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1 [The R.M.C. 803 session was called to order at 0903,  
2 28 July 2022.]

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

5 TC [MR. MILLER]: Good morning, Your Honor.

6 These proceedings are being transmitted via CCTV to  
7 public viewing locations in the United States pursuant to your  
8 order, AE 028M.

9 Present for the United States here in GTMO are myself,  
10 Mark Miller; Mr. John Wells; Major Michael Ross; Major Stephen  
11 Romeo. Assisting us is Forrest Parker Smith; Special Agent  
12 Aaron Kellerman of the FBI, the case agent; Staff Sergeant  
13 Carlos Salazar, and Staff Sergeant Jaune Daniels.

14 Also present in the Remote Hearing Room in northern  
15 Virginia for the prosecution, Your Honor, are Lieutenant  
16 Commander Cherie Jolly, Lieutenant Commander Keven Schreiber,  
17 and Lieutenant Tess Schwartz. And assisting them today is  
18 Master Sergeant Laura Speranza.

19 All persons have the necessary qualifications and  
20 clearances to be present.

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

22 Defense Counsel, good morning. Please account for  
23 your personnel.

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1 LDC [MR. NATALE]: Good morning, Your Honor.

2 MJ [COL ACOSTA]: Good morning.

3 LDC [MR. NATALE]: Anthony Natale on behalf of  
4 Mr. Nashiri. Present in the courtroom here at the ELC is  
5 Captain Mizer, Ms. Carmon, Ms. Morgan, Mr. Padilla, Ms. Brandi  
6 Janes, and Mr. Marc Dolphin may be coming in.

7 At the RHR, I believe we will be having Commander  
8 Piette, Mr. Roosevelt Roy, Mr. Scott Hoffmann, Ms. Rachel  
9 Pinate, and possibly, Your Honor, Ms. Manice Brown. All of  
10 these people have the necessary clearances and qualifications  
11 to be present at these locations.

12 MJ [COL ACOSTA]: Thank you, Defense Counsel.

13 LDC [MR. NATALE]: Thank you.

14 MJ [COL ACOSTA]: The accused is not present today?  
15 Government?

16 TC [MR. MILLER]: He is not, Your Honor. Major Romeo will  
17 address that issue.

18 ATC [MAJ ROMEO]: Good morning, Your Honor.

19 MJ [COL ACOSTA]: Good morning.

20 ATC [MAJ ROMEO]: I would like to call the witness from  
21 the Joint Task Force legal support section.

22 MJ [COL ACOSTA]: Call the witness.

23 ATC [MAJ ROMEO]: Commander, please take the stand.

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1 MJ [COL ACOSTA]: I'm sorry?

2 ATC [MAJ ROME0]: Commander, please take the stand. I'll  
3 swear you in.

4 COMMANDER U.S. NAVY, was called as a witness for the  
5 prosecution, was sworn, and testified as follows:

6 ATC [MAJ ROME0]: Thank you. Please take a seat.

7 DIRECT EXAMINATION

8 Questions by the Assistant Trial Counsel [MAJ ROME0]:

9 Q. Good morning, Commander.

10 A. Good morning, sir.

11 Q. Are you currently employed in the Office of the Staff  
12 Judge Advocate at Joint Task Force Guantanamo Bay?

13 A. I am.

14 Q. And did you have the opportunity this morning to meet  
15 and speak with the accused, Mr. Nashiri, regarding his rights  
16 to attend this hearing?

17 A. Yes.

18 Q. Did Mr. Nashiri indicate whether he would attend  
19 today's proceedings?

20 A. He indicated he did not want to come today.

21 Q. Okay. So I have in front of me a statement of  
22 understanding of rights to be present at commission  
23 proceedings executed on this date, 28 July 2022, which has

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1 been marked as Appellate Exhibit 375S.

2 ATC [MAJ ROME0]: Your Honor, may I approach the witness?

3 MJ [COL ACOSTA]: You may.

4 ATC [MAJ ROME0]: Thank you.

5 Q. Commander, do you see that document in front of you?

6 A. I do.

7 Q. How many pages is it?

8 A. It's three pages.

9 Q. Is that the document you used today to advise the  
10 accused of his rights to attend this commission?

11 A. Yes.

12 Q. Please describe how you used that document and what  
13 you communicated to the accused.

14 A. Met the accused this morning at about 07. He -- he  
15 and I have met many times before so he immediately said, oh,  
16 hello, and I said hi. I said do you want to go today? And he  
17 says, no, I don't want to go today. And I said okay, I have  
18 these rights I need to read to you. He's been read them  
19 before, so he was prepared for it, it seemed.

20 And so I, with the interpreter next to me, read  
21 through the rights, and he signed the -- the Arabic version  
22 and I signed as a witness.

23 Q. So he -- did he voluntarily absent himself?

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1 A. It appeared to me that his absence was voluntary, yes.

2 Q. Okay.

3 ATC [MAJ ROMEO]: Your Honor, permission to retrieve the  
4 exhibit?

5 MJ [COL ACOSTA]: You may.

6 ATC [MAJ ROMEO]: Thank you.

7 I've just retrieved the exhibit and passed it to the  
8 court reporters. I have no further questions, Your Honor.

9 MJ [COL ACOSTA]: Defense, any questions?

10 LDC [MR. NATALE]: No, sir.

11 ATC [MAJ ROMEO]: All right. No further questions for us,  
12 Your Honor, so we do request you make a determination of his  
13 voluntariness to absent himself from the proceedings.

14 MJ [COL ACOSTA]: Okay. Just one second.

15 You're -- for the purposes of this hearing, you're  
16 permanently excused. Do not discuss your testimony or your  
17 knowledge of the case with anyone other than counsel for  
18 either side. You may step down and return to your duties.

19 WIT: All right, sir. Thank you.

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

22 MJ [COL ACOSTA]: The commission finds that Mr. al Nashiri  
23 has voluntarily absented himself from these proceedings.

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1 Thank you.

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

3 MJ [COL ACOSTA]: All right. Since our early stop on  
4 Tuesday, there was word of a -- of a fire in the government's  
5 workspace up north that prevented them from being able to --  
6 to get all of the materials that they needed for yesterday's  
7 proceeding, so we continued yesterday's proceeding until  
8 today.

9 In the interim, also, the commission issued -- well,  
10 the -- the commission issued a ruling in 479C that is  
11 coming -- that is going out now, or it should be being  
12 published as I sit here, and the ruling in 475G, golf, is  
13 awaiting publication right now.

14 In 479C, the commission denied the defense request for  
15 discovery on the special trial counsel, but permits the  
16 defense to make a separate motion on the detailing of the next  
17 special trial counsel.

18 In 475G, the commission ordered the production of the  
19 requested behavioral health records to the commission only by  
20 the end of today for in camera review by the commission.

21 Following the early end, again, to Tuesday's  
22 proceeding, the commission ordered both Captain Mizer and the  
23 defense team to provide their ex parte affidavits to the

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1 commission by the end of business yesterday. Both of them  
2 have complied.

3 Defense, I have a question about yours, and it's just  
4 a procedural one. It has no -- to the commission's review, it  
5 has no confidential client information at all within it or  
6 even, for lack of a better term, attorney work product for any  
7 other material. Is there any reason it should remain an  
8 ex parte filing?

9 ADC [MS. MORGAN]: We would ask that it remain ex parte.

10 MJ [COL ACOSTA]: Why? What's your basis?

11 ADC [MS. MORGAN]: And, Your Honor, we are -- we are in  
12 consult with our supervisory attorneys. At this point we are  
13 requesting legal guidance.

14 MJ [COL ACOSTA]: I understand that. You mentioned that  
15 on Monday as well. I'm just trying to figure out why the  
16 statements, and it's -- and it's purely -- I mean, the  
17 statements that you're making are -- that, you know, generally  
18 reflect the role of Captain Mizer but don't go into any  
19 attorney-client privileged information.

20 ADC [MS. MORGAN]: Sure, Your Honor, but there is a  
21 section in there that does discuss internal team discussions  
22 that we believe is protected as attorney work product.

23 MJ [COL ACOSTA]: I want you to take a look at it and tell

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1 me which redaction -- which paragraph needs to be redacted  
2 before we can discuss it in open -- with -- amongst all the  
3 parties, okay? Take a look at it, figure out which paragraph  
4 that is, and we'll talk from there. Okay?

5 ADC [MS. MORGAN]: Okay. I can provide the commission  
6 that information at the -- oh, I'm ----

7 MJ [COL ACOSTA]: Just -- you don't need to do it -- I'm  
8 not asking you to do it right this moment but during the lunch  
9 recess, perhaps, if you could go over it, take a look and  
10 figure out, so you can tell me which paragraph is the one that  
11 you think is -- that would -- I believe you're classifying as  
12 attorney work product as far as internal discussions, and then  
13 from there perhaps we can discuss the rest of it more openly.

14 ADC [MS. MORGAN]: Copy.

15 MJ [COL ACOSTA]: Thank you.

16 Neither in his latest application to withdraw, nor  
17 during his questioning on Monday did Captain Mizer assert any  
18 potential conflict with his former client arising from the AE  
19 467 filing, which was filed in February of 2022, which is a  
20 motion, again, to suppress the statements of Mr. Nashiri  
21 during a 2007 interview.

22 Additionally, during the discussion of this issue on  
23 Monday, neither party raised the issue of the conflict

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1 potentially arising during the litigation of AE 467 in any  
2 pleading about the conflict or, again, during the discussion  
3 on that matter. The statements of Mr. Hamdan, while not  
4 directly offered, came up during the witness testimony on AE  
5 467 on Tuesday. And AE 467 generally focuses in the greatest  
6 part, Defense, on the voluntariness of the statements of the  
7 accused.

8 Does either party anticipate the issue of Mr. Hamdan's  
9 statements coming up today? Government?

10 TC [MR. MILLER]: No, Your Honor.

11 ATC [LCDR JOLLY]: No, sir.

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

13 MJ [COL ACOSTA]: All right. And to both parties, 467 is  
14 a motion to suppress and the burden is on the government to  
15 prove the admissibility of the statement. Nonetheless, the  
16 defense proceeded first with direct of the witness on Tuesday.  
17 Government, was that an intentional, in that you're not  
18 calling any witnesses, or is that just about the availability  
19 of witnesses and the order and able to proceed with some  
20 efficiency?

21 ATC [LCDR JOLLY]: It's about efficiency, sir. The next  
22 witness the government is calling and the defense ----

23 MJ [COL ACOSTA]: Okay. I'm just making sure, because I

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1 wasn't sure who they -- I think that -- I assumed it was on an  
2 availability issue when the defense went first on the -- with  
3 the -- with a motion upon which the government bears the  
4 burden. Nonetheless, we have four witnesses available today.

5 Government, we're taking up 467.

6 ATC [LCDR JOLLY]: Yes.

7 MJ [COL ACOSTA]: Hold on.

8 DDC [CAPT MIZER]: Judge, just very briefly. I should  
9 have asked yesterday, but it was my intent, obviously, given  
10 the content of my declaration, that that be sealed. And so I  
11 don't know if Your Honor wants me to file a motion to that  
12 effect or if ----

13 MJ [COL ACOSTA]: No, no, no. I stated that it would  
14 be -- that it is under seal. Captain Mizer's ----

15 DDC [CAPT MIZER]: Thank you, Judge.

16 MJ [COL ACOSTA]: ---- own affidavit declaration is -- is  
17 sealed by the commission and it will not be released to either  
18 the defense or the government. It is only for in camera  
19 review, and that seal is -- is in effect until a court of  
20 competent jurisdiction orders that it be opened, so -- all  
21 right.

22 We're on 467 -- oh, sorry. Defense?

23 ADC [MS. MORGAN]: And, Your Honor, we just need to

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1 protect our record. And so the defense would note that we  
2 believe that by proceeding at this point that Mr. al Nashiri  
3 is proceeding with a conflicted counsel and that this will  
4 prejudice his right to receive the effective assistance of  
5 counsel moving forward in any manner in these proceedings. We  
6 would renew our request for a continuance.

7 MJ [COL ACOSTA]: Your request for a continuance is again  
8 denied. As I've stated previously, the -- and even as was  
9 stated during Monday's proceeding with Captain Mizer on the  
10 issue, that it was a -- that it is a potential conflict that  
11 would ripen into an actual conflict that the defense was aware  
12 of that we're not taking up anything on 467.

13 The parties proceeded into an issue into 467 which  
14 implicated that conflict issue without -- without informing  
15 the commission, knowing that they were going to get into those  
16 issues, I believe, prior, and that is why we're -- I'm making  
17 sure that we're not going into any issues involving Mr. Hamdan  
18 today. I still have the issue of the conflict under  
19 consideration.

20 The -- again, the statements of -- of Mr. Hamdan were  
21 implicated, yet not offered, on the issue of AE 467. I will  
22 have more to say about this as we get close -- as I conclude  
23 the inquiry into this conflict issue.

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1 I'll ask defense: Defense, is -- I'm going to need  
2 the -- I'm ordering that the accused be here present tomorrow.  
3 So the parties need to ensure that he's present for tomorrow  
4 morning's proceeding.

5 Again, with the conflict -- as the conflict was  
6 explained, both in Captain Mizer's application and the defense  
7 response, the conflict was framed in such a manner as to be  
8 limited only to the admission of the hearsay statements of  
9 Mr. Hamdan and not into the issues involving AE 467. That is  
10 why the commission believes it's appropriate to go forward on  
11 everything but the admission of Mr. Hamdan's statements, which  
12 I stated we will take up sometime in February and that is why  
13 we are able to proceed.

14 Because the defense -- the remaining defense counsel,  
15 I understand your imputed -- not -- you have no actual  
16 conflict that I can see right now, remaining defense counsel,  
17 because you have no conflicting information and you don't have  
18 this confidential client information that Captain Mizer has.  
19 His still only potentially arises from the information that  
20 could come -- that relates to the admissibility of the hearsay  
21 statements of Mr. Hamdan, and I do not impute anything of that  
22 conflict upon you.

23 That said, we'll take up the -- again, your request

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1 for continuance is denied. We're going to continue with the  
2 witnesses we have today.

3 Government?

4 TC [MR. MILLER]: Your Honor, one issue. May I approach  
5 the podium?

6 MJ [COL ACOSTA]: You may.

7 TC [MR. MILLER]: Out of an abundance of caution, I  
8 anticipate that Mr. Gaudin will be testifying in the third  
9 week of these sessions, and the issue of Mr. Hamdan's  
10 statements may arise in the same manner in which they did with  
11 Mr. McFadden. I just wanted to alert the court that that ----

12 MJ [COL ACOSTA]: I'm aware of that. After what happened  
13 on Tuesday with that issue, I am now tracking that. I  
14 anticipate -- if I can resolve this issue before then, it will  
15 be resolved before ----

16 TC [MR. MILLER]: All right. I just wanted to notify the  
17 court.

18 MJ [COL ACOSTA]: If not, we'll address it before that  
19 comes up.

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

21 MJ [COL ACOSTA]: Thank you.

22 Government, call your witness.

23 ATC [LCDR JOLLY]: The government calls Captain DeLury.

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1           If you would please remain standing and raise your  
2 right hand.

3 CAPTAIN BERNARD EDWARD DELURY, JR., civilian, was called as a  
4 witness for the defense, was sworn, and testified as follows:

5                               DIRECT EXAMINATION

6 Questions by the Assistant Trial Counsel [LCDR JOLLY]:

7       Q. Sir, would you please state your name, spelling your  
8 last name for the record.

9       MJ [COL ACOSTA]: You don't need to spell it. Just state  
10 your name.

11       A. Bernard Edward DeLury, Jr.

12       Q. And you're a resident of New Jersey?

13       A. I am.

14       Q. So, sir, today we want to talk about the Combatant  
15 Status Review Tribunal in March 2007. But before we get  
16 there, I'd like to talk about your education and background  
17 and who you were leading up to March 2007. So if you could,  
18 sir, tell us about your educational background.

19       A. Sure. I got my Bachelor of Arts at St. Charles  
20 Borromeo in Philadelphia, 1982. Then I -- after a brief  
21 period of study abroad, I went to Rutgers Law School in Camden  
22 and graduated with a JD in 1986. While at law school, I  
23 entered the JAG student program and was commissioned an ensign

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1 and then ultimately went on active duty from law school and --  
2 when I graduated, and did my naval training and started my  
3 active duty time of about four years from 1986 to 1990.

4 And after I left the service, I worked in private  
5 industry as an attorney, in-house corporate counsel for  
6 several companies in the gaming industry.

7 And around 2005, I became a Superior Court judge in  
8 New Jersey where I've been serving since. I'm beginning my  
9 18th year in September on the bench. And while in private  
10 work as an attorney, I affiliated with the Reserves and was  
11 selected reservist from 1990 until my retirement in 2011.

12 Q. And, sir, what rank did you retire from the  
13 United States Navy?

14 A. Captain O-6.

15 Q. And that was as a judge advocate?

16 A. I'm sorry?

17 Q. That was as a judge advocate? You were a Navy ----

18 A. It was. I was always a member of the Judge Advocate  
19 General's Corps.

20 Q. So was there an occasion in your military service that  
21 you were at Guantanamo Bay?

22 A. There was, twice. I was given a set of orders in 2004  
23 to be a tribunal member on the CSRTs that were convened then,

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1 and I was there for a couple months. And then I was re-called  
2 in 2007. I guess my orders were in '06 but in through '07 to  
3 go back to Guantanamo to do CSRTs for the high-value  
4 detainees.

5 Q. What is a CSRT?

6 A. A Combatant Status Review Tribunal, an administrative  
7 proceeding, nonadversarial, fact finding for the tribunal  
8 members having received evidence and information to make a  
9 determination by a preponderance of the evidence as to whether  
10 or not the detainee presented to the tribunal should be  
11 classified as an enemy combatant.

12 Q. Sir, how did the CSRT process work? You were there in  
13 2004 and then again in 2007; and for 2007, it was related to  
14 the high-value detainees to determine their status and whether  
15 or not they were enemy combatants.

16 A. Correct.

17 Q. So if you could walk us through, please, sir, what  
18 that looked like, the whole process. So it's a hearing. Tell  
19 us about that day. So this is March 2007 for the accused  
20 CSRT.

21 A. Sure.

22 Q. Let's talk about that day. What's the room look like?

23 A. So going through the hearing process for this day in

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1 particular or just generally speaking?

2 Q. Let's go ahead and talk about the one for the accused  
3 in March 2007.

4 A. Okay. So we arrived in Guantanamo over a period of  
5 time and reported in and then were -- I was assigned to a  
6 tribunal panel and was given the assignments of the detainee  
7 cases that we would be hearing as a tribunal. We began by  
8 reviewing the instructions regarding the hearing process.  
9 There had been a change from '04 to '06, so we -- I was  
10 reorienting myself as to the process.

11 We received some basic information about the  
12 allegations that the recorder was going to be making in the  
13 unclassified summary of information, and then responded to  
14 things like witness requests and the like in advance of the  
15 hearing. And then the hearings were scheduled and we  
16 conducted them.

17 They occurred at Camp Delta, the camp on the -- on  
18 Guantanamo Naval Station and there was a hearing room there  
19 where we conducted the hearings.

20 Q. So you received instructions about how to perform the  
21 hearing. And what was your role there, sir, in the hearing?

22 A. The -- my second trip, I was the presiding officer,  
23 the president of the tribunal and the judge advocate member of

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1 the tribunal. I was an 0-6 at the time.

2 Q. What's the room look like for these hearings, the  
3 hearing room?

4 A. The room? Not dissimilar from what we're in today:  
5 Tables, chairs. It was a prefab room, as I recall, so like a  
6 couple of large prefab trailers put together. In the room  
7 there was a table for the presiding officer and the two other  
8 members. And then perpendicular to that and a little removed  
9 was a table for the recorder and the reporter. And then in  
10 the center of the room was, I believe, a couple of chairs and  
11 maybe a small table for the detainee, the personal  
12 representative, and the translator. And that was it.

13 I don't remember if there was any seating in the  
14 hearing room itself. There was a partition, a one-way glass  
15 that I recall, and on the other side I believe there was some  
16 gallery seating in there.

17 Q. Let's go over the roles of each of those participants.

18 A. Sure.

19 Q. So you're the presiding officer.

20 A. Correct.

21 Q. There are two other members with you on that panel.

22 A. That's right.

23 Q. There's a recorder. Now, what is the recorder's job?

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1       A. The recorder's job was to present the government's --  
2 the government's case, the information that they wanted the  
3 tribunal to consider in order to make a determination  
4 regarding the status of the detainee. So it was the  
5 recorder's job to marshall and produce the unclassified  
6 summary that would be provided to the personal representative  
7 and the detainee for their review before the hearing, and also  
8 to marshall the classified evidence that would be presented to  
9 the tribunal in a classified session of the tribunal.

10           And the reporter was the -- usually an enlisted person  
11 who was there to make sure the tape recorder was going and to  
12 handle the paperwork that came from the recorder or anybody  
13 else.

14       Q. So this proceeding was audio-recorded?

15       A. It was audio-recorded.

16       Q. And then after there was an audio recording, a  
17 transcript was made of the proceeding?

18       A. That's correct.

19       Q. All right. So you described the recorder and the  
20 reporter and then there is a counsel for the respondent? The  
21 counsel for the detainee, who is this person?

22       A. There's no counsel for the detainee. The instruction  
23 provided there would be a personal representative who,

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1 specifically in the instruction said, was not to be an  
2 attorney, a judge advocate. And that personal representative  
3 was assigned to the detainee to assist the detainee through  
4 the tribunal process, to determine whether or not the detainee  
5 wanted to participate, whether the detainee wanted to provide  
6 a statement in advance, respond to the unclassified summary in  
7 any way, seek witnesses to attend. And the personal  
8 representative, usually operating with a translator to assist  
9 in communication with the detainee, would -- would perform  
10 those functions.

11 Q. So let's talk about the atmospherics.

12 A. I'm sorry?

13 Q. The atmospherics. Let's talk about the atmospherics.  
14 So before this proceeding begins, you've reviewed  
15 instructions. Have you reviewed any evidence before that  
16 morning?

17 A. To the extent that there was a witness request, we  
18 would have had the unclassified summary, the ----

19 Q. The allegations?

20 A. Allegations, the A through CC or whatever it was that  
21 the government was providing to the -- both to the detainee,  
22 the personal representative, in order to determine whether or  
23 not witness requests should be reviewed or -- or acted on in

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1 some way.

2           So we would review that. We'd review the instruction  
3 and be prepared for the hearing when it would occur. I would  
4 not have seen any evidence as such, certainly no classified  
5 evidence, before the hearing began.

6           Q. And you had -- aside from the allegations that you  
7 were going to be evaluating at this board, you had no prior  
8 information about the detainee when you came in that morning?

9           A. That's correct.

10          Q. All right. So how does it start? Is he already in  
11 the room or are you in the room first?

12          A. The -- the guide for conducting the hearing proceeded  
13 in a couple of steps. The first step was the tribunal coming  
14 into the room, so the three members, where the reporter and  
15 the recorder were present. There was a brief recitation of  
16 the name of the case and why we were here, date, time, and  
17 participants. Oaths would have been administered to some of  
18 the participants. I don't remember exactly who was sworn at  
19 that point. And then a brief recess was taken.

20                 The tribunal would leave the room. And then during  
21 that recess the detainee would be brought into the room. And  
22 then we would come back in and begin the unclassified session  
23 in the presence of the detainee.

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1 Q. How did the detainee look when you reentered the room?  
2 And I'm talking about the accused in this case specifically,  
3 Nashiri. How did he look when you reentered the room?

4 A. He looked alert. He looked calm. He didn't appear to  
5 be in any distress. He may have been -- I don't have a clear  
6 recollection as to whether or not he was wearing restraints of  
7 any kind. I believe he was -- belly chains and -- and perhaps  
8 on his ankles. But I have a recollection that his hands were  
9 free because I know there were papers being handled and being  
10 passed to him, but I can't say with certainty.

11 But he appeared to be calm and oriented. And we began  
12 the -- we began the hearing almost immediately by me  
13 addressing him through -- directly, but with the assistance of  
14 a translator.

15 Q. And we're going to play that audio in just a moment,  
16 but before we do, I just want to drill down on that.

17 So did the detainee appear physically healthy?

18 A. He did. I -- it was -- I didn't remark on anything  
19 beyond that he was present and appeared to be alert and  
20 cooperative with the process and was interacting appropriately  
21 with me and the rest of the tribunal participants.

22 Q. And in March 2007, you had had significant experience  
23 evaluating someone's status who appeared before you, even as a

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1 judge, right?

2 A. Sure. I'd been at that point a judge for about two  
3 years, a civilian judge. I was a military judge in my reserve  
4 capacity, but I was on the appellate bench, so not a lot of  
5 interaction with litigants during that process, but  
6 interacting on a daily basis with litigants, detained  
7 defendants, attorneys, witnesses, participants. So, yes, I  
8 was accustomed to evaluating people as they participated in a  
9 formal setting such as a court proceeding.

10 Q. So before this proceeding begins, you have no concerns  
11 about his ability to participate?

12 A. No. I would have been looking, as I would have done  
13 in my other capacities, looking to make sure that everyone is  
14 oriented to place and time and the appropriateness of what was  
15 occurring. And if there was any concern in my mind that  
16 someone either wasn't participating appropriately or didn't  
17 understand what was going on, I would have taken time to make  
18 sure that I -- I assured myself of that and the members could  
19 be assured of it as well.

20 Q. Yes, sir. And the accused had certain rights at this  
21 proceeding?

22 A. I'm sorry?

23 Q. The accused had certain rights, or the detainee had

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1 certain rights at this proceeding?

2 A. The detainee has the rights described in the process  
3 for conducting CSRTs, right to be present, the assistance of  
4 the personal representative, the assistance of a -- of a  
5 translator, to make a statement if he chose to do so, to make  
6 it either sworn or unsworn, and if he would -- wanted to, to  
7 submit to questioning by the members, to call witnesses that  
8 were otherwise available and relevant to the proceedings.

9 So, yes, there were an outline of process rights that  
10 were described in the instruction.

11 Q. And you read those rights to him, sir?

12 A. I did.

13 Q. If I could please have Appellate Exhibit 467C  
14 Attachment N, that's the audio recording of the Combatant  
15 Status Review Tribunal, at 4 minutes and 50 seconds, please.  
16 [Audio from AE 467C Attachment N played.]

17 A. That's my voice.

18 Q. So, sir, in the interim, in the middle of that audio,  
19 it sounded -- could you hear the accused's voice? Could you  
20 hear the detainee's voice?

21 A. I could hear the detainee's voice, yes.

22 Q. And he was asking basically a clarifying question.

23 A. He was.

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1 Q. Did it seem to you that he understood the rights that  
2 you provided him?

3 A. It appeared to me that he understood what was going on  
4 through the benefit of the -- of the translator and was  
5 responding to both me and to the translator.

6 Q. Understanding that you had the opportunity to review  
7 the transcript yesterday, which is Appellate Exhibit 467C  
8 Attachment M, and the audio is N, the government  
9 representative then laid out his case, right?

10 A. That's correct.

11 Q. What was the form of that?

12 A. The form of it?

13 Q. Yes, sir.

14 A. Through the guide process, I would then have called  
15 upon the recorder to outline the unclassified summary for --  
16 for the record, and he did that.

17 Q. So basically, he just read off a series of facts that  
18 he believed supported holding the accused as an enemy  
19 combatant?

20 A. That's correct.

21 Q. At that point, did the detainee have an opportunity to  
22 challenge those facts or provide his own explanation of what  
23 occurred?

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1       A. It wasn't in, you know, a -- a tit for tat or back and  
2 forth. After the presentation of the unclassified summary,  
3 then the -- the proceeding turned to the detainee and the  
4 detainee was asked if he would -- wanted to respond to it or  
5 make a statement of his own or provide any additional  
6 information to the tribunal.

7       Q. And Nashiri elected to do so?

8       A. He elected to do so, yes.

9       Q. So he had the assistance of a personal representative.

10      A. He did.

11      Q. He chose to have that personal representative read you  
12 his responses to each of the allegations against him.

13      A. That's how it proceeded, yes.

14      Q. That was prepared in advance?

15      A. It was. I don't have a recollection whether it was  
16 handwritten or typed out, but it was clearly prepared and was  
17 being read from by the personal representative and then  
18 pausing for -- being read in English and being -- and pausing  
19 for translation for the benefit of the detainee.

20      Q. So choosing to participate and choosing to use  
21 assistance of this personal representative, he provided  
22 responses to each of the allegations against him?

23      A. He did.

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1 Q. In some instances, he denied an allegation outright?

2 A. Based on what the allegation made by the recorder was,  
3 it was an outright denial in some circumstances that that was  
4 not what occurred or he wasn't involved in that or didn't know  
5 anything about it.

6 Q. In some instances, he denied the rationale, the  
7 reasoning behind the allegation, but admitted to certain facts  
8 like asking Mr. Badawi, for example, to purchase a boat for  
9 him?

10 A. He did. He acknowledged some of the information and  
11 then had a -- an explanation or his own version of what those  
12 facts meant to him.

13 Q. And regarding the attack on USS COLE, he denied any  
14 responsibility for it but admitted to being in Afghanistan  
15 when he heard about the attack occurring?

16 A. He did say that, yes.

17 Q. And that was in the written response that his personal  
18 representative provided?

19 A. He had indicated -- that's true. He indicated in his  
20 response that he was in Afghanistan when he had heard of  
21 the -- the attack on the COLE.

22 Q. After the personal representative read to you the  
23 prepared statement, was there an opportunity for you and the

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1 other panel members to ask the detainee questions?

2 A. There was. There was another explanation as to where  
3 we were in the process for the detainee's purposes, and then I  
4 asked if he would -- wanted to say anything further or add to  
5 the statement that was made for him on behalf -- on his behalf  
6 by the personal representative. He acknowledged that it was  
7 his statement. And then there were questions from myself and  
8 the other members that he was agreeable to responding to.

9 Q. And so he chose to do that?

10 A. He did.

11 Q. What was the tone of the questions, the questioning  
12 that the members and you were asking the detainee?

13 A. The tone?

14 Q. Yes, sir.

15 A. They were businesslike. They were direct. Inquiring,  
16 cordial. It was -- there was not a heated exchange, by any  
17 means. It was, I would say, professional and courtroom-like,  
18 in my experience.

19 Q. Would you characterize it as follow-up questions based  
20 on what he provided through his personal representative?

21 A. I read it yesterday, so I don't recall exactly the --  
22 the every line. But it was largely follow-up and largely  
23 exploring what his relationship, if any, was to the

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1 participants in the -- the COLE incident as described in the  
2 unclassified summary, his alleged involvement in it. So it  
3 was follow-up along those lines, yes.

4 Q. Yes, sir. And if at any moment you would like to  
5 refresh your recollection, I've got a copy of the transcript.  
6 So if you want it, I'm happy to hand it to you.

7 A. Thank you.

8 Q. Yes, sir. So some of the information that the  
9 detainee volunteered was accepting money from Usama bin Laden?

10 A. He did indicate that, yes.

11 Q. Large sums of money?

12 A. As I recall, about half a million dollars over time.

13 Q. And the members had follow-up questions about that?

14 A. They did.

15 Q. Because it surprised them that someone could so easily  
16 access Usama bin Laden?

17 A. It was. And I remember one questioning from reviewing  
18 the transcript the other day that he had indicated that he was  
19 one of the youngest millionaires in the area, and that -- the  
20 question from one of the members was, well, if you were a  
21 millionaire, why would you need to obtain money from Usama  
22 bin Laden.

23 Q. So in this free-flowing exchange, the detainee goes

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1 back and discusses again that he was in Afghanistan at the  
2 time of the COLE bombing and indicates he heard about it at  
3 midnight.

4 A. That's what he said.

5 Q. And then several minutes later, the members are asking  
6 about his involvement with Usama bin Laden and his  
7 relationship with Usama bin Laden, and he indicated that Usama  
8 bin Laden was surprised when he heard about the COLE attack at  
9 midnight in Afghanistan.

10 A. That's what he said, yes.

11 Q. So, again, as he's explaining these things, they're  
12 thoughtful responses?

13 A. I'm sorry?

14 Q. They're thoughtful responses that he ----

15 A. They were follow-up responses, yes.

16 Q. They're thoughtful responses.

17 A. Certainly. I mean, they were appropriate and -- and  
18 they were responsive. They weren't off topic. They were --  
19 appear to me to be attempting to answer the questions posed.

20 Q. It's not as though when presented with the authority  
21 of the panel, he saw you and immediately confessed all of his  
22 conduct or the allegations of the government?

23 A. It certainly didn't appear to me that way. It was an

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1 exchange between somebody asking questions more like an  
2 interview process almost and not unlike what we're doing right  
3 now.

4 Q. Yes, sir. And so in some instances, again, he's  
5 denying and in some instances he's admitting some facts but  
6 explaining some others away?

7 A. It was my view, at least as the presiding officer, to  
8 give him the opportunity to say whatever he wanted to say.

9 Q. Yes, sir. And some of his responses indicated that he  
10 understood the nature of legal proceedings because he's using  
11 language like, well, that's just hearsay.

12 A. I was surprised to -- when I reread that the other day  
13 to see the word "hearsay" again. I obviously read it when I  
14 saw it 15 years ago, but that it was the use of a technical  
15 legal term that -- I was -- I was surprised to see the use of  
16 a word that has a technical meaning and used appropriately.

17 Q. All right. So at the very beginning of the statement  
18 read by the personal representative, he volunteers, the  
19 detainee does, that he made confessions under pressure he  
20 received from the CIA. And in your follow-up questions, you  
21 asked him some questions about that.

22 A. I did.

23 Q. Why?

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1       A. As part of our briefing before we began the CSRTs, we  
2 were advised of the Detainee Treatment Act and were made aware  
3 of it more so to the extent that we might not have been  
4 through our previous duties and responsibilities or just  
5 general knowledge of the law, to be aware that allegations  
6 regarding the treatment of the detainees may be made by the  
7 detainee and that they were to be followed up to understand  
8 what happened, if what was said under duress -- if that's how  
9 it was described; I believe this detainee described it as  
10 torture in his own words -- and then to follow up on those  
11 topics with the detainee to understand whether or not he was  
12 speaking under any kind of duress today.

13       And -- and there was a -- a series of questions, which  
14 I don't recall off the top of my head, but that I know I  
15 addressed in the -- in the transcript that was based on the  
16 Detainee Treatment Act and what I wanted to be assured of  
17 based on his allegations.

18       Q. And he was advised of that right and we listened to  
19 that just a few moments ago.

20       A. He was.

21       Q. So you were specifically trying to preclude any  
22 evidence or information that might have been coerced or  
23 produced under duress from entering this administrative

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1 proceeding?

2 A. That was my view.

3 Q. Sir. And as a judge and then also -- as a judge  
4 advocate in the United States Navy, you're familiar, I'm sure,  
5 with a very robust -- the care inquiry during presentencing  
6 when taking a guilty plea inquiry?

7 A. I am familiar with the need to make a very full record  
8 and to assure -- the court has to assure itself that what is  
9 being presented to the court is being done without threat,  
10 without duress, without coercion, that it's being done  
11 knowingly, intelligently, and voluntarily.

12 Q. And in March 2007, you presided over how many trials?  
13 Or let's just say guilty plea inquiries in New Jersey, for  
14 example.

15 A. Oh, guilty plea inquiries by that point in 2007,  
16 hundreds of them as a civilian judge, and probably -- maybe a  
17 half a dozen testimonial hearings at that point, full  
18 testimonial hearings like we're doing now.

19 Q. So you had experience in assessing a person when  
20 they're standing there in front of you and whether or not  
21 they're making a voluntary statement?

22 A. And, of course, I -- you know, I learned how to do it  
23 at the beginning as a judge advocate and taking guilty pleas

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1 as a -- a member of the military that -- the court and the  
2 parties have to be assured that the accused is -- understands  
3 what's going on and is making a full and free statement.

4 Q. How long would you say this administrative hearing  
5 was?

6 A. This one ----

7 Q. Yes, sir, this CSRT.

8 A. ---- with al Nashiri?

9 Approximately two hours with brief recesses during the  
10 setting up of the hearing.

11 Q. And you had the opportunity, obviously, to observe the  
12 detainee?

13 A. I did.

14 Q. And throughout the course of the exchange, from when  
15 his personal representative is making the statement on his  
16 behalf, or during the exchange with the members when he's  
17 answering questions, does his demeanor change at all?

18 A. There was nothing between the -- the exchange of the  
19 detainee with the entire proceeding that gave me any cause for  
20 concern that other -- that he was participating knowingly,  
21 intelligently, and voluntarily with the process.

22 Q. Did he appear fearful at any time?

23 A. Did not appear fearful to me.

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1 Q. Did he appear depressed?

2 A. Depressed? No.

3 Q. Did it seem as though he wasn't really engaging with  
4 the members?

5 A. No. I mean, he was -- he was looking right at me, I  
6 was looking at him. I know it's kind of basic, but in order  
7 to -- in my view, to assess credibilities, when I instruct  
8 people, I try to look at them and see how they're responding  
9 to questions.

10 Q. So he seemed to be present and engaging with you?

11 A. He was present in the moment, yes.

12 Q. He did not appear to be dissociating, for example?

13 A. No.

14 Q. It seemed like he was there?

15 A. He -- he was participating in the process.

16 Q. How would you characterize his intelligence after  
17 interacting with him?

18 A. He appeared to be of normal intelligence. I'm not a  
19 psychologist, obviously, but he -- his answers were  
20 appropriate. They were responsive to the questions. He  
21 followed up on certain points. His intelligence seemed good.

22 Q. And he seemed to understand the nature of the  
23 proceedings?

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1 A. He did.

2 Q. Did he appear anxious at all?

3 A. Didn't appear to be anxious to me, no.

4 Q. And even though this is an administrative hearing and  
5 the rules of evidence didn't apply, it was important to you to  
6 get facts as they actually were?

7 A. It was a -- in my view, it was a fact-acquiring  
8 proceeding, and obviously, we're going to be presented with  
9 certain materials. The tribunal, while it had the ability to  
10 call witnesses, I believe, if I'm remembering the instruction  
11 correctly, we were looking at the record that was being  
12 created in front of us.

13 Q. But at the time that you're interacting with the  
14 detainee, you don't have any outside information. You've only  
15 got the allegations from the government representative and  
16 what the personal representative has told you on behalf of the  
17 detainee?

18 A. Until the unclassified session was ended, I had no --  
19 we had no additional information about the proceeding.

20 Q. Is there any question in your mind as to whether he  
21 was making voluntary statements that day?

22 A. No question in my mind that the exchange he had with  
23 the tribunal was made knowingly, intelligently, and

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1 voluntarily.

2 Q. Any question in your mind about his ability to provide  
3 voluntary consent to participate in that proceeding?

4 A. He appeared to me to be able to do so.

5 Q. And, sir, so you were on a panel of CSRTs, so you  
6 presided over others as well, and other detainees chose not to  
7 participate or ----

8 A. Yeah. It was a -- it was a mix. Some chose to  
9 participate ----

10 DDC [CAPT MIZER]: Object to relevance, Judge.

11 A. I'm sorry?

12 MJ [COL ACOSTA]: I'm sorry. Defense -- Government, the  
13 objection is relevance from the defense.

14 ATC [LCDR JOLLY]: Yes, sir. It goes to ----

15 MJ [COL ACOSTA]: What's the relevance of other  
16 proceedings?

17 ATC [LCDR JOLLY]: Yes, sir. It goes to the knowledge of  
18 the witness that -- and in forming his opinion that this was  
19 voluntary and that the accused was participating voluntarily,  
20 because other people could absent themselves and choose not to  
21 participate if they so desired.

22 MJ [COL ACOSTA]: Overruled. I'll allow a brief inquiry  
23 into this.

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1           Go ahead.

2           A. The question, if you'd repeat it, please.

3           Q. Of course. Other detainees chose to participate or  
4 not?

5           A. During my trip in 2007, I conducted seven hearings.  
6 There were 14, I believe, high-value detainees split between  
7 two panels, so I did seven. Some showed up and participated  
8 like al Nashiri did. Some chose not to show up and, as I  
9 recall, some might have shown up but didn't make a statement  
10 and just were there, if I'm remembering it correctly.

11          Q. So based on the accused's election of rights form,  
12 which you covered at the very beginning of this proceeding,  
13 and then based on the rights that you read to him and your  
14 understanding that other detainees chose not to show up, it  
15 was your understanding that he was there voluntarily that day?

16          DDC [CAPT MIZER]: Judge, at this point I'm going to  
17 object to leading.

18          MJ [COL ACOSTA]: Well, I think that that horse has left  
19 the barn about 85 questions ago.

20          DDC [CAPT MIZER]: Yes, Judge.

21          MJ [COL ACOSTA]: But sustained.

22               Go ahead.

23          Q. Did you have any question as to whether he was

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1 participating voluntarily that day?

2 A. There was no question in my mind.

3 Q. At the conclusion of the open session, you gave the  
4 detainee the opportunity to present other evidence?

5 A. I did.

6 Q. If we could please go back to that. I'd like to have  
7 the audio at 1 hour and 55 minutes and 22 seconds. For the  
8 record, that's AE 467C Attachment N.

9 [Audio from AE 467C Attachment N played.]

10 Q. So, sir, you had the opportunity to review the  
11 transcript?

12 A. I have.

13 MJ [COL ACOSTA]: Counsel, I'm just -- I'm assuming you're  
14 asking about the transcript, because I don't know that  
15 anybody -- I certainly could not understand a single word that  
16 was being said by the translator in English there. And it  
17 wasn't because of anything -- it was -- it was just the static  
18 in the audio quality, I couldn't understand it, because I  
19 believe I know -- I think that translator is still working, if  
20 I recognize the voice, but I could not understand anything  
21 that was said there.

22 ATC [LCDR JOLLY]: I could play it again, sir. We can  
23 listen to it a couple of times.

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1           The point I'm trying to make, and we've highlighted  
2 this in our response to the defense motion, is that the  
3 transcript reflects that the detainee requested one witness,  
4 but it's a different name than is actually in the audio. And  
5 I would like the witness to establish that since he was there  
6 in the room, sir. I could ask him about it ----

7           MJ [COL ACOSTA]: Well, just ask him the question ----

8           ATC [LCDR JOLLY]: Yes, sir.

9           MJ [COL ACOSTA]: ---- sir, was there a witness requested?

10          Q. You just heard the audio. At the conclusion of the  
11 evidence and ----

12          A. As I -- I heard the audio, and it wasn't overly clear  
13 in here, although I listened to it before. And I read the  
14 transcript again yesterday, and the transcript indicated that  
15 he was making a witness request, which I determined was  
16 untimely, and the transcript referred to al Owhali as the  
17 witness that he was requesting.

18          Q. And is that accurate?

19          A. It wasn't accurate based on my review and listening to  
20 it earlier. It appeared that he was asking for, at least and  
21 what the translator said was, al-Badawi.

22          Q. So understanding that the exhibit list, the  
23 government's exhibit list that they provided you after this

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1 session with the -- the detainee before we move on, so that --  
2 that concluded it? You determined ----

3 A. That concluded the unclassified portion. We took a  
4 recess and I believe the detainee was removed from the room at  
5 that time and we either began immediately the classified  
6 session or we took a break and came back.

7 Q. Before he departed, did he appear fearful?

8 A. He did not appear fearful. He appeared as he appeared  
9 throughout the whole hearing, calm and cooperative and engaged  
10 in the hearing.

11 Q. So he leaves and then you review evidence?

12 A. That's correct.

13 Q. And some of the evidence that you reviewed included  
14 the 25 January 2001 statement of Badawi to the FBI?

15 A. I believe it was marked as recorder 7 at the time,  
16 based on my review yesterday.

17 Q. And for the record, that's also at AE 327A  
18 Attachment B, and that's the FD-302, the FBI's interview of  
19 Badawi on 25 January 2001.

20 So, sir, did that interview of Badawi factor into your  
21 determination about whether the accused is an enemy combatant?

22 A. The information contained in the 302 provided by  
23 al Badawi, in our judgment during our deliberations, was very

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1 useful and important information in helping us make our  
2 determination regarding his status.

3 Q. And it's rather lengthy, that report?

4 A. It was.

5 Q. Like 30-something pages?

6 A. 30-plus pages.

7 Q. And it chronicles the detail of the co-conspiracy --  
8 excuse me, the conspiracy between Badawi and the accused?

9 DDC [CAPT MIZER]: Objection, leading ----

10 A. As it was ----

11 DDC [CAPT MIZER]: ---- again, Judge.

12 MJ [COL ACOSTA]: Sustained.

13 WIT: I'm sorry.

14 MJ [COL ACOSTA]: Don't answer the question.

15 WIT: I won't, Judge. Thanks.

16 Q. In this lengthy interview, Badawi talks about the  
17 accused asking him to buy a boat.

18 A. He did.

19 DDC [CAPT MIZER]: Same objection, Judge.

20 MJ [COL ACOSTA]: Sustained.

21 Q. Did that report that you read tend to corroborate the  
22 statements that the detainee made to you earlier that day?

23 A. It -- there was intersections between what he had told

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1 us in his unsworn -- or sworn statement and in response to  
2 questions. Certainly intersected with the information  
3 provided to the FBI by al Badawi as to where he was, the  
4 relationship to the acquisition of a -- of a boat, the  
5 purchase of cars, some of his travel.

6 Q. And understanding that the audio is difficult to hear,  
7 but it's your understanding that Badawi is the same person  
8 that the detainee wanted presented to participate?

9 A. That's what -- that -- in my view, that's what was  
10 said in the -- in the hearing room. The transcript doesn't  
11 reflect that.

12 ATC [LCDR JOLLY]: Sir, if I could have just a moment?

13 MJ [COL ACOSTA]: You may.

14 [Pause.]

15 ATC [LCDR JOLLY]: All right. We have no further  
16 questions for open session, sir.

17 MJ [COL ACOSTA]: All right.

18 Defense, cross?

19 DDC [CAPT MIZER]: Judge, I don't know at the outset if  
20 it's possible to avoid a closed session by using the ELMO to  
21 show the witness two documents that I would like to discuss,  
22 if they're not published to the gallery. I expect his answers  
23 are going to be "I don't know." I don't know if -- if that

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1 can be done.

2 I would hate to have to set up a closed session to  
3 review two documents for three or four questions.

4 MJ [COL ACOSTA]: Can you show them to the government and  
5 let's ----

6 DDC [CAPT MIZER]: I can.

7 MJ [COL ACOSTA]: ---- see if we can resolve this?

8 Yeah. Go ahead, please.

9 [Counsel conferred.]

10 ATC [LCDR JOLLY]: And if we could have the Bates numbers  
11 for those, that would be helpful.

12 MJ [COL ACOSTA]: Your co-counsel will provide it to you  
13 in just a moment.

14 DDC [CAPT MIZER]: Judge, I apologize. For the record,  
15 I'm referring to Appellate Exhibit 467, page 981, and then  
16 Appellate Exhibit 467, 983.

17 MJ [COL ACOSTA]: 981 and 983.

18 [The military judge conferred with courtroom personnel.]

19 MJ [COL ACOSTA]: Okay. Government?

20 TC [MR. MILLER]: Judge, could we just have a second?

21 ATC [LCDR JOLLY]: I'm sorry.

22 MJ [COL ACOSTA]: You may.

23 [The military judge conferred with courtroom personnel.]

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1 MJ [COL ACOSTA]: Hold on. Nothing you're saying is  
2 getting recorded on the record here, and I -- I appreciate  
3 working through things, but -- Government, any issue?

4 TC [MR. MILLER]: We don't think so. No, Your Honor.

5 MJ [COL ACOSTA]: I need you to not know so.

6 TC [MR. MILLER]: As proposed, we think it's going to be  
7 fine.

8 MJ [COL ACOSTA]: Okay. With that rousing endorsement by  
9 the government, what I think -- what I'm ordering is that this  
10 can be published to counsel table. My -- my court reporter,  
11 who sits in front of me, can control certain amounts, but I  
12 know that the gremlins in the back room that control it going  
13 up to the RHR, this is to go to the witness and to counsel up  
14 there only. This is not to be published to the public viewing  
15 because it is my understanding it is classified. We're going  
16 to show it.

17 Go ahead, Defense.

18 DDC [CAPT MIZER]: Thank you.

19 CROSS-EXAMINATION

20 Questions by the Detailed Defense Counsel [CAPT MIZER]:

21 Q. Good morning, Captain. How are you?

22 A. Good morning, Captain. I'm well. Thank you.

23 Q. You mentioned taking guilty pleas and I think my

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1 friend from the government discussed care inquiries. In the  
2 context of guilty pleas, does that involve informing a  
3 defendant of his or her rights?

4 A. It does.

5 Q. Does it typically, in your experience, involve the  
6 right to testify or to say nothing at all?

7 A. It does. In my civilian court, I advise them of the  
8 constitutional rights that they're waiving by entering a  
9 guilty plea.

10 Q. And among those constitutional rights they would be  
11 waiving would be the right to confront one's accusers in  
12 court?

13 A. Confrontation is one of the rights I advise a criminal  
14 defendant of.

15 Q. And please, apologize, Captain, that I'm asking you  
16 some obvious questions ----

17 A. It's quite all right.

18 Q. ---- but I'm building a record, and I'm sure you're  
19 familiar with that.

20 A. Yes, sir.

21 Q. And the purpose is -- you said on direct, was -- of  
22 conducting these inquiries was to determine if the accused is  
23 making a knowing and voluntarily waiver of those rights,

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1 right?

2 A. That's correct.

3 Q. Would a defendant's educational background be relevant  
4 to you in assessing the voluntariness of a waiver?

5 A. It is. I ask, in my inquiries in civilian court to  
6 the extent of one's education, how far did you get with your  
7 education, sir, is usually what I ask.

8 Q. And so if a defendant didn't graduate high school,  
9 say, until he was 25, would you want to know that in assessing  
10 voluntariness?

11 A. I'd want to know it, basically because I'm going to be  
12 using some terms that are -- may need explanation. So I gear  
13 my inquiry based on what I perceive to be the understanding  
14 and the capacity of the criminal defendant.

15 Q. But you weren't given any information during the CSRT  
16 about Mr. al Nashiri's educational background, were you?

17 A. I was not, no.

18 Q. Let's talk about intelligence, because Commander Jolly  
19 asked about intelligence. If a psychologist had assessed the  
20 defendant as unintelligent, or I'll pull a word from the  
21 ether, a pile of rocks, would you want to know that?

22 A. If it were available, yes. But it depends on the  
23 context, obviously. If I'm making a determination as to

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1 competency to proceed, I'd want to know certain things. If I  
2 was making an inquiry with respect to accepting a guilty plea  
3 where -- so it's -- it's a different series of questions.

4 It's a different inquiry. It's certainly important  
5 information that I would want to know if the defendant were  
6 not going to be competent to answer questions appropriately.

7 Q. Okay. Another obvious question for you, Captain.

8 You're familiar with Miranda v. Arizona, aren't you?

9 A. I am.

10 Q. And would you agree with me that the purpose of  
11 Miranda is to inform the layman of his rights as he determines  
12 whether to talk with law enforcement?

13 ATC [LCDR JOLLY]: Objection.

14 MJ [COL ACOSTA]: Basis?

15 ATC [LCDR JOLLY]: Relevance, sir. Miranda wasn't read to  
16 the accused.

17 MJ [COL ACOSTA]: Defense?

18 DDC [CAPT MIZER]: I'm going to get there, Judge. I'm  
19 just asking the witness if Miranda is a useful tool.

20 MJ [COL ACOSTA]: Overruled. I'll allow it.

21 Go ahead.

22 A. Yes, it is. It's important. It's certainly in my  
23 civilian practice where Miranda does apply to -- if there was

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1 a question regarding the voluntariness of a statement given,  
2 custodial statement given, then, yes, it comes into play.

3 Q. Obviously, Miranda includes the right to remain  
4 silent?

5 A. It does.

6 Q. And it includes the right to counsel; is that correct?

7 A. It does.

8 Q. Okay. Captain, I'd like to talk to you now about the  
9 Combatant Status Review Tribunal, and I'm not interested in  
10 2004. What I'm interested in is 2007.

11 Can you tell the military commission how you got  
12 involved in the CSRTs?

13 A. Yeah. To the best of my recollection, because I had  
14 been involved in '04 and they were looking to stand up  
15 commissions -- not commissions, I'm sorry -- tribunals for  
16 this process, I believe OARDEC reached out to people who had  
17 served before and I was among them.

18 Q. You got a phone call?

19 A. I -- I did. I don't remember from whom, but I got a  
20 phone call sometime in the late fall, early winter of '06 for  
21 a set of orders if I was interested in accepting them.

22 Q. And you were asked to come down to Washington or  
23 Crystal City?

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1       A. Crystal, yeah, I think so. That was where it  
2 initially began. And then I had to go to some -- I think  
3 Florida to prepare for out-country transit and then on to  
4 Guantanamo from there.

5       Q. And when you went to Washington, D.C., do you recall  
6 being given a white paper on high-value detainees?

7       A. I'd have to see it. I don't remember, Captain. I  
8 know we were briefed about what we were going to be -- who we  
9 would be seeing as high-value detainees.

10      Q. Do you recall being given a fact sheet on each of the  
11 14 high-value detainees attached to a white paper?

12      A. I don't remember, Captain. I'm sorry.

13      Q. And that's perfectly fine. I appreciate it.

14               When did you first travel to Naval Station Guantanamo  
15 Bay for the second set of CSRTs?

16      A. Late December, early January if I'm not mistaken.

17      Q. And so you arrive in early January, but you don't  
18 receive an appointment letter until 22 February 2007. Does  
19 that sound correct?

20      A. It sounds right. There was, I recall, an earlier  
21 appointment order, but then there was a change in personnel.  
22 Somebody either couldn't arrive or had to leave, and that a  
23 new appointment order was drafted with -- with a different

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1 name on it. That's my recollection.

2 Q. Do you recall the reason for the delay? I mean, as  
3 early -- late December or early January arrival, and you don't  
4 get an appointment until two months later?

5 A. Other than that the government was getting ready to  
6 present its case, no.

7 Q. Did anyone ever tell you what was happening with  
8 Mr. Nashiri between January and February of 2007?

9 A. If it was anything, it was about scheduling. Nothing  
10 specific to him.

11 Q. Okay. You were eventually detailed, as you testified,  
12 as the president of the CSRT for seven detainees; that's  
13 right?

14 A. That's correct.

15 Q. That included the five 9/11 defendants?

16 A. That's correct.

17 Q. And it obviously included Mr. Nashiri?

18 A. It did.

19 Q. Was some of the information that you were given  
20 regarding Mr. al Nashiri classified?

21 A. It was. There was a classified proceeding.

22 Q. Is it fair to say that you don't know the sourcing of  
23 that classified information that you were given?

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1       A. I -- I do not. The one that I reviewed yesterday, it  
2 appeared to be from the FBI. It was a 302, so I -- I presumed  
3 it was from the FBI.

4       Q. But if it were from the FBI, you don't know if the FBI  
5 obtained that information from some other source?

6       A. I have no idea.

7       Q. And so if the FBI were collaborating with other  
8 government agencies, you would have no way of knowing it,  
9 having reviewed those documents?

10      A. All I know is the names of the special agents that  
11 were listed in that document.

12      Q. You have described the room where the CSRT took place  
13 in Camp Delta. And you've previously testified in the 9/11  
14 case; is that correct?

15      A. I did.

16      Q. And there you testified that Senator Lindsay Graham  
17 was there for Khalid Shaikh Mohammad's CSRT. Do you recall  
18 that?

19      A. I do recall that.

20      Q. And do you recall the senator being present for Khalid  
21 Shaikh Mohammad's CSRT?

22      A. I recall him before the -- the hearing and I recall  
23 him after the hearing. He did not participate in the hearing.

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1 I don't know if he remained in that room throughout the  
2 hearing, but he -- he was there after the hearing.

3 Q. Was he present for Mr. al Nashiri's CSRT hearing, or  
4 just Khalid Shaikh Mohammad's?

5 A. Not to my knowledge. Not to my knowledge.

6 Q. Was he seated behind the one-way glass in Khalid  
7 Shaikh Mohammad's hearing?

8 A. As far as I know, that's where he retired to after he  
9 was brought into the building. I know there were staffers as  
10 well, civilian staffers with him. And there were other  
11 military personnel from -- from OARDEC that were there.

12 Q. Okay. I want to focus on the personal representative  
13 that you've testified. He was a Navy Lieutenant Commander,  
14 correct?

15 A. As I recall, he was a Navy Lieutenant Commander, yes.

16 Q. He was not an attorney?

17 A. He was not -- he wasn't wearing JAG device, and I know  
18 the instructions said that personal representatives were not  
19 to be judge advocates. So as far as I know, he was not on  
20 attorney.

21 Q. And, Captain, you obviously know what a millrind is,  
22 correct?

23 A. I do.

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1 Q. And can you tell the judge what a millrind is?

2 A. It's what you're wearing on your shoulder boards,  
3 Captain. It's two oak leaves with a metal device in between  
4 it to represent the spacing between millstones.

5 Q. And what is the significance of that on shoulder  
6 boards?

7 A. That it indicates that you're a member of the Judge  
8 Advocate General's Corp of the United States Navy.

9 Q. And so, again, he wasn't wearing that device?

10 A. He was not.

11 Q. Did you communicate with that Lieutenant Commander  
12 outside of the hearing or just in the CSRT?

13 A. I don't remember communicating with him relative to  
14 the CSRT. As you know, it's a small island. I'm sure I would  
15 have seen him around, but I don't remember discussing anything  
16 about the case with him except when he was sitting there in  
17 the hearing.

18 Q. Okay. I'm going to call him, because we're in an open  
19 session, Lieutenant Commander X.

20 A. Okay.

21 Q. I know his name. I've met with Lieutenant Commander  
22 X. So if you remember his name, please don't say this in your  
23 response. But did Lieutenant Commander X ever tell you that

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1 Mr. al Nashiri told Lieutenant Commander X that he was afraid  
2 that he would be executed or dismembered at his CSRT?

3 A. I don't remember that, Captain.

4 Q. Is it fair to say that that would -- you would have  
5 wanted to know that to assure him that that wasn't going to be  
6 the case if he had told you that?

7 A. If he -- if he had told me that, I certainly would  
8 have explored it with him, yes.

9 Q. Now, my colleague from the government played the  
10 rights advisement for you, and so I'm not going to belabor the  
11 inquiry that you went through with him. You did advise him of  
12 certain rights, but you didn't tell him that he had the right  
13 to remain silent. Would you agree with that?

14 A. As such, no.

15 Q. You ----

16 A. Told him he didn't have to say anything, though.

17 Q. You told him, Captain, he had the right to be present  
18 so long as he didn't disrupt the proceedings, correct?

19 A. I said something like that, yes.

20 Q. You didn't tell him that anything he said could later  
21 be used against him in court?

22 A. I did not.

23 Q. Did you tell him statements that he had previously

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1 made before the CSRT could not be used against him before the  
2 tribunal?

3 A. I don't remember saying that, Captain.

4 Q. Did you tell him that if he decided not to testify, no  
5 negative inference could be drawn from his failure to do so?

6 A. I don't believe there was any reference to inferences  
7 to be drawn, no.

8 Q. Did you tell him he had a right to speak to an  
9 attorney before the CSRT?

10 A. I did not tell him that.

11 Q. You did ask him if he wanted to make a statement,  
12 though?

13 A. I did.

14 Q. And he told you that his personal representative would  
15 speak on his behalf, correct?

16 A. He did.

17 Q. Now, also during the CSRT, he told you that he had  
18 previously made admissions while in CIA custody; is that  
19 correct?

20 A. I don't remember if he said CIA, but I remember him  
21 saying that he had made other statements as a result of the --  
22 his -- of the coercion or torture that he received.

23 Q. Your memory, Captain, is actually better than mine. I

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1 think he said Americans. Is that consistent with what you  
2 recall?

3 A. It is. I looked at the unclassified transcript  
4 yesterday. I don't know if it was redacted in any way, but  
5 I -- so I don't remember. He -- I don't remember him saying  
6 CIA. I do, now that you say it, remember him saying  
7 Americans.

8 Q. But he was cleared -- he was clear in his mind that he  
9 had been tortured?

10 A. That's what he said, yes, sir.

11 Q. And he conveyed that to you?

12 A. He did.

13 Q. And then following up on that, you asked him, quote,  
14 what did you tell your interrogators about the COLE bombing.  
15 Does that sound accurate?

16 A. It does.

17 Q. And then several pages later, you ask: So what you're  
18 telling us today is that those statements are not true.

19 Does that sound correct?

20 A. It does.

21 Q. Captain, you gave an oral history interview in 2015 to  
22 the Atlantic County Veterans History Project. Do you recall  
23 that?

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1 A. I do.

2 Q. During that interview, which is about 48 minutes long,  
3 you talked about the CSRTs. Do you remember doing that?

4 A. I do.

5 Q. Do you recall saying during that interview that you  
6 were told before conducting the CSRTs that individuals were  
7 likely going to be charged under the Military Commissions Act  
8 of 2006?

9 A. I remember saying that, yes.

10 Q. And then the last question I have is about towards the  
11 end of the interview, and I'm going to read this quote to you:  
12 The people involved in the CSRTs were Khalid Shaikh Mohammad,  
13 Ghailani, al Basiri. These were some of the guys who had  
14 planned 9/11 according to KSM. Khalid Shaikh Mohammad, he was  
15 the mastermind. The guys who did the COLE bombing that blew  
16 up the ship in Yemen. The guys who blew up our embassies in  
17 Africa. So these were the worst of the worst. The guys were,  
18 if you were at Nuremberg, this would have been Gehrig, it  
19 would have been Hess, guys at that level of the al Qaeda  
20 organization.

21 Do you remember making that statement?

22 A. I do, Captain.

23 Q. And by Gehrig, you would mean Herman Gehrig, the head

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1 of the Luftwaffe in World War II?

2 A. Yes, sir.

3 Q. And Rudolph Hess, Hitler's personal secretary until  
4 1941?

5 A. Yes, sir.

6 Q. Captain, thank you for coming down and for your time.

7 A. You're welcome.

8 DDC [CAPT MIZER]: Judge, I don't think I need to review  
9 those -- those classified documents.

10 MJ [COL ACOSTA]: All right.

11 Government, redirect?

12 ATC [LCDR JOLLY]: No, sir. Thank you.

13 MJ [COL ACOSTA]: Government, permanent or temporary for  
14 the purposes of this hearing?

15 ATC [LCDR JOLLY]: Permanent, sir.

16 MJ [COL ACOSTA]: Any objection, Defense?

17 DDC [CAPT MIZER]: I'm sorry, Judge. Yes.

18 MJ [COL ACOSTA]: You do object to his permanent excusal  
19 for the purposes of this hearing?

20 DDC [CAPT MIZER]: I'm sorry. I do not object, Judge.

21 MJ [COL ACOSTA]: Okay. All right.

22 Mr. DeLury, this is the military judge. Can you hear  
23 me.

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1 WIT: I can, Judge.

2 MJ [COL ACOSTA]: All right. For the purposes of this  
3 hearing, you're permanently excused. While this hearing is --  
4 while this case is in session, do not discuss your testimony  
5 or your knowledge of this case with anyone other than counsel  
6 for either side of the accused. You can step down and return  
7 to your day.

8 WIT: Thank you, sir.

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

11 MJ [COL ACOSTA]: All right. Government.

12 ATC [LCDR JOLLY]: Sir, I think the next witness is a  
13 defense witness.

14 MJ [COL ACOSTA]: Is that correct, Defense?

15 ADC [MS. MORGAN]: It is, Your Honor. The defense would  
16 call Dr. David Johnson.

17 ATC [LCDR JOLLY]: And, sir, if we could have a brief  
18 moment to make sure that the witness is available.

19 MJ [COL ACOSTA]: Here's what we'll do. We'll take a --  
20 we'll take a brief recess to make sure -- that witness is in  
21 the -- in the RHR, correct?

22 ATC [LCDR JOLLY]: Yes, sir.

23 MJ [COL ACOSTA]: Okay. We're going to take a brief

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1 recess for you to get the witness upstairs and ready to go.

2 The commission is in recess.

3 [The R.M.C. 803 session recessed at 1021, 28 July 2022.]

4 [The R.M.C. 803 session was called to order at 1038,

5 28 July 2022.]

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

7 All parties present as before, Government?

8 TC [MR. MILLER]: With the exception of Mr. Wells, who's  
9 attending to other matters. He'll be here shortly.

10 MJ [COL ACOSTA]: Defense?

11 LDC [MR. NATALE]: Your Honor, everyone is present. May I  
12 have a moment?

13 MJ [COL ACOSTA]: Yes.

14 [Pause.]

15 ADC [MS. MORGAN]: And, Judge, prior to starting with the  
16 witness, we would just request at some point today if it's  
17 possible to -- for the defense to approach the commission  
18 ex parte regarding our client's appearance tomorrow.  
19 Understanding that the commission earlier this morning had  
20 said that the commission wished to have our client here  
21 tomorrow ----

22 MJ [COL ACOSTA]: Yes.

23 ADC [MS. MORGAN]: ---- we would like to provide the

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1 commission with some specific information relating to our  
2 client's appearance tomorrow.

3 MJ [COL ACOSTA]: Is there any reason that that can't be  
4 shared in this forum?

5 ADC [MS. MORGAN]: Your Honor ----

6 MJ [COL ACOSTA]: I'm trying to figure out what the ----

7 ADC [MS. MORGAN]: Your Honor, it relates to  
8 attorney-client privileged information. We would request that  
9 the commission do that ex parte.

10 MJ [COL ACOSTA]: All right. I'll take that request under  
11 consideration at this time. Thank you.

12 ADC [MS. MORGAN]: Understood.

13 MJ [COL ACOSTA]: Defense, you've called Dr. Johnson,  
14 correct?

15 ADC [MS. MORGAN]: Yes, Your Honor. I apologize. I was  
16 grabbing notes.

17 ATC [LCDR JOLLY]: [Counsel away from podium; no audio.]

18 MJ [COL ACOSTA]: Can't hear you, Government. Cannot hear  
19 you, Government.

20 DAVID JOHNSON, M.D., civilian, was called as a witness for the  
21 defense, was sworn, and testified as follows:

22 ATC [LCDR JOLLY]: Please have a seat.

23 MJ [COL ACOSTA]: Defense, you may proceed.

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1 ADC [MS. MORGAN]: Thank you, Your Honor. I'm just  
2 waiting to be able to see the witness.

3 MJ [COL ACOSTA]: There we go.

4 ADC [MS. MORGAN]: There we go.

5 DIRECT EXAMINATION

6 Questions by the Assistant Defense Counsel [MS. MORGAN]:

7 Q. Good morning, Dr. Johnson. Can you see me?

8 A. Yes, I can see you okay.

9 Q. Okay, great. Thanks for being here today.

10 Can I have you state your full name.

11 A. David Johnson.

12 Q. And let me just start out, I'm going to go ahead,  
13 start with your qualifications and just go ahead and place  
14 those on the record in furtherance of having you qualified as  
15 an expert before the commission today.

16 My understanding, Dr. Johnson, is that you are a  
17 retired Army officer?

18 A. That is correct.

19 Q. And how many years did you spend in the service?

20 A. 25 years.

21 Q. And when did you retire from the Army?

22 A. October 2021.

23 Q. And what was your terminal rank?

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1 A. Colonel.

2 Q. And in the Army, what was your MOS, your specialty?

3 A. 60W, psychiatrist.

4 Q. All right. I'm going to start with your education.

5 Can you briefly walk the commission through your educational  
6 background.

7 A. I attended college at the University of California at  
8 Berkeley. I received two degrees in molecular biology and  
9 physical anthropology. From there I went straight to the  
10 Uniform Services University in Bethesda, Maryland, which is  
11 the military's medical school. I spent four years there. And  
12 upon graduation, I spent four years in psychiatry residency  
13 training at the old Walter Reed Army Hospital here.

14 After that, I did a one-year fellowship in forensic  
15 psychiatry, and I began practicing as a full-time psychiatrist  
16 in the Army in mid-2005.

17 Q. And then in 2005, until your retirement, did you focus  
18 either on clinical or forensic work, or a mix of both?

19 A. It was a mix of both. In my initial half of my  
20 career, I did mainly clinical work, running behavioral health  
21 clinics and operations. But I also did expert consultation  
22 for trials and I did R.C.M. 706 evaluations whenever needed.

23 In the final ten years of my career -- or final nine

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1 years, I should say, I was in charge of the -- the only  
2 forensic psychiatry operation in DoD at Walter Reed.

3 Q. All right. And is that the Center for Forensic  
4 Behavioral Sciences? Am I getting that name right?

5 A. That's correct. I guess I should clarify. I was in  
6 charge of training there for six years, and then I was the  
7 chief of that center for the final three years.

8 Q. Okay. Just to -- just so we understand what the  
9 organization is, what is the Center for Forensic Behavioral  
10 Sciences?

11 A. So it's a location where we have both a forensic  
12 psychiatry training program and a forensic psychology training  
13 program. They're the only ones that exist in DoD. We trained  
14 Army as well as Navy individuals for forensic training. And  
15 mainly our full-time role is supporting military courts as far  
16 as R.C.M. 706 evaluations, expert consultation, expert  
17 testimony, and other questions or topics that are kind of  
18 related to those matters.

19 Q. And you said your initial role there was as the  
20 director of training?

21 A. Yeah. I was the program director for the forensic  
22 psychiatry fellowship program.

23 Q. All right. And so as the director of training, what

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1 were your responsibilities?

2 A. I was an assistant professor at the Uniform Services  
3 University. I provided weekly didactics for several hours to  
4 the fellows in training. I assigned them cases at  
5 courts-martial and supervised them and sometimes traveled with  
6 them if they were to testify at trial.

7 I also handled our -- all the R.C.M. 706s for the --  
8 like a 50-mile radius around Walter Reed, and handled a number  
9 of other administrative matters. I did some forensic consults  
10 for the hospital as well, such as medical capacity  
11 determinations, stuff like that.

12 Q. And in that role, you said that you were training  
13 other psychiatrists to support military courts. Were you also  
14 at times acting as an expert in military courts?

15 A. Yes. I had my own work that I did on the side as  
16 well, when I could fit it in. So I traveled extensively  
17 through those nine years.

18 Q. And then you became the director. And how did your  
19 responsibilities change at that point?

20 A. So at that point I wasn't the point person for  
21 training the fellows, but I was still staff of the fellowship.  
22 So fellows still came to me and were assigned cases with me  
23 and I supervised them. I still rotated in teaching didactics,

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1 as needed.

2 My primary role was to make sure that the  
3 administrative and logistical requirements of both training  
4 programs were supported, so staffing issues, physical location  
5 issues, and then just developing whatever SOPs or policies  
6 were needed for issues that arose.

7 Q. And during that time did you still maintain your own  
8 forensic practice?

9 A. I did, yes.

10 Q. All right. Since you've retired from the Army, what  
11 is your current occupation? Are you still a practicing  
12 psychiatrist?

13 A. Yeah. I still maintain my licensure and my  
14 qualifications. I basically have a private practice that I  
15 operate from my home. I still consult to military  
16 courts-martial. I've worked on roughly ten cases since  
17 October, with a few more coming up later this year. And  
18 that's what I'm doing right now.

19 Q. Okay. And where are you licensed?

20 A. I am licensed in the state of Maryland. I've also  
21 held licenses in the states of Indiana and California,  
22 although currently I don't really need them, so letting them  
23 wind down.

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1 Q. And you mentioned that you've done ten cases since  
2 October, a few more coming up this year. Do you work with  
3 both prosecution and defense?

4 A. Yes, I do.

5 Q. And has that been true throughout your career, you've  
6 served as an expert consultant for both the prosecution and  
7 the defense?

8 A. Yeah, it's almost 50/50. Generally, whoever calls me  
9 first and asks for my service, that's who I work for. I don't  
10 have a preference.

11 Q. And in addition to consulting, have you ever testified  
12 as an expert witness in a -- military courts?

13 A. Yes, I have.

14 Q. Can you give me just a WAG about how many times that  
15 has happened?

16 A. Yeah. I've probably been involved in about 140  
17 courts-martial. I've testified somewhere close to half of  
18 them, so perhaps in the 60 to 70 range.

19 Q. And have you testified outside of military court --  
20 excuse me, outside of military courts at all?

21 A. When I was in training, I testified in a Maryland  
22 court one time. I do have a private case right now in  
23 Maryland, which should go to court but it hasn't yet.

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1 Q. And in those roughly 60 to 70 military mostly, but  
2 also civilian cases, have you ever been qualified as an expert  
3 in forensic psychiatry?

4 A. Yes. Every time, I have.

5 ADC [MS. MORGAN]: And at this time, the defense would  
6 request that the commission recognize Dr. Johnson as an expert  
7 in the field of forensic psychiatry.

8 MJ [COL ACOSTA]: Government?

9 ATC [LCDR JOLLY]: No objection, sir, to his expertise,  
10 but noting that the defense did not provide notice of its  
11 intention to qualify anyone as an expert or produce the notes  
12 or records of that individual, sir.

13 ADC [MS. MORGAN]: Your Honor, this was not a defense  
14 witness until about 24 hours ago; this was a government  
15 witness. The records that the government has relied on this  
16 are the 706 boards. I, in fact, do not intend to have  
17 Dr. Johnson testify to the 706 board in this. His testimony  
18 will be limited to the -- what a 706 board is, what the  
19 parameters of one are, and what the limitations of a 706 board  
20 are, which would require him to be recognized as an expert.  
21 There are no notes to disclose. There are no reports to  
22 disclose.

23 But as for the late timing of the recognition of an

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1 expert, it is due to the late timing of the switch in the  
2 parties that would be calling him.

3 MJ [COL ACOSTA]: Government, is that accurate, that you  
4 decided not to call him 24 hours ago; is that correct?

5 ATC [LCDR JOLLY]: In light of the commission's ruling  
6 prohibiting our review of 706 material, yes, sir.

7 MJ [COL ACOSTA]: No, I didn't prohibit you from reviewing  
8 706 material. I prohibited you from using the statements of  
9 the accused contained in the 706 material. I stated  
10 specifically that you could use the 706 absent the statements  
11 of the accused, but I understand your -- your reasoning.

12 Dr. Johnson is recognized as an expert in the field of  
13 forensic psychiatry. Go ahead.

14 ADC [MS. MORGAN]: Thank you, Your Honor.

15 Q. Dr. Johnson, you talked about your forensic  
16 experience. You mentioned that you have conducted 706 boards  
17 throughout your career, both in the military now and outside  
18 of it. Can you -- can you explain what a 706 board is.

19 A. So the main purpose of a 706 board is to answer four  
20 questions that are encapsulated in R.C.M. 706. That's going  
21 to include is there a severe mental disease or defect in the  
22 accused; what are the psychiatric diagnoses, if anything; is  
23 he or she competent or not to stand trial; and is he or she

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1 criminally responsible for the alleged offense or offenses.

2           To answer these four questions, we put together either  
3 a single or a small team of a physician, possibly a  
4 psychologist as well, and we start off by gathering as much  
5 data as we can prior to doing an interview with the accused.  
6 We spend hours or days reviewing hundreds of pages of criminal  
7 investigative documents, sworn statements. We look at  
8 photographs, anything that's potentially relevant to the  
9 alleged offense as well as the current state of competence or  
10 non-competence. We'll review any sort of medical records that  
11 exist throughout the entire lifespan that we can get ahold of.

12           We do all this in order to be prepared to, you know,  
13 verify or seek contradiction with what the accused may tell us  
14 or what other sources of data may tell us.

15       Q. Okay. And you did a competency evaluation in  
16 Mr. al Nashiri's case, correct, a 706 board in  
17 Mr. al Nashiri's case; is that correct?

18       A. Yes, that is correct.

19       Q. Okay. For the purposes of the questions I'm going to  
20 ask you, I'm not going to ask you about that competency  
21 evaluation. I'm asking you very general questions about how  
22 you conduct competency evaluations in your practice and  
23 experience. Does that make sense?

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1 A. Yep.

2 Q. Okay. So is it fair to say when -- when you're asked  
3 to do a competency evaluation, it's because one side or the  
4 other has a question about whether an accused is competent to  
5 participate in their defense or understands the wrongfulness  
6 of their actions? Is that a fair way to summarize it, or do  
7 you have a better way to say that?

8 A. No, that's pretty accurate. Usually there's one side  
9 requesting it, and then we just do it.

10 Q. And can you give a WAG on how many of these competency  
11 evaluations or 706 boards you have done in the entirety of  
12 your career?

13 ATC [LCDR JOLLY]: Objection.

14 MJ [COL ACOSTA]: Basis?

15 ATC [LCDR JOLLY]: Relevance, sir. If we're not going  
16 into the 706 of this case, this is irrelevant.

17 MJ [COL ACOSTA]: Overruled. I'll allow it.

18 Go ahead.

19 A. I've probably performed nearly 200 706s in my career.

20 Q. All right. And so I just want to talk to you a little  
21 bit about what a 706 actually can determine. Is it fair to  
22 say that a 706 board speaks to competency at the time of the  
23 evaluation itself?

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1 A. Yes, that's accurate.

2 Q. And so in other words, it's a point-in-time  
3 assessment?

4 A. It is.

5 Q. Can you assume prior competency when you're going --  
6 when you're conducting a 706 evaluation?

7 A. So, you know, depending on someone's mental state, if  
8 there's like a waxing and waning component of it, they may  
9 have had a different mental state at an earlier point in time,  
10 so we can't automatically assume that competence now refers to  
11 competence at a past point.

12 Q. Understood. And does it -- if somebody was competent  
13 at the time of their competency evaluation, does it mean that  
14 they will always be competent going forward?

15 A. No, it can change as well in the future.

16 Q. So fair to say it's not a prediction of future  
17 competency?

18 A. We do sometimes make comment about potential future  
19 competency, but still the evaluation is focused on the here  
20 and now, and we can't predict what exactly would happen in the  
21 future.

22 Q. Other than 706 evaluations, when you are acting in  
23 your capacity as a expert in forensic psychiatry, are there

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1 other evaluations that you conduct?

2 A. I'm sorry. Did you say during a 706 or at other times  
3 not during a 706?

4 Q. Sorry. When you're hired as an expert in forensic  
5 psychiatry, are there evaluations that you conduct other than  
6 the 706 evaluation?

7 A. Yeah. So there's a large number of other forensic  
8 evaluations we do based on the referral question and what the  
9 attorney is asking for.

10 Q. Okay. And, for instance, have you ever conducted an  
11 evaluation to determine competency at the time of a confession  
12 or competency to waive Miranda rights?

13 A. I have conducted those types of evaluations.

14 Q. And is that a different type of examination from the  
15 examination you conduct in a 706 evaluation?

16 A. Yes. There are some different components to it ----

17 Q. And ----

18 A. ---- to them.

19 Q. ---- can you explain the differences in those two  
20 examinations?

21 A. So for one thing, those evaluations are usually going  
22 to be evaluation of a mental state and competence at a past  
23 point in time, not at the present time. So, you know, that

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1 changes a little bit how much data we strive to collect as  
2 well as how we interpret the data given that we weren't there  
3 at the time of the confession.

4 We're also going to be interested in some factors that  
5 are not usually looked at in a competence to stand trial  
6 evaluation. So not only the mental state of the accused at  
7 the time of the confession, but also what are the  
8 environmental conditions and the techniques used by the  
9 interviewer to elicit information.

10 So examples of environmental conditions might be  
11 issues related to sleep deprivation, temperature, the  
12 hospitality of the environment, the size of the room, how  
13 close people are to the accused. And some of the factors with  
14 the interviewer are going to involve, you know, the use of  
15 techniques that are designed to sometimes coerce cooperation  
16 such as implying some sort of leniency will follow if they  
17 confess, how a Miranda warning is delivered or whether they  
18 answer questions in a thorough way when asked.

19 Q. Thank you. So just to kind of sum that up, fair to  
20 say if you're going to conduct an evaluation to determine  
21 competency for a confession, you're going to ask different  
22 questions and you're going to look for different information?

23 A. There's going to be some more stuff we look at,

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1 definitely.

2 Q. Now, if you are conducting an R -- a 706 board, is it  
3 your habit or practice to go beyond the four questions that  
4 you articulated at the beginning of your examination? Do you  
5 go beyond the bounds of that?

6 A. No. We -- we always strictly teach all of our  
7 trainees that we answer the four questions and we don't create  
8 new questions or answer things that aren't being asked in  
9 R.C.M. 706.

10 Q. Okay. Dr. Johnson, I do not have any additional  
11 questions for you. However, my colleague in the NCR may.  
12 Thank you so much for your time today.

13 A. Thank you.

14 MJ [COL ACOSTA]: Government, cross?

15 CROSS-EXAMINATION

16 Questions by the Assistant Trial Counsel [LCDR JOLLY]:

17 Q. Good morning, sir. So you are a forensic  
18 psychiatrist.

19 A. I am.

20 Q. You have decades of experience.

21 A. Yes.

22 Q. If you could please help us understand some  
23 psychological terms or these medical terms.

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1           What is learned helplessness?

2           A. I'm sorry. Repeat that last one.

3           Q. What is learned helplessness?

4           A. So learned helplessness is a ----

5           ADC [MS. MORGAN]: Objection.

6           MJ [COL ACOSTA]: Basis?

7           ADC [MS. MORGAN]: Beyond the scope.

8           MJ [COL ACOSTA]: Government?

9           ATC [LCDR JOLLY]: Completely relevant and responsive,  
10 sir. I intend -- I can start it in and then we can see how it  
11 feeds into it, but competence exams, whether competent to  
12 confess or 706 examinations, there are different ways an  
13 individual can be incompetent. And the defense in AE 467  
14 alleged that the accused is incompetent -- or was incompetent  
15 to make a voluntary statement to law enforcement in 2007 due  
16 to PTSD, conditioned behavior, and learned helplessness. So I  
17 intend to explore each of these three areas with this witness,  
18 sir.

19          MJ [COL ACOSTA]: Overruled. I'll allow it.

20               Go ahead.

21          Q. Sir.

22          A. So learned helplessness is a psychological term that  
23 refers to when an individual is in a situation where they make

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1 their own decision that no matter what they do, either  
2 cooperation or -- or not cooperation, it's not going to change  
3 the ultimate result of whatever is going on.

4           So in -- you know, for example, in the setting of a  
5 police custodial interrogation, the person may come to feel  
6 that it doesn't matter what they say or how they answer the  
7 questions, it's still going to be the same final outcome at  
8 the end of the police proceeding.

9           Q. So is learned helplessness a medical diagnosis?

10          A. It is not a psychiatric diagnosis. It's not in our  
11 DSM-5 statistical manual.

12          Q. And could learned helplessness render someone from  
13 intelligently -- incapable of intelligently participating in  
14 their defense?

15          A. So you can still intelligently cooperate with your  
16 defense even if you are experiencing some symptoms of learned  
17 helplessness.

18          Q. All right. Let's talk about PTSD. What is PTSD?

19          A. PTSD is post-traumatic stress disorder. It's a  
20 psychiatric diagnosis. It's a condition that's kind of unique  
21 in our book in that we believe we know the exact cause of it  
22 and the cause is going to be a trauma of some sort. Someone  
23 being severely harmed or killed usually in front of another

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1 person, or at -- or it's a threat that's made to their own  
2 bodily integrity.

3           Once the trauma happens, they may have a set of  
4 symptoms that may last for longer than six months, which could  
5 include reexperiencing the trauma in a very anxiety-provoking  
6 manner, flashing back, reliving it, as well as avoiding things  
7 that are going to trigger these reexperiences. They may have  
8 some dissociative symptoms and they may have symptoms such as  
9 insomnia, anger problems, memory problems, mood problems.

10       Q. Is this a medical diagnosis?

11       A. It is, yes.

12       Q. Could PTSD ever render someone incapable of  
13 intelligently cooperating in their defense?

14       A. It is possible in extreme circumstances.

15       Q. What would be that kind of circumstance?

16       A. So generally we're going to say that, you know, if  
17 someone's dissociating, as in having an actual flashback at a  
18 specific moment in time where they're not present in the  
19 current reality but they are reliving the past trauma as if  
20 they're really there, then that would be a state of mind where  
21 you may not be able to cooperate intelligently with attorneys  
22 who are near you.

23           If you had a severe experience of other symptoms such

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1 as severe depression that's rendering you kind of unable to  
2 have energy to get up out of your bed or to speak to other  
3 people, if you had severe sleep deprivation to the point that  
4 you literally cannot stay awake while conversing with someone,  
5 or if you had severe anger problems such that you're  
6 constantly shouting back at other people whenever they're  
7 trying to speak to you, those could be circumstances where a  
8 psychiatrist might find someone not competent to stand trial.

9 Q. These symptoms that you've just described, the anger,  
10 for example -- and it sounded like you were describing the  
11 inability to not shout -- is that volitional or can people  
12 control their response?

13 A. Right. So -- so anger is generally considered a  
14 volitional component of behavior. You know, when you look at  
15 the standards for competence to stand trial, it doesn't  
16 require a severe mental disease or defect. So it's kind of up  
17 to the interpretation of -- of who's doing the -- the board,  
18 how much they want to say that anger could actually render  
19 someone unable to work with their lawyers.

20 I can say in my personal experience, I've never found  
21 anyone not competent for anger or mood issues.

22 Q. So generally speaking, I'm just -- a hypothetical  
23 here. Let's say someone has a traumatic event, they're

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1 diagnosed with PTSD, they experience a trigger of some sort,  
2 whatever it is. If they're responding to that trigger, are  
3 there any outward manifestations that other -- like  
4 non-medical personnel might see in that individual to  
5 recognize that they're responding to this trigger?

6 A. I believe there might be, yes. I mean, if someone's,  
7 for instance, actually flashing back to a past incident, they  
8 would be behaving in a way that's not in accordance with  
9 whatever the conversation is in the room around them. They  
10 may be acting funny. They may be showing facial expressions  
11 that are seemingly not appropriate. They may say things that  
12 don't make any sense to the current context. They may show  
13 some sort of signs of being afraid or fearful or shielding  
14 themselves. Yeah. That's about it.

15 Q. So if they're in a different place, they're  
16 dissociating, you're generally going to be able to tell?

17 A. I believe you would, yes.

18 Q. All right. So if someone is leaning in and making eye  
19 contact and answering questions appropriately, probably not  
20 experiencing a dissociative state?

21 A. That would be far less likely I would say, yes.

22 Q. I want to talk about the overlap between the  
23 competence examinations that you were just discussing with

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1 defense counsel. There's the competence to confess exam and  
2 then the 706 exam, and you indicated that there are some  
3 similarities and some differences.

4 In both exams, though, you consider the age and  
5 intelligence of the person you're evaluating, right?

6 A. Yes. Those are two prime factors we consider in any  
7 competence evaluation.

8 Q. Why are you considering those factors?

9 A. It has to do with the experience level of the person,  
10 their experience with life and their ability to kind of  
11 predict how their answers are going to be used in the future,  
12 you know, as in are they putting themselves in a worse  
13 situation by what they say.

14 Also, you know, intelligence, it has to do with just  
15 kind of street smarts in some degree. It can also have to do  
16 with their ability to choose to not cooperate with someone.  
17 So people with less intelligence and less age, especially when  
18 in the presence of an authority figure, they sometimes feel  
19 that they have to cooperate and aren't able to consider the  
20 fact that it's actually an option, they don't have to.

21 Q. And in the things that you consider when conducting  
22 these competence exams, are medical records something you look  
23 at?

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1 A. Yes. As -- every time, if we can get them, yes.

2 Q. So when you're talking about whether or not someone  
3 was competent to make a confession, you're not called in right  
4 then, and so it's a back-in-time look, right?

5 A. That's right.

6 Q. So the medical records that were closer in time to the  
7 confession are important evidence for you?

8 A. Yes, they are.

9 Q. And in those medical records, what are you going to be  
10 looking for?

11 A. We're looking for any diagnoses; we're looking for any  
12 descriptions of behaviors that might be atypical or  
13 problematic; we're going to look for any evidence that, for  
14 instance, there was a flashback or that there's sleep problems  
15 or that they require medication to treat symptoms. Just their  
16 overall functioning.

17 ATC [LCDR JOLLY]: Sir, if I could have a moment?

18 MJ [COL ACOSTA]: You may.

19 ATC [LCDR JOLLY]: No further questions. Thank you, sir.

20 MJ [COL ACOSTA]: All right.

21 Defense?

22 REDIRECT EXAMINATION

23 Questions by the Assistant Defense Counsel [MS. MORGAN]:

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1 Q. Just very briefly.

2 Talking about the competency evaluation for a  
3 voluntary confession, you had made a comment on direct about  
4 wanting to know things like what the interrogation techniques  
5 were. Can you talk a little bit about why things like what  
6 interrogation techniques were employed are important?

7 A. So in the literature we have on this topic, you know,  
8 we generally focus on two main categories of interrogation  
9 techniques. One is called maximization, the other is called  
10 minimization.

11 So a maximization would be kind of increasing the fear  
12 within the accused. So, for instance, saying you're going to  
13 go to -- you're going to face the death penalty for what you  
14 have done so far, or you're going to be in prison for the rest  
15 of your life.

16 Minimization would be trying to reduce their anxiety  
17 by saying if you cooperate and you confess, then things will  
18 go better for you in the future. You may not face death or  
19 you may receive a lighter sentence or you may be able to talk  
20 to family members again.

21 So those techniques are associated with individuals  
22 sometimes deciding to give statements. Some of those  
23 statements may or may not be true for various reasons.

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1 Within -- you know, within the Army interrogation manual, at  
2 least back when I was familiar with it, you know, fear-up was  
3 one technique that was used. That's an example of a  
4 maximization technique.

5 A minimization technique in that manual would be kind  
6 of what I said earlier about, you know, implying that there's  
7 some sort of opportunity to talk to friends or family or  
8 receive a lighter sentence.

9 Q. So you would want to know if any of these techniques  
10 were used and if they were used correctly and how they had  
11 been used in the individual's prior, perhaps, experience.  
12 Would that be important to you?

13 A. That would be useful information, yes.

14 Q. And you said location is also important; is that  
15 correct?

16 A. Yes.

17 Q. And why is that important?

18 A. Well, you know, depending on the size and  
19 configuration of a room -- I mean, when interrogators enter  
20 someone's personal space, that can either increase fear and  
21 anxiety in some individuals or it may enhance a minimization  
22 effect, you know, as if the interrogator is giving some sort  
23 of empathic affect.

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1 Q. Would it be important to know if that -- if the  
2 subject of the interrogation had a history at that location,  
3 would you want to know that?

4 A. That could be important.

5 Q. I'm sorry?

6 A. That could be important.

7 MJ [COL ACOSTA]: I'm sorry. Everybody was talking over  
8 each other there. I'm going to let you ask the question  
9 again. And, Dr. Johnson, I just want you to hold on one  
10 second. I'm not saying it was you that went first, but  
11 let's -- I want to hear the answer clearly, please.

12 Q. Would it be important to know if the subject had a  
13 history with the location where the interrogation was  
14 conducted?

15 A. Yes, it would be.

16 Q. And you mentioned things like sleep deprivation. Why  
17 would you want to know about things like sleep deprivation?

18 A. So it's very common among psychiatric patients that  
19 they have sleep issues. This is a very common thing we look  
20 at. So individuals who aren't sleeping chronically have  
21 trouble concentrating, focusing, and planning and making  
22 decisions. They also have a lot of short-term memory  
23 problems. They don't necessarily remember everything that's

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1 said to them.

2 So as a result, you're going to look at decreased  
3 performance of the executive functioning of the brain. That  
4 is the master decision-making apparatus.

5 ADC [MS. MORGAN]: All right. I have no further questions  
6 at this time. Thank you very much.

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

9 ADC [MS. MORGAN]: Yes, Your Honor.

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

11 ATC [LCDR JOLLY]: For purposes of this hearing, sir, but  
12 we may wish to re-call the witness later on 467.

13 MJ [COL ACOSTA]: All right. Dr. Johnson, I'm going to  
14 temporarily excuse you. While this case is in hearing, do not  
15 discuss your testimony or your knowledge of this case with  
16 anyone except for counsel for either side.

17 Government, do you intend on re-calling him during  
18 this three-week session or at a later date?

19 ATC [LCDR JOLLY]: At a later date, sir, depending on the  
20 evolution of the behavioral health records.

21 MJ [COL ACOSTA]: Okay. All right. Dr. Johnson, you can  
22 step down and return to your day.

23 [The witness was temporarily excused, and withdrew from the

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1 RHR.]

2 MJ [COL ACOSTA]: The next witness, Government, is yours?

3 ATC [LT SCHWARTZ]: The next witness is defense's, Your  
4 Honor.

5 MJ [COL ACOSTA]: Defense, what's your anticipated time  
6 frame for how long you're going to take with this -- it's  
7 Elkalouby. And I don't know if I said that right.

8 LDC [MR. NATALE]: I was told it's Elkalouby.

9 MJ [COL ACOSTA]: Elkalouby, yes. So how long?

10 LDC [MR. NATALE]: I would say probably no more than an  
11 hour, most likely less.

12 MJ [COL ACOSTA]: On direct?

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

14 MJ [COL ACOSTA]: All right. We'll proceed. Call the  
15 witness. The defense is calling Mr. Elkalouby, please.

16 ATC [LT SCHWARTZ]: He'll be here momentarily, Your Honor.  
17 Just one minute.

18 [Pause.]

19 ATC [LT SCHWARTZ]: Please raise your right hand.

20 JOHN J. ELKALIOUBY, civilian, was called as a witness for the  
21 defense, was sworn, and testified as follows:

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

23 MJ [COL ACOSTA]: Sir, please state your name.

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1 WIT: My name is John J. Elkaliouby.

2 MJ [COL ACOSTA]: Yeah, you don't -- John J. Elkaliouby?

3 WIT: Yes, sir.

4 MJ [COL ACOSTA]: All right. Defense, proceed.

5 DIRECT EXAMINATION

6 Questions by the Learned Defense Counsel [MR. NATALE]:

7 Q. Mr. Elkaliouby, are you an agent or -- of the FBI?

8 A. I -- I'm a former linguist with the FBI. I retired in  
9 2015.

10 Q. Very good. Have you at any time been a certified  
11 interpreter for the federal courts of the United States?

12 A. I was certified as a linguist with the FBI in 1994.

13 Q. My question was not whether you were a witness but did  
14 you ever pass and became certified as a federal court  
15 interpreter?

16 A. I was certified as a federal linguist with the  
17 Department of Justice but not with the court.

18 Q. Let me ask you this, sir. Did you provide testimony  
19 or did you provide simultaneous translation during the time  
20 you were in federal court?

21 A. I've never been in the federal court before.

22 Q. Sir, have you passed the United States' State  
23 Department conference or seminar regarding interpreters?

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1       A. I did pass the certified interpreters, not with the  
2 State Department but with the Department of Justice.

3       Q. Are you a member in good standing of the American  
4 Association of Language Specialists?

5       A. At one point -- at one time, I was certified, yes, and  
6 I was a member of this organization, but I didn't continue  
7 with the membership.

8       Q. Were you a member in 2007?

9       A. In 2007?

10      Q. That is correct, sir.

11      A. I wasn't a member at that time. I didn't contribute,  
12 you know, towards my membership. I didn't keep it.

13      Q. I'd like to direct your -- ask you, how long did you  
14 work for the FBI as an interpreter?

15      A. I worked as an interpreter -- I started in 1994 and I  
16 retired in -- in 2015, in February 2015.

17      Q. Now ----

18      A. I worked for 20 years -- oh, a little bit over 20  
19 years.

20      Q. Now, sir, I'd like to direct your attention  
21 specifically to the statement which we have been told you were  
22 the interpreter for in 2007 that was allegedly given by  
23 Mr. Nashiri.

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1 A. That's correct.

2 Q. Okay. Prior to going to meet with Mr. Nashiri here in  
3 Guantanamo, had you ever met with him before?

4 A. No, I haven't.

5 Q. Had you ever reviewed any video or audio tapes of him?

6 A. No, I haven't.

7 Q. Now, prior to your interview, was there a preliminary  
8 meeting with you and the agents to discuss the nature and  
9 scope of what the questioning would involve?

10 A. Yes, by the head of the team, Steve Gaudin. Yes.

11 Q. And ----

12 A. We were prepared, you know, the night before.

13 Q. And that is something that would happen prior to each  
14 of your sessions?

15 A. That's correct. And all the sessions were monitored  
16 while in GTMO.

17 Q. And was it your understanding that they were -- they  
18 were audio recorded as well as video recorded?

19 A. I didn't know about the video recording.

20 Q. You didn't know about the video?

21 A. I think the Army -- the -- the -- in Guantanamo, in  
22 the room we were sitting in, yes, they were -- there was an  
23 audio and video recorder. That's correct.

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1 Q. Okay. And having something like this recorded would  
2 be beneficial to review whether or not something was asked,  
3 correct?

4 A. Yes.

5 Q. To determine whether or not there was -- and I don't  
6 mean this anything in a derogatory way, but if there were any  
7 problems with the interpretation, it would be good to have  
8 that to review at the end of the day to make sure that things  
9 were taken down exactly?

10 A. That's my understanding, yes.

11 Q. And that's something that you all would have done in  
12 order to confirm what happened at the end of the day of each  
13 interview?

14 A. That's correct. The head of the team, Steve Gaudin,  
15 when writing the report, 302s, used to sit down with us and  
16 discuss ----

17 Q. Now ----

18 A. ---- everything what's happened during that time.

19 Q. Prior to conducting the interview, were you told what  
20 was the purpose of the interview?

21 A. We were told about the person we are interviewing, but  
22 there was no specific about the purpose of the interview, no.

23 Q. Was there -- were you advised what the subject matter

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1 would be of the interviews?

2 A. On my part, no. I would say no.

3 Q. Sir, what I'm asking is: Sometimes lawyers or  
4 investigators will tell the interpreter, I'm going to be  
5 asking questions about this, like this.

6 A. No, no. This has never happened.

7 Q. Prior to you going into the room, is it accurate to  
8 say that you had no idea what questions would be asked?

9 A. That's -- that's hundred percent correct.

10 Q. Prior to going into the room, did you know the  
11 nationality of the person who was going to be interviewed?

12 A. I -- at the time I probably knew the nationality.

13 Q. And, sir, would you agree that that could be helpful  
14 to an interpreter, because even though someone may speak the  
15 same language, there can be manners or dialects of  
16 pronunciation or there could be idiomatic expressions which  
17 are unique to, say, particular countries or particular  
18 territories within a country?

19 A. I -- I wasn't worried as much because I was born in  
20 Egypt and there were a lot of teachers during that time  
21 teaching in Yemen, and they were well-received by the Yemenis.  
22 Therefore, I didn't anticipate any problem or I didn't see,  
23 and if I saw any problem, I would have mention it to the lead

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1 interrogator.

2 Q. Now, prior to going into the interview, were you told  
3 that Mr. Nashiri would be read certain rights, or certain  
4 things in particular had to be explained to him?

5 A. Absolutely. I just wanted to point out that the lead  
6 interrogator, Steve Gaudin, he worked in Yemen at the embassy,  
7 and he and his wife had a good memories of working there. And  
8 he always, always used to wear a Yemeni's clothes, talk about  
9 Yemen and the good life his wife had in Yemen and the  
10 memories. Therefore, he was a pleasant person to talk to and  
11 feel comfortable with.

12 Q. Now, sir, this information about he and his wife and  
13 their experience in Yemen, was that something that you came to  
14 learn before the interview of Mr. Nashiri?

15 A. No, no, no. The way -- the manner of the lead  
16 interrogator gave me that impression, and he talked about it.  
17 And he was kind and -- towards the subject, Mr. al Nashiri.

18 Q. Sir, my question is: When did you learn this  
19 information about his past experience in Yemen? Was it before  
20 the interview with Mr. Nashiri or was it after?

21 ATC [LT SCHWARTZ]: Objection, Your Honor. Relevance to  
22 this line of questioning.

23 MJ [COL ACOSTA]: Defense?

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1 LDC [MR. NATALE]: Your Honor, I think that it's relevant  
2 to be able to show -- because I'm going to get to the  
3 relationship that he may have had with Special Agent Gaudin.  
4 And if it was something that he knew before and they talked  
5 about before, I think that could be significant.

6 MJ [COL ACOSTA]: All right. I'll allow a little  
7 exploration of this.

8 Go ahead. You can answer the question. Did you learn  
9 the information about Special Agent Gaudin before the  
10 interview with Mr. Nashiri or after the interview with Mr.  
11 Nashiri.

12 WIT: I learned it before, because he was sharing his  
13 experience in Yemen and he was happy during the time he worked  
14 there. And he was fond of the time he worked with the  
15 Yemenis. He always used to wear Yemeni clothes in the  
16 interviews.

17 Q. Let me ask you this, sir: Did he ever explain to you  
18 the nature of the work he was doing while he was in Yemen?

19 A. No. We didn't talk about it.

20 Q. Were you aware of the nature of the work he did in  
21 Yemen?

22 A. No. We didn't get into this discussion at all.

23 Q. In your mind, what was your understanding of the

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1 purpose of the interview?

2 A. My understanding was bridge the gap between two people  
3 who don't speak the same language and translate accurately --  
4 accurately, without any omission or massaging the message or  
5 make it appealing.

6 Q. Could you -- forgive my ignorance, but could you  
7 explain to me Yemeni clothing, what that would be.

8 A. Yemeni clothes ----

9 ATC [LT SCHWARTZ]: Objection, Your Honor. Relevance to  
10 this question.

11 LDC [MR. NATALE]: Your Honor, I think that it could get  
12 to what we think is the totality of the circumstances around  
13 this statement as to what could have been influences on  
14 Mr. Nashiri.

15 MJ [COL ACOSTA]: All right. Overruled. I'll allow it.  
16 Go ahead.

17 A. I have just to be -- I have to say that the lead  
18 interrogator was a kind person to all, you know, needs of  
19 Mr. Nashiri and bring food and pastries and -- Yemeni pastry,  
20 and he was happy to see Mr. Nashiri.

21 MJ [COL ACOSTA]: Re-ask your question.

22 Q. Sir, could you please describe what you meant when you  
23 said "Yemeni clothing"? That is, describe the clothing.

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1       A. The clothes that he was wearing, he bought it from  
2 Yemen. Was like a jacket and pants. That's all. It wasn't a  
3 tie or a suit or -- or a shirt.

4       Q. What caused you to believe that it was, in your words,  
5 Yemeni clothing? Was there anything about his jacket and  
6 shirt?

7       A. He said that he bought this suit in Yemen, when he was  
8 working in Yemen. That's the only thing I know. But I -- I  
9 don't know how to describe. It's just normal clothes.

10      Q. Is it fair to say that it was based on what he told  
11 you about the suit and nothing about the appearances of the  
12 suit that caused you to conclude that it was Yemeni clothing?

13      A. He -- he was proud of wearing the Yemeni suit. That's  
14 what my understanding. He was -- he was proud of the time he  
15 spent in Yemen.

16      LDC [MR. NATALE]: I would like to move on, but I just  
17 want to ask one more question, Your Honor, about this.

18      Q. Can you see me, sir?

19      A. Yes, sir.

20      Q. Just based on looking at me, do you have any  
21 indication as to whether this could be a Yemeni suit ----

22      A. No.

23      Q. ---- or an American suit or a French suit or

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1 Guatemalan suit?

2 A. No, this is a regular suit, a normal suit. What he  
3 was wearing was a jacket, like a -- a summer jacket and  
4 regular pants.

5 Q. Sir, would it be fair to say that one of the goals and  
6 objectives was to get the most accurate information as a  
7 result of this interview?

8 A. That's correct.

9 Q. And in order to get the most accurate information,  
10 they obviously needed you to be the interpreter?

11 A. That's correct.

12 Q. Now, when you were interpreting, sometimes there may  
13 be a need to take notes?

14 A. Yes.

15 Q. During this interview, do you recall if you took any  
16 notes?

17 A. If I ever did take notes, we were -- we can't keep any  
18 notes. [REDACTED]

19 [REDACTED]

20 Q. [REDACTED]

21 [REDACTED]

22 A. [REDACTED]

23 Q. [REDACTED]

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1

2

A.

3

4

Q.

5

6

7

A.

8

Q. Now, during the session ----

9

LDC [MR. NATALE]: Your Honor, I'd like to show him what  
has previously been marked and entered into evidence as  
Appellate Exhibit 518, which was shown previously. It is  
listed as an unclassified document.

MJ [COL ACOSTA]: Has this been cleared, Government?

ATC [LT SCHWARTZ]: It has, and we have not been shown a  
copy or have what he has in his hands, but we are aware that  
it has been entered.

LDC [MR. NATALE]: Your Honor, this document is the same  
one that was used by Ms. Carmon during her examination.

MJ [COL ACOSTA]: This is the -- oh, I apologize. Now I  
know what 518 is. Go ahead.

LDC [MR. NATALE]: May I, Your Honor?

MJ [COL ACOSTA]: You may.

LDC [MR. NATALE]: May I ----

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1 MJ [COL ACOSTA]: Sorry. The number had fallen out. Go  
2 ahead.

3 LDC [MR. NATALE]: This -- I'd like to -- could you have  
4 this appear on the ELM0?

5 MJ [COL ACOSTA]: Yes.

6 Q. Sir, I'd like you to look at that document. And that  
7 document is, again, Appellate Exhibit 518.

8 Are you able to read it, sir, or should I enlarge it?

9 A. No, no, no. I'm able to read it, yes.

10 Q. Now, in reading that exhibit, do you recall if this is  
11 something that you read to Mr. al Nashiri?

12 A. Yes, sir.

13 MJ [COL ACOSTA]: I'm sorry. I couldn't hear you.

14 A. Yes, I did.

15 Q. Now, it says here the date is ----

16 A. ---- January 31st.

17 Q. 31.

18 A. Yes.

19 Q. Did you read the same document to him prior to each  
20 session that you had with Mr. Nashiri?

21 A. It wasn't my job to read the document to him. That's  
22 not part of my job.

23 Q. Sir, I'm not asking if it was part of your job. I was

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1 just asking if it occurred.

2 A. Yes, I was -- yes, it was part of my job.

3 Q. And that if there was a session on February 1 or  
4 February 2, is it your understanding that there would be a  
5 document that would reflect that you read this to him on those  
6 other dates?

7 A. I believe so.

8 Q. Now, prior to or at any time during the course of your  
9 interviews, did you suggest that this document be translated  
10 into Arabic so Mr. al Nashiri could read it in his native  
11 language?

12 A. No, I haven't, but I convey the information to him in  
13 his language.

14 Q. I understand that, sir. My question is: At any time,  
15 did you suggest that it should be translated into Arabic?

16 A. No, I haven't.

17 Q. Now, when these were read to Mr. Nashiri, who was  
18 reading them in English?

19 A. Mr. Gaudin, Stephen Gaudin.

20 Q. Now, when each of these were read, there were marks  
21 placed next to the numbered paragraphs. Do you see that, sir?

22 A. Yes, sir.

23 Q. Traditionally referred to as checkmarks.

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1 A. Yeah.

2 Q. Who placed those checkmarks?

3 A. I can't tell you. I'm sorry.

4 Q. At any time, did you suggest that, instead of

5 checkmarks, there should be an initial, the initials of

6 Mr. Nashiri?

7 A. So you ask me questions that I have no answer for you.

8 It's not my position to ask the lead interrogator would you

9 please just have him put his initial ----

10 Q. I understand that.

11 A. ---- or not.

12 Q. I understand that ----

13 A. Okay, thank you.

14 Q. ---- it's not your job ----

15 A. Thank you.

16 Q. What I'm asking you: Did you ever suggest that as a

17 way ----

18 A. No, I haven't.

19 Q. -- of making sure that that ----

20 A. No, I haven't.

21 Q. ---- was an accurate understanding?

22 A. No, I haven't.

23 Q. Okay. Now, at any time did you suggest that at some

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1 point Mr. al Nashiri sign this document?

2 A. Sir, I am a linguist. I just convey ----

3 MJ [COL ACOSTA]: Sir ----

4 A. ---- information.

5 MJ [COL ACOSTA]: Sir, I understand. Sir, this is the

6 military judge. If you just answer the question about whether

7 or not you suggested that Mr. Nashiri signed it. I understand

8 that it may or may not have been your role. I just need you

9 to answer the question: Did you ever suggest that Mr. Nashiri

10 sign this form? Yes or no?

11 WIT: No.

12 MJ [COL ACOSTA]: Okay. Go ahead.

13 WIT: I haven't.

14 Q. Did you have any discussions with Special Agent Gaudin

15 about having Mr. Nashiri sign this document?

16 A. No, I haven't.

17 Q. Were you ever told any reason why he would not be

18 asked to sign this document?

19 A. No, I haven't.

20 Q. Now, the questions that were asked, were these in

21 terms of what we would characterize as sort of consecutive

22 question and answers or were they what we would call

23 simultaneous interpretation?

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1 A. No, it was consecutive questioning.

2 Q. And by consecutive, we mean there would be a question  
3 and there would be an answer; is that correct?

4 A. That's correct.

5 Q. And during that question and answer, during any of the  
6 sessions you had, was there a need to clarify either what the  
7 question was or what Mr. Nashiri's answer was?

8 A. Maybe it's happen. I don't recall it, but it could  
9 happen.

10 Q. What I'm saying is that there are some times where it  
11 takes a little more than just verbatim report -- saying the  
12 words?

13 A. Yes.

14 Q. Do you recall if that occurred?

15 A. Yes.

16 Q. I'm sorry. I didn't hear your answer, sir.

17 A. Yes.

18 Q. And when that occurred, did you make any notes of that  
19 happening?

20 A. No.

21 Q. Do you recall if the need for that was -- came from  
22 the questions of Mr. Gaudin or the answers of Mr. Nashiri, or  
23 both?

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1       A. It was mainly from Mr. Nashiri if they mention about a  
2 place and, you know, I just wanted to get more information  
3 from him so I will relay the message accurately.

4       Q. During the course of this interview, do you recall if  
5 Mr. Nashiri was told not to talk about what happened to him  
6 previously?

7       A. No, never. Never, no. That's -- no.

8       Q. Did they ever invite him to tell them about what  
9 happened to him before?

10      A. Yes. And he mentioned that. Yes.

11      Q. And what he mentioned was that he had been tortured,  
12 correct?

13      A. That's correct.

14      Q. And he mentioned the variety of ways that he was  
15 tortured, and you translated them from Arabic to English so  
16 that Agent Gaudin and everybody else present could understand  
17 his answers, correct?

18      A. That is correct. And he mentioned about waterboarding  
19 and we reported it. Yes.

20      Q. And upon mentioning those, do you recall if there were  
21 additional questions to say tell us more about that?

22      A. No.

23      Q. Do you recall if there were questions as to, in light

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1 of the torture, that he was uncomfortable and that he had been  
2 in pain?

3 A. No. He -- he never mentioned that -- he was happy and  
4 willing to talk to the team, and he want us to listen to the  
5 message, what he has to say.

6 Q. Did you ever convey to Mr. Nashiri that -- a promise  
7 that he would never be taken back to the places where these  
8 horrible things have occurred to him?

9 A. I'm -- I would say yes, by Mr. Steve Gaudin, yes.

10 Q. Do you know ----

11 A. Absolutely.

12 Q. Do you know if he had the actual authority to enforce  
13 that?

14 A. You're talking Mr. Gaudin? Yes. Yes. Yes.

15 Q. And it is your understanding that he expressed to the  
16 client, Mr. Nashiri, that he had the power and the  
17 authority ----

18 A. Yes.

19 Q. ---- to prevent him from ever going back to those bad  
20 places?

21 A. A hundred percent, yes.

22 Q. And that a hundred percent that Agent Gaudin had the  
23 power, not only to prevent him from going there, but he had

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1 the power to prevent those horrible things, the torture that  
2 he endured, from ever happening again?

3 A. That is we won't accept that. Yes, absolutely.

4 Q. So it was directly conveyed to him that it not only  
5 was a promise, there was the power to make that happen?

6 A. That's correct.

7 ATC [LT SCHWARTZ]: Objection, Your Honor. Asked and  
8 answered.

9 MJ [COL ACOSTA]: Sustained. Go ahead, Defense.

10 Q. Now, during the questioning, part of your  
11 interpretation is sometimes to make note of gestures and  
12 mannerisms of the individual; is that true?

13 A. That's correct.

14 Q. And sometimes gestures and mannerisms are culturally  
15 centered. By that, I mean a gesture in one culture may convey  
16 a meaning extremely different than in another culture?

17 A. That's correct.

18 Q. And so in order to get the true understanding in the  
19 context of what was said, it would be important for you to  
20 convey what, if any, gestures Mr. Nashiri made when answering  
21 questions?

22 ATC [LT SCHWARTZ]: Objection, Your Honor. Leading.

23 MJ [COL ACOSTA]: Defense?

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1 LDC [MR. NATALE]: Would it be? I'll change it.

2 MJ [COL ACOSTA]: All right.

3 Q. As an interpreter ----

4 MJ [COL ACOSTA]: Sustained. Go ahead.

5 Q. As an interpreter dedicated to convey the accuracy and  
6 the reliability of what was said ----

7 A. That's correct.

8 Q. ---- if you noticed gestures, behavior, or anything  
9 that had an impact upon what the person was actually saying,  
10 that is something that you would want to make note of?

11 A. Absolutely, sir.

12 Q. And that is something that not only would you make  
13 note of, you would convey that and, in this case, to Agent  
14 Gaudin?

15 A. That's correct.

16 Q. And those would have been contained in the notes which  
17 you took [REDACTED]?

18 ATC [LT SCHWARTZ]: Objection, Your Honor. Leading again.

19 MJ [COL ACOSTA]: Overruled. Answer the question.

20 A. I didn't take much of notes, per se, and -- just to  
21 answer your question.

22 Q. Now, during the interview, did anyone other than Agent  
23 Gaudin ask questions of Mr. Nashiri?

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1       A. Yes. The other interrogators from NCIS was -- he  
2 spoke Arabic as well, a little bit of Arabic, and he was  
3 asking questions as well.

4       Q. The questions that he asked, were they always in  
5 English which had to be translated, or were they in a form of  
6 Arabic?

7       A. It was a little bit of Arabic but mostly in English.

8       Q. When he would ask questions in Arabic, did you ask for  
9 clarification ----

10      A. He ----

11      Q. ---- or did you translate it again?

12      A. No, I didn't translate it again because Mr. Nashiri  
13 understood and was -- mainly it's very basic words was  
14 mentioned in Arabic.

15      Q. Now, that would be -- do you recall if that was Agent  
16 McFadden?

17      A. Yes, that's correct.

18      Q. Do you recall another agent, and I hope I'm  
19 pronouncing her name correct ----

20      A. Sendlein.

21      Q. ---- agent -- Ms. Sendlein?

22      A. She was present, but I don't recall that she, you  
23 know, said much. She was present in the room.

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1 Q. Now, to the best of your recollection, how long did  
2 these sessions last?

3 A. It was at the pleasure of Mr. Nashiri. This is up to  
4 Mr. Nashiri if he wants to go for prayers, to get a break, to  
5 get -- get him some tea, pastry. At his pleasure.

6 Q. At any time, did he request a prayer break?

7 A. Yes, absolutely. And we honored that.

8 Q. And how many times do you say he requested a prayer  
9 break?

10 A. I would say during noon prayers.

11 Q. And during ----

12 A. Noon time.

13 Q. ---- that break, were you available to observe whether  
14 he did actually pray during that break?

15 A. We -- we just gave him, you know, the privacy in the  
16 room. I would say I didn't observe -- maybe I observed him  
17 praying. I -- I don't remember.

18 Q. When he was in the room, was he in any way shackled?  
19 That is, did he have any chains on him, either on his hands,  
20 on his feet, on his waist, anything like that?

21 A. Okay. When -- when the soldiers in GTMO bring the  
22 detainees, the detainee is shackled by the hands and feet.  
23 Mr. Gaudin will never accept that. They always, always -- his

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1 policy, just hands free, take the shackles off his hands. But  
2 because of Guantanamo policy, he -- he was, you know, left  
3 shackled on his -- by his feet.

4 Q. Now, when -- prior to him coming into the room, did  
5 you observe or come to learn that Mr. Nashiri not only was  
6 escorted to the room shackled but with a hood on?

7 A. No, never. Never, ever. No.

8 Q. And to your knowledge, do you recall if Mr. Nashiri  
9 was ever asked whether he had been to Guantanamo before?

10 A. No.

11 Q. To your knowledge, was he -- did he ever say that one  
12 of the places where he was held by the CIA and tortured and  
13 abused was the very same place he was now in, which is  
14 Guantanamo?

15 A. What he mentioned, that the abuse happened in other  
16 sites outside of Guantanamo Bay. That was my understanding,  
17 it's happened outside. When -- when -- just to mention, when  
18 the FBI took over, none of that is acceptable and none of that  
19 will have -- none is not -- it's not -- you get fired.

20 Q. And that's because people were aware of what occurred  
21 before, correct?

22 ATC [LT SCHWARTZ]: Objection, Your Honor. Question calls  
23 for speculation.

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1 MJ [COL ACOSTA]: Sustained.

2 Q. Do you know, sir ----

3 A. No, no, no ----

4 MJ [COL ACOSTA]: Don't answer the question.

5 A. ---- no, no.

6 MJ [COL ACOSTA]: Sir, stop. He's going to ask you  
7 another question.

8 Go ahead.

9 Q. In your mind, were you aware of things that happened  
10 before which were extremely unpleasant, which were tortuous  
11 and the like?

12 A. When you say happened before, by who exactly?

13 Q. By the CIA. Were you aware of that?

14 A. No, I -- no, I wasn't. No, I wasn't aware of that.

15 Q. In your mind, would there be any reason to promise  
16 that none of the bad things would happen if no bad things had  
17 ever happened? Did it make sense to you as an interpreter?

18 A. Department of Justice and the FBI, we don't believe in  
19 torture. You would be in trouble. You're going to get fired,  
20 and this is the result of any action taken by any individual.

21 Q. My specific question is what knowledge that you had  
22 that torture and other bad treatment occurred prior to your  
23 interview. I'm not saying it was done by the FBI.

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1 A. I ----

2 Q. What knowledge did you have?

3 A. I didn't have any information or knowledge about that.

4 I didn't expect it, to be honest with you. I wasn't -- no.

5 Q. Did you ever ask why, then, there would be a need to  
6 tell him things would never happen?

7 A. Because we knew that we can't do that with the  
8 Department of Justice.

9 Q. All right, but ----

10 A. We had a different mindset.

11 Q. I understand that, but that he could never be returned  
12 to those prior locations.

13 A. That's what Mr. Gaudin mentioned to Mr. Nashiri.

14 Q. Now ----

15 A. He will never go back again and will never happen from  
16 now on.

17 Q. Now, at the end of each day, there would be a written  
18 summary of what happened ----

19 A. Yes.

20 Q. ---- is that correct?

21 A. At the end of -- yes, that's correct.

22 Q. And that written summary was written by Special  
23 Agent Gaudin?

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1 A. With the help of -- yes.

2 Q. And with the help of you, among other people?

3 A. Yes.

4 Q. And ----

5 A. Correct.

6 Q. ---- did you have the opportunity to review it before  
7 it was completed?

8 A. Yes.

9 Q. And what was the purpose, in your mind, for reviewing  
10 it?

11 A. For accuracy about the statement Mr. Nashiri mentioned  
12 and the information revealed during the session.

13 Q. Is it fair to say that Special Agent Gaudin was the  
14 boss of this operation?

15 A. I wouldn't say the boss. He was the lead  
16 interrogator. I wouldn't say -- he never was a boss ----

17 Q. Well ----

18 A. ---- you know, of anything.

19 Q. So ----

20 A. He was the lead kind interrogator.

21 Q. So when you reviewed this, if you saw anything that  
22 was ----

23 A. Of course.

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1 Q. ---- maybe different or inaccurate, you felt very  
2 comfortable in saying this needs to be changed?

3 A. Absolutely. Hundred percent, yes.

4 Q. And ----

5 A. It's a teamwork. It's a team effort.

6 Q. And have you ever been present for other  
7 interrogations where you learned about Mr. Nashiri and his  
8 activities?

9 A. No, I never -- no.

10 Q. To your knowledge, do you know if questions that were  
11 going to be submitted, say, on the second and third day of  
12 interviews were discussed in advance with the entire group?

13 A. No, never. Never, ever. It was up to Mr. Nashiri to  
14 end the session, and to answer the question. If he wanted to  
15 end the session, it was up to him.

16 Q. Sir, my question is that at the end of the first day's  
17 session, did you participate with the other people who were  
18 there, Agent Gaudin and the rest, in a discussion as to what  
19 would be the ----

20 A. No.

21 Q. ---- topics for the next day?

22 A. Absolutely not. We wouldn't know what's the topics  
23 for the next day. No. No. Absolutely not. There's no

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1 topics to talk about.

2 Q. To your knowledge, do you remember if at any time  
3 Mr. Nashiri was told we've talked to other people and we know  
4 certain things about you?

5 A. No.

6 LDC [MR. NATALE]: Your Honor, may I have a moment?

7 MJ [COL ACOSTA]: You may.

8 [Pause.]

9 Q. Do you recall if there were any times where Agent  
10 Gaudin spoke with Mr. Nashiri without you being present?

11 A. No, never. Never.

12 Q. Or any of the other people?

13 A. Never.

14 Q. Now, when you introduced yourself to Mr. Nashiri, did  
15 you mention that you were raised in Egypt and that you were  
16 fluent in the language?

17 A. Yes. The -- you can tell we -- when we entered the  
18 room, everybody shows the -- our credentials to Mr. Nashiri  
19 and mentioned to him about where we work and what we do.

20 Q. Right. I understand that.

21 Let me ask you this: Had you worked with Gaudin --  
22 Agent Gaudin before, or was this the first time?

23 A. I worked with Mr. -- yes, I -- we went to Iraq -- yes,

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1 I was assigned to the team. I went -- I was deployed in Iraq  
2 three times. I was the man -- I was assigned to a team to  
3 interrogate Saddam Hussein.

4 Then another one, in '05 when they started to take  
5 hostages, American hostages in Iraq in '05. Then I work with  
6 Mr. Gaudin -- the U.S. ----

7 TC [MR. ROSS]: Objection, 505.

8 MJ [COL ACOSTA]: Hold on.

9 TC [MR. MILLER]: Judge, I don't know -- I think the  
10 question was, just so we don't get into trouble, he's starting  
11 to talk about things that really are sort of irrelevant to  
12 this inquiry. So if you could just limit it if he has worked  
13 for Mr. Gaudin and leave it at that.

14 A. He's ----

15 MJ [COL ACOSTA]: Hold on. Sir, don't ----

16 A. That's correct.

17 MJ [COL ACOSTA]: Everybody stop talking.

18 WIT: ---- in Iraq.

19 MJ [COL ACOSTA]: Everybody stop talking over each other,  
20 please. Okay.

21 The question, sir, is whether or not you worked with  
22 Mr. Gaudin previous to the 2007 interviews. Yes or no?

23 WIT: Yes.

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1 MJ [COL ACOSTA]: Okay.

2 WIT: That's correct.

3 MJ [COL ACOSTA]: Thank you. Go ahead.

4 Q. How many times do you think you have? And that's all  
5 I'm asking, the number of times, not location, not anything  
6 else.

7 A. I just want to mention that Mr. Gaudin ----

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

9 A. ---- was assigned to the Boston division ----

10 MJ [COL ACOSTA]: ---- sir ----

11 A. ---- and I was ----

12 MJ [COL ACOSTA]: Sir.

13 WIT: Yes, sir?

14 MJ [COL ACOSTA]: I just need you to answer the question  
15 about how many times he worked -- you worked with Mr. Gaudin  
16 prior to 2007. Just a number. One, two, three, four. How  
17 many times?

18 WIT: I would say several times. I can't recount of how  
19 many times.

20 MJ [COL ACOSTA]: Okay.

21 WIT: We came from the same office.

22 Q. I think I just have one last question.

23 Was any notes that you were -- took or you saw taken

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1 about the torture that was done, that would have been torture  
2 by the CIA, correct?

3 A. I didn't take a note, but I convey the information  
4 Mr. Nashiri mention about the torture to Mr. Gaudin.

5 Q. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 A. [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 LDC [MR. NATALE]: I have no further questions.

12 MJ [COL ACOSTA]: All right. Government, before you begin  
13 your cross-examination, we're going to take a recess for  
14 lunch. We'll kick back off at 1315.

15 Sir, this is the military judge. While this -- while  
16 during this recess, I remind you that you remain under oath  
17 and you're essentially still on the stand, so you're not to  
18 discuss your testimony with anybody, including any of the  
19 government or defense attorneys that are in the same location  
20 as you. Do you understand that?

21 WIT: Yes, sir.

22 MJ [COL ACOSTA]: All right. You can go ahead and step  
23 down and take lunch. You need to be prepared to be back in

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1 your current seat at 13 -- at 1:15. Can you do that?

2 WIT: Absolutely. Hundred percent, yes.

3 [The witness was warned, was temporarily excused, and withdrew  
4 from the RHR.]

5 MJ [COL ACOSTA]: Thank you. Until then, the commission  
6 is in recess.

7 [The R.M.C. 803 session recessed at 1207, 28 July 2022.]

8 [The R.M.C. 803 session was called to order at 1318,  
9 28 July 2022.]

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

11 Government, all personnel for you again present?

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

13 MJ [COL ACOSTA]: Defense, same?

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

15 [The witness John J. Elkaliouby resumed the witness stand.]

16 MJ [COL ACOSTA]: All right. Mr. Elkaliouby, I remind you  
17 that you remain under oath.

18 Government Counsel, you may begin.

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

20 CROSS-EXAMINATION

21 Questions by the Assistant Trial Counsel [LT SCHWARTZ]:

22 Q. Sir, I want to get a little bit into your educational  
23 background. Can you please take us through what your

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1 education was?

2 A. I went to law school in Egypt and I was a lawyer. And  
3 then I came to United States here and then I went to graduate  
4 school. I got my MBA from a Catholic college, Anna Maria  
5 College in Paxton, Mass in 1988.

6 Q. And you retired from the FBI in 2015 as a language  
7 analyst?

8 A. That's correct.

9 Q. And that was in modern Arabic, correct?

10 A. That's correct.

11 Q. What was your office assignment for the duration of  
12 your career?

13 A. I spent all my career in the Muslim division.

14 Q. Did you receive any annual training in your area,  
15 profession, a language analyst?

16 A. It's required to have a training, annual training  
17 and -- on the computer. And every two, three years we used to  
18 have a conference ----

19 Q. And what is ----

20 A. We used to go for training.

21 Q. And what is the purpose of that annual training?

22 A. The purpose of the annual training, it's a refresher  
23 course for linguists.

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1 Q. Are there levels of proficiency in the language within  
2 the FBI?

3 A. Yes, there is.

4 Q. And is that a sliding scale, as I understand, from 1  
5 to 5?

6 A. Exactly. That's 1 to 5.

7 Q. And you were a level 5 ----

8 A. That's correct.

9 Q. ---- speaker?

10 A. As speaker.

11 Q. Which is the highest?

12 A. Yes.

13 Q. Does your level of proficiency have -- make a  
14 determination somewhat on what projects you're assigned to as  
15 a language analyst?

16 A. That is correct. It's according to the areas, what  
17 you get.

18 Q. So the higher your proficiency ----

19 A. They give you more document work to translate as well.  
20 And review other linguists' works underneath you.

21 Q. Okay. And does anyone review language analysts' work  
22 for accuracy?

23 A. We have a unit which is a quality control unit in the

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1 FBI, which the supervisor each quarter require to get a sample  
2 of your work and you don't know what sample she is -- she or  
3 he is going to get and they send it to the quality control  
4 unit to be reviewed.

5 Q. And do you know what the purpose of that review is?

6 A. The accuracy of the translation.

7 Q. Is it fair to say that you've done hundreds of  
8 translations of interviews and interrogations?

9 A. I -- I did so many with the high level interrogation.

10 Q. And have you ever had any issues with any of your  
11 translations while you were employed by the FBI?

12 A. No, I haven't.

13 Q. What were some of your duties as a language  
14 specialist?

15 A. I used to provide -- I used to go out for interviews  
16 with the special agents for professional -- for subjects  
17 matter, as well as I used to do document translation and audio  
18 as well.

19 Q. So essentially twofold, some of spoken interviews and  
20 also of document reviews?

21 A. That's correct.

22 Q. And were there certain aspects or goals in translating  
23 interviews that you found to be very important? For example,

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1 the accuracy of the interview. What were some of your goals  
2 in translating interviews and interrogations?

3 A. I -- I -- mainly my goals was that bring the gap  
4 together between two people who don't speak the same language  
5 and bringing on an equal field and everybody will understand  
6 each other.

7 Q. And was it your understanding that there was an  
8 importance for accurately relaying the -- the information that  
9 an individual was saying or translating that information?

10 A. That is correct. You know, accuracy, it's -- was very  
11 important and you're relaying the same message. You don't  
12 massage the message or add or omission.

13 Q. When you say massage, do you mean -- would paraphrase  
14 be an ----

15 A. Don't add or paraphrase, yes, that's correct.

16 Q. And as a lawyer, as you stated you're a lawyer, you  
17 understand the importance of the accuracy of these statements?

18 A. Of course. Yes, I do.

19 Q. And why do you believe that it's important to  
20 accurately relay those -- those statements?

21 A. It's reflect to what's -- you know, the truth is about  
22 the subject and the document itself. It speaks for itself.

23 Q. And do you know or did you have an idea that -- of

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1 what maybe these statements or translations would be used for  
2 in the future?

3 A. Yes, of course.

4 Q. And what -- what, to your knowledge, would they  
5 possibly be used for in the future?

6 A. It's going to go to -- all our work goes to -- we --  
7 we -- all our work goes to court.

8 Q. I want to talk a little bit, sir, about the time in  
9 Guantanamo in 2007. At that time, you were working with the  
10 FBI?

11 A. Yes, I -- yes, also.

12 Q. And you were assigned to a team with Special Agent  
13 Steve Gaudin, correct?

14 A. I was assigned to the Guantanamo team as interpreter  
15 for the Guantanamo team, but I was stationed -- SA Gaudin was  
16 assigned to the team here in D.C. I was in -- doing my duties  
17 in the Boston Division and every time they need me, I used to  
18 travel to Guantanamo. I went to Guantanamo 19 times.

19 Q. And that wasn't just for the case against al Nashiri.  
20 You also interpreted for other cases?

21 A. 9/11.

22 Q. All of the 9/11 cases?

23 A. Yes.

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1 Q. And did you -- do you recall acting as an interpreter  
2 for Mr. al Nashiri in January of 2007?

3 A. Yes, I did.

4 Q. And you had not met him prior to this, correct?

5 A. No, no, no. I haven't.

6 Q. Whenever -- whenever he entered the room,  
7 Mr. al Nashiri, you stated you recall his hands were free,  
8 correct?

9 A. Yeah. That's the policy of Mr. Gaudin. He doesn't  
10 like the detainee to be handcuffed on the hands. But  
11 according to Guantanamo policy, they have to leave the shackle  
12 on -- on the feet.

13 Q. And the rights advisement form that you were asked  
14 about earlier, you interpreted the rights from that form to  
15 Mr. al Nashiri, correct?

16 A. That's correct.

17 Q. And whenever you interpreted -- whenever you  
18 translated that document, did you get any indication from him  
19 that he did not understand what was on that piece of paper?

20 A. No, I haven't. I haven't. If he, you know, indicated  
21 any of such, I would have repeated, you know, everything to  
22 him again.

23 Q. And in that room, you stated that there were three

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1 other investigators: Special Agent Gaudin, Mr. McFadden, and  
2 Ms. Sendlein, correct?

3 A. That's correct.

4 Q. There were no guards in the room during the interview?

5 A. No, no, no, no. No. They weren't allowed in the  
6 room. They weren't allowed. No.

7 Q. And whenever you first saw Mr. al Nashiri, he looked  
8 healthy to you?

9 A. Yes.

10 Q. Physically he looked healthy? He looked healthy  
11 physically to you?

12 A. Definitely.

13 Q. He did -- in your opinion, did he look scared at all?

14 A. No, he -- no. He wasn't -- he was -- mainly he wants  
15 to talk about the message and why he did and what he did and  
16 what he wants to relay ----

17 Q. Okay.

18 A. ---- you know?

19 Q. And I'll get to that momentarily as well.

20 Whenever you observed him initially, did you check for  
21 any discrepancies in translation or understanding between the  
22 two of you?

23 A. No, it never happened before. No.

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1 Q. Do you mean there were no discrepancies in  
2 understanding each other?

3 A. Yes, of course.

4 Q. If there had been discrepancies or issues ----

5 A. Yeah, I would have asked them again and even he would  
6 have asked me to repeat the question again.

7 Q. And just pertaining specifically to understanding some  
8 of the intricacies of the language, just generally, you guys  
9 had no issue understanding each other whenever you spoke?  
10 Just generally.

11 A. No, that's not -- yeah, no.

12 Q. Okay.

13 A. We didn't have any, you know, misunderstanding with  
14 each other.

15 Q. When you were with him that day, in your opinion, was  
16 he showing any signs of distress?

17 A. No. He was really -- he was healthy and he spoke  
18 normally and ----

19 Q. And was he -- he was calm?

20 A. He was very calm, yeah. He was ----

21 Q. He wasn't acting erratic?

22 A. No, he wasn't.

23 Q. And he wasn't falling asleep during the interview at

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1 all?

2 A. No. We -- he used to, you know, getting tea and, you  
3 know, pastry and ----

4 Q. He was very engaged?

5 A. He was happy. He was happy to be able to get out of  
6 the cell and talk to us. He was happy to be in the room with  
7 us and talk to us.

8 Q. And he was actively engaging ----

9 A. Engaging.

10 Q. ---- with all of you?

11 A. Yeah, that's correct.

12 Q. Can you give us an idea of, in your practice, how the  
13 interpretation and translation works between you and another  
14 person?

15 A. Mainly, the person speak and -- in a language. For  
16 example, in our situation it's Arabic. And I relay the  
17 message in English and try to bridge the gap and have common  
18 understanding between the two parties.

19 Q. And on direct, you said that sometimes in the  
20 interview there were times whenever you might have to clarify  
21 a question or an answer ----

22 A. That's correct.

23 Q. ---- with ----

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1 A. That's happened, yes.

2 Q. And is that just naturally a result of translating  
3 between two languages?

4 A. No. It has nothing to do with languages. It has to  
5 do with, like, places they have been overseas. It's -- and I  
6 wasn't familiar with the place overseas and I ask Nashiri just  
7 to explain so I will get the idea, so I will be able to  
8 translate it to the team.

9 Q. Are you familiar with people who in some instances do  
10 not wish to speak with authority?

11 A. Oh, yes, I am.

12 Q. In your opinion, whenever you were speaking with  
13 Mr. al Nashiri, did you get any indication that he was unhappy  
14 or did not wish to speak with authorities that were there?

15 A. We are -- we were under his pleasure, and he could  
16 have ended at any minute if he want -- he doesn't want to  
17 speak to us. He was speaking freely and willingly to tell us  
18 about, you know, his message.

19 Q. And you mentioned a couple times in passing that he  
20 seemed happy to be speaking with you. What made you believe  
21 that he was happy to be speaking with you?

22 A. The -- the lead of the team, Mr. Gaudin, was always  
23 pleasant and we -- we wanted to make him comfortable as much

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1 as we, you know, we could at the time, and make him very  
2 comfortable and happy and, you know, listen to him.

3 Q. And what were some of the things that you did that --  
4 to make him comfortable, specifically?

5 A. Like the unshackle -- we -- we tell the guards it's  
6 not acceptable -- you know, to unshackle, you know, the hands.  
7 Whenever he ask for a time, you know, to recess, we -- you  
8 know, we were happy to, you know, give him that time. We used  
9 to -- our -- from our own pockets or whatever, buy him the  
10 food. He eats, you know, Middle Eastern food, so he would be  
11 happy ----

12 Q. And ----

13 A. ---- and tea.

14 Q. And this -- in your opinion, did this help the  
15 investigators build rapport with Mr. al Nashiri?

16 A. Yeah, that's correct. And make him comfortable, you  
17 know, to deal with us.

18 Q. And whenever he was answering questions, was he -- did  
19 he seem confident, in your opinion? Did he seem confident in  
20 his answers or in speaking with everyone?

21 A. He -- he was happy to speak with us. He was happy to  
22 be out of the cell and speak with us, talk about, you know,  
23 his -- his message.

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1 Q. Whenever he was asked questions, he consistently gave  
2 detail -- very detailed answers, correct?

3 A. That's -- that's absolutely correct, yes.

4 Q. Usually more detail than was even asked of him?

5 A. Yeah, yes.

6 Q. And if there was a topic that was brought up that he  
7 did not wish to discuss, that was perfectly fine?

8 A. Hundred percent, yes.

9 Q. And the FBI would just -- or the interviewing agents  
10 would just move on to the next topic?

11 A. We -- yeah. We, you know, under his disposal.

12 Q. So he controlled the conversation?

13 A. That's correct.

14 Q. And it was that, a conversation, in your opinion? It  
15 was just a conversation?

16 A. Conversation, yes. It wasn't -- yeah. It was -- the  
17 atmosphere was a pleasant atmosphere.

18 Q. So, as you said earlier, he decided when he wanted to  
19 take a break to pray, for example?

20 A. Yes.

21 Q. And use the restroom?

22 A. And -- or get a break.

23 Q. He decided ----

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1       A. Or I need a break, you know. Everybody's happy to get  
2 a break.

3       Q. He decided what he wanted to answer?

4       A. Yes, of course.

5       Q. He decided what topics were going to be discussed?

6       A. The -- I think -- yes.

7       Q. He decided when the conversation ended for the day?

8       A. That's his -- yes. At his disposal. We were at his  
9 disposal.

10      Q. And he decided if he didn't want to talk at all, he --  
11 that was his decision?

12      A. He -- that's his decision, yes.

13      Q. And at no point during this conversation did he  
14 indicate that he did not wish to talk with the agents?

15      A. No, he never.

16      Q. At numerous points he actually asked for everyone to  
17 come back so he could speak with them about things such as  
18 Islam ----

19      A. Yes.

20      Q. ---- and other topics?

21      A. We did interview him, I believe, like three days, and  
22 every time he was willing to talk to us and come talk to us.

23      ATC [LT SCHWARTZ]: Your Honor, if I may just have a brief

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1 moment?

2 MJ [COL ACOSTA]: You may.

3 [Pause.]

4 ATC [LT SCHWARTZ]: Your Honor, nothing further from the  
5 government at this time.

6 MJ [COL ACOSTA]: Defense, redirect?

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

8 REDIRECT EXAMINATION

9 Questions by the Learned Defense Counsel [MR. NATALE]:

10 Q. Sir, previously you mentioned that you participated in  
11 other interviews with FBI agents. Do you recall testifying  
12 about that? I'm not ----

13 A. Testifying meaning ----

14 Q. ---- asking you who or where. But prior to your  
15 interviewing of Mr. al Nashiri ----

16 A. Yes.

17 Q. ---- you had the opportunity and you interviewed,  
18 conducted interviews along with other FBI agents.

19 A. That's correct.

20 Q. Is that correct?

21 A. Yes, absolutely.

22 Q. And these interviews, were you made aware if any of  
23 these interviews were conducted as part of the CIA RDI

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1 program?

2 A. No. We had nothing to do with the CIA. I used to go  
3 out with the agents and -- to meet subjects and conduct  
4 interviews. But the CIA wasn't part of our interviews, no.

5 Q. Did you ever come to learn anything different about  
6 who was really involved in the interviews you participated in?

7 A. No.

8 Q. Very well. Now, sir, it was your understanding that  
9 if statements regarding torture and mistreatment were made,  
10 they were to be placed in a separate report, that is, a report  
11 different than the one that just dealt with the interview of  
12 what happened?

13 A. I just ----

14 Q. Bless you, sir?

15 A. I just conveyed Mr. Nashiri's message and what he said  
16 to the team.

17 Q. And that would include that he mentioned, in addition  
18 to the waterboarding, that he was hung from the ceiling naked?

19 A. I don't recall that he mentioned that.

20 Q. That he had to relieve himself in that position while  
21 he was naked?

22 A. He never mentioned about being naked or hung on the  
23 ceiling, no. He -- he talked about the waterboarding. He

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1 said I was waterboarded by the CIA, and I reported it right  
2 away to the team.

3 Q. Did he ever report to you that he was placed in a  
4 small box and that his hands and feet and legs would swell?

5 A. No.

6 Q. Did he ever report that he believed drugs were placed  
7 in his food?

8 A. No.

9 Q. Did he ever report that his body was stepped on?

10 A. No, no. I would have reported all this stuff. No.

11 Q. And did he ever report that ice was shoved into his  
12 clothes?

13 A. No, no, no, no, no. No, no.

14 Q. [REDACTED]

15 [REDACTED]

16 A. [REDACTED]

17 [REDACTED]

18 Q. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [The security classification button was pushed in the  
22 courtroom which caused the video feed to terminate at 1338,  
23 28 July 2022.]

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1 [The Military Commission resumed at 1342, 28 July 2022.]

2 MJ [COL ACOSTA]: All right. It's my understanding that  
3 we can proceed.

4 LDC [MR. NATALE]: Thank you. Your Honor, may I restate  
5 the question? In as artfully as I ----

6 MJ [COL ACOSTA]: Concisely. Concisely you may.

7 LDC [MR. NATALE]: Thank you.

8 Questions by the Learned Defense Counsel [MR. NATALE]:

9 Q. Sir, the reports that were made at the end of every  
10 day, did you review them all for their accuracy?

11 ATC [LT SCHWARTZ]: Objection, Your Honor. This is  
12 outside the scope of cross.

13 LDC [MR. NATALE]: I'm trying to lay a foundation ----

14 MJ [COL ACOSTA]: Hold on a second. Overruled.

15 Go ahead.

16 Q. You may answer, sir.

17 A. Can you repeat the question, please?

18 Q. Sir ----

19 MJ [COL ACOSTA]: The question was: The reports that you  
20 completed at the end of every day, did you personally review  
21 them for accuracy at the end of every day? Yes or no.

22 WIT: Yes.

23 MJ [COL ACOSTA]: Okay. Next question.

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1 Q. Now, was it your understanding that any statements  
2 involving torture or misconduct were to be placed in a  
3 separate report?

4 ATC [LT SCHWARTZ]: Objection, Your Honor. Asked and  
5 answered. We've ----

6 MJ [COL ACOSTA]: Overruled.

7 You can answer the question, sir.

8 A. I was unaware of that. It's a requirement.

9 Q. At any time, were you aware that at the end of every  
10 day, there would be more than one report or did you think that  
11 there would only be one report that would include everything?

12 A. My understanding that at the end of the day, I sit  
13 down with the -- with the team and would review the day's  
14 work.

15 Q. Sir, did you ever review a report that listed  
16 instances of torture or abuse for accuracy?

17 A. No, I haven't.

18 LDC [MR. NATALE]: I have no further questions.

19 MJ [COL ACOSTA]: All right. Permanent for the purposes  
20 of this motion?

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

22 MJ [COL ACOSTA]: Any objection, Government?

23 ATC [LT SCHWARTZ]: No objection, Your Honor.

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1 MJ [COL ACOSTA]: All right, sir. For the purposes of  
2 this hearing, you are permanently excused. While this case is  
3 in hearing, do not discuss your testimony or your knowledge of  
4 this case with anyone other than counsel for either side. You  
5 may step down and return to your day.

6 WIT: Thank you, Your Honor.

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

9 MJ [COL ACOSTA]: Government?

10 ATC [LCDR SCHREIBER]: Your Honor, government calls  
11 Special Agent -- former Special Agent Andre Khoury. I believe  
12 he's on this floor, but it will just take us a second to get  
13 us in the room up here at the RHR.

14 MJ [COL ACOSTA]: Correct. Yes?

15 LDC [MR. NATALE]: Your Honor, while we're waiting for  
16 that, would it be possible for us to have that brief ex parte  
17 meeting with you regarding the order that Mr. Nashiri be here  
18 on Friday? There is a timeliness of it in light of our  
19 ability to communicate with him. So may we do it ----

20 MJ [COL ACOSTA]: At the end of this session?

21 LDC [MR. NATALE]: Yes, sir.

22 MJ [COL ACOSTA]: At the end of today, I mean. Whenever  
23 we're finished with this witness?

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1 LDC [MR. NATALE]: That's fine, Your Honor.

2 ATC [LCDR SCHREIBER]: And, Your Honor, as we've done with  
3 previous witnesses that may have to deal with identities --  
4 protected identities of Yemeni persons, we're going to be  
5 placing AE 337D Attachment C, which is the crosswalk list, on  
6 the witness stand.

7 MJ [COL ACOSTA]: All right. Lieutenant Commander  
8 Schreiber, what's your anticipated time frame for this  
9 witness?

10 ATC [LCDR SCHREIBER]: Probably in the ballpark of -- at  
11 least 90 minutes, potentially two hours, sir. This is  
12 obviously a little bit new ground and how we're doing -- this  
13 is the first hearsay witness we're offering and there are  
14 seven hearsay statements that this witness is a sponsor for.  
15 I -- my best estimate is between 90 minutes and two hours.

16 MJ [COL ACOSTA]: Okay.

17 ATC [LCDR SCHREIBER]: Well, could be shorter, though. I  
18 do -- or longer.

19 [Pause.]

20 ATC [LCDR SCHREIBER]: Your Honor, I apologize for the  
21 delay. I believe the witness must have been on the first  
22 floor, so.

23 MJ [COL ACOSTA]: Defense counsel has provided the

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1 commission with a redacted version of the ex parte filing that  
2 they had previously made with the commission regarding the  
3 conflict issue. Is that correct, Defense?

4 LDC [MR. NATALE]: That is correct. Pursuant to your  
5 order, we've ----

6 MJ [COL ACOSTA]: Right.

7 LDC [MR. NATALE]: ---- filed that directly with the  
8 court.

9 MJ [COL ACOSTA]: All right. We're going to have that  
10 marked and provided to the -- any objection to providing it  
11 now that it's -- it's still marked ex parte at the top.  
12 However, now that it's been redacted, you have no issue  
13 providing ----

14 LDC [MR. NATALE]: No problem with the redaction.

15 MJ [COL ACOSTA]: Okay. To the government, I mean.

16 LDC [MR. NATALE]: To the government, yeah.

17 MJ [COL ACOSTA]: Okay.

18 ATC [LCDR SCHREIBER]: Your Honor, we have the witness  
19 now. Are we ready to proceed?

20 MJ [COL ACOSTA]: Are you asking me if I'm ready to  
21 proceed?

22 ATC [LCDR SCHREIBER]: Yes, sir. You were just ----

23 MJ [COL ACOSTA]: I've been ready to -- I've been ready to

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1 proceed. I was just making use of the time that you gave me.

2 ATC [LCDR SCHREIBER]: Yes, sir.

3 MJ [COL ACOSTA]: Go ahead.

4 ATC [LCDR SCHREIBER]: And I was just making sure you were  
5 complete.

6 MJ [COL ACOSTA]: I'm ready. Go ahead.

7 ATC [LCDR SCHREIBER]: Mr. Khoury, if you'd raise your  
8 right hand.

9 SPECIAL AGENT ANDRE KHOURY, civilian, was called as a witness  
10 for the prosecution, was sworn, and testified as follows:

11 ATC [LCDR SCHREIBER]: Please have a seat.

12 DIRECT EXAMINATION

13 Questions by the Assistant Trial Counsel [LCDR SCHREIBER]:

14 Q. Could you just state your full name, please.

15 A. It's Andre Khoury.

16 Q. Okay. And in front of you in that folder is what's  
17 known -- what's labeled as Appellate Exhibit 337D  
18 Attachment C. And that's if you need to refer to that for  
19 identities of Yemeni persons, so it's there for you if you  
20 need it.

21 During our questioning today, just keep in mind I have  
22 no intent to elicit any sort of classified information. This  
23 is an open session. If at any point I'm asking you anything

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1 that you think might be classified just let us know and we'll  
2 take a break and figure that out ----

3 A. Sure.

4 Q. ---- okay? All right.

5 What is your present employment and how long have you  
6 been doing that?

7 A. I currently work at The Soufan Group as a vice  
8 president for the company.

9 Q. If you could either scoot up a little bit or move the  
10 microphone closer for my hearing purposes. Thank you.

11 MJ [COL ACOSTA]: Hold on. I understand. I heard you.  
12 The -- Mr. Khoury, could you speak again. I want to make sure  
13 that -- could you state your name again for the record.

14 WIT: It's Andre Khoury.

15 MJ [COL ACOSTA]: All right. This is to our -- it's not  
16 on your screen? You have nothing? You have no witness on  
17 your screen? The defense does not have the witness on their  
18 screens here in the room. Can we switch over to -- thank you.

19 All right. Proceed.

20 Q. Okay. And let's go ahead and ask that first question  
21 again, for the audio and everything else.

22 Where do you work right now and for how long have you  
23 been there?

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1       A. I work at The Soufan Group as a vice president, and  
2 I've been there since January of 2019.

3       Q. Just very generally, what does The Soufan Group do?

4       A. It's an intelligence and security consultancy firm.

5       Q. All right. Let's talk about your background. Where  
6 did you grow up?

7       A. Lebanon.

8       Q. And how long did you live in Lebanon?

9       A. I lived there for 20 years, until 1988.

10      Q. And in 1988 -- in 1988, where did you go?

11      A. I came to the United States.

12      Q. And what was your pathway to the United States?

13      A. I had a brother who was in the United States, and  
14 still here, so he had applied for my parents to obtain the  
15 green card. Then they applied in turn for me, and that's how  
16 I came into the United States in 1988.

17      Q. And you were 20 years old at the time?

18      A. Yeah.

19      Q. Where did you -- where did you go to school when you  
20 arrived in the United States?

21      A. I first went to a community college, Northern Essex,  
22 for a couple of years to learn English as a second language.  
23 Then I transferred to Merrimack College, both of them are in

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1 the northern Boston area, and graduated in 19 -- I believe  
2 1993.

3 Q. Now, ultimately you joined the FBI, right?

4 A. Yes, sir.

5 Q. Before you joined the FBI after college, did you have  
6 any work experience?

7 A. I worked at a department store, which I worked at part  
8 time while I was in college, in loss prevention. And briefly  
9 I worked for a lithography company called Integrated  
10 Solutions. Then I joined the FBI.

11 Q. Okay. What led you to decide to join or to apply to  
12 the FBI?

13 A. I had someone who was an FBI agent that came in while  
14 I was in college and he described what the FBI -- its mission  
15 and what is it exactly that they do, and I thought that's  
16 exactly what I wanted to do.

17 Q. And when did you -- when did you join the FBI?

18 A. In 1996.

19 Q. All right. Now, I assume at the beginning of your  
20 time at the FBI you went to Quantico for training?

21 A. Yes.

22 Q. And graduated from there?

23 A. That's correct.

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1 Q. After you graduated Quantico, what was your first  
2 assignment?

3 A. I was assigned to the Washington Field Office and, due  
4 to my background and my language, I'm assuming, I was put on  
5 an Extraterritorial Squad that did, you know, a lot of work  
6 overseas mainly.

7 Q. What was the first major investigation, overseas  
8 investigation you worked with that group?

9 A. I was involved in the Khobar Tower bombings in Saudi  
10 Arabia.

11 Q. And that's in what year?

12 A. In 1996.

13 Q. And then after that, what was the next major -- or,  
14 excuse me, investigation that you worked?

15 A. The East Africa bombings.

16 Q. And what year was that?

17 A. 1998.

18 Q. After the -- and we'll come back to that a little  
19 later briefly, but after the East Africa bombing investigation  
20 in 1998, did you change offices?

21 A. In 1999, the FBI Boston office where I actually  
22 processed requested an Arabic speaker for a specific case.  
23 They wanted an Arabic agent, not a -- an interpreter. So we

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1 didn't have that many, so I applied and I was granted to  
2 transfer to Boston.

3 Q. So let's just take a pause on that for a second. It  
4 sounds like up to this point your native Arabic skills were  
5 pretty important to what you did with the FBI?

6 A. 100 percent.

7 Q. Okay. But were you at any point an interpreter for  
8 the FBI or were you a special agent?

9 A. No, I was never an interpreter. I'm a special agent  
10 with the FBI.

11 Q. Okay. So you're just an FBI investigator, special  
12 agent who happens to speak native Arabic?

13 A. Correct.

14 Q. Following the cases you worked and after you  
15 transferred to the Boston office in 1999, what was the next --  
16 excuse me, what was the next major case that you worked?

17 A. The next major case would have been the Egypt Air  
18 crash and then followed by the Millennium investigation.

19 Q. And then taking you to 2000, did you ultimately work  
20 on the -- the bombing of the USS COLE?

21 A. I did.

22 Q. Okay. We're going to come back to that a bit. Just  
23 really very briefly, between the time that you worked the COLE

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1 and -- the COLE case and the first time you left the FBI, can  
2 you just describe kind of what you were doing?

3 A. Sure. So in 2001, I was assigned to our office in --  
4 in Egypt as an assistant legal attaché representing the FBI  
5 covering several countries: Sudan, Ethiopia, Eritrea,  
6 Djibouti. I did that for three years. In those three years,  
7 I was tasked to go to Iraq and help out our intelligence  
8 partners from the United States pre the invasion and then I  
9 stayed there until June of 2003.

10 And then I returned back to Egypt. And soon after I  
11 returned, I was tasked to go to Saudi Arabia where I spent a  
12 year working on a case that we labeled as the end of the  
13 summer threat, which combined with the bombings of the  
14 compounds there.

15 In 2004, I ended up in Jordan, in Amman, Jordan, as  
16 the legal attaché, and covered Syria, Lebanon, and Iraq at  
17 that time. I worked on several high-level investigations,  
18 including some of the bombings of the hotels and some rocket  
19 launches on some U.S. ships down in Aqaba and worked  
20 extensively on the assassinations that took place in Lebanon  
21 at the time.

22 Then in 2007 -- 2007, I was assigned as a legal  
23 attaché in Morocco covering North Africa, parts of it. About

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1 eight countries: Tunisia, Algeria, Mauritania. And I was  
2 there for about a year.

3 Also worked on several investigations, including some  
4 assassination -- some suicide bombings that targeted U.S.  
5 interests and local governments.

6 Then I -- I left the FBI in 2008, and then I went to  
7 work for Goldman Sachs as a vice president in their office of  
8 global security and I ran their operations in the Middle East  
9 and Africa. I did that for two and a half years.

10 Then I returned back to the FBI to the Boston office.

11 Q. What year did you return to the FBI?

12 A. It was sometime in 2010. And after I returned, I was  
13 sent to Fort Jackson where I got certified as a polygraph  
14 examiner. The Bureau did not have many -- not many. They did  
15 not have any native Arabic speakers at the time that conducted  
16 polygraphs.

17 And then after finishing my polygraph school, I went  
18 back to the Boston office, was assigned to a HUMINT squad. I  
19 did that for a short time before FBI Headquarters ordered me  
20 to go to Jerusalem, opening up our office in Jerusalem to work  
21 with the Palestinian Authority in the West Bank. I did that  
22 for several years on a TDY basis. You know, six months at a  
23 time or less back in the United States for one or two months

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1 and then back to Jerusalem.

2 Then that led to a -- a one-year assignment in  
3 Tel Aviv where I worked with the -- the Israeli National  
4 Police. I was assigned to their Lahav Unit, which is their --  
5 the equivalent of LX1. I did that for a year. And then I  
6 ended up joining the FBI office in Athens, Greece, in 2016, as  
7 an assistant legal attaché until I retired in 2018, at the end  
8 of 2018.

9 Q. So it sounds like throughout your time -- would you  
10 say it's a fair assessment that you've had extensive  
11 experience in the Middle East and the majority Muslim  
12 countries?

13 A. Yes.

14 Q. And not only that, but working with law enforcement  
15 agencies in those countries?

16 A. Yes.

17 Q. Going back to the -- back to 1998, what was your first  
18 major investigatory exposure to al Qaeda, the organization  
19 known as al Qaeda?

20 A. It was the East Africa Bombing.

21 Q. Were you, when you were participating in that  
22 investigation, familiar with the players in al Qaeda at that  
23 time?

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1       A. I mean, I was -- I was familiar with some of the main  
2 players, but not entirely, until we started doing the  
3 investigation.

4       Q. Did that investigation educate you and the other FBI  
5 investigators more about that organization?

6       A. For sure.

7       Q. And when is the next time you started to see persons  
8 from that investigation, members of al Qaeda, when did you  
9 start to see those people pop up again in another  
10 investigation?

11      A. During the USS COLE investigation.

12      Q. All right. So I want to go -- focus back now to  
13 October of 2000. I think you said you were in Boston at the  
14 time, right?

15      A. Correct.

16      Q. In October of 2000, how did you find out about the  
17 attack on the USS COLE in Yemen?

18      A. I believe it was the news that reported it, is always  
19 the best way to find out about what's going on overseas. So I  
20 think it was -- I learned it through the news, to begin with.

21      Q. And after you saw this on the news, what happened?

22      A. I was called into the special agent in charge's office  
23 who told me that the New York Field Office was assigned the

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1 USS COLE bombing case and they wanted me to be part of that  
2 investigation. So in essence, working for New York during  
3 that time.

4 Q. So packed your bags and head to Yemen?

5 A. Pretty much.

6 Q. From that -- from the point that you were told that to  
7 the time you got on the ground in Yemen, about how long was  
8 that?

9 A. I don't exactly recall but it was -- it was not long.  
10 Maybe -- maybe a few weeks, or less. I don't exactly recall.

11 Q. So when you got there, what was the situation on the  
12 ground when you first arrived?

13 A. It was a little chaotic. There was a lot of -- there  
14 was a lot of uncertainty. You know, people were a little bit  
15 on edge, realizing that, you know, al Qaeda is in our backyard  
16 where we are operating on the ground. Working with the  
17 services, right off the bat, was a little bit rocky.

18 Q. When you say the services, do you mean other U.S.  
19 agencies or local? Or both?

20 A. Actually, both. So it was -- it was a little bit  
21 awkward to begin with when we first arrived and started doing  
22 some of the work.

23 Q. When you arrived, was there already an active

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1 investigation going on by the local authorities?

2 A. Yes, there was.

3 Q. And what are the two primary local authorities there  
4 in Yemen who were already working the investigation?

5 A. It was the Political Security Organization and the  
6 Ministry of Interior.

7 Q. What was -- when you -- when you first arrived and  
8 started to get involved, what was the relationship, as you  
9 observed it, with the PSO and the MOI? I'm sorry, just to be  
10 clear, the relationship that y'all -- that you as  
11 investigators, as U.S. law enforcement, had with those -- with  
12 those individuals.

13 A. I think at the beginning it was a little strange  
14 because I don't think the -- the PSO or the MOI had worked  
15 with the FBI before. You know, they had engagements with some  
16 other entities within the U.S. embassy. But even those, I  
17 think, were limited. So it was a little bit -- it was a  
18 little bit difficult to, you know, try to communicate to them  
19 how we do things and -- and what we do.

20 As a matter of fact, I remember them saying we don't  
21 even know why you guys are here, to begin with. You know, it  
22 was just two people in a boat that committed suicide and blew  
23 up one of your ships. You know, case closed. And that's when

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1 we realized, like, oh, my God, we have a lot of things to  
2 educate them on and a lot of work to do.

3 Q. Was there any difference between the -- I'm going to  
4 talk in generalities. Was there any difference between the  
5 relationship that y'all as American law enforcement agents had  
6 with the just everyday law enforcement guys for the PSO and  
7 the MOI versus, say, their leadership?

8 A. Yeah. I mean, for sure. You know, Yemen is an  
9 interesting place. There was factions within the services  
10 that have allegiances to different entities in Yemen. So we  
11 had good relationships with people who were aligned with  
12 Abdullah Saleh at that time and his vision, if that's what you  
13 want to call it, and there were some entities that were more  
14 sympathetic to the extremists who are in the country and all  
15 around the world.

16 So it kind of varied on who exactly you were dealing  
17 with. So dealing with the leadership was interesting because  
18 the leadership, you know, gave orders to their subordinates on  
19 what exactly needs to be done and how it needs to be done. So  
20 most of our engagements were with the leadership. And we  
21 quickly realized that there were some entities that we could  
22 work with much easier than others, and we tried our best to do  
23 that. With all the hurdles that was thrown in front of us, we

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1 always overcame -- or overcome the -- the, you know, these  
2 matters, but sometimes a little bit more difficulty than  
3 others.

4 Q. Now, your role when you got there, were you working as  
5 a -- as, like, a site investigator? Were you responsible for  
6 any, like, evidence collection or actual physical sites on the  
7 ground in Yemen, or was it more just with potential witness  
8 interviews?

9 A. Yeah, no. My job was more of a -- of a -- as an  
10 investigator. I mean, we do everything, but I was not in  
11 charge of evidence collection. I mean, if during our  
12 interviews evidence was presented or we realized that there  
13 was some piece of evidence that needs to be collected, you  
14 know, we directed to do that. But I was not personally  
15 responsible to go search homes or -- or, you know, collect  
16 evidence from -- in the water under the U.S. -- the USS COLE  
17 or anything like that.

18 Q. So when you first -- so speaking specifically of the  
19 interviews. When you first arrived, were you immediately able  
20 to conduct interviews of potential witnesses, or did it take a  
21 couple days or ----

22 A. So when I first arrived, there was already some people  
23 on the ground before I -- I got there. They had got in before

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1 me. They were from New York. And they had already started a  
2 process on trying to speak with some people, specifically on  
3 the routes or in the areas where we had intelligence that some  
4 of these entities may have worked.

5 And we were doing a lot of work independently to begin  
6 with, until some of the factions within the Yemeni services  
7 realized that, you know, that's not what they wanted done, so  
8 they pretty much said that's it. No more. This is our  
9 backyard. You know, you do what we tell you to do.

10 Led to a lot of tension, and ultimately there was an  
11 MoU that was signed between the ambassador, the Attorney  
12 General, and a U.S. attorney from the Southern District of New  
13 York, pretty much creating this investigative joint -- joint  
14 investigative team to work together on the investigation.

15 Q. And this is, I think, what we've all kind of come to  
16 know as guidelines regarding the investigation of the  
17 explosion. This is signed by Barbara Bodine, et cetera, who  
18 was then the U.S. ambassador?

19 A. That's correct.

20 Q. So at the time that that came into being, were -- were  
21 you made aware of it and familiar with it?

22 A. I am very familiar with it.

23 Q. Okay. So once that agreement was struck, was the --

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1 was the FBI able to do then witness interviews?

2 A. Yes, we did.

3 Q. All right. Let's talk a little bit about how that --  
4 how those interviews worked. Give me one second here.

5 How did you decide what interviews were going to be  
6 done in a given day? Were they given to you? Did you request  
7 them? How did that work?

8 A. So the interviews were done in a combination of ways.  
9 So a lot of times, you know, we used to work with the PSO and  
10 ask them for specific individuals that we wanted to speak  
11 with. Sometimes the PSO told us that, you know, they had  
12 conducted some interviews of interest and maybe we should look  
13 into speaking with some of those individuals.

14 And let me rephrase. It's not just the PSO. It was  
15 also the MOI. So they used to say there was such-and-such  
16 that we spoke with yesterday and we believe it's somebody of  
17 interest that you might want to talk to.

18 But, also, there were some individuals that we  
19 presented to the FBI -- I'm sorry, to the Yemeni services,  
20 telling them that we want to speak with them, and those were  
21 individuals that we had developed or obtained their  
22 information through independent investigation. You know, some  
23 of it could potentially be forensically linked. Some of it

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1 could have been on the ground HUMINT work or intelligence from  
2 partners in the USG.

3 Q. So just to be clear, when you're in the process of  
4 conducting the number of interviews that you did, this wasn't  
5 just the PSO bringing somebody in and saying, hey, interview  
6 this guy. It was sometime -- it was frequently you requested  
7 people that you wanted or you'd found on your own and then  
8 they were brought to you at your request?

9 A. Correct.

10 Q. Okay. You kind of touched on it already, but I just  
11 want to attach it very closely to the interview process. Were  
12 there challenges that you -- in your experience doing a bunch  
13 of these interviews at the FBI, were there challenges that you  
14 ran into in trying to conduct interviews that you wanted to  
15 conduct with witnesses?

16 A. I mean, look, we always ended up doing the interviews  
17 that we wanted to do. Just sometimes, as I explained, it was  
18 a little bit easier than others. So if, you know, as I  
19 explained, some of the factions really wanted to put as many  
20 hurdles as possible.

21 So we used to -- you know, as FBI agents we realized  
22 very quickly that maybe instead of engaging those factions, we  
23 should wait until the other factions were around, if it is --

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1 some of them worked at night versus day. Some of them worked,  
2 you know, specific days, so we used to just go to them.

3 Ultimately, we always did the -- the interviews that  
4 we wanted to. Sometimes with ease, sometimes it took a little  
5 bit of work to do it.

6 Q. So I kind of already said it but I want to make it  
7 real clear.

8 Did you -- were you ever unable to do an interview  
9 that you wanted to do ----

10 A. No.

11 Q. ---- because the PSO or MOI prevented you from doing  
12 it?

13 A. No.

14 Q. Okay. We talked a little bit already about the --  
15 we'll call it the Bodine memorandum, this agreement about how  
16 the investigation was supposed to work.

17 Did that include a protocol for how the FBI was  
18 supposed to conduct interviews of Yemeni persons?

19 A. Yes, it did.

20 Q. And can you tell us a little bit about what that  
21 protocol said and what it was supposed to be.

22 A. The protocol was that those interviews will be  
23 conducted jointly in the presence of Yemeni services, PSO and

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1 MOI, and that the FBI would -- the FBI investigators will have  
2 to -- they will not be engaging the witness directly. They  
3 will be working with the PSO or the MOI officers in order for  
4 them to relay messages or questions to the witnesses and vice  
5 versa. The witnesses will respond to the investigators, then  
6 they will let the FBI agents know what the witness said.

7 Q. That sounds rather cumbersome.

8 A. I would say so.

9 Q. We're going to come back to it, but did that protocol  
10 stick? Did it really -- is that the way things really worked?

11 A. So I'm a native Arabic speaker and those interviews  
12 were done in Arabic. So at least in my case that I can speak  
13 of, they really did not stick for long because the witness,  
14 the Yemeni investigators and myself, we already realized that  
15 that was silly. I'm asking a question in Arabic, the witness  
16 already knows what I'm asking. You know, it's silly for the  
17 investigator to ask the same question. And the same thing  
18 with the responses. So it didn't really stick for long.

19 Q. We'll come back to that a little bit, but -- now, the  
20 interviews, most of the interviews that you did in Aden, where  
21 did those interviews take place?

22 A. At the PSO headquarters.

23 Q. Now, can you describe, what is the PSO headquarters?

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1 Was does it look like from outside? I mean, what is this  
2 building like?

3 A. I mean, it was -- it was a regular building. If I  
4 recall correctly, it had -- it had, like, a blueish gate in  
5 the front that, you know, opened into a courtyard. And then  
6 there was just a building with a bunch of offices in it. I  
7 don't remember how many stories. I think it was, like, two or  
8 three stories. But it wasn't anything like -- like we are  
9 used to as, like, you know, the head of a -- a security  
10 organization.

11 Q. Now, is there a particular room that you used all the  
12 time for these interviews?

13 A. We used a couple of rooms inside of that office, but  
14 the rooms were -- I mean, they were -- I wouldn't call them  
15 spacious but they were regular rooms with chairs and some  
16 desks and windows, long windows with, like, shutters that were  
17 open where you could see outside. You could see the water.  
18 So they were not -- they were just regular rooms inside of a  
19 building.

20 Q. Was there anything scary or intimidating about the  
21 building in your observation?

22 A. No.

23 Q. Were there, you know, big racks of weapons or anything

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1 around?

2 A. No.

3 Q. Typically, when you were doing one of these interviews  
4 under -- of a local Yemeni person, who would be in the room  
5 for the interview?

6 A. There would be the FBI investigators or the FBI  
7 agents. If they did not have a -- a native speaker, then  
8 there would be an FBI interpreter in the room with the FBI  
9 agents. And then there would be a number of PSO and MOI  
10 Yemenis with us, and the witness.

11 Q. Were there, like, assigned seats in the room? Was it  
12 very formal or ----

13 A. No, it was not formal. But, I mean, the FBI people  
14 kind of stuck -- sat next to each other and then the Yemenis  
15 stuck to -- next to each other. And I don't think that was,  
16 you know, for any other reason than in case we needed to  
17 confer with each other. It's much easier than just walking  
18 across. So it wasn't for anything else.

19 Q. So we talked about this a little bit earlier, but on a  
20 given day when you went to go do interviews at PSO  
21 headquarters, did you know on a given day who you were going  
22 to be interviewing?

23 A. We knew. We knew who we were going to be

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1 interviewing. And -- but in some instances, like I mentioned  
2 earlier, you know, depending on -- on which faction was  
3 present during those interviews. Sometimes we'll go in to  
4 interview one or two witnesses and when we're done, they'll  
5 say, hey, you know, while you're here, there's somebody else  
6 that we think you should talk to.

7           And then we'll be like, okay, no problem. We'll do  
8 that.

9           But in most cases we knew exactly who we were going to  
10 talk to ahead of time.

11         Q. And did you almost always do more than one interview  
12 per day?

13         A. Yeah. I mean, we tried to capitalize on the movements  
14 back and forth between their headquarters and the hotel for  
15 the threat level that was there, so we tried to do as many as  
16 possible on a given day.

17         Q. Now, you said that generally you knew who you were  
18 going to interview. So were you able to prepare with your  
19 team in advance for these interviews?

20         A. Yes, we were able to. But, you know, conducting  
21 interviews, I'm sure, as most of us know, it's -- you can only  
22 prepare so much because those were witnesses where there  
23 wasn't a lot of information or intelligence about them. But

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1 more so it was we didn't know where the interview was going to  
2 lead. So, yeah, we talked about, okay, what we were going to  
3 do, but it's mainly when you sit in front of the person,  
4 that's when you realize, okay, this is where the discussion is  
5 going to take us.

6 Q. So circling back a little bit to the interview  
7 protocol. So that first day of interviews and the first  
8 couple that you can remember where you're operating within  
9 this interview protocol, how did that work out? I mean, how  
10 quickly was it -- you mentioned that you kind of strayed away  
11 from that protocol. How did that all happen?

12 A. I mean, the -- the protocols were actually that we had  
13 to write the questions and hand them to the Yemeni  
14 investigators. Then they had to read it and then the witness  
15 will answer. Then -- then the investigators will just tell us  
16 what that person said.

17 Obviously, that was -- we told them that -- they  
18 learned that our witness interviews are not very short. You  
19 know, we have long witness interviews. So they did not want  
20 this to be any longer than needed.

21 So then they said, you know what? Instead of just  
22 writing the questions, just ask the questions and that's when  
23 everybody realized that it was very silly. Because when I

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1 asked the question in Arabic, the witness was already  
2 answering before the PSO or the MOI officer is asking the  
3 question again. So everybody realized in the room, like, okay  
4 there is no need for that. Then we go direct.

5 Q. Now, in every -- did you document the protocol and  
6 the -- the fact that an interview was done under the protocol  
7 when you -- we're going to come to documenting interviews, but  
8 did you ever document that in, like, the 302 reports of  
9 interviews, that protocol?

10 A. Yeah, of course.

11 Q. So it says -- if you're documenting that that was the  
12 protocol followed but then you're saying it wasn't really  
13 followed, why -- why would you document the protocol at all?

14 A. I mean, it was a protocol that was signed by the  
15 ambassador and the government of Yemen, so we wanted to ensure  
16 that that protocol was documented.

17 Q. Even if it in reality wasn't really followed?

18 A. Absolutely. And everybody knew this. I mean, the  
19 embassy knew this. The leadership in Yemen knew this. But  
20 just because it was a protocol that was officially signed  
21 between the ambassador, the U.S. Ambassador to Yemen, and the  
22 Attorney General for the country, we just had to put it in the  
23 302.

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1 Q. Did you ever have an interview where you 100 percent  
2 stuck to that protocol?

3 A. I don't recall any interviews that were 100 percent  
4 with that protocol. Some interviews took a little bit longer  
5 for the protocol not to be effective anymore, but I don't  
6 recall any interviews that I personally did where I did not  
7 have direct engagements with the witness.

8 Q. And did you -- did you seek permission to go off --  
9 off the protocol and have a direct interview or did you just  
10 go on your own?

11 A. I mean, out of respect, we used to always let the  
12 investigators, you know, kind of just look at each other, and  
13 I think everybody knew just looking at each other it's silly.  
14 And we used to say is it okay? And most of the time they did  
15 not -- you know, most of the time they just nodded and says,  
16 okay, go ahead.

17 But again, I go back to some factions were a little  
18 bit more difficult than others and those ones wanted to stick  
19 to the protocol. But then, again, we're like, okay, we'll  
20 stick to the protocol. But then they themselves after a  
21 while, they'd be like, why don't you just go ahead and ask the  
22 questions.

23 Q. Did you ever have an instance, sir, where you were in

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1 an interview already in sort of a direct interview mode and  
2 then had to switch back because somebody told you to follow  
3 the rules?

4 A. No.

5 Q. Okay. All right. Talking more about just ----

6 A. Actually, if I just could ----

7 Q. Sure.

8 A. ---- rephrase, take back.

9 In the interviews, there was -- there was some people  
10 that were there as -- I want to call them observers, that were  
11 sent specifically by some of the leadership that we did not  
12 get along very well. And sometimes those entities used to  
13 leave the room and then go directly to their bosses. And I'm  
14 assuming -- that's only an assumption, but I'm assuming they  
15 went and said, you know, this is -- the protocol is not going  
16 as it should be. And they used to come down and poke their  
17 head in and say go back to the protocol, which we used to for  
18 a very short period. But then, again, the protocol is out.  
19 Just to set the record straight.

20 Q. So once that sort of minder is no longer in the room,  
21 you're back to just doing an interview?

22 A. Pretty much.

23 Q. Okay. Talking about -- let's move forward a little

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1 bit to now you -- you have a -- a person in the room, a  
2 witness, and you're going to do an interview. And this is  
3 just, generally speaking, about your interview practice.

4 A person comes in. What do you do first as an  
5 interviewer in these -- in these interviews you did in Aden?

6 A. I mean, we -- we tried to build rapport with the  
7 witness before we start asking them the questions that we  
8 wanted to ask. This is -- I think it's FBI protocol, but it's  
9 also -- you know, it's an investigative protocol. You -- we  
10 really need to kind of establish a little bit of, you know, a  
11 relationship with the witness for them to feel comfortable and  
12 for us to feel comfortable asking the questions.

13 Q. What kinds of things would you make sure that they  
14 understood? What kinds of things would you -- would you ask  
15 them to build that rapport?

16 A. How are you today? We appreciate you being in the  
17 room. You know, how is everything? How is your family?  
18 Anything you need? You know, please let us know if you need  
19 anything to drink or eat or if you need to go, you know, take  
20 a break for a prayer. Or, you know, we're here just -- you  
21 know, we want to make it as easy as possible. You know, tell  
22 us a little bit about yourself. Just -- just regular, you  
23 know, regular talk.

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1 Q. So separate from the actual just interview part, in  
2 terms of rapport building, did you find that people were  
3 willing to talk with you and sort of chat?

4 A. Always.

5 Q. In your observation and discussions with them, why di  
6 you -- why was that?

7 A. Why would they talk to us?

8 Q. Yeah. Did you gather anything about why they were  
9 interested in talking to you?

10 A. I mean, they were there as a witness. And I don't  
11 believe that they found us or anybody else to be threatening,  
12 so they just wanted to talk. It was just a discussion.

13 Q. Was there an interest in y'all being foreigners?

14 A. They were very interested in the fact that I spoke  
15 Arabic. And when I -- they know from my dialect that I'm  
16 Lebanese. And they used to always say it's weird that you  
17 speak Arabic in a Lebanese dialect but you don't look like a  
18 Lebanese. So that was kind of a little bit odd, to try to  
19 explain to them that, yeah, Lebanese people are not all dark  
20 and with thick hair and -- but -- but, yeah, no, I mean, it  
21 was just normal, normal discussions.

22 Q. Now, do you document this rapport building in this  
23 sort of early part of an interaction with a witness in your

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1 302 documents?

2 A. No.

3 Q. Why not?

4 A. I mean, the 302s are to document relevant information  
5 to the investigation. Rapport building is not a relevant  
6 piece to the investigation. It's just for us to get  
7 comfortable with the witness.

8 Q. So important but not relevant to the investigation?

9 A. Correct.

10 Q. When any of the witnesses that you interviewed in Aden  
11 arrived to the interview, were any of them brought in in any  
12 sort of restraint?

13 A. No.

14 Q. Did everybody arrive on time to their interviews?

15 A. Some instances we were in the room maybe for a little  
16 bit longer. It's Middle East time, so sometimes people showed  
17 up a little bit later. But I wouldn't say it was, you know,  
18 hours.

19 Q. Did all of the witnesses appear to have just all the  
20 time in the world for you?

21 A. They -- yeah. None of them were -- well, I mean, they  
22 were there for the interview. But some of them told us right  
23 off the bat, like, how long is this going to take? Because

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1 they had some engagements that they needed to tend to. So  
2 some of the witnesses, you know, had to go back to work. Some  
3 of the witnesses had some family engagements. So they just  
4 wanted to know how long it was going to take.

5 And, you know, we used to tell them we'll try to  
6 accommodate whatever it is that you need but, you know, we're  
7 here to conduct these interviews and we just would like to get  
8 them done.

9 Q. So just to clarify, so some of these witnesses told  
10 you they were coming from work to -- to go to -- interview and  
11 needed to go back?

12 A. I believe that some of these witnesses came directly  
13 from work or from home.

14 Q. Did any of them appear -- just, again, generally --  
15 we'll ask about each specific person, but did any of the  
16 witnesses that you talked to appear frightened or intimidated  
17 by either the PSO or the setting in the room?

18 A. Not that I noticed.

19 Q. Broadly, were they just generally friendly with you  
20 and your team?

21 A. Very friendly.

22 Q. Now, when you did these interviews, what was your  
23 primary role in doing them as -- because I assume there were

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1 more than one FBI agent present for these interviews. What  
2 was your primary role?

3 A. I mean, my primary role was to obtain information that  
4 is pertinent to the investigation. The other investigators  
5 that were with me were part of the team. So I used to conduct  
6 the interviews myself, but with some translation back to my  
7 colleagues. But also gave the chance for my colleagues to ask  
8 questions, so that's why the translation -- I used to  
9 translate back to them, because if they wanted to ask  
10 questions that did not come to mind, or if I missed something,  
11 then they have the chance to ask the question.

12 But I -- I'm the one that used to translate both from  
13 Arabic to English and from English to Arabic.

14 Q. But again, you weren't there as a translator, right?  
15 You were there as an investigator?

16 A. Correct.

17 Q. At the end of your day of interviews, did you type up  
18 notes, put together your 302s?

19 A. Correct.

20 Q. Okay. And how -- what -- how did that process work?

21 A. We used to go back to -- to our base and then we used  
22 to type up our -- our interviews into a 302. Then they would  
23 be reviewed by U.S. entities or U.S. investigators that were

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1 present in the room. And once agreed that this -- this is  
2 what needs to be done, will be -- it will be documented as  
3 it's complete.

4 Q. So who are the primary drafters of the 302? Is it  
5 y'all who did the interviews?

6 A. Correct.

7 Q. And did you ever have an instance where any entity  
8 told you, hey, you can't put that in an interview -- or in a  
9 302 or you don't include that information from a witness?

10 A. You mean from our team, from the ----

11 Q. Correct.

12 A. ---- U.S. team?

13 Q. Right.

14 A. No. I mean, the -- the -- the 302s are pretty simple.  
15 They're exactly what -- we document what the witness says. So  
16 there was no speculation. There was no -- it's -- it's pretty  
17 straightforward. So in some instances we may have a piece of  
18 information that was not fully explored and we used to just  
19 put a question mark and tried to clarify it or we used to ask,  
20 hey, can we go back and ask these questions to clarify because  
21 it's incomplete or we're not sure exactly what happened. But  
22 it's -- it's a straightforward process.

23 Q. I want to talk briefly about the process you used for

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1 witnesses to do photo -- photo array identifications.

2 A. Okay.

3 Q. Okay? Did you ask some or all of these witnesses you  
4 interviewed to -- to look at photos and see if they could  
5 identify anybody?

6 A. Yes.

7 Q. Can you talk just a little bit about that process that  
8 you used.

9 A. So in -- just like any other major investigation, we  
10 used to have photo books of individuals. Some of them known,  
11 some of them are unknown. And we just wanted the witnesses to  
12 take a look and let us know if they know or if they have seen  
13 any of those individuals.

14 So we used to just ask them, do you mind taking a look  
15 at these photos and let us know if you know or if you have  
16 seen any of those individuals and what were the circumstances.

17 Q. Did you ever ask somebody -- like a targeted  
18 identification, like, hey, do you recognize person X in these  
19 photos?

20 A. No.

21 Q. Okay. So it was open ended?

22 A. It was definitely open ended. We work for the  
23 Department of Justice, right? So definitely open ended.

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1 Q. Okay. I want to go ahead and move on and talk about  
2 the details of some of the interviews that you actually  
3 conducted.

4 A. Sure.

5 Q. Okay. We're going to start and focus first on three  
6 different witnesses you talked to about the purchase of a  
7 200-horsepower motor, okay? Do you remember approximately  
8 the -- or do you remember the date or, you know, the day and  
9 year, month, however close you can be, that you did those  
10 interviews?

11 A. I know -- believe they were in January 2021.

12 Q. 2001?

13 A. Correct. I'm sorry. 2001.

14 Q. Okay. The first one I want to talk about is an  
15 interview of Mr. Abkar Shoui Dawood Ahmed. Do you remember  
16 that interview?

17 A. I do.

18 Q. And did you -- where did you do that interview? Same  
19 place as you described?

20 A. At -- yes, at the PSO headquarters.

21 Q. Was the setting for that interview as you've described  
22 as before?

23 A. Yes.

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1 Q. Can you recall who else from U.S. law enforcement was  
2 there for that interview?

3 A. I believe Special Agent George Crouch from the FBI and  
4 Ken Reuwer from NCIS.

5 Q. And you described before that typically interviews  
6 had -- or all the interviews had PSO or MOI present. Were  
7 there PSO and MOI officers there that day?

8 A. Yes.

9 Q. Now, why did you want to speak to Mr. Ahmed?

10 A. If I remember correctly, we interviewed several people  
11 that worked at a marine equipment shop and those -- those were  
12 brought to -- or we learned about them through, like --  
13 through a combination of forensic work by the FBI and HUMINT  
14 work on the ground which indicated that there is a specific  
15 marine store in Al-Hudaydah in Yemen that had -- that sold  
16 engines and that they were -- they had some large horsepower  
17 engines that they were selling.

18 So we had -- and again, I'm trying to remember 20-some  
19 years ago, but I believe this is how the -- that's how we came  
20 about to speak with some of these individuals that worked in  
21 that shop.

22 Q. And so to be clear, it sounds like you found or made  
23 this lead yourself and asked to speak with these witnesses?

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1       A. I -- if I recall correctly, that's exactly how these  
2 individuals surfaced.

3       Q. Okay. So, but I guess to be more clear, the PSO  
4 didn't offer these witnesses to you. The FBI requested them?

5       A. I believe so, yeah.

6       Q. And this is not just for Mr. Ahmed but for the next  
7 two witnesses, the other two. There were three total, right?

8       A. Correct.

9       Q. Okay. Did you get any pushback that you recall from  
10 the PSO or MOI about speaking to these witnesses?

11      A. I actually don't recall, but I -- knowing that there  
12 was some entities that were problematic and some that were  
13 not, as a smart investigator I believe we went to the --  
14 waited for the factions that really were more lenient and we  
15 went and asked them that that's what we wanted to do.

16      Q. Okay. So who then brought Mr. Ahmed into the  
17 interview room?

18      A. Usually PSO officers bring in the witnesses into the  
19 room because it was their headquarters.

20      Q. Do you remember seeing any signs of -- well, actually,  
21 just more generally, what was the appearance of the witness,  
22 Mr. Ahmed?

23      A. I mean, it was normal appearance. They didn't seem

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1 they were under any duress. Definitely there was, you know,  
2 no signs of unwillingness to be there. No -- no signs of, you  
3 know, being forced to be in the room.

4 Q. And if you'd seen any of that, you would have  
5 documented that?

6 A. For sure.

7 Q. All right. So did you take an opportunity to  
8 introduce the team and tell him why he was there and what you  
9 were going to talk to him about?

10 A. Yes.

11 Q. And did you take some time to try and build rapport  
12 with him?

13 A. We did, as all -- with all -- all interviews.

14 Q. With this interview, did you start with the interview  
15 protocol that we've talked about?

16 A. We always -- all interviews started with the protocol.

17 Q. And then did you shift to doing normal straight-on  
18 one-to-one interview?

19 A. Yes.

20 Q. And at any time in this interview, were you prevented  
21 in any way from asking questions you wanted to ask by Yemeni  
22 law enforcement?

23 A. No.

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1 Q. And from your observation of this interview, did it  
2 appear that Mr. Ahmed was answering your questions willingly?

3 A. For sure.

4 Q. Okay. All right. What did Mr. Ahmed tell you that he  
5 did for a living?

6 A. He worked as a salesman in the Dawood Marine shop in  
7 Hudaydah.

8 Q. And what specifically do they do in that marine shop?  
9 Or I guess what do they generally do in that marine shop?

10 A. They sold marine equipment to fishermen and boaters  
11 and -- so they sold motors and other -- other, you know,  
12 marine-related equipment.

13 Q. And what did he do there?

14 A. He was a salesman.

15 Q. Okay. Now, did you ask him about the sale of a large  
16 marine motor?

17 A. I did.

18 Q. And did he have a memory of a recent sale of something  
19 like that?

20 A. He did.

21 Q. What did he say about that?

22 A. He said he remembers selling a -- a 200-horsepower  
23 Yamaha outboard engine because it was really unusual for them

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1 to sell engines of that size in Yemen.

2 Q. Did he recall when that sale occurred?

3 A. I believe it was in November of 1999.

4 Q. Did he have any personal acquaintance with the buyer  
5 of that engine, like, outside of this purchase?

6 A. No.

7 Q. What details could he provide you about the type of  
8 engine that he sold that day?

9 A. He said it was a -- a -- a 200-horsepower Yamaha  
10 engine that needed a -- an ignition starter. It was -- it was  
11 new. It was not used.

12 Q. Did he recall the sale price?

13 A. He did.

14 Q. What was the price?

15 A. 1,150,000 rials.

16 Q. Now did he -- you said he was a salesman. Did he  
17 personally, like, sign off the sale and take the money or was  
18 that elsewhere?

19 A. No, that was done separately.

20 Q. After the -- he kind of closed the deal, if you will,  
21 on the sale of the motor, did he have further sales  
22 interaction with the buyer?

23 A. He did. The buyer inquired about a steering wheel,

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1 which was not available in the store. But he was told -- the  
2 buyer was told that they could inquire with their sister store  
3 in Aden, Yemen, to see if they could provide him with a  
4 steering wheel. And the next day the buyer came back and he  
5 was told that there was not a -- the store in Aden did not  
6 have it either.

7 Q. Now, did Mr. Ahmed actually see the buyer take  
8 possession of the motor?

9 A. I don't believe so. I think, you know, that -- the  
10 engines are kept in a separate location, so I know that he --  
11 he saw the receipt and he saw that he was going to pick it up,  
12 but I don't think he saw ----

13 Q. He didn't indicate to you that he saw them take  
14 possession of the motor?

15 A. Correct.

16 Q. You said he -- he did indicate to you he saw a receipt  
17 for the motor?

18 A. He did.

19 Q. Did he see a name on the receipt?

20 A. He did.

21 Q. What was the name?

22 A. Taher Tuhami.

23 Q. After the buyer came back the next day to inquire

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1 about the steering wheel, did he indicate if he ever saw the  
2 buyer again?

3 A. He said he never saw him again.

4 Q. Did he say anything about what kind of boat might need  
5 a 200-horsepower motor? Like what that would that get  
6 attached to?

7 A. He said that a -- an engine of that size would need  
8 a -- a boat of at least 12 meters long.

9 Q. And that's just because of the weight?

10 A. Correct, and the horsepower.

11 Q. You mentioned that Mr. Ahmed told you about there  
12 being a receipt for the boat that was purchased and that he  
13 saw the name of Tuhami on it. Did you ever -- do you know if  
14 the FBI recovered that receipt?

15 A. We did.

16 Q. Okay. And can you describe the information -- did you  
17 actually see it yourself?

18 A. Yeah. I mean, we -- we usually obtained the receipts  
19 and put them in one envelope for evidence. I don't recall  
20 exactly how we obtained the receipt, but I remember we had  
21 obtained it. I don't recall if we had gone to the store with  
22 them to obtain it or if -- or if it was given to us by the  
23 Yemenis. I -- I honestly don't recall.

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1 Q. Did the information on the receipt corroborate what  
2 Mr. Ahmed told you about the item he sold?

3 A. It did at that time.

4 Q. What -- what kind of information was on the receipt?

5 A. The price, the name, and -- and how it was paid for.

6 Q. Now, did you ask Mr. Ahmed if he could identify photos  
7 in the FBI photo book?

8 A. I did.

9 Q. Did you do it in the same manner we described earlier?

10 A. Yes.

11 Q. Do you recall what version of the photo book you used  
12 for this -- with this witness, with Mr. Ahmed?

13 A. I believe it was -- we had several photo books, but I  
14 believe it was the first version that we were showing to  
15 everybody.

16 Q. So this was back in January of 2001, so ----

17 A. Yes.

18 Q. Okay. Now, were you familiar with the photos in that  
19 photo book?

20 A. As I explained before, we knew some of the individuals  
21 in the photos, and some of them were -- we did not know who  
22 they were.

23 Q. When you showed him the photo book and asked him if he

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1 knew of anybody in there, did he identify anybody?

2 A. He did.

3 Q. Who ----

4 A. He identified the buyer.

5 Q. Okay. He identified the buyer. Which photo did he  
6 indicate was the buyer?

7 A. It was number 8.

8 Q. And did you -- do you know who photo 8 was a photo of?

9 A. It was Taher Tuhami.

10 Q. Tuhami. Okay. Do you happen to recall his level of  
11 confidence in his identification of that photo?

12 A. Very confident.

13 Q. And Tuhami is the same name that was on the receipt,  
14 right?

15 A. Correct.

16 ATC [LCDR SCHREIBER]: Just one moment, Your Honor.

17 MJ [COL ACOSTA]: All right.

18 Q. Okay. I'd like to move on to a different interview.  
19 This now -- the second person that you interviewed in relation  
20 to the purchase of this outboard motor.

21 So do you recall doing an interview with a gentleman  
22 by the name of Abd al Aziz al Monaji Hassan?

23 A. Yes.

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1 MJ [COL ACOSTA]: Hold please.  
2 Q. Was that the same day that you interviewed ----  
3 MJ [COL ACOSTA]: Hold on one second, please.  
4 You may continue.  
5 Q. And was that the same day that you interviewed  
6 Mr. Ahmed?  
7 A. Yes.  
8 Q. So did you do the interview in the same location?  
9 A. Yes.  
10 Q. Same personnel present?  
11 A. Yes.  
12 Q. And when Mr. Hassan came in the room that day, what  
13 was his appearance?  
14 A. Very similar to Mr. Ahmed. He was -- he seemed  
15 normal.  
16 Q. No signs of distress or abuse or fear?  
17 A. None.  
18 Q. And did you introduce yourself and your team?  
19 A. As always.  
20 Q. Attempt to build some rapport with him?  
21 A. Yeah.  
22 Q. And did you start out in the interview with him with  
23 the same interview protocol we've discussed?

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1 A. I did.

2 Q. Okay. Did you ultimately transition to a -- a  
3 one-to-one interview?

4 A. Yes.

5 Q. Were you ever prevented from asking any questions that  
6 you wanted to of this witness?

7 A. No.

8 Q. Did the -- was there any interference at all in this  
9 interview from Yemeni law enforcement?

10 A. No.

11 Q. And from your observation, did Mr. Hassan appear to be  
12 answering your questions during the interview willingly?

13 A. Yes.

14 Q. Okay. What did -- what did Mr. Hassan tell you that  
15 he did for a living?

16 A. He was a cashier at the same Dawood Marine store in  
17 Al-Hudaydah.

18 Q. And was he present in the store for the motor sale  
19 that we discussed with the previous witness?

20 A. He was.

21 Q. Why did he remember the sale?

22 A. Because it was a large engine, which that store did  
23 not sell many of at all.

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1 Q. And did he recall when the sale was?

2 A. He said it was in November of 1999.

3 Q. Was he at any point able to learn the name of the man  
4 who purchased the engine?

5 A. He did.

6 Q. And what was his recollection of that person's name?

7 A. It was Taher Tuhami.

8 Q. When he described Mr. Taher Tuhami to you, did he  
9 indicate that Mr. Taher Tuhami spoke with any particular  
10 accent?

11 A. He said that he spoke with a Hadhramaut accent.

12 Q. What's the significance of a Hadhramaut accent?

13 A. Hadhramaut, just -- it's a region in the eastern part  
14 of Yemen, and they have a distinct accent than some of the  
15 others. Just like in the United States, Bostonians have a  
16 different accent than people in Alabama.

17 Q. I went to college in Alabama. I'm very familiar.

18 So that would be notable to somebody who's not from  
19 that area?

20 A. Excuse me?

21 Q. The accent would be notable to somebody not from that  
22 area?

23 A. Sure.

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1 Q. Did he recall the price of the motor?

2 A. He indicated that it was 1,150,000 rials, but he also  
3 indicated that there was some negotiation between Tuhami and  
4 another individual in the store in order for them to reach  
5 that price.

6 Q. Did he tell you how the buyer paid for the -- paid for  
7 the engine, paid that price?

8 A. He indicated that after the price was agreed upon,  
9 Tuhami left and came back with a plastic bag and paid cash,  
10 which had cash in it.

11 Q. Was he aware whether the buyer asked for any other  
12 marine equipment?

13 A. He did ask for a steering wheel, which was not  
14 available. And the buyer was quoted a price, which I think  
15 found it to be a little bit too expensive.

16 Q. As the cashier, did he indicate whether he was able to  
17 see the receipt for the purchase?

18 A. Yes, he did.

19 Q. And I apologize if I already asked this. I just want  
20 to make sure I ask again. Was he able to, therefore, learn  
21 the name of the buyer?

22 A. Correct.

23 Q. And what was that name?

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1 A. Taher Tuhami.

2 Q. Tuhami, okay. Did you ask him to take a look at any  
3 photo arrays in the photo book?

4 A. I did.

5 Q. Was he able to identify -- or excuse me, did you do  
6 the same process as we've described before?

7 A. Correct.

8 Q. Ask him if he -- to look and identify anybody he might  
9 recognize?

10 A. Correct.

11 Q. Was he able to recognize anybody from the photo book?

12 A. He identified two or -- two individuals.

13 Q. Okay. Which two individuals -- well, which photos and  
14 who did he say that they were to him?

15 A. He identified Tuhami as picture number 8 and he  
16 identified an individual in picture number 23 as someone  
17 who -- who was outside of the shop waiting in a pickup truck  
18 for Tuhami.

19 Q. And who is -- at the time, who was the photo of 23 of?

20 A. Unknown.

21 Q. So at the time you didn't know who that was? It was  
22 an unknown subject?

23 A. Correct.

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1 Q. How confident was he about each of those  
2 identifications?

3 A. He was very confident.

4 Q. Okay. I'd like to move on to the third interview you  
5 did with relation to the purchase of this -- this motor.

6 Do you recall an interview you conducted of Mohammad  
7 Abdo Ahmed Mohsini?

8 A. I did.

9 MJ [COL ACOSTA]: Hold on.

10 Q. Did you do the interview ----

11 MJ [COL ACOSTA]: Hold on. Counsel. Counsel, need you to  
12 stop for a second.

13 ATC [LCDR SCHREIBER]: Yes, sir.

14 MJ [COL ACOSTA]: As you might imagine, I have a -- I'm  
15 trying to keep track of all the ones that we're going to be  
16 covering during this time period that we're going to cover  
17 this.

18 ATC [LCDR SCHREIBER]: Yes, sir.

19 MJ [COL ACOSTA]: Give me the name one more time, please.

20 ATC [LCDR SCHREIBER]: Mohammad Abdo Ahmed Mohsini.

21 MJ [COL ACOSTA]: Thank you. Go ahead.

22 ATC [LCDR SCHREIBER]: Yes, sir.

23 Q. Did you conduct this interview on the same day as the

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1 other two?

2 A. I did.

3 Q. And this is the same location as the other two?

4 A. Correct.

5 Q. And with the same personnel present?

6 A. Correct.

7 Q. When Mr. Mohsini was brought into the room, what was  
8 his appearance?

9 A. Similar to the other two. No signs of distress. No  
10 abuse. Willingly being there.

11 Q. And did he appear frightened or intimidated by the  
12 Yemeni law enforcement who were present?

13 A. No.

14 Q. And again, did you introduce your team, build some  
15 rapport with him?

16 A. Exactly.

17 Q. At any time when you were doing -- or excuse me. And  
18 when you started the interview part with him, did you start  
19 with the interview protocol?

20 A. Yes.

21 Q. And eventually, did you shift to a normal -- a normal  
22 interview?

23 A. Yes.

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1 Q. At any point were you prevented in any way from asking  
2 a question you wanted to ask of this witness?

3 A. No.

4 Q. Did the Yemeni law enforcement interfere in any way  
5 with your questioning of this witness?

6 A. No.

7 Q. And from your observation, did Mr. Mohsini appear to  
8 be speaking with you willingly and answering your questions  
9 willingly?

10 A. Yes.

11 Q. Okay. What did Mr. Mohsini tell you that he did for a  
12 living?

13 A. He actually worked part time at the -- at the Dawood  
14 Marine store. He's a teacher by trade, I believe. But he  
15 worked part time at the store, and he managed their warehouse.

16 Q. Did he indicate whether the warehouse was collocated  
17 with the store or was it -- or elsewhere?

18 A. It was 300 yards -- or 300 meters away from the -- the  
19 sale floor.

20 Q. And did he have a recollection of the sale of the  
21 200-horsepower motor?

22 A. He did.

23 Q. Why did he recall that?

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1       A. Again, because it was a -- it was a large engine that  
2 was being sold, which they don't sell many of.

3       Q. At any point was he able to see the receipt for a sale  
4 of that motor?

5       A. He did.

6       Q. Did it have a name on the receipt?

7       A. It had the name of Taher Tuhami.

8       Q. So he was able to recall the name Tuhami from that  
9 receipt?

10      A. Correct.

11      Q. Was he aware of the price of the -- of the sale?

12      A. Yes.

13      Q. What price did he recall?

14      A. 1,150,000 Yemeni rials.

15      Q. And was he aware whether it was a cash or a credit  
16 sale, I guess?

17      A. It was cash.

18      Q. Okay. Was he able to describe the motor that was  
19 sold?

20      A. He said it was -- it was a 200-horsepower outboard  
21 Yamaha engine, black in color, that was in actual -- still in  
22 the packaging.

23      Q. Now, to be clear, was he actually in the store on

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1 the -- the day of the purchase to start with?

2 A. He was in the store.

3 Q. So ----

4 A. He did not have any interaction during the sale, but  
5 he was in the store.

6 Q. Okay. So then how did he become involved with the  
7 sale or with the transfer of the -- the -- the engine?

8 A. Since the engines are kept at the warehouse and he is  
9 in charge of the warehouse, he was the individual to retrieve  
10 the engine from the warehouse and give to the buyer.

11 Q. And how did that process work? Or how did he tell you  
12 about that process?

13 A. He got in the vehicle and ----

14 Q. Which vehicle?

15 A. In the pickup truck that Tuhami was in and they drove  
16 to the warehouse.

17 Q. So they drove the 300 meters down -- down the road?

18 A. Correct.

19 Q. Did -- so did he indicate who was in the car with him?

20 A. He said there was a driver and Tuhami and himself.

21 Q. And we talked about this pickup truck a little bit.

22 And this is departing maybe just a slight bit from what

23 Mr. Mohsini said specifically, but what's the term for a

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1 pickup truck in that area?

2 A. As I recall, they call them shoust, but that was a  
3 term that they use for pickup trucks.

4 Q. So just a local term for that type of car?

5 A. Correct.

6 Q. When he was interacting with the buyer, Tuhami, did he  
7 note that the buyer had any particular accent?

8 A. He also said that he spoke with a Hadhramaut accent.

9 Q. Now, once they make the ride to the warehouse, did he  
10 tell you what happened there?

11 A. Mr. Mohsini ended up opening up the crate -- or he had  
12 not opened it, but he brought the crate where the engine is,  
13 and the buyer, Tuhami, opened it up to check it out, make sure  
14 that it was to his liking. And then they loaded it up on a  
15 pickup truck.

16 Q. Did they enlist some help to load it up?

17 A. They did.

18 Q. Just laborers? Did he indicate who?

19 A. I don't recall who, but I know that he -- he had said  
20 that there was several of them. There was a number of them to  
21 carry it because it's a -- it's a heavy -- it's a heavy  
22 engine.

23 Q. We mentioned that -- you mentioned that he said that

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1 Tuhami took a look inside the crate at the engine. Did he  
2 indicate what the other man who was with him did?

3 A. He said he didn't do much. He wasn't -- he did not  
4 participate in helping to put the engine on the truck or  
5 anything at all. He was just standing there as a -- as a  
6 gentleman would.

7 Q. Now, after loading up the engine and finishing that  
8 up, did Mr. Mohsini ever see the buyer again, Tuhami?

9 A. No.

10 Q. So Mr. Tuhami came back for a steering wheel, right?

11 A. He -- he did not -- he -- he knew from his colleagues  
12 at the store that Tuhami had asked for a steering wheel.

13 Q. All right. Did you take an opportunity to show  
14 Mr. Mohsini a -- the photo book?

15 A. I did.

16 Q. Was it the same photo book version that we've been  
17 talking about?

18 A. Correct.

19 Q. And was he able to identify photos in the photo book?

20 A. He did.

21 Q. Which photos was he able to identify and who were they  
22 to him?

23 A. He identified photo number 8 as Taher Tuhami. He

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1 identified number 23 as the individual that was the driver,  
2 but he also identified picture number 20 as the driver with a  
3 beard. So number 23 he said is the driver, clean shaven, and  
4 number 20 is the driver wearing a beard.

5 Q. And we hadn't talked yet about photo number 20. At  
6 the time, who was in the photo numbered 20? Who was -- sorry.  
7 Who was in photo number 20?

8 A. It's Abd al Rahim al Nashiri.

9 Q. Okay. I'd like to ----

10 A. Sir, can I just ask a question? Is it possible to get  
11 a drink of water or something? I didn't bring one with me by  
12 chance.

13 MJ [COL ACOSTA]: I think we're going to be taking a break  
14 here in just a second.

15 ATC [LCDR SCHREIBER]: Yes, sir. It was about to shift to  
16 another -- a different kind of bucket of witnesses. This  
17 would be a good time to take a break.

18 MJ [COL ACOSTA]: Yep. That's what we're going to do.  
19 We'll take a break for 20 minutes. We'll come back at 1520.  
20 The commission is in recess.

21 Pardon me. Pardon me. Sit back down. I apologize.  
22 I failed in my commission's -- Mr. Khoury, I failed to warn  
23 you, which is what I'm required to do every time I have a

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1 witness on the stand.

2 I just remind you that you remain under oath and that  
3 you're still on the stand during this recess. What I -- what  
4 that means is you're not to talk to anybody, including the  
5 attorneys for the government or the defense, that are located  
6 in your same location, or to anybody at all about your  
7 testimony during this recess.

8 Can you do that?

9 WIT: Yes, Your Honor.

10 [The witness was warned, was temporarily excused, and withdrew  
11 from the RHR.]

12 MJ [COL ACOSTA]: All right. The commission is in recess  
13 for 20 minutes.

14 [The R.M.C. 803 session recessed at 1503, 28 July 2022.]

15 [The R.M.C. 803 session was called to order at 1524,  
16 28 July 2022.]

17 MJ [COL ACOSTA]: The commission is called to order. All  
18 parties present as before with the exception of Mr. Forrest  
19 Parker Smith and Ms. Annie Morgan, who has stepped out.  
20 They've both stepped out to handle other issues.

21 [The witness, ANDRE KHOURY, resumed the witness stand.]

22 MJ [COL ACOSTA]: Mr. Khoury, you remain on the stand.  
23 You remain under oath.

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1 Government?

2 ATC [LCDR SCHREIBER]: Thank you, Your Honor.

3 DIRECT EXAMINATION CONTINUED

4 Questions by the Assistant Trial Counsel [LCDR SCHREIBER]:

5 Q. Okay. I want to shift away from talking about the  
6 boat motor purchase to talking about obtaining a Yemeni  
7 passport. Do you remember conducting an interview with a  
8 gentleman named Fawz Shahir Sad al Qobati?

9 A. I did.

10 MJ [COL ACOSTA]: Stop.

11 ATC [LCDR SCHREIBER]: I was waiting on you, sir. Would  
12 you like me to repeat the name, sir?

13 MJ [COL ACOSTA]: Hold on. Fawz Shahir Sad al Qobati?

14 ATC [LCDR SCHREIBER]: That's correct, sir.

15 MJ [COL ACOSTA]: All right. You may proceed.

16 Q. Mr. Khoury, do you generally recall when this  
17 interview took place?

18 A. I believe that was also in that January time frame of  
19 2001.

20 Q. Okay. If you could scoot a little closer to the  
21 microphone, just for in-here purposes. Thank you.

22 And did you conduct this interview in the same  
23 location you've described before?

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1 A. Yes.

2 Q. Were the same personnel from U.S. law enforcement that  
3 you described before, Special Agent Crouch and Special Agent  
4 Ken Reuwer, were they present?

5 A. Yes.

6 Q. And were there PSO and MOI personnel present as you've  
7 described before?

8 A. Yes.

9 Q. Who brought Mr. Qobati into the room?

10 A. The PSO officer.

11 Q. And can you recall what his appearance was?

12 A. It was normal. No signs of distress or duress or  
13 abuse or anything.

14 Q. Did he appear intimidated or frightened by the PSO/MOI  
15 personnel?

16 A. No.

17 Q. And I take it you introduced your team and did some  
18 rapport building as you described before?

19 A. Yes.

20 Q. Did you start out with the interview protocol with  
21 him?

22 A. Yes.

23 Q. And -- but did you -- were you able to shift to a

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1 normal interview at some point?

2 A. Yes.

3 Q. Were you prevented in any way from asking any  
4 questions of Mr. Qobati by Yemeni law enforcement?

5 A. No.

6 Q. Did they try and interfere with the interview in any  
7 way?

8 A. No.

9 Q. And from your observations of -- during the interview,  
10 was Mr. Qobati willingly answering your questions?

11 A. Yes.

12 Q. Now, had Mr. al Qobati been previously interviewed by  
13 the PSO?

14 A. Yes.

15 Q. So this is an aspect of some of these interviews we  
16 haven't talked about yet. Did you review his prior interview  
17 with him?

18 A. I believe we did, yes.

19 Q. And can you talk about that part of the interview  
20 protocol process?

21 A. Usually, his -- the witness statement that was taken  
22 by PSO and/or MOI would be read to the witness. And if  
23 they -- you know, we would ask them if what was read is what

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1 he actually said. And, once they agree, we will -- we'll move  
2 forward with our questioning.

3 Q. Now, when there was a previous interview that had been  
4 conducted and you had a witness go over it and sort of accept  
5 it, if you will, did the fact that they had been asked  
6 questions before ever prevent you from asking the same  
7 questions of them?

8 A. No.

9 Q. So what was the reason for even doing that with them?

10 A. Doing the ----

11 Q. I'm sorry. Going over their -- their prior interview  
12 if there had been one.

13 A. Just want to make sure that actually what was  
14 documented is what they said.

15 Q. Okay. And then you were able to proceed with whatever  
16 questions you wanted to ask?

17 A. Yes.

18 Q. All right. So, again, Mr. -- I think I may have asked  
19 this, but had Mr. al Qobati made a previous statement?

20 A. Yes.

21 Q. And you covered it with him as you've described?

22 A. Yes.

23 Q. So then when you started the actual -- your own

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1 interview, the FBI interview of Mr. al Qobati, did he indicate  
2 where he worked?

3 A. He said he worked at the passport office in  
4 Al-Hudaydah.

5 Q. And is that why you wanted to speak with him and  
6 interview him?

7 A. Yes.

8 Q. Did you discuss a particular passport application with  
9 him?

10 A. We did.

11 Q. And what were the -- the details that you discussed  
12 with him about that passport application?

13 A. We wanted to find out if he had issued a passport to a  
14 specific individual of interest in the investigation.

15 Q. And did he recall issuing a passport ----

16 A. He did.

17 Q. ---- to this particular person? Okay.

18 So what name did you ask him about?

19 A. We asked him if he had issued a passport by someone of  
20 the last name Saffani.

21 Q. Okay.

22 A. And he -- he indicated that he had issued a passport  
23 to someone in that name.

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1 Q. Okay. And that's the last -- the last name. Do you  
2 remember the rest of the name? Did he recall it?

3 A. I think it's Abdul Rahman.

4 Q. Abdul Rahman Saffani?

5 A. Yeah.

6 Q. Did he happen to -- did he happen to know or have  
7 access to the -- the application, the passport application  
8 number?

9 A. He did.

10 Q. Okay. And did he tell you what it was?

11 A. He did.

12 Q. Do you know what it is?

13 A. I'm not that good. Maybe if I could take a look at  
14 the 302, because I'm sure it's probably documented there.

15 Q. Sure. One second.

16 ATC [LCDR SCHREIBER]: Your Honor, permission to approach  
17 the witness and show him what's been previously marked as  
18 AE 319MM, pages 313 and 314. That's from Tab 21 of that  
19 filing.

20 MJ [COL ACOSTA]: You may.

21 ATC [LCDR SCHREIBER]: Excuse me. Not Tab 21 from that  
22 filing. I apologize. Just pages 313 and 314.

23 MJ [COL ACOSTA]: You may.

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1 ATC [LCDR SCHREIBER]: Thank you. I've handed the pages  
2 to the witness.

3 Q. Can you take a look at that and just look up when  
4 you're done.

5 A. I'm good.

6 Q. Okay. Looking at that, did that refresh your memory  
7 of the passport number that he told you?

8 A. The application number, yes.

9 Q. The application number, sorry.

10 And what was the application number?

11 MJ [COL ACOSTA]: Retrieve it.

12 ATC [LCDR SCHREIBER]: Oh, thank you. I'm going to  
13 retrieve it from the witness. I have retrieved it from the  
14 witness.

15 Q. Does that refresh your memory? What was the number?

16 A. 403853.

17 Q. Did Mr. al Qobati explain to you the process of  
18 getting a passport in Yemen?

19 A. He did.

20 Q. And what did he say was that process and the documents  
21 required?

22 A. He said it's either someone will have to come in with  
23 a -- a picture ID or someone will have to come in with two

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1 witnesses to vouch of who this individual is.

2 Q. And on the application, did he indicate there's any  
3 other identifying or biometric information that's required?

4 A. The applicant will have to provide his -- his or hers  
5 thumbprint.

6 Q. And for this particular passport application for this  
7 Abdul Rahman Saffani, did he indicate whether that individual  
8 was able to provide the necessary information?

9 A. That individual did provide a -- a pictured ID.

10 Q. And a thumbprint?

11 A. Correct.

12 Q. Did Mr. al Qobati explain how quickly a passport  
13 typically is generated?

14 A. He said the passports are usually done very quickly,  
15 within one day.

16 Q. And was he aware whether Mr. Saffani was able to come  
17 back and pick up the passport?

18 A. He stated that he did, but I believe it was, like,  
19 four days later.

20 Q. Did you -- did you have an opportunity to show him the  
21 photo book and have him do a photo identification?

22 A. I did.

23 Q. Was this the same photo book that you used for the

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1 previous three interviews -- yes, previous three interviews  
2 we've talked about?

3 A. Yes.

4 Q. So the January 2001 photo book?

5 A. Correct.

6 Q. And was he able to identify anybody in the photo book?

7 A. He identified picture number 22 as the individual who  
8 filled out the application, picked up the passport.

9 Q. And who did you know -- did you know who the person in  
10 photo 22 was at the time?

11 A. Yes.

12 Q. And who was it?

13 A. Nashiri.

14 Q. Okay. I'd like to shift gears a bit again and talk  
15 about two interviews you did. Are you generally familiar with  
16 a group of individuals that were interviewed by the FBI that  
17 are -- have been referred to in the investigation as the Beach  
18 Boys?

19 A. Yes.

20 Q. All right. I'd like to talk to you about one of those  
21 interviews -- actually two of them. It's starting with an  
22 individual by the name Ahmed Ali Zein al Afifi.

23 A. Okay.

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1 ATC [LCDR SCHREIBER]: Standing by, Your Honor.

2 MJ [COL ACOSTA]: I've got it. It's Ahmed Ali Zein  
3 al Afifi, correct?

4 ATC [LCDR SCHREIBER]: That's correct, sir. May I  
5 proceed, sir?

6 MJ [COL ACOSTA]: Just one second.

7 ATC [LCDR SCHREIBER]: Okay.

8 MJ [COL ACOSTA]: Okay. You may proceed.

9 Q. Mr. Khoury, do you recall when you did --  
10 approximately when you did this interview?

11 A. I believe it was also around this same time. I think  
12 it was in January of 2001.

13 Q. And did you do the interview in the same location that  
14 you did the other interviews?

15 A. Yes.

16 Q. PSO headquarters?

17 A. Yes.

18 Q. Were the same FBI personnel present, Special Agent  
19 Crouch and Special Agent Reuwer?

20 A. Correct.

21 Q. And did you also have some PSO/MOI individuals  
22 present?

23 A. Yes.

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1 Q. As we've talked about before, did the PSO bring  
2 Mr. al Afifi into the room?

3 A. Yes.

4 Q. What was his appearance when he came into the room?

5 A. He was -- he appeared normal.

6 Q. Any indications of abuse or -- or fear or anything  
7 like that?

8 A. No.

9 Q. Okay. He was clean, normally dressed?

10 A. Yes.

11 Q. Did he appear frightened or intimidated by the PSO or  
12 MOI?

13 A. No.

14 Q. And did you take the opportunity to introduce your  
15 team to him and conduct some rapport building with him?

16 A. I did.

17 Q. And when you started the interview with him, did you  
18 start out with the standard interview protocol?

19 A. Always.

20 Q. And did you then transition over to doing a normal  
21 interview?

22 A. Yes.

23 Q. All right. At any point were you prevented from

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1 asking any questions of this witness ----

2 A. No.

3 Q. ---- that you wanted to by law enforcement?

4 A. No.

5 Q. Did the Yemenis attempt to interfere in the interview  
6 in any way?

7 A. Excuse me. No.

8 Q. And from your observation during the course of the  
9 interview, did it appear that Mr. al Afifi was participating  
10 willingly, answering your questions willingly?

11 A. Yes.

12 Q. Okay. What did Mr. al Afifi tell that he did for a  
13 living at the time?

14 A. I believe that Mr. al Afifi said that he was a student  
15 at the time.

16 Q. And did you discuss events with him from the end of  
17 January of 2000?

18 A. I did.

19 Q. And this was with regard to a boat that was found in  
20 the surf, right?

21 A. Correct.

22 Q. Okay. So who did he tell you he was with on the day  
23 where -- that this boat was found?

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1       A. He said he was with a few of his friends. Allan was  
2 one of his friends that he ended up going with when they found  
3 the -- the boat in the surf.

4       Q. Okay.

5       ATC [LCDR SCHREIBER]: May I have just one second, Your  
6 Honor?

7       MJ [COL ACOSTA]: You may.

8       [Pause.]

9       Q. Sir, just to be clear, you said that he indicated he  
10 was with someone named Allan. Is that Mahmoud Salah Allan?

11      A. Yes.

12      Q. Did he tell you who this Mahmoud Allan was to him?

13      A. He was a friend of his that owned a -- a small shack  
14 down on the beach front where they used to go hang out and do  
15 some fishing.

16      Q. And on that day, what was Mr. Afifi doing with  
17 Mr. Allan and the other friend?

18      A. They drove down to the shack from Allan's house to  
19 work on his boat, trying -- in order to fix it, and then  
20 potentially go do some fishing.

21      Q. When they got down there, what did -- did they see  
22 something unusual, did they tell you about?

23      A. They found a -- a boat that was -- it looked like was

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1 sinking in the surf.

2 Q. And when they saw the boat, what did they -- what did  
3 they decide to do?

4 A. They tried to salvage the boat by pulling it out of  
5 the water, but they were unsuccessful in doing so.

6 Q. So when they were unsuccessful in pulling the boat out  
7 of the water, actually, you know, salvaging the entire boat,  
8 did he tell you what they did instead?

9 A. They decided to salvage some parts of the boat. So  
10 they retrieved the engine, the batteries, and the steering  
11 wheel.

12 Q. Was there a -- a boat trailer nearby that he told you  
13 about?

14 A. There was a boat trailer, yes.

15 Q. What did they do with the motor and the batteries and  
16 the steering wheel?

17 A. They took the -- they took this equipment back to  
18 Allan's house.

19 Q. Now, from the time that they found the boat in the  
20 surf and tried their initial salvage efforts, until the time  
21 they got the materials back to the -- the house, did he  
22 indicate a time frame for that?

23 A. I believe they started early in the evening, around

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1 5:00, 5:00 p.m., and they did not finish until -- until 3:00  
2 or so in the morning.

3 Q. So after they got the materials back to the house, did  
4 he indicate to you something that happened next that night?

5 A. He said that a -- a yellowish or tannish-looking  
6 pickup truck arrived with two individuals, and they asked  
7 them -- you know, they did not -- they've never seen these  
8 individuals before.

9 Q. Okay. So these two unknown -- he told you these two  
10 unknown gentlemen showed up. What happened when those two  
11 guys showed up?

12 A. I believe Allan had asked them if they -- if they were  
13 fishermen, and they said they were, and that they asked about  
14 the sink -- the boat that was sinking in the surf.

15 Q. And was Mr. Afifi able to observe the reaction of  
16 these men when they realized the boat was sinking in the surf?

17 A. al Afifi said that they were a little bit disturbed  
18 when they knew the boat was sinking, but then they were  
19 relieved when they learned the engine was retrieved, along  
20 with the batteries and the steering wheel.

21 Q. So what did the -- what did Mr. Afifi tell you that  
22 the drivers of the pickup truck did once they found out that  
23 the -- where the boat was and where the engine was?

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1       A. They decided to go back to Allan's house so they can  
2 ensure that the equipment actually exists over there. So they  
3 drove back to Allan's house and -- and once they confirmed  
4 that the engine, the steering wheel, and the batteries were  
5 there, they told them that they will come back at sometime to  
6 pick up the -- the equipment.

7       Q. Did they make a plan for the next day?

8       A. They did.

9       Q. And what was the plan that was made?

10      A. The plan was that they -- they wanted Afifi, Allan,  
11 and his friends to help them at 12:30 down at the beach front  
12 in order to retrieve the boat out of the water.

13      Q. Did -- and Mr. Afifi, in describing his interactions  
14 with these two men, did he indicate that either one of them  
15 had a particular dialect?

16      A. He described one of them as speaking in a -- in a  
17 Hadhramaut or a Saudi accent.

18      Q. And I guess I should be clear. Did he indicate that  
19 there was one for the driver and one for the passenger, or was  
20 it just general?

21      A. I -- I believe he said the driver spoke with a Saudi  
22 accent and the -- the other individual spoke with a Hadhramaut  
23 accent.

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1 Q. So the next day, you said that he -- he indicated to  
2 you that there was a plan to meet on the beach and retrieve  
3 the boat ----

4 A. Yes.

5 Q. ---- correct?

6 Did he tell you what happened the next day when the --  
7 to try and go through with that plan?

8 A. Yeah. Afifi, Allan, and his friends arrived as agreed  
9 upon at 12:30. The two individuals in the pickup truck did  
10 not arrive, so they waited for a while. And afterwards, Afifi  
11 decided to go on the boat since they had not arrived.

12 So he got on the boat and he realized that there were  
13 several compartments in the boat. Some of them were not  
14 manufactured compartments; they were cutouts. And the  
15 compartment that was a cutout was below, like, the steering  
16 wheel. He described the boat as it was a white boat. It had  
17 white -- you know, red carpet. You know, he described it  
18 as -- it had a -- a steel homemade steering wheel. He said it  
19 had a -- a makeshift wooden dashboard with no gauges, but it  
20 did have a throttle and there was an ignition on the -- on the  
21 steering wheel column.

22 So when he said that he -- he noticed that the carpet  
23 was being pulled out a little bit on the boat, and when he

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1 lifted it, that's when he discovered a cutout that was not  
2 manufactured. It was -- it was a homemade cutout into the  
3 boat. And inside of it he found some blocks that looked  
4 similar to a cigarette packet, maybe a little bit bigger. And  
5 they were wrapped in some type of a paper that was waterproof,  
6 but it was not water-resistant -- or vice versa,  
7 water-resistant but not waterproof.

8           So he -- he didn't know what they were, so he lifted  
9 one of them, which came out easy. He -- he described it as it  
10 was, you know, like yellowish in color. It had a little bit  
11 of a sawdust texture. The water was already in that  
12 compartment, which took the same color of -- of the -- these  
13 blocks.

14           He broke a piece off and he asked Allan if he knew  
15 what it was, to which Allan also said he did not know. So he  
16 put the block back. And he did say that he saw some wiring  
17 that was in -- in some type of a putty under those blocks, and  
18 the wiring was extended from under the blocks to -- to the  
19 steering wheel.

20           Q. Were there any batteries or other things in there that  
21 he recalled finding?

22           A. He said there were two batteries. One of them was 200  
23 amps, and he believed that that was the battery for the engine

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1 because the engine was 200 horsepowers, and that was  
2 connected. And the other battery was in its original  
3 packaging.

4 Q. Sorry. And just to circle back, did he indicate to  
5 you if he had any idea what the blocks that he found were for?

6 A. Afifi said that the blocks -- or in his opinion, they  
7 were a counterweight, because he believed the engine was too  
8 powerful for the size of the boat.

9 Q. And did he recall about how big the boat was?

10 A. He said -- he described it as almost 10 meters long.

11 Q. Was there any indication that he saw of where the boat  
12 was manufactured?

13 A. He said that there was a placard that said the boat  
14 was in -- manufactured in Ajman, which is one of the Emirates.

15 Q. We talked about that boat trailer before. Was that  
16 still present? Did he tell you whether it was still present?

17 A. He did, and he described it as a locally made trailer  
18 of steel welded together with four tires.

19 Q. So the two individuals that he described from the day  
20 before, did they arrive that day?

21 A. They did.

22 Q. And did he describe to you what they -- what happened  
23 when those gentlemen arrived?

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1       A. They -- they arrived and they had brought with them a  
2 front-loader, and they tried to retrieve the boat out of the  
3 water using some slings that they had brought with them and  
4 straps. They were unsuccessful in doing so. So they -- they  
5 decided to drag the boat out with the -- with the  
6 front-loader.

7       Q. Was he -- did he -- was he able to, like, observe all  
8 this?

9       A. He did.

10      Q. Yeah? How far did they get the boat out of the water  
11 with the front-loader by dragging it?

12      A. He said approximately 200 meters.

13      Q. Once they had the boat out of the water, was he able  
14 to observe what they did next with the boat?

15      A. They -- they tried to put the boat on a flatbed but  
16 also they were unsuccessful in doing so.

17      Q. And when they were unsuccessful on the flatbed, did  
18 they tell Mr. Afifi what they were going to do, these two men?

19      A. They said that they were going to try to bring a crane  
20 the next day and try it that way.

21      Q. Did Mr. Afifi come back the next day to the location  
22 where the boat was?

23      A. He did.

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1 Q. And was the boat there when he came back?

2 A. No.

3 Q. Did he ever see either of those two men again after --  
4 after that day?

5 A. No, he didn't.

6 Q. Did he see the driver again?

7 A. Well, he did see the driver when he came back after  
8 the Eid holiday to retrieve the engine.

9 Q. You said the Eid holiday. That's the end of Ramadan?

10 A. Correct.

11 Q. And when that gentleman came back to try and retrieve  
12 the motor, did he tell you what happened?

13 A. He came back and he said that he had a receipt with  
14 him for the boat, for the engine, and he told them that he  
15 wants to retrieve it and if they did not give them the engine,  
16 he would call the police. So they gave him the engine and I  
17 believe he ended up paying the people 20,000 rials each.

18 Q. All right. Did you take the opportunity to show  
19 Mr. Afifi the photo book?

20 A. I did.

21 Q. Was this the same version photo book that you were  
22 using for the other interviews that we've discussed.

23 A. Yes.

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1 Q. And was he able to identify any photos in the photo  
2 book?

3 A. He did identify picture 22.

4 Q. Okay. And again, picture 22 as whom to him?

5 A. Nashiri.

6 Q. Sorry. Who was it to him? He says -- and this is  
7 photo 22. Who was it to him of the two men?

8 A. The driver.

9 Q. Okay. Now, you knew that individual in photo 22 to be  
10 whom?

11 A. Nashiri.

12 Q. Okay. I'd like to move on ----

13 MJ [COL ACOSTA]: Counsel, before you move on, are you --  
14 how many more statements is Mr. Khoury going to be a proponent  
15 for today?

16 ATC [LCDR SCHREIBER]: Two, sir.

17 MJ [COL ACOSTA]: Pardon?

18 ATC [LCDR SCHREIBER]: Two.

19 MJ [COL ACOSTA]: Two? Is Mr. Khoury available the rest  
20 of the week as well? Tomorrow?

21 ATC [LCDR SCHREIBER]: Mr. Khoury is available Friday,  
22 yes, sir.

23 MJ [COL ACOSTA]: Okay. Because I have some issues that I

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1 want to take up with the defense, I'm going to stop you right  
2 there with Mr. Khoury for today.

3 Agent Khoury, you remain on the stand. I'm going to  
4 temporarily excuse you until tomorrow. I'd just remind you  
5 that you remain a witness on the stand. You're not to discuss  
6 your testimony with anybody, including the attorneys for  
7 either side, during this recess. And if anybody tries to  
8 discuss your testimony with you during the -- the overnight  
9 recess, I want you to tell me about it tomorrow. Okay?

10 WIT: Yes, Your Honor.

11 MJ [COL ACOSTA]: All right. You can step down.

12 [The witness was warned, was temporarily excused, and withdrew  
13 from the RHR.]

14 MJ [COL ACOSTA]: All right. Government, you say you have  
15 two more that you're going to go through with him, and that's  
16 the end of Mr. Khoury's testimony?

17 ATC [LCDR SCHREIBER]: Yes, sir. That's correct. Two  
18 more and they're, like, of medium length so they're not any  
19 longer than any of the ones we've done so far.

20 MJ [COL ACOSTA]: No. No, they've all been about the  
21 same. So, okay. I'm just trying to estimate our time, so we  
22 can take those up in the morning before we pick up with  
23 Dr. Crosby and then some argument. But I have one other

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1 thing. You can return to counsel table. Thank you very much.

2 Government, you promised an update by yesterday on the  
3 discovery in 474. I understand that we weren't in session  
4 yesterday, but this is our next available day, so do you have  
5 an update for me?

6 MATC [MR. WELLS]: Sir, good afternoon. John Wells.

7 MJ [COL ACOSTA]: Yep.

8 MATC [MR. WELLS]: We have taken a look, and at your  
9 guidance to look broadly, and also with the defense, at the  
10 materials again. Sir, I think we've identified a number of  
11 them that would require 505 process but also those that have  
12 been disclosed in the 9/11 case, so I will discuss with  
13 Mr. Miller with the intent to -- what's relevant and material  
14 to disclose.

15 MJ [COL ACOSTA]: And that's on 474, right?

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

17 MJ [COL ACOSTA]: Not the items related to Agent Gaudin  
18 but to the relationship between the two organizations,  
19 correct?

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

21 MJ [COL ACOSTA]: Both parties are satisfied with the --  
22 with the Agent Gaudin discovery, correct?

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

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1 MJ [COL ACOSTA]: I'm only tracking because I happen to  
2 know of another order that happened in the 9/11 case that  
3 you're probably -- I know you're working through the issue  
4 with the relationship. I know that they're working on that  
5 issue as well. I don't track it other than I ----

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

7 MJ [COL ACOSTA]: ---- wave tops to the extent that it  
8 could impact us.

9 MATC [MR. WELLS]: Yes, sir. And we are looking at that  
10 order also.

11 But for 474, we have a material that was produced in  
12 the 9/11 case on that relationship, and so I will segregate  
13 those and meet with Mr. Miller and Mr. Smith to -- to review  
14 those.

15 Then there's another body looking broadly on that  
16 whole program. And we'll go through that and, consistent with  
17 your order, make relevance and materiality determinations with  
18 Mr. Miller.

19 The end result of this, though, is none of these  
20 witnesses participated in that program and the requirements  
21 that were sent, as the testimony has borne out, were not  
22 returned. So this is more informational rounding out to prove  
23 just the scope of the program.

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1 MJ [COL ACOSTA]: I understand that's your position ----  
2 MATC [MR. WELLS]: So ----  
3 MJ [COL ACOSTA]: ---- but ----  
4 MATC [MR. WELLS]: ---- that's where we are.  
5 MJ [COL ACOSTA]: ---- produce the discovery.  
6 MATC [MR. WELLS]: Yes, sir.  
7 MJ [COL ACOSTA]: As soon as you have the 505 material  
8 ready for -- once it comes to me, I'll make sure that it's  
9 processed.  
10 MATC [MR. WELLS]: Thank you, sir.  
11 MJ [COL ACOSTA]: Because I know this is -- there's been a  
12 rare lull in the 505 reviews that have been required by the  
13 commission to do, so ----  
14 MATC [MR. WELLS]: All right, sir. Thank you.  
15 MJ [COL ACOSTA]: I'll take them up as soon as I get them.  
16 All right. Defense, you stated you wanted to speak to  
17 me ex parte because of an issue -- because of the issue about  
18 me asking for the accused to be here tomorrow. I don't  
19 understand how that's an ex parte-related issue.  
20 LDC [MR. NATALE]: Because it relates to attorney-client  
21 privileged communications with our client.  
22 MJ [COL ACOSTA]: My telling you to have him here tomorrow  
23 relates to attorney-client related privilege with your client?

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1 LDC [MR. NATALE]: As to -- as to what he has said. For  
2 example, I can disclose that on Tuesday, he told us that he  
3 was not going to be in -- wanted to come to court for the rest  
4 of the week and he would come back on Monday. The reason why  
5 it's needed to explain ex parte is to tell you the reasons why  
6 he initially said that, which was long before your order.

7 We are hoping to explain to you a situation that would  
8 not require a forced extraction for tomorrow but his  
9 appearance on Monday. I just want to be ----

10 MJ [COL ACOSTA]: You're asking for a delay until Monday  
11 for him to come in?

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

13 MJ [COL ACOSTA]: I don't -- I don't necessarily have an  
14 issue with him coming on Monday, but I do need to talk to him,  
15 so I -- again, if we want to -- if we need him here, he needs  
16 to be willing to come here, okay? And that needs to be  
17 something that's communicated to him by his counsel that there  
18 are certain times, as it says -- as I read to him every time,  
19 that if I -- that if we, the commission, determine that he  
20 needs to be here, he needs to be here.

21 LDC [MR. NATALE]: Your Honor, let me make something  
22 abundantly clear. That has been made clear to him. He -- we  
23 believe, and what we would disclose, is the reason why that he

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1 has told us previously. We have not been able to get an  
2 answer to him -- from him after we explained what we believe  
3 the situation to be.

4 MJ [COL ACOSTA]: Right.

5 LDC [MR. NATALE]: We have limitations, Judge, on how and  
6 when we can communicate with him. And the reason why we have  
7 asked for this is to let you know. This is not him trying to  
8 be difficult.

9 MJ [COL ACOSTA]: Oh, I don't assume it's him being  
10 difficult, but I -- but I -- but what I do believe is that  
11 there has to be a way for us to proceed, and I -- and I need  
12 the parties to work towards that. Okay?

13 LDC [MR. NATALE]: I am working towards it and I ----

14 MJ [COL ACOSTA]: To actively work towards it.

15 LDC [MR. NATALE]: ---- and I have always been.

16 MJ [COL ACOSTA]: I understand, but I'm going to keep my  
17 emphasis on that moving forward, okay.

18 LDC [MR. NATALE]: And I will keep working on that same  
19 thing yourself [sic].

20 MJ [COL ACOSTA]: I don't have a problem. I -- Monday is  
21 fine.

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

23 MJ [COL ACOSTA]: Monday is fine. All right. So we don't

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1 need any more ex parte. I've just handled that. I was just  
2 trying to resolve that issue before we get along with that.

3 Okay. Once the government is finished, Defense, with  
4 its three -- with its two more witnesses on Agent Khoury, how  
5 long do you anticipate the cross will be? And I -- I'm fine  
6 with -- if you can give me just a -- a broad guess, I'll take  
7 it.

8 DC [MR. PADILLA]: Broadly, a couple hours.

9 MJ [COL ACOSTA]: Okay. I anticipate no less, but take as  
10 much time as you need, because we don't have much on -- on for  
11 tomorrow and I'm glad of -- that we're able to fit it in there  
12 as well, because that's what we need to be able to do, is work  
13 through these statements one by one, so ----

14 DC [MR. PADILLA]: Yes, Judge.

15 MJ [COL ACOSTA]: And that's going to be you making this?

16 DC [MR. PADILLA]: Yes.

17 MJ [COL ACOSTA]: Wonderful. We'll get to hear from you.

18 All right. I'd like to also point out that the  
19 defense provided a redacted copy of 339FF to the commission  
20 and to the government regarding -- which is the -- their  
21 affidavit removing out what they believe to be client --  
22 attorney-client privileged material or attorney  
23 work-product-type material from that. I'm taking it all into

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1 consideration as I work through this potential emerging  
2 conflict issue that we're trying to get through.

3           So everybody be prepared to talk about that on a more  
4 extended basis.

5           It looks like Monday we just have the -- the one  
6 witness; is that correct? Dr. Malone.

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

8       MJ [COL ACOSTA]: Anticipated time for that? I'm trying  
9 to build in some time there for -- for me. So how long do you  
10 think?

11       TC [MR. MILLER]: My understanding is that the doctor will  
12 go into the next day.

13       MJ [COL ACOSTA]: It will take over a day? Okay.

14       TC [MR. MILLER]: We anticipate, yes, Your Honor.

15       MJ [COL ACOSTA]: Okay. Defense agree?

16       ADC [MS. MORGAN]: I -- defense does not anticipate a  
17 particularly long examination. I think mine will be less than  
18 a half a day.

19       MJ [COL ACOSTA]: Is she yours or theirs for this  
20 particular -- I don't know who ----

21       ADC [MS. MORGAN]: She is ours, Your Honor. I don't  
22 anticipate more than half a day.

23       MJ [COL ACOSTA]: Okay.

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1 ADC [MS. MORGAN]: But I don't know what the government  
2 intends to cross on.

3 MJ [COL ACOSTA]: Understood. And that gives me -- I will  
4 have time, since I'm getting the in camera review of the  
5 behavior health records, I need time. That should be given to  
6 me -- so that's why I'm going to stop now, to give myself some  
7 time in the -- in the evening to review that material and  
8 determine whether or not there's anything that's -- or is  
9 required to be disclosed.

10 And I expect to have that review done within 24 hours.  
11 But I have to have some time with it, so ----

12 Okay. So tomorrow we're going to pick up with Agent  
13 Khoury. Then we have Dr. Crosby is going to go. We'll hear  
14 some argument on a couple of motions. And I will very likely  
15 be -- I will hopefully be able to rule on any of the records  
16 that I deem need to be produced.

17 Okay. Is there anything else to take up before I  
18 recess the court for today -- the commission for today?  
19 Defense?

20 LDC [MR. NATALE]: Nothing from the defense, Your Honor.  
21 Thank you.

22 MJ [COL ACOSTA]: Government?

23 TC [MR. MILLER]: Nothing from the government. Thank you,

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1 Your Honor.

2 MJ [COL ACOSTA]: All right. Oh, were you standing up to  
3 say something or just standing up to exit?

4 DC [MR. PADILLA]: Just standing up to exit.

5 MJ [COL ACOSTA]: I apologize.

6 All right. The commission is in recess until 09  
7 tomorrow.

8 [The R.M.C. 803 session recessed at 1603, 28 July 2022.]

9 [END OF PAGE]

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