensic scientist trainee, and I
11 completed a one-year training period in serology in DNA
12 testing in the crime lab. And during that time I also spent
13 time investigating crime scenes as a trainee in that capacity
14 as well.

15 And so at the end of the one-year training period, I
16 was a certified forensic scientist, forensic examiner, and
17 crime scene investigator.

18 Q. And how long did you remain with the Tennessee Bureau
19 of Investigation?

20 A. For a total of three years.

21 Q. All right, and how many, if you could put a number on
22 it, how many crime scenes do you think you investigated?

23 A. So I traveled across the state. I would say more

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1 than 50, less than a hundred, somewhere in there.

2 Q. And did you receive specialized training in your area
3 over that three-year period, additional to what you learned at
4 the academy, your initial mentorship, rather?

5 A. Yes, in two different capacities. In DNA analysis, I
6 spent time in California at a school out there learning DNA
7 analysis techniques. And in addition to that, then I had
8 training, most of it on the job with more experienced
9 investigators in crime scene investigation and analysis.

10 Q. I think you indicated you remained with the TBI for
11 three years?

12 A. That's correct.

13 Q. And at the end of that three years, what did you do?

14 A. So then I began my employment with the FBI.

15 Q. And I take it you went to Quantico to New Agent
16 School?

17 A. I did. I started new agent training in March of
18 1997, and upon completion of that I was assigned to the
19 Washington field office in Washington, D.C.

20 Q. Did you receive more evidence collection training
21 while at Quantico?

22 A. I did. It was very basic, particularly for the
23 experience that I already had. But nonetheless, it's part of

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1 the basic new agent training at Quantico.

2 Q. You indicated that you went to the Washington field
3 office. What was your -- what was the squad or your initial
4 assignment?

5 A. So my first assignment was on a squad which
6 specialized in espionage cases, particularly military
7 espionage.

8 Q. Did you have any what we call collateral duties?

9 A. Yes. After -- after being assigned to the Washington
10 office for approximately one year, then I was asked to join
11 the Evidence Response Team in the Washington office, based on
12 my prior experience.

13 Q. Again, did you receive training, specialized training
14 to be a member of the ERT?

15 A. I did. There's a -- the Evidence Response Team
16 members all go through a basic course, which I attended. And
17 then there's opportunities to go to advanced level courses as
18 well.

19 Q. And did you take advantage of those opportunities?

20 A. I did. There was several that I took, to include
21 some blood spatter analysis, the human -- recovery of human
22 remains, some ballistics work; so there were several classes I
23 took.

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1 Q. How long did you remain at the Washington field
2 office?

3 A. Seven years.

4 Q. And at the end of the seven years, were you
5 transferred?

6 A. I was. I took a promotion to the counterterrorism
7 division at FBI Headquarters.

8 Q. And how long did you remain in that position?

9 A. Two years.

10 Q. And where did you go from there?

11 A. After those two years, I was assigned to the
12 Knoxville FBI field office in Knoxville, Tennessee, as the
13 joint terrorism -- Joint Terrorism Task Force supervisor of
14 the squad in Knoxville.

15 Q. How long did you remain in Knoxville?

16 A. Five years.

17 Q. And what was your assignment -- what was your next
18 assignment?

19 A. After I left Knoxville, I was promoted to assistant
20 special agent in charge in the Richmond, Virginia, FBI field
21 office.

22 Q. Did you have any specific duties and
23 responsibilities?

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1 A. I did. I was the ASAC over the National Security
2 Branch, which included counterterrorism, counterintelligence,
3 and intelligence.

4 Q. How long did you remain in Richmond?

5 A. For approximately two years.

6 Q. And where did you go next?

7 A. After that I went back -- I was promoted back to FBI
8 headquarters to the counterterrorism division. I was the
9 section chief of the strategic operations section.

10 Q. How long did you remain as chief?

11 A. So I was in that position for one year, and then I
12 was promoted to deputy assistant director in counterterrorism
13 division.

14 Q. How long did you remain as -- in that position, sir?

15 A. One year.

16 Q. And where did you go?

17 A. And then I was promoted to the special agent in
18 charge of the Norfolk FBI field office in Norfolk, Virginia.

19 Q. So you would have headed that Norfolk division?

20 A. I was, indeed.

21 Q. And are -- you remained there or did you ----

22 A. I was there for about 18 months, until I was promoted
23 to my current position of Assistant Director of the

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1 Directorate of Intelligence at FBI headquarters.

2 Q. Generally what are your duties and responsibilities?

3 A. So I'm in charge of the FBI's intelligence division,
4 which oversees how we in the FBI do all of our intelligence
5 analysis, how we collect it, how we analyze it; in charge of
6 all the policy and the process and the training for all of our
7 intelligence workforce.

8 Q. In addition to -- or other than the COLE bombing,
9 have you ever worked what I will call a large bomb scene ----

10 A. Yes.

11 Q. ---- crime scene?

12 And what were those?

13 A. So -- so prior to the USS COLE investigation, I -- in
14 1998 I was a member of the Evidence Response Team in
15 Washington, D.C. I deployed, with other team members, to
16 investigate the bombing of the U.S. Embassy in Nairobi, Kenya.
17 In 1999 I was part of a team that went -- deployed to Kosovo
18 to investigate war crimes following the war there. And then
19 the COLE in 2000. And then in 2001 I led the crime scene
20 investigation at the Pentagon after the attacks of 9/11. And
21 then in 2003, I led a team in Saudi Arabia where there was
22 attacks on three different residential compounds near Riyadh,
23 and I led that crime scene investigation there.

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1 Q. You indicated you went to Kosovo in 1999. What were
2 your duties and responsibilities there?

3 A. So I was one of the team members. It was a fairly
4 small team that -- of ERT personnel that went. We also took a
5 number of our hostage rescue team members for force protection
6 in that environment.

7 But responsibilities of the team in that
8 investigation were to examine victims or potential victims of
9 war crimes to determine how they were killed, their identity.
10 And some of those victims were buried, and so we had to exhume
11 them from either individual graves or, in some instances, mass
12 graves, and examine those remains.

13 In other instances there were individuals that were
14 killed and then their houses were burned and the debris had
15 covered their remains. And so we had to recover the remains
16 from the burned-down houses and identify those individuals by
17 whatever means we could, and sometimes that was personal
18 effects, jewelry, clothing and the like that we had to then
19 talk with the families to help identify them; others by
20 certain injuries that we knew that they had had based on some
21 medical records or, potentially, less frequently, some dental
22 records that helped with that as well.

23 Q. I want to direct your attention to October of 2000.

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1 You were working at the Washington field office at that time;
2 is that correct?

3 A. That's correct.

4 Q. Did you -- were you notified that there had been an
5 attack in Aden, Yemen, on a U.S. warship?

6 A. I was. And that we needed to identify some personnel
7 from the team to be ready to deploy to Yemen to investigate
8 the attack.

9 Q. And were you to be a member of that team?

10 A. I was.

11 Q. And did you travel to Yemen with the team?

12 A. I did indeed, yes.

13 Q. Did you take a military flight?

14 A. We did, yes, sir.

15 Q. And do you remember how many people went with you?

16 A. Not an exact number. Approximately 50 people, FBI
17 personnel.

18 Q. Did you take certain supplies with you, also?

19 A. Indeed. We took our ERT supplies. We took some --
20 actually some MREs for food and some water and some
21 sustainment items, a lot of protective equipment. And then we
22 also had, as I mentioned, members of our hostage rescue team
23 that were there for -- to help with force protection, and they

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1 took, you know, a lot of equipment as well to support that.

2 Q. Do you remember landing in Yemen?

3 A. I do.

4 Q. And anything unusual happen?

5 A. Indeed. It was, of course, a long trip. We landed
6 in Yemen. We were on a military plane with all our equipment
7 inside of the cargo area. Lowered the back gate, back hatch
8 of the aircraft, and immediately saw Yemeni military members
9 in military jeeps with guns mounted up on the tops of the jeep
10 pointed in our direction, and immediately recognized that --
11 not necessarily a welcoming sight, for sure.

12 Q. Were you able finally to leave the plane? Obviously
13 you were.

14 A. We were. It took what seemed to -- over an hour of
15 negotiations between the leadership of the -- of our
16 deployment with some individuals on the ground, some of our
17 personnel from State Department, trying to sort out the
18 arrangements on how we would be able to get our equipment off
19 the plane and transported to a facility where we were going to
20 stay.

21 Q. And did you finally -- did you go to the facility
22 where you were going to stay, the hotel?

23 A. We did. We worked out an arrangement. The Yemenis

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1 eventually conceded to allow us to take our equipment, which
2 was part of the discussion. They were concerned about the
3 equipment that we were bringing into the country. They
4 allowed us to eventually bring it in as long as we x-rayed --
5 allowed it to be x-rayed as we brought it through the airport.

6 We were able to then load it onto some trucks and
7 then transport all of our equipment, our bags, and our
8 personnel to a compound, which we were planning to stay at,
9 which included some small houses and then a larger kind of
10 lodge. But we ultimately determined that it was -- the
11 security was not what we wanted it to be in that location. So
12 after approximately eight hours, we actually packed things up
13 again and moved to another facility, a hotel that had a more
14 secure perimeter.

15 Q. And at the hotel, was that -- the second hotel, were
16 there other law enforcement personnel staying there?

17 A. There were some members of the Naval Criminal
18 Investigative Service that were there; members of U.S. Navy
19 were there. That's all that I remember.

20 Q. Were there any what I will call operational meetings
21 held at the hotel prior to going out to the ship?

22 A. Yes, there were. So as many of us team members got
23 checked into a room, got our things kind of situated, some of

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1 the leadership of the FBI group met with the leadership of the
2 Navy and NCIS to talk about the situation and arrangements to
3 get our team out to the ship. And during those discussions it
4 was reported back to us that the Navy had requested that we
5 prioritize our efforts to help them locate the missing
6 sailors, that -- the sailors that had gone missing after the
7 attack.

8 Q. Were you assigned any specific duties?

9 A. I was. So what we were told was that the site of the
10 attack below deck on the USS COLE was a very confined area.
11 It was a challenge to get equipment down to that lower -- the
12 lower deck. And so we had to take only a small number of
13 individuals that were absolutely necessary to -- to help with
14 that search.

15 Based on my body recovery experience, I was one
16 chosen, and I asked for a couple of the other guys on the team
17 that I had worked with before to go down to that area as well.
18 And so we limited it to four of us from our ERT team, and then
19 a couple of bomb techs that went down with us as well.

20 Q. And who were the members of the team that ----

21 A. So it was myself, Special Agent Tom O'Connor, Special
22 Agent Jeff Miller, and Special Agent Kevin Finnerty were the
23 four ERT members that went.

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1 Q. Do you remember going out to the ship?

2 A. I do.

3 Q. And how did you get to the ship?

4 A. So we were transported by van. Had to go through a
5 number of checkpoints as we arrived at the harbor, which was
6 about a -- seemed like about a 20-minute drive from our hotel
7 to the -- to the harbor. After going through a number of
8 checkpoints, then we got out of the van and walked up to the
9 edge of the shoreline there where I saw that there was a small
10 contingent of U.S. Marines that had set up a screening area
11 and campsite right there at the edge.

12 And then we walked down to a small boat with our
13 equipment, loaded that on the boat that would then transport
14 us out to the COLE, which was anchored about 200 yards
15 offshore out in the middle of the bay.

16 Q. And when you arrived, I take it, you went on to the
17 ship. Did you receive any sort of tour or any -- for lack of
18 a better term, sort of a walkthrough?

19 A. We did. So as we arrived on the COLE, we carried all
20 of our equipment up the gangway up onto the topside of the
21 deck. And then -- then we wanted to do kind of a site survey
22 and to try to see what the area looked like. And so we went
23 down a number of hatches and down several levels to get down

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1 to the galley area where much of the damage was evident.

2 And it was -- a couple things that I remember
3 distinctly was it was very hot, of course, in Yemen at that
4 time, close to 90 degrees, very humid. We went into the ship.
5 The air conditioning felt nice, but as we got down to the
6 lower decks and down to the galley area, you could tell that
7 it was -- it was very hot, very humid down there. And it was
8 obvious when we got there that the big hole in the side of the
9 ship was the cause of that, allowing all the air from the
10 outside to get into that lower level.

11 Q. Were -- I take it the sailors were on the ship, also,
12 correct?

13 A. There were. There were -- we got up onto the deck of
14 the COLE, there were a lot of sailors that were up topside,
15 because down below deck where many of the sailors -- where
16 their bunks were, those were -- it was uninhabitable down
17 there because of the hot and humid nature, and quite honestly
18 from the smell down there, that it was just not hospitable.

19 And so many of the sailors had nowhere else to go,
20 and so they just stayed up on topside. Many of them just
21 trying to kind of pass time, sitting, talking. It was evident
22 that they were very traumatized and very emotionally upset.
23 It was a very difficult time for many of them.

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1 TC [MR. MILLER]: Permission to publish to the witness,
2 Your Honor, Prosecution Exhibits 192, 193, 223, and 228.

3 MJ [Col SPATH]: You may.

4 Q. First I want to show you what is Prosecution
5 Exhibit 192. Do you recognize that, sir?

6 A. I do.

7 Q. What do you recognize that to be?

8 A. This appears to be a photograph of the USS COLE
9 depicting the blast damage in the hull of the ship.

10 Q. 193, please. Do you recognize that?

11 A. I do. This appears to be a close-up shot, photograph
12 of the blast damage in the side of the ship.

13 Q. Now, from this position, looking at this photograph,
14 we see the hole, and then above it is this the area that you
15 were doing the search, or the body recovery was occurring?

16 A. So it -- looking at the photograph, it would be the
17 upper part, so above the hole and to the right of the hole.
18 That was -- the galley area was behind this upper part of the
19 hull that has less damage.

20 The hole itself was the pump room of the ship, and it
21 was -- it was gone. It was -- it was completely destroyed.
22 There was water inside that pump room. And so me and my
23 teammates, we did not work in the pump room. There was no way

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1 for us to work in there. We worked in the galley area and
2 then back to the -- behind the galley in the dining area.

3 Q. 223. Do you recognize that when you did your
4 walkthrough?

5 A. So I do, not necessarily from this vantage point, but
6 certainly I remember seeing the dome that was displaced on
7 this particular piece of equipment.

8 Q. Prosecution Exhibit 228. [Conferred with courtroom
9 personnel.] Do you recognize this photograph?

10 A. I do. This is a photograph of the topside or the
11 deck of the USS COLE. This is exactly what it looked like
12 when we arrived.

13 You can see pieces of debris on the deck of some sort
14 and different material. And then also this black staining, it
15 looked like ashes all over the top of the deck and then also
16 on the sides of the ship itself.

17 Q. So the ship had not been washed down or cleansed or
18 cleaned prior to your entry?

19 A. No, it had not.

20 Q. All right. You indicated that you and three -- you
21 and two others went down into the galley area; is that
22 correct?

23 A. That's correct. Three others, myself and three

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1 others.

2 Q. And that would have been Finnerty, Miller and
3 O'Connor, correct?

4 A. That's right, yes.

5 TC [MR. MILLER]: Permission to publish to the witness,
6 Your Honor, Prosecution Exhibits 251, 255, 256, 258, and 197.

7 MJ [Col SPATH]: You may.

8 Q. I'm going to show you a series of photographs. Do
9 you recognize this individual?

10 A. Yes, sir, that's Special Agent Tom O'Connor.

11 Q. And is this the area in which you were conducting
12 your search, your body recovery search?

13 A. So this is -- yes. Beyond Tom you can see some
14 stainless steel back behind him, and that is back in the --
15 appears to be back in the galley area of the ship, and that's
16 one of the areas where we were working.

17 Q. All right. 256, please. Do you recognize this, sir?

18 A. Yes, sir. That's -- that's another photograph of the
19 galley area.

20 Q. Is that how it appeared back when you were conducting
21 your search, body recovery?

22 A. Yes.

23 Q. 255. Again, do you recognize this particular area?

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1 A. I do. That's another shot of the galley area, but it
2 also -- to the left side of the photograph you can begin to
3 see a bit of that pump room area that I described. It's
4 really destroyed.

5 Q. 258, please. Do you recognize this area, sir?

6 A. I do. So this is looking more at the pump room area.
7 You can actually see -- if I can draw on this. In this area
8 here, you can actually see water, and that's the hole in the
9 side of the ship.

10 TC [MR. MILLER]: Your Honor, the record should reflect,
11 as to Prosecution Exhibit 250 -- 258, I take it, the witness
12 has drawn a circle in sort of the middle, midleft area.

13 Q. 197. And do you recognize this photograph, sir?

14 A. I do. So this is just inside the blasted area of the
15 ship. So this is where the pump room was, and this is looking
16 from the water level up into the galley area.

17 You can see -- there are a couple of things to note
18 here. One is up in the right corner, it shows this green
19 metal/steel that is somewhat almost vertical. That is part of
20 the -- what was the pump room ceiling that was blasted up into
21 the galley from below when the -- from the blast damage.

22 TC [MR. MILLER]: Again for the record, Your Honor, the
23 witness has circled a -- sort of the greenish metal in the

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1 upper right-hand corner of the photograph.

2 Q. Did -- I take it the body recovery was made difficult
3 because of all this jagged metal and compressed metal?

4 A. Yes, it was -- it was hazardous to those of us
5 working; therefore, we had lots of protective equipment, to
6 include gloves and helmets and heavy boots and Tyvek
7 coveralls. But in addition to that, it was very challenging
8 because the twisted metal had formed and actually had trapped
9 a number of the sailors in the twisted metal remains.

10 TC [MR. MILLER]: Permission to publish to the witness,
11 Your Honor, Prosecution Exhibits two fifty -- 254 and 257.

12 MJ [Col SPATH]: You may.

13 Q. I'm going to show you first what has been marked for
14 identification as Prosecution Exhibit 254 for Identification.
15 Do you recognize that area, sir?

16 A. I do.

17 Q. What is that?

18 A. So this is -- it's actually a -- this is a bulkhead
19 between the dining area in the mess hall and the galley area
20 in the mess hall. And what you -- I can trace this. See,
21 this area here [indicating] is a hole that we had to cut in
22 the bulkhead with a cutting torch to access the galley area.

23 Q. And you did that so you could recover the bodies?

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1 A. Yes.

2 Q. And were you in charge of that particular operation
3 or were other persons doing that?

4 A. So -- yes. So I was in charge of that, but O'Connor
5 and Finnerty and Miller assisted with that.

6 Q. Do you know an agent by the name of Bodie?

7 A. I do. He was a bomb technician from one of our --
8 Dallas office, I think.

9 Q. Was he assisting in this project?

10 A. So he was -- he was down there at the time. I don't
11 know that he helped us actually recover the body [sic], but he
12 was down there.

13 Q. I mean, not recovering the bodies but assisting in
14 the cutting process? Do you know if Bodie was?

15 A. Yeah, I can't remember if he was there or not.

16 TC [MR. MILLER]: Your Honor, the record should reflect
17 that the witness has drawn a -- an outline around the opening
18 in the picture, Prosecution Exhibit 254 for Identification.
19 And we would move for its admission at this time, Your Honor.

20 MJ [Col SPATH]: Defense Counsel, any objection to what's
21 been offered as Prosecution Exhibit 254 for Identification?

22 DDC [LT PIETTE]: Your Honor, the defense takes no
23 position.

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1 MJ [Col SPATH]: All right. And as I've said over the
2 course of the last two-plus weeks, the defense is taking a
3 strategic position, in my opinion. I'm going to conditionally
4 admit it. It's Rule of Evidence 104(b). Once you demonstrate
5 relevance in trial, it's admitted.

6 You may proceed.

7 TC [MR. MILLER]: 257, please.

8 Q. Do you recognize this photograph, sir?

9 A. Yes. So this is a photograph of -- looking the
10 opposite direction from the last one. So this is in the
11 galley area, and you can see now -- I'll draw here. This is
12 the bottom side of that cutaway area, so it would be -- this
13 area was cut out. So we were looking at, in the last
14 photograph, from the other side of the wall; this is looking
15 from the galley side into the dining area.

16 Q. Do you recognize not necessarily who this person is,
17 but what function this person -- in the photograph, what
18 function he was fulfilling?

19 A. Yes. The Navy brought out -- very quickly brought
20 over some workers, some welders from the Norfolk Naval
21 Shipyard, and this was one of those guys, that -- he actually
22 did the cutting with the torch to get that opening in the
23 wall.

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1 TC [MR. MILLER]: Your Honor, the record should reflect
2 that the witness has drawn sort of an outline on the far
3 right-hand side of the photograph.

4 246 -- oh. Permission to publish to the witness,
5 Your Honor, Prosecution Exhibit 246, 244, and 248?

6 MJ [Col SPATH]: All right. You may.

7 Q. Do you recognize this, sir?

8 A. I do. So this is a photograph of one of the sailors
9 that we recovered from down in that galley area. This is
10 actually -- so this is me at the -- at the top of the
11 photograph; this is Agent Finnerty, circling his head; and
12 Agent O'Connor there.

13 This is the area where -- we had set up an area on
14 the top side of the USS COLE's deck, and we separated it from
15 view from anywhere else around the deck itself with sheets and
16 tarps. And we set up a process when we brought the sailors up
17 top side to help try to identify anything we could, clothing
18 or identification or anything that would help us identify each
19 of the sailors.

20 And it was very dark down in the galley area. Our
21 primary effort down there was to recover the remains, put them
22 in the body bag and then take them up top.

23 TC [MR. MILLER]: Your Honor, the record should reflect he

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1 circled the faces or the heads of the three individuals in
2 that picture.

3 MJ [Col SPATH]: He did. And just -- if you'd go back to
4 that just for a second. It was 246 for Identification.

5 TC [MR. MILLER]: For Identification.

6 MJ [Col SPATH]: For you, the witness -- you, the witness,
7 you're on the left.

8 WIT: Correct.

9 MJ [Col SPATH]: Special Agent Finnerty is the person in
10 the middle?

11 WIT: That's correct.

12 MJ [Col SPATH]: And then, as you look at the photo to the
13 right, is Special Agent O'Connor.

14 WIT: That's correct.

15 MJ [Col SPATH]: Okay. You may proceed.

16 TC [MR. MILLER]: We would move for admission of that
17 photo ----

18 MJ [Col SPATH]: Defense Counsel?

19 TC [MR. MILLER]: ---- Prosecution Exhibit 246 for
20 Identification.

21 DDC [LT PIETTE]: Defense takes no position.

22 MJ [Col SPATH]: All right. I -- again, recognizing that
23 is your position, I am not going to admit it yet. Again,

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1 because of MR -- or Military Commission Rule of Evidence 403,
2 until we determine how many photographs you're going to offer
3 of the bodies, just to sort that. But you have offered it.
4 Thank you. 245 for Identification.

5 TC [MR. MILLER]: 244, please.

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

7 Q. What would happen to the bodies after they were
8 processed?

9 A. So after we did our processing, meaning everything we
10 could do to try to identify that individual, potential
11 injuries and the like, then we would zip the body bags up and
12 then drape the body bag with the American flag and secure it
13 and make it ready for presentation to a group of sailors that
14 the captain had identified that would come and carry the body
15 bags off of the ship and take them to the harbor.

16 Q. All right. And that's -- what you've just described
17 is Prosecution Exhibit 244 for Identification; is that
18 correct?

19 A. That's correct.

20 Q. And 248. Do you recognize that, sir?

21 A. I do. This is a group of sailors carrying two body
22 bags off the ship. This is the process that -- that the
23 captain and the sailors arranged. They wanted to do this to

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1 ensure that the victims were treated with appropriate dignity
2 and respect as they were taken off of the ship.

3 Q. And this was all occurring while you were conducting
4 your duties and responsibilities and the ERT team was
5 gathering evidence, correct?

6 A. That's correct. As -- we would collect or recover
7 the sailors' remains, then we would bring them up top side,
8 get them prepared for removal off of the ship, and then go
9 back down and continue our work to locate and recover other
10 sailors.

11 Q. All right. And this carrying the sailors off, that's
12 Prosecution Exhibit 248 for Identification, correct?

13 A. That's correct.

14 Q. Fair and accurate depiction of how it appeared on the
15 COLE while it was actually occurring?

16 A. It is.

17 Q. And in the prior picture -- go back to the -- it's a
18 fair and accurate depiction of the bodies with the draped
19 flags?

20 A. It is, yes.

21 TC [MR. MILLER]: Move for the admission of two forty --
22 Prosecution Exhibit 244 for Identification and 248 for
23 Identification.

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1 MJ [Col SPATH]: I just want to -- I think it was 244 is
2 that one, and then 248 is the follow-on.

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

4 MJ [Col SPATH]: Okay. Defense Counsel?

5 DDC [LT PIETTE]: Defense takes no position.

6 MJ [Col SPATH]: All right. I understand. I think the
7 record is eminently clear on the court's position on that.

8 244 and 248 again I'm going to defer on until we sort
9 through how much of this type evidence we are going to use,
10 but you have offered them.

11 TC [MR. MILLER]: Thank you. And with permission we're
12 shortly going to publish to the witness, if we ask Court's
13 permission, Prosecution Exhibit 220, 221, and 242.

14 MJ [Col SPATH]: You may.

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

16 Q. How long did the body recovery last?

17 A. Four days.

18 Q. And did you then assist in the generalized evidence
19 recovery that was occurring on the ship?

20 A. I did, on the ship, yes.

21 Q. Prosecution 220.

22 Do you recognize photograph Prosecution Exhibit 220?

23 A. I do.

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1 Q. And what is that?

2 A. This is a pile of metal that was created by -- we had
3 to remove a lot of that from the galley to make room to work
4 in that area. There was all of this large pieces of metal
5 that was difficult to work around, and so if we could, we
6 would remove that. And so this is a pile that we created
7 topside just to get it out of our way down below.

8 Q. 221, please.

9 Do you recognize that?

10 A. I do. This is a smaller pile of -- this appears to
11 be steel mostly, but metal that were recovered by the
12 divers -- Navy divers mostly. We had -- there was a couple of
13 FBI personnel that helped with the diving efforts -- that were
14 recovered from the area in the bay right around the ship that
15 were brought up and put in a pile on the -- on the topside --
16 on the deck as well.

17 So this -- it obviously has a different appearance
18 and consistency and weight as the other material from the
19 galley. This was believed to be pieces of the ship's hull
20 that was collected.

21 Q. Was there a sifting operation occurring?

22 A. There was.

23 Q. And did you assist in that?

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1 A. To a certain extent. There was a larger operation on
2 the back, on the fantail part of the ship, and we did some
3 smaller sifting on the sides, of some buckets material. I
4 helped with the smaller sifting on the sides of the ship.

5 Q. And I think you indicated that you had previously
6 been involved in the embassy bombing crime scene, the Pentagon
7 crime scene. Is sifting a legitimate methodology?

8 A. Absolutely. It's -- in any of these big blast
9 scenes, there's all kinds of debris that results. And that
10 can be things blown in different directions, but also
11 buildings and other things that crumble. And to be -- conduct
12 a thorough crime scene investigation, all of that has to be
13 gone through. And oftentimes sifting is really the best
14 method to do that.

15 Q. Did the naval -- did the sailors assist you in any
16 way or assist the ERT efforts in any way?

17 A. So there was a Navy dive team that assisted greatly
18 in waters that were more than knee deep, essentially. We had
19 kind of worked out an arrangement. They handled, of course,
20 the operation outside of the boat in the bay and diving in the
21 waters there, but also there were many compartments in the
22 lower deck of the ship that were actually flooded. And so
23 even -- even those inside the ship we -- the Navy dive team

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1 really conducted the searches of those areas.

2 Q. You indicated you assisted the ERT team after your
3 body recovery. What exactly were you looking for in a very --
4 in a general sense? What were you attempting to find?

5 A. So any -- any items that looked like they did not
6 belong on the ship, essentially, and more specifically,
7 anything that could have been from a smaller vessel that
8 potentially had a bomb, carrying a bomb, that may have ended
9 up on the ship itself.

10 TC [MR. MILLER]: Permission to publish to the witness,
11 Your Honor, Prosecution Exhibits 76, 76A, 76B, and 76C, all
12 for Identification.

13 MJ [Col SPATH]: You may proceed.

14 Q. For the record we have placed before you, Assistant
15 Director, the Prosecution Exhibit 76 for Identification.

16 A. That's correct.

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

18 MJ [Col SPATH]: You may.

19 Q. I show you what has -- what is Prosecution
20 Exhibit 76A for Identification. Do you recognize that, sir?

21 A. I do.

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

23 A. I recognize that be some items that I collected from

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1 the deck of the COLE and placed in an evidence bag for later
2 evaluation at our laboratory.

3 Q. All right. And it has a Q number on the bottom; is
4 that correct?

5 A. That's correct.

6 Q. All right. Are you familiar with the Q tab system?

7 A. I am.

8 Q. I don't know if you can make it out, but can you make
9 out the Q number on that?

10 A. It appears to be Q565.

11 Q. All right. I'm going to ask you, if you would, take
12 a look at the evidence bag itself. Do you recognize
13 Prosecution Exhibit 76 for Identification?

14 A. I do.

15 Q. And how are you able to recognize it?

16 A. It's a standard evidence bag that we use in the FBI
17 on our Evidence Response Team to collect evidence and seal it
18 for packaging and transport to our laboratory for examination.

19 Q. Do you recognize the handwriting?

20 A. I do. On the outside of the bag, the label portion,
21 there's a number of items that bear my handwriting, my name,
22 and my signature.

23 Q. And if you could, please, read into the record the

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1 description of the evidence, the date and time of the
2 recovery, location of the recovery, and by whom it was
3 recovered.

4 A. Okay. The description of the evidence is "machine
5 pieces." Date and time of recovery is 10/20/2000, 1500 p.m.
6 Location of recovery is Grid 1 Forward, recovered by
7 SA J. Adams. Received from USS COLE by SA J. Adams; date,
8 10/20/2000; time, 1500.

9 Q. That is all your handwriting; is that correct?

10 A. That's correct.

11 Q. And can you see the contents of the bag?

12 A. I can, yes.

13 Q. And are those the same contents that are contained in
14 the photograph, Prosecution Exhibit 76A for Identification?

15 A. Yes.

16 Q. All right. Is there a W number on the exhibit,
17 Prosecution Exhibit 76?

18 A. There is. It says W-111.

19 Q. All right. And is there also a 1B number?

20 A. There is, 1B882.

21 Q. I'm going to ask you: Is there a chain of custody
22 form attached to that exhibit or attached to the folder in
23 which the exhibit came?

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1 A. Yes, sir.

2 Q. And do you recognize that particular chain of custody
3 form?

4 A. I do. It ----

5 Q. And is it in your signature?

6 A. It does have my signature in the "Accepted by" space.

7 Q. Are you able to associate this particular form, this
8 chain of custody form, with Exhibit 76?

9 A. I can, yes. It's -- this chain of custody goes with
10 item 1B882 and item number W-111.

11 Q. For the record, I'm placing on the ELMO Prosecution
12 Exhibit 70 -- Prosecution Exhibit 76C for Identification.
13 Does [sic] the four entries on that exhibit, Prosecution
14 Exhibit 76C for Identification, identical to the form that
15 you've just described?

16 A. Yes.

17 Q. And again, for the record, your signature is at the
18 top right above the word "Collected"; is that correct?

19 A. That's correct.

20 Q. Lastly I'm showing you a photograph, Prosecution
21 Exhibit 76B. Do you recognize that photograph, sir?

22 A. I do. It appears to be a photograph of the evidence
23 label on the front of this evidence bag.

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1 Q. Fair and accurate depiction?

2 A. It is indeed, yes.

3 Q. Now, after you packaged that evidence, what did you
4 do with it?

5 A. So we had set up a room in one of the lower decks of
6 the COLE that we could secure. It was a small meeting room
7 that we could secure. We had a evidence lockbox in there, and
8 we had two agents from our New York office that maintained
9 control of that room, and they accepted evidence every day.

10 So I took -- that was our process. So when I
11 collected this, I took it to -- Jane Rhodes was the agent --
12 one of the agents that was there that day, and I gave it to
13 her for logging into our system and maintaining it in that
14 room.

15 Q. And what was your interest in obtaining or seizing
16 this specific evidence? Why was it of interest to you?

17 A. Because in my examination, just cursory examination
18 of these items, they did not appear to be anything that looked
19 obviously as part of the USS COLE. So it looked like it could
20 be something that ended up on the deck that came from another
21 vessel potentially.

22 Q. Do you have any reason to believe that these items
23 were altered, changed, or damaged in any way since the time

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1 that you seized them?

2 A. No. They appear to be identical to the -- at the
3 time I seized them.

4 TC [MR. MILLER]: Your Honor, we would move for the
5 admission at this time of Prosecution Exhibit 76A for
6 Identification, 76B for Identification, and 76C for
7 Identification.

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

9 Q. Did you ever help conduct any of the land searches?

10 A. I did not.

11 Q. After they were done searching the COLE, what did you
12 do?

13 A. So went back to the hotel. And -- well, we actually
14 had a small command post set up in the hotel as well. I spent
15 some time there trying to just get some documentation
16 completed. As we then prepared to evacuate the area -- we had
17 some information that there may be a threat to our group, and
18 so we were rapidly making plans to depart Yemen.

19 And so I was part of a contingent that was sent to
20 Germany, and stayed there for a few days in the event that
21 there was another attack in the Middle East, and I would be
22 somewhat pre-deployed to go wherever needed.

23 Q. And then did you eventually return to the

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1 United States?

2 A. I did, yes.

3 TC [MR. MILLER]: Nothing further. Thank you, Your Honor.

4 MJ [Col SPATH]: Defense Counsel, any questions?

5 DDC [LT PIETTE]: Your Honor, the defense takes no
6 position.

7 MJ [Col SPATH]: All right. Again, I think the record is
8 pretty clear on the ruling the commission has made, and I'll
9 enter additional findings of fact before we depart, along with
10 a written ruling to follow.

11 I say this to every witness. I appreciate you
12 traveling down here to testify in person. I know that people
13 can testify by VTC. It is important to come down and do it in
14 person. So I thank you for taking the time to do that.

15 I'm going to give you a standard order. Don't
16 discuss your testimony until we resolve this issue. Here it
17 is a little unique in that it might be a little while, so keep
18 that in mind as we move forward. And likely we'll see you at
19 some point in the future. Thank you very much. You are
20 excused.

21 WIT: Thank you, sir.

22 [The witness was warned, temporarily excused, and withdrew
23 from the courtroom.]

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1 MJ [Col SPATH]: Defense Counsel -- I'm sorry, Trial
2 Counsel, tomorrow how many witnesses do we anticipate?

3 MATC [COL WELLS]: Your Honor, Colonel Wells here. Sir,
4 we anticipate one witness tomorrow.

5 MJ [Col SPATH]: And I know you will keep the defense
6 updated as to the order of witnesses, as I know you've done
7 throughout this -- this process.

8 And then Wednesday the plan still is no witnesses,
9 correct?

10 MATC [COL WELLS]: That is correct, sir.

11 MJ [Col SPATH]: And then Thursday and Friday, a
12 combination of seven witnesses, plus maybe Professor
13 Yaroshefsky.

14 MATC [COL WELLS]: Yes, sir. And we do have one
15 adjustment, and I will follow up with an e-mail. One witness
16 cannot travel because she is ill. Again, we'll inform the
17 parties. So that would be six witnesses on this issue, one by
18 VTC. I'm also informed that that witness may also be
19 unavailable, but I'll confirm.

20 And then the additional witness that we hope will
21 voluntarily comply with the court's order and the subpoena.
22 And I think we should have a decision by the Federal District
23 Court in the Southern District of New York at that time.

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1 MJ [Col SPATH]: Perfect.

2 MATC [COL WELLS]: And, sir, before I leave the podium, I
3 would like to take an opportunity to discuss -- you raised the
4 question of a defense member, Mr. Paradis, and his
5 participation in this matter.

6 I was passed some research. This matter arose about
7 his conflict in representing another detainee that is a
8 co-conspirator with Mr. Nashiri. This arose ----

9 MJ [Col SPATH]: Mr. -- it was Mr. al Bahlul, right?

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

11 MJ [Col SPATH]: That's what I thought.

12 MATC [COL WELLS]: This arose back in 2012, and there was
13 a series of motions filed under the Appellate Exhibit 059.

14 Subsequent to that, under Judge Pohl's presiding
15 under the commission, the defense filed Appellate Exhibit 083,
16 releasing Mr. Paradis from Mr. Nashiri's representation based
17 on a conflict of interest.

18 Judge Pohl, on the UNOFFICIAL/UNAUTHENTICATED
19 transcript at pages 961 through 970, addressed the matter on
20 the record. And he said, "So at this point in time I am
21 finding -- and actually if you look at Colonel Colwell's memo,
22 paragraph 3, that clearly there is a conflict. At this
23 time -- the commission finds at this time that there is a

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1 conflict with -- between Mr. Paradis' representation of
2 Mr. Nashiri in this case and Mr. Al Bahlul in the other case.
3 Again, the defense, if you wish to file a motion to explain
4 this and wish to revisit the issue, that is up to you. But as
5 of now, there is no motion before me and, therefore, that
6 issue is resolved at this time."

7 So it seems that he did conduct the R.M.C. 505
8 hearing on the record. There was further discussion.

9 And then later in the transcript, at page 969, Judge
10 Pohl said, "Again, at this point this is not a motion before
11 me. It has nothing to do with the notice. This is simply a
12 notice. If you wish to include it in a motion and you want me
13 to remedy it, file it. We are not going to start sticking
14 pieces of paper in the record for no apparent purpose, and
15 that is what I think you are doing." So at this point he is
16 still looking for a motion from the defense as it relates to
17 the conflict of interest.

18 When you look at Appellate Exhibit 083 on their
19 notice, they indicate that they intended to file a notice or a
20 motion indicating that the military judge was interfering with
21 their attorney-client representation issue. Yet, as Judge
22 Pohl noted in paragraph 3 of the chief defense counsel's
23 decision, she had made the determination that a conflict did

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1 exist and Mr. Paradis should not continue his representation
2 with Mr. Nashiri so long as Mr. Bahlul's military commission
3 case on appeal remains active.

4 So I think the prosecution would suggest to the
5 commission it would be appropriate to ask the defense for a
6 filing of some sort explaining Mr. Paradis' current
7 representation, just to clear this up on the record.

8 Nothing further, sir.

9 MJ [Col SPATH]: Thank you. More forthcoming on that.

10 Anything else from the government today?

11 TC [MR. MILLER]: Nothing further from the government.

12 Thank you, Your Honor.

13 MJ [Col SPATH]: Defense counsel?

14 DDC [LT PIETTE]: Nothing from defense, Your Honor.

15 MJ [Col SPATH]: All right. I think the record is
16 eminently clear regarding the absence of still-appointed
17 outside learned counsel and two civilians who have an
18 attorney-client relationship with this accused. All three of
19 them have voluntarily abandoned their role of representing
20 him, which should be shocking. I just -- I really can't say
21 much else about it. I've said it every day.

22 But what we have done is moved through the basic
23 block-and-tackling of trial procedure, and we've had limited

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1 witnesses each day and multiple days off, allowing defense
2 counsel to continue to prepare. And that was the case today.
3 We had two witnesses, one who the defense counsel asked
4 questions of, thereby demonstrating their competence and their
5 ability to ask quality questions, which the Strickland court
6 certainly would envision as strategy.

7 And so the decisions not to ask questions of these
8 witnesses on basic issues of real evidence is clearly a
9 strategic decision, and I think any appellate court is going
10 to see that. And I am confident that everybody recognizes the
11 abandonment by the civilian learned appointed counsel. We'll
12 stick with our practice.

13 We will start at 0900 tomorrow with the single
14 witness for tomorrow. Thank you. We are in recess.

15 [The R.M.C. 803 session recessed at 1115, 13 November 2017.]

16 [END OF PAGE]

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