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1 [The R.M.C. 803 session was called to order at 0902,
2 8 November 2017.]

3 MJ [Col SPATH]: The commission is called to order. On
4 the government side, the same parties are present who were
5 present yesterday.

6 Mr. Miller, transmitting in accordance with the
7 order?

8 TC [MR. MILLER]: We are, Your Honor.

9 MJ [Col SPATH]: Thank you.

10 TC [MR. MILLER]: And in addition to the persons who were
11 here yesterday -- I'm sorry. I'll go up here. Thank you.

12 In addition, Your Honor, to the persons who were here
13 yesterday, Ms. Kathleen Bushong, who will be assisting with
14 the evidence, with the FBI is here; she has the necessary
15 clearances. And Brianna Hearn of the FBI will also be here.
16 She also has the necessary clearances. Thank you.

17 MJ [Col SPATH]: Thank you.

18 The defense, we have the detailed counsel. I notice
19 there's no learned counsel here despite a number of orders and
20 scheduled hearing that we had scheduled months ago, and no DoD
21 civilians despite the fact they remain detailed to the case, a
22 number of orders, and again, a schedule that we put out months
23 ago.

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1 Also, Major Robinson isn't here despite being
2 detailed and cleared.

3 Government, any update on Major Fewell? I know she
4 had to be read into one more program. Do we know if that has
5 occurred?

6 TC [MR. MILLER]: We do not know yet, Your Honor.

7 MJ [Col SPATH]: Okay.

8 TC [MR. MILLER]: If I get a report, I will let the court
9 know.

10 MJ [Col SPATH]: All right. More on that in a minute. I
11 notice the accused is not here this morning.

12 Lieutenant Piette, I know the government is going to
13 call a witness about that, but did he voluntarily waive his
14 presence today?

15 DDC [LT PIETTE]: Yes, Your Honor. He has a medical
16 appointment today.

17 MJ [Col SPATH]: All right.

18 Trial Counsel, do you have a witness you're planning
19 on calling about that?

20 TC [MR. MILLER]: Yes, Your Honor. We're calling Colonel
21 Wells.

22 MATC [COL WELLS]: Good morning, Your Honor.

23 MJ [Col SPATH]: Good morning.

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1 MATC [COL WELLS]: We call an assistant staff judge
2 advocate who met with the accused this morning.

3 MJ [Col SPATH]: All right. Come on up, give him the
4 oath, and -- thank you.

5 MAJOR, U.S. Army, was called as a witness for the prosecution,
6 was sworn, and testified as follows:

7 **DIRECT EXAMINATION**

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

9 Q. Please have a seat. Major, I understand you're an
10 assistant SJA with the Joint Task Force Guantanamo Bay; is
11 that correct?

12 A. That is correct.

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

14 MJ [Col SPATH]: You may.

15 Q. Major, I've handed you a document which is three
16 pages marked as Appellate Exhibit 388B. Do you see that?

17 A. I do.

18 Q. And is it three pages?

19 A. It is three pages.

20 Q. All right. And nothing on the back; is that correct?

21 A. That is correct.

22 Q. All right. And do you recognize your signature on
23 there?

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1 A. I do recognize my signature on page 2.

2 Q. Did you have a chance to meet with the accused this
3 morning?

4 A. I did.

5 Q. Did you talk to him?

6 A. I did talk to him.

7 Q. And what did he say?

8 A. I met with him and advised him that he had a
9 commission this morning. He said he understood that. I asked
10 him if he would be coming to the commission. He advised he
11 did not want to come. I then asked him to -- he was sitting
12 on his bed, so I asked him to come to the door and asked him
13 if he wanted me to read the English version and then have it
14 translated or simply read the English version.

15 He asked for the Arabic version, so I handed him the
16 Arabic version of the acknowledgment; and he advised that if I
17 read the English version, he would follow along with Arabic.
18 So I read the English version to him, and he followed along.

19 Q. Okay. And then what was his election again?

20 A. After I read the English version to him, I asked him
21 if he understood his rights. He indicated that he did. And
22 then he asked me which page he [sic] wanted me to sign, the
23 Arabic page or the English version. I put both of them up on

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1 the tray for him to sign, and he signed the English version,
2 indicating that he understood his rights but was voluntarily
3 waiving his right to attend the commission this morning.

4 Q. And then he handed that form back to you; is that
5 correct?

6 A. He did hand that form back to me. After he signed
7 it, I signed it, and then asked the time; it was 0737 when I
8 signed the document.

9 Q. And was it your perception that he was making this
10 election voluntarily?

11 A. It was.

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

13 MJ [Col SPATH]: You may. Would you hand me that?
14 Thanks.

15 MATC [COL WELLS]: Your Honor, for the record, I've
16 retrieved the exhibit, Appellate Exhibit 388B. I've handed it
17 to the court reporters and then they've handed it to you. No
18 further questions, sir.

19 MJ [Col SPATH]: All right. Thank you. Let me just take
20 a look at it.

21 Here you go. Thanks.

22 Defense Counsel, questions?

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

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1 MJ [Col SPATH]: Thank you.

2 Thanks for your testimony. You're excused.

3 WIT: Thanks, Judge.

4 [The witness was excused and withdrew from the courtroom.]

5 MJ [Col SPATH]: Certainly find that he has voluntarily
6 and knowingly waived his right to be present for the session
7 as he has done in the past for some of these sessions.

8 Defense Counsel, any impression on whether he plans
9 to attend later today, or any information?

10 DDC [LT PIETTE]: No, Your Honor. My understanding is he
11 has a medical appointment today but -- and won't be returning
12 today. Possibly tomorrow, definitely on Friday.

13 MJ [Col SPATH]: Okay. Good. And I think tomorrow he'll
14 find probably no need. I'm going to ask the government for an
15 update on witnesses in just a moment, and then we'll move from
16 there.

17 Again, with the absence of both detailed counsel and
18 still-appointed learned counsel, who continue to remain
19 absent, once I ultimately issue findings of fact and
20 conclusions regarding this issue, it appears to be a strategy
21 chosen by the defense community that becomes more and more
22 apparent each day without more detailed counsel showing up.

23 We've got one counsel who is cleared to assist in

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1 defending Mr. Nashiri. Lieutenant Piette, at any point, if
2 you want, I'll take a break and you can spend a couple hours
3 with your client and the new detailed counsel to introduce
4 them. Certainly introducing your client to counsel is
5 something that I believe you can handle, knowing the time you
6 spent with your client. If you don't want to take that
7 opportunity, you don't have to. I'm not going to order the
8 attorney in here.

9 But at any point if you want my assistance in
10 introducing him to Mr. al Nashiri, I'll do that here publicly,
11 or I'll give you an opportunity to do it and we'll get out of
12 your way. And I'll do that at any time.

13 For the people watching, I'm going to again remark,
14 what we're doing here is pretty simply the
15 blocking-and-tackling type things you do in any trial, capital
16 or noncapital. And in every jurisdiction requiring learned
17 counsel there are times learned counsel can absent themselves
18 from a proceeding. And there are many, many times when other
19 counsel, who are not learned in the state of capital
20 litigation, conduct significant parts of a capital trial.

21 Here what we're doing is, frankly, the simple direct
22 and cross-examination of witnesses, fact witnesses and
23 foundational witnesses. The bread and butter of law practice,

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1 the bread and butter of judge advocates -- frankly, judge
2 advocates are in the courtroom more often than many of our
3 counterparts in the civilian world for trial and have a great
4 deal of experience.

5 I continue to find right now we're not dealing with
6 matters that require capital qualification or capital
7 experience at all. I'm going to make these findings each day
8 on the record as we go forward. It doesn't require a
9 capitally qualified attorney, which is why the law allows
10 capital representation to the extent practicable.

11 And I don't believe it requires a capitally qualified
12 attorney to introduce another attorney to your client. Again,
13 the opportunity is yours whenever you want it. I'm happy to
14 assist here in the courtroom. If you don't want my
15 assistance, I'll give you a break at any point to make that
16 introduction, no matter where we are this week. And I think
17 the government would work to let you do it right here in the
18 courtroom, if you wanted to, and we'll all get out of your
19 way.

20 Again, I have to emphasize that just in the normal
21 course of any commission, tribunal, trial, court-martial, it's
22 pretty straightforward. A commission or a judge or tribunal
23 officer rules, parties object, they note it for the appellate

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1 record. In some instances maybe they file an immediate appeal
2 hoping to get action from an appellate court. What parties
3 can't do is disregard the orders.

4 If we get to a place where everybody here can just
5 pick and choose what orders they want to obey, you have
6 chaos -- I've said it before -- in any system, and courts were
7 created to avoid chaos.

8 I have ruled every day that the statute we are
9 governed by makes clear, learned counsel to the extent
10 practicable. And we have a learned counsel here who is on the
11 case. He has not been released. And he knew he was supposed
12 to be here, and he continues to voluntarily absent himself
13 from each proceeding that have been scheduled, again, for
14 months.

15 We'll, I'm sure, continue to deal with that issue as
16 we move forward, but what we're going to do now is move
17 forward into 207 matters.

18 Before we do that, what I want -- Mr. Miller, if you
19 would, can you give us some update? I saw some e-mail traffic
20 through the staff. But I just -- rather than admitting
21 e-mails, if your team can give me an update on kind of the
22 order of witnesses -- if not by name, by number -- and what
23 days we'll be in session.

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1 TC [MR. MILLER]: Colonel Wells will address that issue,
2 Your Honor.

3 MJ [Col SPATH]: Thanks, Mr. Miller.

4 MATC [COL WELLS]: Good morning, Your Honor.

5 MJ [Col SPATH]: Good morning.

6 MATC [COL WELLS]: For today, 8 November, we have five
7 witnesses. Our first witness will be Mr. Aaron Morgan; our
8 second witness will be Mr. Anthony Duback; third witness, Paul
9 Fennewald; fourth witness, Robert Holley; and if we're
10 capable, a fifth witness, Michael Marks by VTC.

11 And, sir, this morning just before we came into
12 court, I did send out another update e-mail on how we should
13 proceed through the rest of the week with witnesses that are
14 available. What we've attempted to do for today is move
15 witnesses that we would normally call on Thursday to today.
16 There is a flight out on Thursday. Our idea is if we can get
17 through these witnesses, a travel day on Thursday. We do have
18 witnesses coming in on Thursday.

19 MJ [Col SPATH]: So right now no witnesses tomorrow?

20 MATC [COL WELLS]: Correct, sir.

21 MJ [Col SPATH]: All right. We'll probably then be off
22 the record completely. Good. Friday, how many witnesses,
23 approximately?

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1 MATC [COL WELLS]: Sir, at this time we're attempting to
2 schedule two witnesses. One is a definite, Mr. Morgan Bodie,
3 if his travel is successfully accomplished tomorrow; and also
4 Mr. Robert Mulry, but this is looking more difficult and this
5 may be by VTC. We'll update the court this afternoon, in
6 fact, on the status.

7 And then for next week, on Monday we anticipate three
8 witnesses, including the two expert witnesses; that appears to
9 be shaping up appropriately. At least one has indicated
10 voluntary. The other one we're still working through a few
11 issues.

12 And then on Tuesday we only have one witness. I have
13 on here Wednesday, no witnesses for travel. And this may be
14 an error. But for the remaining week then we have one, two,
15 three, four witnesses on Thursday; and Friday, I believe, we
16 have an additional witness, one witness.

17 MJ [Col SPATH]: All right.

18 MATC [COL WELLS]: We'll repair that communication to you
19 to make sure it's accurate.

20 MJ [Col SPATH]: No, I appreciate that. I know that was
21 communicated as well to the defense. I knew it would be, and
22 I appreciate keeping everyone in the loop. And the time out
23 of the courtroom is helpful as well to continue to build the

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1 record that I'm clearly building for where we're at. Thank
2 you.

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

4 MJ [Col SPATH]: Lieutenant Piette?

5 DDC [LT PIETTE]: Yes, Your Honor, thank you. I just
6 wanted to make a quick record and then also clarify something
7 that I thought I understood yesterday, but I may not have.

8 First, the issue with the -- my fellow military
9 detailed counsel. As we've stated before, we're trying to
10 follow the ABA Guidelines here and ----

11 MJ [Col SPATH]: But you do know they're guidelines.

12 DDC [LT PIETTE]: Yes.

13 MJ [Col SPATH]: I mean, you know that. And you recognize
14 that some systems have not incorporated them.

15 DDC [LT PIETTE]: Yes.

16 MJ [Col SPATH]: And they're not the law.

17 DDC [LT PIETTE]: Right.

18 MJ [Col SPATH]: Okay.

19 DDC [LT PIETTE]: Absolutely, Your Honor, but they are
20 certainly best practice, and this is a case where ----

21 MJ [Col SPATH]: Well, they're ABA best practice.

22 DDC [LT PIETTE]: Right. But it's a person's life on the
23 line, and I want to make sure we are doing everything right.

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1 I mean, I understand that the government and this court will
2 likely look at almost everything we do as a strategy. I think
3 if we brought detailed counsel in here, the government would
4 find a way to frame that as a strategy.

5 However, it's not a strategy and ----

6 MJ [Col SPATH]: The government has been remarkably silent
7 about this, frankly.

8 DDC [LT PIETTE]: But bringing more unqualified counsel in
9 isn't going to change the fact that learned counsel isn't
10 giving us, or Mr. al Nashiri, assistance and advice, which he
11 statutorily has the right to have and needs to have, frankly.

12 And as far as bringing on and introducing new
13 learned -- or new detailed counsel, I think initial meetings
14 with a client, even in a normal, everyday courts-martial or
15 trial, under normal circumstances is difficult. But here,
16 where he's meeting people who are in the same uniform as the
17 people who are trying to kill him, where learned counsel, for
18 whatever reason, has disappeared, which he understands as much
19 as he can, based on the -- based on what we've been able to
20 tell him.

21 But obviously it's a difficult situation that
22 requires -- especially in a death penalty case and especially
23 in a death penalty case down here and under the circumstances,

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1 requires the advice and assistance of somebody who has
2 experience in this and understands how things go.

3 Additionally, Your Honor, I want to make a record,
4 too, that -- you know, I don't want anybody to make a mistake
5 here. What we're doing here is -- in the course of the next
6 week and a half, is admitting -- the government's attempting
7 to admit evidence into a trial on a person's life.

8 MJ [Col SPATH]: Yes, the government is laying the
9 foundational requirements for real evidence, on which I'm not
10 going to rule, as I have said for over a year now, until the
11 defense has an opportunity to attack the foundation. They're
12 laying -- attempting to lay the foundation for real pieces of
13 evidence that is the same no matter what court you practice
14 in. And, frankly, no matter how complex the evidence, the
15 foundation for real evidence ----

16 DDC [LT PIETTE]: Right.

17 MJ [Col SPATH]: ---- pretty straightforward.

18 DDC [LT PIETTE]: Right. But it is real, physical
19 evidence in a capital trial.

20 Additionally, I just had a question, something that I
21 thought I understood yesterday, but after talking with people,
22 fellow detailed counsel, there might be -- I might have
23 misunderstood or just didn't understand.

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1 Yesterday on the record you mentioned something about
2 a learned counsel that's incoming. When I heard that, I
3 thought you were probably referring to the efforts made by the
4 defense team to get a new learned counsel. But I don't know,
5 maybe I wasn't clear on that. Is there a different ----

6 MJ [Col SPATH]: I assume. That was the filings that I
7 saw, is General Baker determined he would release counsel,
8 without authority, cut into an attorney-client relationship
9 that's been in existence for over six years, again, without
10 authority, at least according to a ruling that has yet been --
11 hasn't been disturbed, and said he was working to secure a new
12 learned counsel ----

13 DDC [LT PIETTE]: Yes, sir.

14 MJ [Col SPATH]: ---- after he recused himself. I would
15 assume Colonel Aaron is doing something.

16 DDC [LT PIETTE]: Yes, sir. Okay. Then I did understand
17 it correctly.

18 MJ [Col SPATH]: But Mr. Kammen has not been released.

19 DDC [LT PIETTE]: Yes, sir. Understood.

20 MJ [Col SPATH]: Thank you.

21 All right. Trial Counsel, is your first witness
22 ready?

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

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1 MJ [Col SPATH]: Let's go.

2 TC [MR. MILLER]: Government calls Aaron Morgan.

3 MJ [Col SPATH]: Bailiff, if you would, go get Mr. Morgan.

4 [The bailiff did as directed.]

5 TC [MR. MILLER]: Stand and raise your right hand, please.

6 AARON O'NEIL MORGAN, civilian, was called as a witness for the
7 prosecution, was sworn, and testified as follows:

8 **DIRECT EXAMINATION**

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

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

11 A. Aaron O'Neil Morgan.

12 Q. And where do you currently reside, sir?

13 A. Oxford, Mississippi.

14 Q. I want to, Mr. Morgan, talk a little bit about your
15 background. Were you ever a member of the armed services?

16 A. Yes, I was.

17 Q. And which branch?

18 A. U.S. Navy.

19 Q. And when did you join the United States Navy?

20 A. September '90.

21 Q. And was that right out of high school?

22 A. Yes, it was.

23 Q. Do you remember the first ship to which you were

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1 assigned?

2 A. Yes, I do.

3 Q. All right. And what ship was that, sir?

4 A. USS WAINWRIGHT out of Charleston, South Carolina.

5 Q. And what type of ship was that?

6 A. Cruiser, guided missile.

7 Q. What is a guided missile cruiser?

8 A. It's pretty much a battleship that has a missile
9 launcher to it, and you control the direction and the
10 targeting of the missile. That's why it's called guided
11 missile.

12 Q. Did you have any special duties and responsibilities
13 on that ship?

14 A. Yes, I did. I was a missile technician or a gunner's
15 mate involved with the missile system, and we maintained a --
16 the forward or aft launcher, depending on which one we had, or
17 both.

18 Q. After your time on the WAINWRIGHT -- and how long
19 were you on the WAINWRIGHT?

20 A. Three years.

21 Q. After the WAINWRIGHT, where did you next go?

22 A. I went to school out of Dam Neck, Virginia.

23 Q. What did you study?

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1 A. The vertical launching system. Once again, it is a
2 missile system but it is a box system that sits inside the
3 ship, and it launches a missile vertically.

4 Q. After school, were you assigned a new ship?

5 A. Yes, I did.

6 Q. And what ship was that, sir?

7 A. I went to the USS MONTEREY out of Norfolk, Virginia.

8 Q. Did you have the same sort of duties and
9 responsibilities as you had on the WAINWRIGHT?

10 A. Yes, I did, just with a different missile system;
11 that was all.

12 Q. How long did you remain on the MONTEREY?

13 A. I was on the MONTEREY three years.

14 Q. And from the MONTEREY, where did you go, sir?

15 A. The MONTEREY got home-ported out of -- from Norfolk,
16 Virginia down to Mayport, Florida, and then I went to physical
17 security detail out of Jacksonville, Florida.

18 Q. And how long did you do physical security?

19 A. Three years.

20 Q. Did you ever -- were you ever assigned another ship?

21 A. Yes, I was. After the -- being physical security
22 detailed, I went to the USS COLE.

23 Q. And when did you go to the USS COLE?

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1 A. Around March of 2000.

2 Q. And what were your duties and what were your
3 responsibilities on the COLE?

4 A. A VLS tech.

5 Q. All right.

6 A. Vertical launching system technician.

7 Q. We're going to get back to that in a second. How
8 long did you remain with the COLE?

9 A. I was with the COLE almost four years, because I
10 stayed with it throughout the yard period as well.

11 Q. When you say you stayed with it during the yard
12 period, what do you mean by that, sir?

13 A. Once the COLE was bombed, it went back into the yard.
14 It went back into a yard period to be repaired, and I stayed
15 on it afterwards throughout the yard period and then a year
16 later.

17 Q. Where was that, sir?

18 A. It was in the yards in Pascagoula, Mississippi.

19 Q. After Pascagoula, where did you go?

20 A. After Pascagoula, I went back to the COLE for about a
21 year. And then I got stationed back down in Pascagoula at the
22 weapons station.

23 Q. After the weapons station, sir?

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1 A. After the weapons station, I was -- I went to school,
2 advanced schooling for the upgrade system of the VLS, vertical
3 launching system, technician out of Dam Neck -- I mean, out of
4 San Diego, California, and then I went to the USS GRIDLEY.

5 Q. And how long did you remain on the GRIDLEY?

6 A. Three years.

7 Q. And was that your last ship?

8 A. Yes, it was.

9 Q. When did you retire, sir?

10 A. October 2010.

11 Q. At what rank?

12 A. E-6.

13 Q. After you left the GRIDLEY, did you return to Oxford?

14 A. Yes, I did.

15 Q. And what sort of employment have you had since you
16 returned to Oxford?

17 A. I stayed out for a minute, not doing anything, just
18 enjoying retirement. Later back, I went to work at the -- as
19 a manager at the Captain D's restaurant and then decided to
20 use up my GI Bill, so I went to school to get my associate's
21 and bachelor's degree from ITT Tech as an electronics
22 engineer. And then from there I went to work at the Lafayette
23 County Detention Center in Oxford, Mississippi, as a jailer.

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1 Q. All right. And Lafayette -- that's the Lafayette
2 County ----

3 A. Sheriff Department.

4 Q. ---- Sheriff Department.

5 I want to return to your time on the COLE. Do you
6 remember when you reported to the COLE?

7 A. Yes, I did.

8 Q. When was that, sir?

9 A. March of 2000.

10 Q. And where was that?

11 A. Out of Norfolk, Virginia.

12 Q. When you reported to the COLE, did you live on the
13 COLE or did you live off the ship?

14 A. I lived on the COLE for a brief moment until my
15 family was home-ported up, and then I moved off the ship.

16 Q. When you reported to the COLE, did you immediately go
17 to sea?

18 A. No, we did not.

19 Q. What did you do, sir?

20 A. We did workups, and that's pretty much you're testing
21 all your systems and everything, going out to sea, coming back
22 in. You go out to sea, test your system, come back in, fix
23 anything that needs to be fixed, and preparations of getting

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1 ready for deployment.

2 Q. And did you deploy with the ship?

3 A. Yes, I did.

4 Q. And when did that occur, sir?

5 A. Around July or August of 2000. I'm not certain of
6 the actual month.

7 Q. And to where were you deploying?

8 A. Out to sea, going to the -- oh, the Mediterranean.

9 Q. Take your time. Okay.

10 How would you describe the camaraderie on the ship?

11 A. It was well, well as expected of, you know, any crew
12 that has been together for a while. Laughter, everybody
13 getting to know one another, if you were just newly reported.
14 It was -- it was a great bunch.

15 Q. And did you at some point leave the Mediterranean?

16 A. Yes. We left the Mediterranean and went
17 throughout -- through the Suez Canal.

18 Q. And where were you headed?

19 A. Oman, Yemen.

20 Q. Did you at some point -- was there a scheduled
21 refueling stop?

22 A. Yes, that -- that was our purpose of our stop, was to
23 take on fuel, water, and any supplies that we needed from

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1 there.

2 Q. Now, prior to making your refueling stop, is the crew
3 given any instructions or any information?

4 A. Yes. Usually when we -- before we pull into a
5 country we're given the directions or the dos and don'ts of
6 that country, places to stay away from, what type of liberty
7 we will have, things of that nature; and also, depending on
8 the country, the force protection that we would use entering
9 the country itself.

10 Q. Was there to be liberty on this particular trip?

11 A. No, it was not.

12 Q. And by liberty, you mean what?

13 A. Liberty is when we actually moor to some form or
14 fashion and the crew gets to leave the ship and go out and
15 enjoy the country itself.

16 Q. Do you remember arriving in Aden, Yemen?

17 A. Yes, I do.

18 Q. And did you have any -- on the day of the attack, did
19 you have any duties or responsibilities?

20 A. Yes, as a gunner's mate we are also part of the
21 protection team, and we also issue weapons to the sentries or
22 the watches that we will have standing, and put out weapons
23 for the force protection condition that we would be using.

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1 Q. Is that a normal procedure?

2 A. Yes, it is.

3 Q. Were there any special procedures or precautions
4 taken on the day of the attack?

5 A. Usually they were given, and depending on the threat
6 level of the country, we would either add more weapons to the
7 outside. They would tell us we would have a -- or boat
8 security from -- at a point surrounding the ship or circling
9 the ship as well.

10 Q. And were there any other purposes other than to
11 refuel in Aden?

12 A. No, that was it.

13 Q. What about garbage?

14 A. Yes. We actually -- like I said, if we can't get
15 into port to take off all the garbage that we cannot dispose
16 at sea, then it's actually -- if we're close enough to land,
17 it's actually taken off on land and issued in dumpsters. If
18 not, they arrange something with the country we're in, and
19 it's usually like they bring a small boat alongside, and we
20 dump all the trash into the boat and it takes it off.

21 Q. I show you what is marked as Prosecution Exhibit 170,
22 a photograph.

23 TC [MR. MILLER]: Oh, I think I need to ask permission to

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1 show.

2 MJ [Col SPATH]: I think we're good. Yes. Yeah, you can
3 display it.

4 TC [MR. MILLER]: I'm sorry. No, I'm sorry. It was my
5 fault.

6 MJ [Col SPATH]: It's a photograph, correct?

7 TC [MR. MILLER]: It is. These are photographs, some
8 photographs, yes.

9 MJ [Col SPATH]: It's 170 for Identification, all right.

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

11 Q. Do you recognize 170, sir?

12 A. Yes, I do.

13 Q. What do you recognize that to be?

14 A. That is the refueling barge that we -- or refueling
15 pier that we pulled alongside.

16 Q. And the ship in the photograph?

17 A. The USS COLE.

18 TC [MR. MILLER]: That document, I believe, Your Honor,
19 has been previously -- or this photograph has been previously
20 admitted ----

21 MJ [Col SPATH]: As Prosecution Exhibit 170.

22 TC [MR. MILLER]: ---- as 170.

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

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1 Q. I want to next show you a Prosecution Exhibit
2 numbered 180, please.

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

4 TC [MR. MILLER]: Thank you.

5 Q. And do you recognize that, sir?

6 A. Yes, I do.

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

8 A. Once again, that's the USS COLE alongside the
9 refueling pier, and that's pretty much after the bombing had
10 occurred.

11 Q. Now, after you had handed out the weapons, did you
12 have any other responsibilities or duties?

13 A. Yes, I did. Once I handed out the weapons, if we
14 were allowed to -- certain positions to take up certain
15 weapons, we had to get those re-stowed back into the armory.
16 Then I have to issue -- because I was on duty that day, I had
17 to issue weapons to the watches that were about to stand up or
18 come up on watch. And after issuing those weapons to them,
19 then it was normally carry on the workday.

20 Q. Did you watch the activity in the harbor?

21 A. Yes, I did. Like I was kind of enthused about seeing
22 the country, like I do with all of them. So at some point I
23 came up just to look out and see what the country looked like

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1 since we wasn't going to be having liberty. And then when the
2 boat detail came alongside, I was actually standing alongside
3 watching the boat detail pull up and the trash be dumped off.

4 Q. Do you remember a call for chow that morning?

5 A. Yes, I do.

6 Q. And when you heard that call, what did you do?

7 A. When they called for chow, me and one of my other
8 petty officers, Stafford Tyson, were actually in our workspace
9 at the time. Then we decided to go to the chow. And right in
10 the middle of heading to chow, on our way to chow, they called
11 away a Morale, Welfare and Recreation -- or MWR -- meeting,
12 which I was part of the detail for that. So I told them that
13 I had to go to the meeting and I would catch up with them
14 later.

15 TC [MR. MILLER]: Although I haven't, Your Honor, I
16 would -- at this time would move for the admission of
17 Government 180, the photograph of the ship.

18 MJ [Col SPATH]: 180 for Identification.

19 Defense Counsel, do you have any objection to what's
20 been offered as 180 for Identification?

21 DDC [LT PIETTE]: Your Honor, the defense does not take a
22 position.

23 MJ [Col SPATH]: Two quick questions.

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1 WIT: Yes.

2 MJ [Col SPATH]: Is that an accurate photograph of what it
3 looked like that day?

4 WIT: Yes, sir.

5 MJ [Col SPATH]: And I know you said that it is post
6 explosion. Just because I don't see it very well, do you just
7 know that? Or how can you tell that it's post explosion?

8 WIT: Because the tents that's set up right here ----

9 MJ [Col SPATH]: There's a ----

10 WIT: ---- were only set up afterwards.

11 MJ [Col SPATH]: ---- green circle drawn on a white
12 marking on the front of the boat.

13 WIT: That's the aft end of the boat -- ship, sir.

14 MJ [Col SPATH]: All right. Thank you very much. It's
15 the back of the boat; it's the bow. Oh, I see. Thank you.
16 All right.

17 I'm going to conditionally admit Prosecution
18 Exhibit 180A -- or 180 for Identification as 180. Again,
19 you'll have the opportunity, Defense Counsel, to attack that,
20 but it is conditionally admitted. You may move forward.

21 TC [MR. MILLER]: Thank you, sir.

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

23 Q. I think you were on your way to the MWR ----

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1 A. Meeting.

2 Q. All right. And why did you go to that meeting?

3 A. Because I was a part of the MWR committee.

4 Q. And if we could go back to Exhibit 170, please.

5 Where was that meeting held?

6 A. It was held in the aft end of the ship in one of the
7 classrooms on the port side.

8 Q. Are we on the port side now?

9 A. No, that's the starboard side.

10 Q. So we need to go back to 180, I'm sorry. All right.

11 Can you show the court, please, where, just generally
12 on the ship, that meeting was held?

13 A. This is still showing the starboard side. But on the
14 port side, it would be right along this area [indicating].

15 Q. All right.

16 A. On the opposite side of the ship.

17 Q. During the course of the -- during the course of the
18 meeting, did anything unusual occur?

19 A. Yes, it did.

20 Q. And what was that, sir?

21 A. We heard a loud thud or -- you can say thud, because
22 that's a muffled sound coming from outside, and the ship
23 listed. It rocked to the right very heavily, and then it fell

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1 back to the left. And as it came down to the left, it did a
2 shaking motion as it was entering back into the water.

3 Q. Do you have any idea ----

4 MJ [Col SPATH]: Mr. Miller, let me just -- I just want to
5 catch -- and tell me if I have it wrong. The witness drew a
6 circle, starboard side, about a fifth of the way down the side
7 of the ship. And you're telling me where you were was on the
8 other side, on the port side, but about where that circle is.

9 WIT: Yes, sir.

10 MJ [Col SPATH]: Okay, perfect.

11 Sorry, Mr. Miller. Keep going.

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

13 Q. Did you have any idea what had occurred?

14 A. No, we did not.

15 Q. When it occurred, did you take any action?

16 A. Yes, we did. At any point -- we are always trained
17 and taught that at any point if something other than normal
18 operation happens, we always go to security alert. In that
19 presence we have a security alert team that we -- that comes
20 down. We get dressed out and weaponized, as you say, or we
21 arm ourselves with weapons, and then we take a position that's
22 coordinated by our action leader, our tactical leader, and --
23 to secure different parts of the ship and make sure the ship

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1 is in good condition.

2 Q. You went to that spot?

3 A. Yes, sir.

4 Q. Did you put on any equipment?

5 A. Yes, we did. We donned a -- we had to don a
6 bulletproof vest or a flak jacket, which is a ballistic vest,
7 and a helmet. And then we actually carry knives or shotguns,
8 depending on what part of the team you're on.

9 Q. And how long did you remain in that area?

10 A. We remained in that area right until the team got
11 manned up. Usually it's about less than five minutes because
12 everything is done by time. The faster you can get done, the
13 faster you can get out and search and secure the area. And so
14 we normally get manned up and set out in about five minutes.

15 Q. Where did you go?

16 A. We were told, me and the guy that I was with, because
17 we were in two-man teams -- we were told to go out the port --
18 I mean out the starboard side flight deck around to the port
19 side and up and to the bridge area to secure the bridge.

20 Q. And did you make it to the bridge?

21 A. Not at the first person. On our way out, we got to
22 the aft door which is right along this area on the inside of
23 the ship. Then we were told to stand by and not to exit

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1 outside until -- I guess they weren't sure what had actually
2 happened.

3 Q. And again, to this point you had no idea what had
4 occurred?

5 A. No, sir.

6 Q. Again on the picture, Government's -- excuse me,
7 Prosecution Exhibit 180, you've drawn a line about a fifth of
8 the way down, correct?

9 A. Yes, sir.

10 Q. Were you eventually allowed to move?

11 A. Yes, sir. About two minutes of waiting, two to three
12 minutes of waiting, we were told to go ahead and proceed to
13 the bridge, which me and my partner exited the door, went
14 around the aft end of the ship, up the port side ladder, and
15 down the port side headed toward the bridge.

16 Q. Did you notice anything unusual?

17 A. Once exiting the door, you could see that there was a
18 black film covering the ship all over the deck area. It
19 actually had the nonskid, which is supposed to be slip
20 resistant, make -- helps you with slip resistance. It had
21 it slightly slippery.

22 And then there was a smell, not really describable
23 because there was so many smells in it at once, but it was

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1 like burnt fuel and smoke and smut in the air.

2 Q. What was the ship doing?

3 A. The ship had a heavy list to the left, or to the port
4 side. And other than that, we had to have other teams going
5 on fire control. They was down in securing the areas, putting
6 fires out, maintaining floods, things of that nature.

7 Q. What did you do?

8 A. My part was security. As part of the security
9 detail, me and my partner actually went around. We got up,
10 out the back door -- out the aft end of the door, up the port
11 side, about midships.

12 I noticed that there were some guys out standing,
13 trying to get a line out in the water. I didn't know why
14 until I turned and looked out into the water, and there was
15 two shipmates out in the water. The guy really -- he was
16 trying to throw what we call a heaving line out in the water,
17 but he couldn't get it to go far enough.

18 And seeing that I had been on the team or line team,
19 I was familiar with the heaving line. I told him to let me
20 have the heaving line, for my partner to stand in the break
21 room out of danger and secure us while I was there. I turned
22 my weapon over to the gentleman. I took his heaving line, and
23 then I continued to try to get it out to the personnel that

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1 were in the water.

2 Q. Do you know the persons who were in the water?

3 A. Yes, I do.

4 Q. Who were they?

5 A. One was Petty Officer McTureous and the other one was
6 Petty Officer Lopez.

7 Q. Were you able to get them back onto the ship?

8 A. At some point in time we were able to get them back
9 on. Petty Officer Lopez was the last one to come on. I
10 finally got the line out as far as it could go, but she was
11 still too far out. So I asked her to swim in closer. She
12 informed me that her head and arm were hurting and she really
13 couldn't do much. I told her just to do her best and come in
14 a little closer.

15 Once she got in close enough to grab the line, I
16 started pulling her in. She informed me that she was
17 slipping, so I had slowed down on the pull and slowly pulled
18 her in closer to the ship. I then looked back out and Petty
19 Officer McTureous was swimming away from the ship. I called
20 out to him, told him to stop. And he informed me, when I
21 called out to him, that he couldn't see because he had stuff
22 in his eyes. So I directed him in, like turn around, stop,
23 start swimming. I did this numerous times.

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1 Once he had come in, I went back -- my attention went
2 back to Petty Officer Lopez to get her calmed down, because at
3 some point she was in a panic mode. And I was trying to get
4 her calmed down and answer her questions when she had
5 questions or doubts and to secure her doubts, confirm them to
6 where she could be positive about it all.

7 And then I would look back up, Petty Officer
8 McTureous would be swimming back out to sea. I would inform
9 him again to stop, turn around, stop, start swimming, to bring
10 him back in closer.

11 Later on I heard some shipmates from on the forward
12 end of the ship talking to him. And that presence, I didn't
13 worry with him as much because they had him, they were
14 communicating with him. So I turned my attention to Petty
15 Officer Lopez at that point.

16 Q. Were you able to get her back on ship?

17 A. Yes. Eventually we got a line with a harness on it.
18 We got it down to her, she got in it, and we got her pulled
19 aboard.

20 Q. Did you see any other persons at this time on the
21 ship, any injured persons?

22 A. Yes. On our way out from the armory, there were
23 individuals coming out of the spaces with, you can say,

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1 scratches or bruises or injuries to their face, hands, neck,
2 legs. They were bleeding. Some with broken arm parts or
3 whatnot coming out of the spaces, and things of that nature.

4 Q. At this point were you aware that you had been
5 attacked?

6 A. No.

7 Q. When did you learn that you had been attacked?

8 A. It was later on. When I got to midships and looked
9 over to see Petty Officer Lopez, I did see fragments of the
10 ship or like bent pieces sticking out. So I assumed it was a
11 bombing or we had got bombed instead of something on the
12 refueling pier exploded that I had doubt about in the first.

13 Q. How would you describe the mood of the ship at that
14 point?

15 A. The mood at that point of the ship was pretty much
16 chaos. You had people just panicking, some knowing -- didn't
17 know what to do. Others -- everybody -- I wouldn't say
18 others. I'm pretty sure everyone was in fear because we
19 really didn't know if that was the last of it, if they were
20 going to come back and try to finish it or what have you.

21 Q. Over the next several hours, what was done on the
22 ship?

23 A. Over the next several hours it was pretty much

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1 getting personnel up to stand watch to get -- to make sure
2 that the ship was secure and safe from that point on, making
3 sure the flooding had gotten controlled of, the fires had
4 gotten put out, to keep the ship from sinking or listing any
5 farther.

6 And then the injured were -- a lot of folks attended
7 to the injured and gathering them up, placing them in what
8 they considered the med unit area. I believe they moved them
9 to the mess decks. After the medical bay had got full, they
10 moved them all to the mess decks area. They moved the medical
11 area to the mess decks because it was a larger space, and all
12 the injured were taken there to be treated and whatnot.

13 And then later on when we did get personnel or things
14 for them, the injured was carried off the ship.

15 Q. Did any reinforcements arrive?

16 A. Yes.

17 Q. And who were they?

18 A. The Marines arrived, I think, maybe a day or two
19 later. I'm not certain, because like I said, throughout the
20 whole chaos you experienced blackouts between here and there
21 because you did do so much and trying to jump from job to job,
22 or whatever that needed to be done to be done. I think it was
23 a day or two later they came over to relieve the sailors that

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1 were standing watches at the present.

2 Q. Did law enforcement arrive at some point, the FBI?

3 A. Yes.

4 Q. And did they arrive after the Marines?

5 A. Yes.

6 Q. And were you asked to assist the FBI in any way?

7 A. Yes, I was.

8 Q. And could you relate to His Honor what it was you
9 were asked to do?

10 A. We were asked to survey our space or our work area or
11 our equipment to see what was on the equipment that wasn't
12 there, or wasn't supposed to be there; and if there was
13 anything there that wasn't supposed to be there, to collect it
14 up.

15 Q. And what was your workspace or your work area?

16 A. The VLS launcher. We had one forward of the ship and
17 one on the aft end of the ship.

18 Q. I am going to show you a photograph, Prosecution
19 Exhibit 214.

20 [Conferred with courtroom personnel.]

21 Q. Let me show you 211. Do you recognize that
22 photograph, sir?

23 A. Yes, I do.

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

2 A. That is the forward end of the ship, and it also
3 displays the vertical launching system that I worked for, and
4 that is this area here.

5 Q. And did you search that area?

6 A. Yes, we did.

7 Q. And did you search the like area in the rear of the
8 ship?

9 A. Yes, we did.

10 Q. And how did you conduct that search, sir?

11 A. We were told to wear gloves because the material we
12 picked -- we may find could be poisonous or hazardous for our
13 health. So me and Petty Officer Stafford Tyson placed on
14 gloves and we were given a bucket to collect all our evidence
15 in.

16 And then we went around the entire launcher itself,
17 on top of it, in between and in around it and collected
18 everything that was on it that wasn't supposed to be there.

19 MJ [Col SPATH]: Mr. Miller, just for the record, the
20 witness circled to the bottom middle of the photo the gray --
21 I know it's the launcher, but it's the gray metal box on the
22 photograph.

23 TC [MR. MILLER]: Correct.

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

2 Q. You say you gathered it up in buckets?

3 A. Yes, sir.

4 Q. And could you describe the sorts of things that you
5 were gathering up?

6 A. We were gathering up bits and pieces of some sort of
7 fiberglass-looking material, like shredded fiberglass-looking
8 material. At some point we found wires and things of that
9 nature.

10 Q. I'm going to show you a photograph, Prosecution
11 Exhibit 144, please, 144A.

12 TC [MR. MILLER]: ELM0, please.

13 MJ [Col SPATH]: Hang on one second. And that's
14 Prosecution Exhibit 144A for Identification?

15 TC [MR. MILLER]: Yes.

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

17 Q. First off, do you recognize the type of material in
18 Government's Exhibit numbered 144 -- excuse me, Prosecution
19 Exhibit 144A?

20 A. Yes, I do.

21 Q. And what do you recognize that sort of material to
22 be?

23 A. Those are the materials that we found on or around

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1 the launcher itself.

2 Q. All right. And this was the rear launcher, not the
3 front launcher, correct?

4 A. Correct.

5 Q. And there's a ruler on the bottom of that photograph;
6 is that correct?

7 A. Yes, it is.

8 Q. And there's a Q number on it?

9 A. Yes, it is.

10 Q. Could you read that into the record, please?

11 A. Q573.

12 Q. Now, the evidence that you gathered you put into a --
13 what kind of a container?

14 A. A blue bucket.

15 Q. And what did you do with the blue bucket?

16 A. We then turned that over to the officers or the
17 police that were there, and then it was placed into an
18 evidence bag.

19 Q. And did you place it into the evidence bag?

20 A. Yes, I did.

21 Q. If you could, I believe we have 140 ----

22 MJ [Co] SPATH]: Just remember, if you're over here,

23 Mr. Miller, just share this microphone. Okay. Thank you.

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

2 Q. I'm going to show you what has been marked -- what
3 has been marked as Prosecution Exhibit 144 and ask you to take
4 a look at that, sir. Do you recognize that?

5 A. Yes, I do.

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

7 A. The evidence bag that we placed the debris that we
8 found on or above or around the launcher itself in.

9 Q. Do you recognize the handwriting on the bag?

10 A. Yes, I do.

11 Q. And whose handwriting is that?

12 A. Myself.

13 Q. And does it indicate the date and time of recovery?

14 A. Yes, it does.

15 Q. And what is the date and time of recovery?

16 A. 20 October 2000, 12:00 a.m.

17 Q. All right. And does it indicate the location of the
18 recovery?

19 A. Yes, it does.

20 Q. And what is the location of the recovery?

21 A. Aft vertical launching system topside surface.

22 Q. And then at the top it says the items that were
23 recovered; is that correct?

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1 A. Yes, it does.

2 Q. And what were those items, sir?

3 A. Miscellaneous debris and fiberglass pieces, strips of
4 wires, pieces of tape, recording tape, pieces of wood
5 particles.

6 Q. As best as you can see those items, those appear to
7 be the items that you seized?

8 A. Yes, it does.

9 Q. And do they appear to be the same items that are in
10 the government photograph that you have just identified?

11 A. Yes, it is.

12 Q. Is there also a Q number on this particular bag?

13 A. Yes, it is.

14 Q. And could you read that into the record, please?

15 A. Q573.

16 Q. Again, that would be the same number that's on the
17 photograph, correct?

18 A. Yes, it is.

19 Q. And is there a 1B number on that, also?

20 A. Yes, it is.

21 Q. And what is the 1B number?

22 A. 785.

23 Q. Do you remember to whom you gave that particular

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1 item?

2 A. As far as name, no, but we gave -- we turned it over
3 to an FBI agent.

4 MJ [Col SPATH]: Would you hand me that exhibit, please?

5 WIT: Sure.

6 MJ [Col SPATH]: Thank you.

7 I'll give it back in just one second, Mr. Miller.

8 I'm just going to look.

9 Here you go.

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

11 Q. I'm going to show you what has been marked as
12 Government's Exhibit 14 -- excuse me, Prosecution Exhibit 144B
13 for Identification. Do you see that photograph, sir?

14 A. Yes, I do.

15 Q. Is that the -- a photograph of the bag that you have
16 previously identified as the bag that you -- evidence bag that
17 you completed?

18 A. Yes, it is.

19 Q. All right. A fair and accurate depiction of it?

20 A. Yes, sir.

21 Q. Lastly, I'm going to show you a sheet that is marked
22 as Prosecution Exhibit 144C for Identification. You did not
23 complete that sheet; is that correct?

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1 A. That's correct.

2 Q. You did not. All right. There are, however, a -- a
3 1B number on that; is that correct?

4 A. Yes, it is.

5 Q. And could you read that 1B number, please?

6 A. 785.

7 Q. And there's also an MDK number on that; is that
8 correct?

9 A. Yes, there is.

10 Q. What is that MDK number?

11 A. 139.

12 Q. Are those two numbers also contained on the evidence
13 bag that you have previously testified to?

14 A. Yes, it is.

15 Q. Did you have occasion to seize any other evidence in
16 this matter?

17 A. No, sir, I did not.

18 Q. Did you remain on the COLE?

19 A. Yes, I did.

20 Q. And for how long did you remain on the COLE?

21 A. Pretty much up until the time it was removed from
22 Yemen.

23 TC [MR. MILLER]: Your Honor, I have no further questions.

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1 We would move for the admission of these photographs,
2 Prosecution Exhibit 144B and 144A. It's my understanding that
3 you're going to reserve ruling on the actual exhibit until a
4 time later.

5 MJ [Col SPATH]: And I'll do the same at this point with
6 the photographs as I did last time, so no change there. Thank
7 you. You've offered it for identification -- or for admission
8 so far. Thanks. If you would retrieve that exhibit.

9 Let me just check with the defense.

10 Defense Counsel, you may cross-examine.

11 DDC [LT PIETTE]: Your Honor, the defense takes no
12 position.

13 MJ [Col SPATH]: All right. And again, I recognize that's
14 your position in what is a standard evidentiary hearing for
15 foundational matters.

16 Mr. Morgan, thank you very much for your testimony.
17 I'm going to give you a standard order. I don't want you to
18 discuss your testimony until we resolve this issue. That
19 could be a little bit in the future. I know you recognize
20 that, so don't talk with anyone about your testimony. Do you
21 understand?

22 WIT: Yes, I do.

23 MJ [Col SPATH]: All right. I appreciate your testimony

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1 and you traveling down here in person to testify. You're
2 excused.

3 WIT: Thank you.

4 [The witness was warned, temporarily excused, and withdrew
5 from the courtroom.]

6 MJ [Col SPATH]: Before you call your next witness,
7 Mr. Miller, we will take ten minutes and then start with your
8 next witness. We're in recess.

9 [The R.M.C. 803 session recessed at 0959, 8 November 2017.]

10 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1012,
2 8 November 2017.]

3 MJ [Col SPATH]: This commission is called back to order.
4 All the parties who were present before the recess are again
5 present.

6 Mr. Miller, call your next witness.

7 TC [MR. MILLER]: Thank you. Government calls Special
8 Agent Anthony Duback.

9 MJ [Col SPATH]: Bailiff, thank you.

10 TC [MR. MILLER]: Stand and raise your right hand, please,
11 sir.

12 ANTHONY DUBACK, civilian, was called as a witness for the
13 prosecution, was sworn, and testified as follows:

14 MJ [Col SPATH]: Have a seat.

15 TC [MR. MILLER]: Be seated, please.

16 **DIRECT EXAMINATION**

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

18 Q. Would you state your name for the court, please.

19 A. Anthony Duback.

20 Q. And your occupation, sir?

21 A. I'm a special agent with the FBI.

22 Q. Agent, I want to talk a little bit about your
23 background. Did you attend college?

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1 A. Yes, sir, I attended UCONN, University of
2 Connecticut.

3 Q. All right. And you have a very soft voice so I'm
4 going to ask you to speak into the microphone. You went to
5 UCONN?

6 A. Yes, sir.

7 Q. And did you graduate from UCONN?

8 A. Yes, I did.

9 Q. And when and with what degree?

10 A. I graduated with a degree in English, minor in
11 psychology, in 1988.

12 Q. Did you have any employment during your time in
13 college?

14 A. Yes.

15 Q. And what was that, sir?

16 A. I taught scuba diving for the college.

17 Q. And how long had you been scuba diving? When did you
18 start scuba diving, I guess, is the better question?

19 A. About age 15.

20 Q. Are there certain certifications in scuba diving?

21 A. Yes, there's sports certifications, open water,
22 advanced, rescue, dive master, instructor. There's a bunch of
23 them.

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1 Q. Did you have all of those?

2 A. Yes, sir.

3 Q. After college did you have any military service?

4 A. Yes, I was -- enlisted into the Navy.

5 Q. And what did you do while you were in the Navy?

6 A. I was a corpsman and a U.S. Navy diver.

7 Q. And as a U.S. Navy diver, what were your duties?

8 What were your responsibilities? What did you do?

9 A. Ships husbandry, underwater welding, salvage, mostly
10 hard hat diving work.

11 Q. What's hard hat diving work?

12 A. The big helmet that you see, the yellow one that
13 everybody sees on TV, that's a hard hat.

14 Q. All right. And how long did you remain in the Navy?

15 A. Six years.

16 Q. And at what rank did you retire?

17 A. I got out at ----

18 Q. Got out at, excuse me.

19 A. ---- E-4.

20 Q. After the Navy, what sort of employment did you have?

21 A. I worked as a diver for a company called Interspiro,
22 designing, testing, building underwater breathing apparatus.

23 Q. And how long did you remain with them?

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1 A. About a year and a half.

2 Q. And what did you do after that?

3 A. I joined the FBI.

4 Q. All right. And do you remember what year you joined
5 the FBI?

6 A. 1999.

7 Q. And did you go to New Agent School at Quantico?

8 A. Yes, I did.

9 Q. And did you receive any training in the collection of
10 evidence?

11 A. Yes, I did.

12 Q. After Quantico, what was your first office?

13 A. New York.

14 Q. And were you assigned to a certain squad?

15 A. Originally I was assigned to what they call the new
16 agent squad, which is go and do interviews and doing
17 surveillances and things like that. And then I was assigned,
18 about a year later, to a terrorism squad.

19 Q. Did you have any what they call collateral duties or
20 extra duties there in New York?

21 A. Yes. I was the senior medic for the office, and I
22 was on the SWAT team.

23 Q. How did -- what training did you have to be a medic?

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1 A. I was a Navy corpsman prior to that.

2 Q. And how long did you remain in the New York office?

3 A. Almost 16 and a half years.

4 Q. Did you ever have -- other than the COLE -- I'm just
5 going to -- other than the COLE, did you ever have occasion to
6 work as a diver with the FBI?

7 A. No.

8 Q. All right.

9 A. I did -- I worked -- like I repaired their equipment
10 and things like that. You can only have so many collateral
11 duties.

12 Q. Okay. I want to go back to October of 2000. Did you
13 have occasion to be sent to Yemen?

14 A. Yes.

15 Q. And how did that come about?

16 A. I don't recall the original, how I found out, but I
17 had heard that the COLE had been struck by an explosive device
18 or a bomb. Called down to the office, because I was on the
19 terrorism squad, and ended up talking to the SAC surprisingly,
20 John O'Neill at the time, and told him what happened -- or
21 what I had heard happened and asked him what he needed and was
22 told, basically, to get to the office because we were leaving.

23 Q. "We" meaning you and him and others?

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1 A. He didn't specify who was going at that point. He
2 just said get down here, because I live far away.

3 Q. And did you get down there?

4 A. Yes.

5 Q. And what were you told?

6 A. I was told that I would use my Navy contacts, get
7 whatever information I can about the USS COLE, and we would be
8 leaving in a few hours for Yemen, and you would be the medic
9 to support the advance team.

10 Q. And did you pack any supplies?

11 A. Minimal supplies for what I had expected the advance
12 team to be.

13 Q. And did you travel to Yemen?

14 A. Yes.

15 Q. How did you travel?

16 A. We flew, I believe it was on a C-130 or C-17 out of
17 Andrews Air Force base, flew to -- I think we stopped in
18 Germany, refueled, and left right away, and ended up in Yemen.

19 Q. And did you land in Aden?

20 A. I believe so, yes.

21 Q. Anything unusual occur upon landing?

22 A. They surrounded our plane and pointed large weapons
23 into the plane when we landed.

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1 Q. How long did you remain on the plane?

2 A. I don't recall. It was a couple hours, the standoff.

3 Q. Obviously you were eventually allowed to leave?

4 A. Yes.

5 Q. Where did you go?

6 A. We went into the airport, got into a couple of
7 different vehicles, and then went to one of the hotels.

8 Q. At the hotel, were there other law enforcement
9 personnel there?

10 A. I don't remember if anybody was there yet. I don't
11 believe so, but I can't recall.

12 Q. Did some arrive later?

13 A. Yes.

14 Q. Were you assigned, at least initially, any duties or
15 responsibilities?

16 A. Besides medical duties and sick call and taking care
17 of everybody, I was also assigned as an evidence response
18 recovery person.

19 Q. Did you travel out to the ship?

20 A. Yes.

21 Q. Leaving the hotel, how did you get to the port?

22 A. We all got in a van, those that were going to the
23 ship, and I think we had a driver take us. I'm not sure who

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1 took us there, but somebody drove us over there. Went through
2 a couple of checkpoints, if I remember right.

3 Q. And do you remember stopping at the port?

4 A. Yes.

5 Q. Arriving -- I guess arriving at the port?

6 A. Yes.

7 Q. Were there any American contingent at the port?

8 A. There was a Marine FAST Company unit that had pretty
9 much just gotten there that was setting up.

10 Q. Did you have occasion to meet with them?

11 A. Yes. The person in charge of the unit came over and
12 met us as the security detail, and then I met with them
13 separately to help him provide medical support.

14 Q. You say you met with them separately?

15 A. I met with the officer in charge of the unit after he
16 met with everybody else, like let us through for security
17 reasons. He said he wanted to talk to me as far as being a
18 medic. They had a brand-new medic and requested, since I had
19 a little more experience, some support, medical support for
20 the battalion, if I would.

21 Q. And did you agree to do so?

22 A. Yes.

23 TC [MR. MILLER]: Your Honor, I'm going to ask permission

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1 to publish to the witness Prosecution Exhibits 176, 177, 178,
2 179, which are photographs of the Marine encampment.

3 MJ [Col SPATH]: You may.

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

5 Q. First I want to show you what has been previously
6 admitted as Prosecution Exhibit 176 and ask you if you
7 recognize that, sir.

8 A. Yes, I recognize it.

9 Q. What do you recognize that to be?

10 A. That's when we first came in where the Marines had
11 set up. It wasn't quite as established as this, but it's
12 similar tents in the same area.

13 Q. And did it later become that established?

14 A. I believe so, yes.

15 Q. All right. Fair and accurate depiction of what you
16 observed in Aden back in October of 2000?

17 A. Yes, sir.

18 Q. 177, please. Prosecution Exhibit 177. Again, I'd
19 ask you, do you recognize that photograph?

20 A. Yes.

21 Q. And what do you recognize that to be, sir?

22 A. That's the same Marine encampment on the other side
23 of the ----

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1 Q. Fair and accurate depiction?

2 A. Yes.

3 Q. All right. Do you recognize -- and I'm circling a --
4 looks like a trailer. Do you recognize that at all?

5 A. I don't believe that was there when I was there.

6 Q. But otherwise, fair depiction of the Marine
7 encampment as you saw it at that time?

8 A. Yes. Again, it's a little more developed than when I
9 first got there.

10 Q. 178. I'm going to show you what has been marked for
11 identification as Prosecution Exhibit numbered 178 and ask you
12 again, do you recognize that, sir?

13 A. Yes.

14 Q. What do you recognize that to be?

15 A. The same, the Marine encampment that was set up in
16 the same location.

17 Q. Fair and accurate depiction of how it appeared back
18 in Aden back in October of 2000?

19 A. Yes.

20 Q. And lastly, show you Prosecution Exhibit Number 179.
21 And do you recognize that, sir?

22 A. Yes. That's the same Marine encampment from a
23 different angle.

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1 Q. Fair and accurate depiction of the encampment as it
2 appeared back in Aden in October of 2000?

3 A. Yes.

4 TC [MR. MILLER]: Your Honor, at this time we would move
5 for the admission of Prosecution Exhibits 178 and 179.

6 MJ [Col SPATH]: Defense Counsel, any questions on the
7 foundation of these or any objection?

8 DDC [LT PIETTE]: Your Honor, the defense takes no
9 position.

10 MJ [Col SPATH]: All right. Your position is noted on
11 your continued position.

12 These are not real evidence. These are photographs,
13 one of the easiest foundations. I'm going to admit
14 Prosecution Exhibits 178, 179 for Identification conditionally
15 into evidence as Prosecution Exhibits 178 and 179.

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

17 Q. And from this port position, how did you travel out
18 to the ship?

19 A. Different small boats.

20 Q. And could you describe for His Honor what you saw
21 when you arrived at the ship?

22 A. The ship was lifting off -- listing off to one side.
23 There was debris still hanging around, and the crew looked

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1 like, for lack of better terminology, their morale was
2 basically just broken. They were very ----

3 Q. When you arrived at the ship, did you assist in the
4 evidence collection in any way?

5 A. Yes. I picked up stuff outside on the deck and then
6 I assisted later on down below decks, removing -- looking for
7 evidence and removing bodies from below deck.

8 Q. And how did you assist in the body -- or the body
9 recovery or the body removal?

10 A. With some of the tools, just to cut them out of the
11 metal area of the galley, identifying body parts, things like
12 that.

13 TC [MR. MILLER]: Permission, Your Honor, to publish to
14 the witness at this time two photographs, Prosecution Exhibit
15 196 and 253.

16 MJ [Col SPATH]: You may.

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

18 Q. This is 196. I show you what has been marked for
19 identification as Prosecution Exhibit numbered 196. Do you
20 recognize this photograph, sir?

21 A. Yes. It's taken from the waterside looking inward on
22 the ----

23 Q. Of the ----

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1 A. Of the COLE.

2 Q. All right. Is that how it appeared when you were
3 involved in the evidence recovery?

4 A. Yes.

5 Q. Fair and accurate depiction?

6 A. Yes.

7 Q. And was this part of the area where you were doing
8 the body recovery?

9 A. Way towards the back of it.

10 Q. All right. Could you identify for the court where
11 you were conducting your search or where you were assisting in
12 the body recovery?

13 A. The area kind of back in here [indicating].

14 Q. Were you doing this alone?

15 A. There were, I believe, two others with me, helping
16 out.

17 TC [MR. MILLER]: Move for the admission of ----

18 Q. Fair and accurate depiction of the site as it
19 appeared?

20 A. Yes.

21 TC [MR. MILLER]: We would move for the admission of 196,
22 Your Honor, at this time.

23 MJ [Col SPATH]: 196 has already been admitted as 196.

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1 TC [MR. MILLER]: Oh, I'm sorry, Your Honor.

2 MJ [Col SPATH]: That's all right. And then the green
3 circle appears to be almost in the center of the photograph, a
4 little center, upper right, there are two kind of black
5 squares within the circle; is that accurate?

6 WIT: That's kind of what I'm going for, yes.

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

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

9 Q. After you were involved in the body recovery, what
10 did you next do?

11 A. I spoke to SAC O'Neill about the potential of diving,
12 looking for evidence below the waterline, because the military
13 unit that was there was busy keeping the ship afloat.

14 Q. And did he approve that?

15 A. Yes. He asked me to set up a team and see what I
16 could do.

17 Q. How did you go about setting up a team?

18 A. There were two SEALs that had come in from the Navy
19 to set up comms. I asked them to give me some help. Went
20 with the -- to the Navy divers, asked them for some equipment
21 to borrow, and then set up a small boat. And there was one
22 other FBI diver that had come in on the second group that was
23 also a medic; I grabbed him to help out, also.

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1 Q. Do you know who that person was?

2 A. It was Robert Mulry.

3 Q. So you formed your team. Did you come up with a plan
4 as to what you were going to do?

5 A. Yes, we did. We planned to lay out a grid search
6 outside of where the blast had happened.

7 Q. What is a grid search?

8 A. You take a bunch of ropes or lines or whatever you
9 happen to have and you build, for lack of better terminology,
10 a net. It looks like -- almost like an Excel spreadsheet.
11 You build boxes. And then on each corner of the net we put
12 buoys that would come up, so that once you lay that net down
13 in a spot, A, you can see from the surface about where the net
14 is because the buoys -- you can follow the buoys down and then
15 go box by box. And if you find something, you know where you
16 found it.

17 You take a second marker, and you leave it in the box
18 that you last finished with and go back up, so you have an
19 idea where you're starting and stopping and where you find
20 things.

21 Q. Is that a standard way of conducting such a search?

22 A. Yes, it is.

23 TC [MR. MILLER]: Permission to publish to the witness,

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1 Your Honor, photographs, Prosecution Exhibits 192 and 193.

2 MJ [Col SPATH]: You may.

3 [Conferred with courtroom personnel.]

4 TC [MR. MILLER]: May we have just a second, Your Honor?

5 MJ [Col SPATH]: You may.

6 TC [MR. MILLER]: We have a computer glitch here.

7 MJ [Col SPATH]: No worry.

8 [Pause.]

9 TC [MR. MILLER]: If we can turn that back on, Your Honor,
10 permission?

11 MJ [Col SPATH]: You may.

12 TC [MR. MILLER]: It was easier when we put these on foam
13 board.

14 MJ [Col SPATH]: No worry.

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

16 Q. I'm showing you what has been previously admitted as
17 Prosecution Exhibit 192. Do you recognize that photograph,
18 sir?

19 A. Yes, sir.

20 Q. All right. And what do you recognize it to be?

21 A. It's the side of the USS COLE with the hole in it.

22 Q. Is that where you conducted your search?

23 A. Approximately that area [indicating] outboard of the

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1 COLE.

2 TC [MR. MILLER]: Your Honor, for the record, the witness
3 has drawn a square coming out from the COLE, maybe a couple
4 inches on either side of the photograph showing the area which
5 he searched.

6 A. We also searched directly underneath, underneath the
7 keel.

8 MJ [Col SPATH]: Underneath the what?

9 WIT: Underneath the keel ----

10 MJ [Col SPATH]: Underneath the keel.

11 WIT: ---- all the way to the ----

12 MJ [Col SPATH]: Okay. And the green circle that comes
13 out, there's a pole on the left side of the picture on the
14 side of the ship and red ladder on the right side. I know
15 it's an approximation. And it comes out probably two-thirds
16 of the way across the water in front of the ship. Thank you.

17 WIT: Yes, sir.

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

19 Q. Is this where you would have laid your grid?

20 A. Yes.

21 Q. How deep was the water at this point?

22 A. I don't recall. It wasn't maybe 60 feet. It wasn't
23 anything where we had to decompress.

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1 Q. All right. So if you had to decompress, would that
2 have taken some special equipment?

3 A. Yes.

4 Q. All right. But in any event, you didn't -- that was
5 not necessary?

6 A. No.

7 Q. And how did you -- once you got in the water, could
8 you explain to the court what it was that y'all did?

9 A. Using the scuba gear that we had acquired, we
10 basically set up a small boat, laid our grids out, would go
11 down the line, check each box in the silt. There was no
12 visibility, so you would have to do it all by feel, find what
13 felt like it could be evidence, bring it up to -- bring it up
14 to above where the silt is so you could see it, determine if
15 it was something that you could bring back up or if it was
16 something that you needed to lay back down.

17 Q. Could you explain in a little bit more detail?
18 You're talking about a silt line. What are you talking about?

19 A. When you get down to the bottom, especially in this
20 area, there is soft mud in different degrees that becomes silt
21 that blocks your visibility and takes up -- takes up your
22 visibility. You can't see anything. It settles down.

23 Eventually you get to a harder surface below it, but

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1 when you're in the water column, as you go through the silt,
2 either as you touch the silt or as you get near it, it billows
3 up and creates like clouds.

4 Here there was an extensive silt bottom. It was
5 probably six feet, maybe more, before you actually reached
6 where you could feel where stuff would settle, where heavy
7 objects would settle.

8 Q. And when you would feel something that you thought
9 was evidence, what would you do?

10 A. We'd pick it up as gently as possible, bring it up to
11 where we could kind of get a look at it in the water column.
12 And if it was -- if we thought it was anything that might be
13 evidence, we'd bag it up. We had a couple of different mesh
14 bags that we would put them in and/or bring them up to the
15 boat. You know, if it was something small you could swim
16 with, you'd put it in, get the next one, you'd bring the bag
17 up when it was full. Something big and heavy, you'd just
18 bring it up.

19 Q. And what would you do with it once you brought it up?

20 A. You would hand it to the people in the boat. You
21 take the -- take the boat, bring it over to the edge of the
22 ship. We had one person on the ship, usually Rob Mulry, who
23 would lower a bag -- or, excuse me, a line, clip to the bag,

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1 pull the bag up, and they'd get the evidence up onto the ship
2 that way.

3 Q. And would you notify him what part of the grid that
4 was found?

5 A. Yes.

6 Q. Were you finding anything other than what you thought
7 were pieces of the boat?

8 A. Yes. We found unexploded ordnance, land mines,
9 things like that.

10 Q. Was there any sort of indentation underneath the
11 boat?

12 A. Yes, you could see from above the silt, even the silt
13 was kind of sunk, creating a small crater underneath it.

14 TC [MR. MILLER]: If we could use the ELMO; permission to
15 use the ELMO, Your Honor?

16 MJ [Col SPATH]: You may.

17 TC [MR. MILLER]: And at this time I'm going to ask
18 permission to publish to the witness ----

19 [Conferred with courtroom personnel.]

20 TC [MR. MILLER]: We're going to actually show it on
21 the -- go back to the computer. These are the two grid
22 searches.

23 MJ [Col SPATH]: And that's Exhibit ----

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1 TC [MR. MILLER]: 676, Your Honor. It's page 1 of that
2 and page 2 of it.

3 MJ [Col SPATH]: 676 for Identification. Thank you.

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

5 Q. I'm going to show you what has been marked for
6 identification as Prosecution Exhibit 676, page 1 of 3. Do
7 you recognize that, sir?

8 A. Yes, I do.

9 Q. What do you recognize that to be?

10 A. That was the drawings that we started out when we
11 were setting up our grid, explained where it was going to be.

12 Q. All right. And if you could explain, it says --
13 looks like it says buoy on one side, aft and forward. Could
14 you explain that just for the record, please?

15 A. Those were the buoys that would mark the edge of the
16 grid.

17 Q. Let me show you Prosecution Exhibit 676, page 2 of 3.
18 Do you recognize that, sir?

19 A. Yes. That's -- again, I was trying to lay out the
20 grid, figuring out how much rope we would need.

21 Q. Did you draw that or did Robert Mulry draw that? Do
22 you recall?

23 A. I believe Rob Mulry drew this one.

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1 Q. And did he do it in conjunction with you?

2 A. Yes.

3 Q. And do you recognize that, those two exhibits, page 1
4 and page 2, as the schematics that you all drew at the time
5 there in Yemen?

6 A. Yes.

7 TC [MR. MILLER]: Move for the admission, Your Honor, of
8 Exhibit 676, pages 2 -- excuse me, 1 and 2, the schematics.

9 MJ [Col SPATH]: All right. I'm going to defer on ruling
10 on that one, Defense Counsel, so you don't need to make any
11 comments yet, but it has been offered for admission. Thank
12 you.

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

14 Q. Did you also have occasion to conduct a search of the
15 ship to seize any evidence, find any evidence on the ship
16 itself?

17 A. Yes. We were broken up into teams to do searches of
18 different areas of the ship.

19 TC [MR. MILLER]: I'm going to ask permission, Your Honor,
20 at this time to publish to the witness Prosecution Exhibit
21 105, which will be a physical exhibit, real evidence, as well
22 as photographs of it, which will be related photographs of it,
23 105A, 105B, and 105C.

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1 MJ [Col SPATH]: You may.

2 TC [MR. MILLER]: If we could switch to the ELMO, please.

3 Your Honor, permission?

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

5 Q. First, I want to show you a photograph marked as
6 Prosecution Exhibit numbered -- Prosecution Exhibit 105A for
7 Identification. Do you recognize that photograph, sir?

8 A. Looks like hair they might -- might have picked up.

9 Q. All right. There is a -- is it -- is that the sort
10 of evidence that you were gathering there at the COLE?

11 A. Yes.

12 Q. Now, there is a ruler underneath that in that
13 photograph; is that correct?

14 A. Yes.

15 Q. And are you familiar with the tag on the bottom, just
16 generally those sorts of tags?

17 A. Yes, it's an FBI evidence tag that they put.

18 Q. All right. And does that tag have a number?

19 A. Yes.

20 Q. And what is the Q number on that?

21 A. Q173.

22 Q. All right. Now, you have before you Prosecution
23 Exhibit numbered 105. Do you recognize that, sir?

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1 A. Yes.

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

3 A. It's hair that I collected from the back of the COLE,
4 I believe. Yes.

5 Q. And there is an evidence tag on it; is that correct?

6 A. Yes.

7 Q. All right.

8 A. Yes.

9 Q. And it has a case number and some other
10 identification on it. Do you recognize any of the handwriting
11 on that evidence tag itself?

12 A. Yes. It's my handwriting on portions of it.

13 Q. And where it says description of the evidence?

14 A. That's my handwriting, yes.

15 Q. And what does it say?

16 A. Hair.

17 Q. Date and time of recovery?

18 A. October 17th, 2000. Time is 1530.

19 Q. All right. And your handwriting?

20 A. Yes.

21 Q. Location of the recovery?

22 A. It's also my handwriting, USS COLE, aft deck port
23 side.

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1 Q. And it says recovered by?

2 A. SA Anthony Duback. That's me.

3 Q. And it says -- then there's a chain of possession,
4 correct?

5 A. Yes.

6 Q. And does it have your handwriting there, also?

7 A. Yes.

8 Q. And what does it indicate?

9 A. Received from USS COLE by SA Anthony Duback, date
10 10/17/2000, 1530 hours, and then it's my signature beneath it.

11 Q. And then it appears that you turned it over to
12 somebody?

13 A. Yes.

14 Q. There's also a Q tag number on it; is that correct?

15 A. Yes.

16 Q. And what is the Q tag number?

17 A. Q173.

18 Q. And do you know whether or not that bag that you have
19 in your hand has what we call a 1B number?

20 A. It should. Yes.

21 Q. And what is the 1B number?

22 A. 1B466.

23 Q. Does it also have a DK number on it?

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1 A. It does.

2 Q. All right. And what is that number?

3 A. DK00-100.

4 Q. Is there a chain of custody, what we call a green
5 sheet, also attached to that exhibit or to the container in
6 which it came?

7 A. I don't see a green sheet in here. Then again, yes.

8 Q. You found the green sheet?

9 A. I found it.

10 Q. All right. And do you recognize your signature?

11 A. Yes. It's the first one, accepted by and collected
12 by.

13 Q. And does that -- are you able to associate that green
14 sheet with that exhibit that you have in your hand,
15 Prosecution Exhibit 105?

16 A. Yes. It has the same 1B number and the same DK
17 number.

18 Q. I'm going to show you two items. First, Prosecution
19 Exhibit 105C. At least as to the first four entries of that
20 Exhibit 105C, is that a duplicate of the green sheet attached
21 to the exhibit?

22 A. Yes, it is.

23 Q. And I'm going to show you Prosecution Exhibit 105B.

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1 Is that a photograph of the exhibit that you have identified,
2 Prosecution Exhibit 105?

3 A. Yes, it is.

4 Q. And is that a fair and accurate photograph of the
5 evidence bag, including the evidence tag which you've
6 identified as containing your handwriting?

7 A. Yes, it is.

8 Q. What did you do with that exhibit after you collected
9 it?

10 A. Once I collected it, I brought it to the -- we had
11 one person that was in charge of maintaining all the evidence,
12 bagging all the evidence, putting all the forms on. So once I
13 collected it, I brought it down to them. I don't recall who
14 it was specifically.

15 Q. Do you have any reason to believe that the exhibit
16 was tampered with, changed -- or changed in any way?

17 A. No, I do not.

18 TC [MR. MILLER]: Your Honor, I know we're going to
19 reserve ruling on the actual exhibit, but we would move at
20 this time the admission of Exhibits 105B, which is a
21 photograph of the evidence bag; 105C, which is a duplicate
22 original of the green sheet.

23 Q. One last question as to 105A. Does that evidence

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1 appear to be the same evidence in your evidence bag, 105?

2 A. Yes, it does.

3 TC [MR. MILLER]: And we would move for the admission of
4 105A at this time, Your Honor.

5 MJ [Col SPATH]: And 105, I assume?

6 TC [MR. MILLER]: 105, it is my understanding you're
7 withholding ruling.

8 MJ [Col SPATH]: I am for all ----

9 TC [MR. MILLER]: Okay.

10 MJ [Col SPATH]: ---- as I did for the last hearing. The
11 original exhibit, which is the number and then the
12 photographs, which is the number with the letter designators,
13 I'm going to reserve ruling until we complete the foundational
14 hearings that we're going to have. Thank you very much.

15 Is that all your questions, Mr. Miller?

16 TC [MR. MILLER]: That is all. Thank you, Your Honor.

17 MJ [Col SPATH]: Thanks.

18 Defense Counsel, do you have any questions for this
19 witness?

20 DDC [LT PIETTE]: Your Honor, the defense takes no
21 position.

22 MJ [Col SPATH]: All right. I think both of us are
23 probably going to sound like the same record, that at least in

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1 the court's opinion it is taking a position on evidentiary
2 matters that, again, are fairly standard, if not completely
3 standard, in any court or tribunal for real evidence.

4 Special Agent Duback, I have no idea if you're going
5 to be called back to testify again on this matter. You likely
6 will be at some point as we move towards trial. So I'm going
7 to give you a standard order: Don't discuss your testimony
8 that you have provided until this matter is resolved which
9 could be some time as I know you recognize. Do you understand
10 the order?

11 WIT: Yes, I do.

12 MJ [Col SPATH]: I say this to everyone who travels down.
13 I appreciate you traveling here in person to provide
14 testimony. Your testimony is appreciated. You're excused.

15 WIT: Thank you, sir.

16 MJ [Col SPATH]: Thanks.

17 [The witness was warned, temporarily excused, and withdrew
18 from the courtroom.]

19 MJ [Col SPATH]: Call your next witness.

20 TC [MR. MILLER]: Thank you, Your Honor. The government
21 calls Special Agent -- or former Special Agent Paul Fennwald.

22 [END OF PAGE]

23

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1 PAUL H. FENNEWALD, civilian, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

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

5 Q. Be seated, please. State your name for the record,
6 please.

7 A. My name is Paul, middle initial H., last name
8 Fennewald, spelled F-E-N-N-E-W-A-L-D.

9 Q. Mr. Fennewald, I want to first talk a little bit
10 about your background. Did you serve in the military?

11 A. Yes, I did.

12 Q. And when was that?

13 A. I served from 1971 to 1972. I was a draftee of the
14 Vietnam era.

15 Q. And in what branch?

16 A. In the U.S. Army.

17 Q. Was that out of high school?

18 A. No. I spent a year going to a tech school, and that
19 was the time when they had the lottery for the draft. And I
20 was in that lottery, and my number was 14, and I was drafted
21 then. And so I went in January of 1972.

22 Q. Did you have any specific duties while in the Army?

23 A. After completing basic training I started to go

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1 through the medical, combat medic training course, but I
2 volunteered to become a explosive ordnance disposal
3 technician. And then after that training I was assigned to an
4 explosive ordnance disposal unit at Corpus Christi, Texas,
5 where I served the rest of my service with the U.S. Army.

6 MJ [Col SPATH]: And Special Agent Fennewald, if you would
7 just slow down a little bit for the court reporters. I
8 appreciate it. Thanks.

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

10 Q. You left in 1973, correct?

11 A. '72, the end of '72.

12 Q. And where did you go to work?

13 A. I then went to work for IBM Corporation.

14 Q. In what general area?

15 A. After spending a year in one of their factories in
16 Minnesota assembling equipment, I then went to work as a
17 customer engineer, basically installing and servicing office
18 equipment in the state of Missouri.

19 Q. All right. And did you attend college?

20 A. Yes, I did.

21 Q. All right. And where did you attend college?

22 A. I attended college, Drury University or Drury College
23 at Springfield, Missouri. I got out -- started to go to

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1 school in 1977 and then earned my degree in 1980, going nights
2 and weekends while working full time for IBM.

3 Q. And what was your degree in?

4 A. My degree was in criminal justice.

5 Q. Did you at some point become a member of the FBI?

6 A. Yes, I did.

7 Q. And when was that, sir?

8 A. I entered the FBI in January of 1981.

9 Q. And did you attend Quantico?

10 A. Yes, I did.

11 Q. And did you receive training in the collection of
12 evidence at your new agents class?

13 A. Yes, we did.

14 Q. Where was your -- after Quantico, where was your
15 first office?

16 A. My first office after Quantico was I was assigned to
17 Kansas City, Missouri field office of the FBI.

18 Q. And how long did you stay in the Kansas City,
19 Missouri office?

20 A. I stayed in the Kansas City office for just a little
21 bit over a year, being transferred out of there to Cedar
22 Rapids, Iowa, FBI resident agency in -- I believe it was
23 around July of the following year.

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1 Q. And how long did you remain in Cedar Rapids at the
2 RA?

3 A. I remained in Cedar Rapids until January 1984, when I
4 was transferred to Chicago, Illinois.

5 Q. When you went to Chicago, to the Chicago office, to
6 what unit were you assigned, or squad?

7 A. After bouncing around from a couple of different
8 squads, I very quickly arrived at the terrorism task force
9 where I spent the -- most of my service with the FBI in
10 Chicago.

11 Q. And did you have any what we call collateral duties
12 or extra duties?

13 A. Yes, I did. In 1985 I went to the FBI's Hazardous
14 Devices School, and I became an FBI bomb technician. In
15 addition to that, I was also -- at one point in time I assumed
16 leadership of an Evidence Response Team in the Chicago field
17 office. I was also assigned to the FBI SWAT team in the
18 Chicago field office.

19 Q. How long did you remain in the Chicago office?

20 A. I transferred out of the Chicago office in 1992,
21 January of 1992, when I transferred to the Cedar -- Jefferson
22 City, Missouri resident agency, which is part of the Kansas
23 City field office division.

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1 Q. And what were your duties? What were your
2 responsibilities in the Jeff City office?

3 A. I had a variety of duties. I was assigned at one
4 point in time to the Heartland Terrorism Task Force. I also
5 from time to time left that area when I was called by the FBI
6 laboratory to be part of an Evidence Response Team. I did a
7 lot of training at the request of the FBI bomb data center,
8 both across the United States and internationally.

9 Q. All right. When you say you acted as an instructor,
10 what sort of instruction did you provide?

11 A. I provided instruction in processing bombing crime
12 scene to various law enforcement agencies.

13 Q. How long did you remain at the Jeff City RA?

14 A. I retired with -- from the FBI at the Jefferson City
15 resident agency in January of 2004.

16 Q. And did you seek employment or did you obtain
17 employment after that?

18 A. Yes, I did.

19 Q. What did you do?

20 A. I -- for approximately a year and a half I was a
21 contract instructor for the U.S. Department of Homeland
22 Security, teaching a course to first responders on how to
23 respond to terrorist bombings at a course that they held at

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1 New Mexico Tech at Socorro, New Mexico.

2 Q. And after that?

3 A. I was recruited and I took over the position of
4 homeland security coordinator, running the homeland security
5 program for the State of Missouri.

6 Q. All right. And how long did you do that?

7 A. I did that for a little bit over six years.

8 Q. And after that position?

9 A. I then assumed a role of special advisor to the
10 Missouri Center for Education Safety, functioning as the
11 director of the Missouri Center for Education Safety.

12 Q. I want to direct your attention back to October of
13 2000. Do you recall receiving information that there had been
14 a bomb, bombing of the United States vessel, the USS COLE?

15 A. Yes, I do. We were -- I was a part of a team of FBI
16 special agent bomb technicians that had been sent to the
17 country of Uzbekistan to do a bombing crime scene course for
18 the Uzbekistan National Police.

19 We received word, I believe on a Thursday, as our
20 course was coming to a close, that there had been a bombing in
21 Yemen and they were considering sending our team to meet up
22 with some other evidence responders from the FBI to go to
23 Yemen and help process that ship as a crime scene.

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1 Q. Do you recall the other individuals who were with you
2 at that school?

3 A. I recall some of the individuals that were with me at
4 that school being William Davitch, a Leo West, Bob Holley,
5 Morgan Bodie, I believe maybe Mark Whitworth.

6 Q. The school, did you -- did you teach -- or were the
7 Uzbeks being taught anything about evidence collection?

8 A. Yes, we -- that was the focus of that school, was
9 teaching them how to collect evidence that was the result of a
10 bombing crime scene.

11 Q. Did you employ the -- or did you teach them the
12 methodology regarding the sifting of evidence?

13 A. Yes, we did.

14 Q. Is that a standard tool?

15 A. Yes, it is. In fact, we brought along some
16 pre-made-up sifters that the FBI Bomb Data Center had made up
17 that we brought along to show them what a model sifter would
18 look like. It was a square aluminum-constructed frame that
19 had screen wire on the bottom and there was prefabricated
20 metal legs. But then we also taught them how they could
21 improvise that, making sifters out of wood and adding screen
22 to the bottom and attaching legs.

23 Q. So once you received notification that you might be

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1 sent to Yemen, what did -- what next happened for you and your
2 team?

3 A. We -- that was a -- we were given word on that
4 Thursday that we were going to go there, so we prepared to
5 leave on Friday. One of the things I had done was I had my
6 clothes laundered as best I could so that I would arrive there
7 with clean clothes to start processing that crime scene, so
8 that there wouldn't be any issue of cross-contamination from
9 the explosives that we were working with in Uzbekistan.

10 Q. And did you make your way to Aden?

11 A. Yes, we did. We left -- we departed Uzbekistan on
12 Friday morning. We went via London and then Frankfurt,
13 Germany. We were transported by embassy vehicles to Ramstein
14 Air Force Base where we linked up with the other FBI evidence
15 technicians, and then we waited for country clearance to fly
16 into Yemen.

17 Q. And did you fly into Yemen?

18 A. Yes, we did, that Saturday afternoon.

19 Q. And anything unusual happen when you landed in Aden?

20 A. I don't recall anything unusual. I recall that we
21 had some sort of a meeting at the airport, and then we were
22 transported to the hotel.

23 Q. And were there other law enforcement personnel at the

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1 hotel?

2 A. Yes, there were.

3 Q. And who was in charge?

4 A. John O'Neill was, I believe, the senior FBI official
5 that was there in charge of the FBI staff or personnel there.

6 Q. Did you come to be assigned certain duties?

7 A. Yes, I was.

8 Q. And what were your duties? What were your
9 responsibilities to be?

10 A. My responsibility was to be part of the evidence
11 collection on board the USS COLE.

12 Q. And do you recall going out to the COLE?

13 A. Yes, I do. I recall -- I believe that we -- on
14 Sunday, after getting a night's rest, arriving on Saturday, I
15 believe that we went out first on Sunday to basically look at
16 the COLE, just to kind of give an overall assessment how
17 difficult it would be to process that as a crime scene. And
18 then we in earnest began processing it as a crime scene
19 starting Monday morning.

20 Q. Would it be -- did you make a determination whether
21 or not it was going to be difficult?

22 A. It was going to be challenging, in my personal
23 estimation or in my personal opinion.

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1 Q. Why?

2 A. It was a relatively large crime scene. It was the
3 first time that I had been involved in processing a crime
4 scene that involved a vessel sitting in the water when it was
5 blown up. I knew that there was going to be debris in the
6 water that would have to be recovered. There was a lot of
7 different parts of the structure, of the vessel, different
8 levels that you would have to access, some of them not easily;
9 you might have to use ladders to access them.

10 And then the fact that the main scene of the
11 explosion, where most of the damage was, was right at the
12 waterline, below and above the waterline, back into the ship
13 where there was a lot of metal that had been torn and ripped
14 and it was jagged, and it would be very hard to get in there
15 and actually do a very thorough job processing that crime
16 scene.

17 Q. Were there other persons in the crime scene while you
18 were actively investigating it?

19 A. There was naval personnel there running pumps trying
20 to keep -- making sure that the COLE didn't sink. There were
21 other people, like myself, collecting evidence. And then
22 beyond that, I don't know that there were people in that crime
23 scene, though.

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1 Q. All right. And what about smell, heat, things of
2 that nature?

3 A. Yeah, when we -- when we first arrived there on the
4 Sunday to give the overall survey and then subsequent when
5 boarding the vessel on Monday and actually going inside the
6 vessel down into the area where the galley was that had
7 suffered a lot of the damage, there was a lot of smell of
8 petroleum, a lot of smell of decomposing organic matter, a lot
9 of other smells.

10 Q. And did this make it more difficult?

11 A. It was -- it made it more difficult. In fact, the
12 fact that, for instance, whenever you went inside the hull of
13 the vessel down into the area of the galley that we were
14 processing as a crime scene, it was extremely hot, extremely
15 humid. There was a lot of smells, again, decomposing,
16 possibly meat from the freezers in the galley area,
17 decomposing flesh from the people that had been killed there.

18 And so we tried to wear glasses as a precaution for
19 biohazards, trying to wear a mask. But because of the
20 humidity, the heat, it was hard to keep those glasses on and
21 still be able to see, to keep the mask on and still be able to
22 breathe and do any productive work.

23 TC [MR. MILLER]: Permission to publish 177, Prosecution

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1 Exhibit 177 to the witness, Your Honor?

2 MJ [Col SPATH]: You may.

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

4 Q. I show you what has been marked as -- previously
5 admitted, actually, as Prosecution Exhibit numbered 177. Do
6 you recognize that photograph, sir?

7 A. Yes, I do.

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

9 A. That depicts the area that -- what I commonly refer
10 to as the beachhead, the staging area where we would go to
11 each day before we were transported by boat out to the
12 USS COLE. It was the area where we would bring evidence back
13 to at the end of the day, where we would collect our evidence,
14 processing supplies each morning before we boarded the COLE.

15 Q. I am going to circle on the side here, appears to be
16 a trailer. Do you recognize that?

17 A. Yes, I do.

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

19 A. That appears to be a cargo trailer that was brought
20 there with supplies for processing evidence. I believe it
21 held bags and other materials, maybe even things like shovels,
22 for processing evidence.

23 Q. And those were items that were used by the FBI; is

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1 that correct?

2 A. That's correct.

3 Q. And did you bring the evidence back at the end of the
4 evenings?

5 A. At the end of the day we would carry the evidence --
6 we would assist the evidence technicians who had already
7 obtained that evidence from us in a chain of custody, but we
8 would help them carry that evidence off the COLE in boxes and
9 then bring it down for storage or processing further in that
10 area.

11 Q. And where was the evidence stored?

12 A. It was stored in a large -- I believe what you would
13 commonly refer to as like a CONEX box that had locks on it.

14 Q. All right. At the Marine ----

15 A. At that beachhead there that was secured by the U.S.
16 Marines.

17 TC [MR. MILLER]: Your Honor, for the record, on 177 I
18 circled what appears to be a trailer, has -- on the right side
19 of the photograph. It's white, has two tires.

20 MJ [Col SPATH]: Thank you.

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

22 Q. Now, were you given any specific area to search on
23 the ship?

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1 A. I was assigned different days to different areas. I
2 spent a considerable amount of my time above, on the deck and
3 in some of the upper structures of the deck, processing them
4 for evidence. I processed the areas, what they called the
5 phased arrays, this apparatus that had suffered some damage
6 from the explosion and possibly held explosive residue or
7 materials, things like that.

8 I also was assigned at times to go down into the
9 galley area where it suffered a lot of the damage and help
10 shovel debris into five-gallon buckets. If anything was
11 obvious as evidence, we would seize that then and there,
12 otherwise we would carry those buckets up above deck, up to
13 the front of the ship, and then process it, running it through
14 screens or spreading it out on tarps.

15 Q. Again, you've been an instructor in the area of
16 evidence collection, correct?

17 A. I have.

18 Q. Is there anything unusual about conducting a search
19 in that manner, putting things in buckets and taking them to
20 sifters?

21 A. No. We -- we often teach that. If you cannot
22 process that crime scene at its location, you want to preserve
23 it as intact as possible and then move it to a location where

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1 you can process successfully, being careful to not change it
2 in any way, if at all possible, and then documenting it as
3 you're moving it, that sort of thing.

4 TC [MR. MILLER]: Permission to publish Prosecution
5 Exhibits 192 and 225 to the witness, Your Honor?

6 MJ [Col SPATH]: You may.

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

8 Q. Start with 192. Do you recognize that, sir?

9 A. Yes, I do.

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

11 A. That appears to be the side of the USS COLE with the
12 area where the explosion had happened, and the most damage
13 right there in the center of the photograph.

14 Q. All right. And did you conduct any of your searches
15 in this general area?

16 A. I did, above that general area where you see the
17 individuals in that photograph there, up on the second level.
18 In fact, I believe if you look real closely, there's two
19 individuals standing at about the 9:00 position that -- one of
20 them appears to be wearing a red hat and a vest, I believe
21 that's myself actually pictured there.

22 Q. All right. If you could, with your finger draw a
23 circle around that.

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1 TC [MR. MILLER]: Your Honor, the record should reflect
2 that on 192 the witness has made a circle of two individuals
3 in, I would say, the 11:00 position in the left-hand corner.

4 MJ [Col SPATH]: Agree it's on the second deck of the ship
5 off to the left of the photograph. Concur.

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

7 Q. And did you conduct the searches by yourself or with
8 other persons?

9 A. I searched it with other persons.

10 Q. Prosecution Exhibit 225, please. I show you what has
11 been marked for identification as Prosecution Exhibit 225 --
12 or Prosecution Exhibit 225 for Identification. Do you
13 recognize that, sir?

14 A. Yes, I do.

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

16 A. I recognize that as one of the two, what I term the
17 phased array antenna on that ship that was part of their
18 system to detect any threats coming at them. And that was one
19 of the areas that I processed, both the deck, and then also we
20 got ladders and leaned them up against that area there. And
21 those little black marks -- you can see, they are all little
22 like pockets that were originally covered with ceramic
23 material and rubber, but the explosion had broken that.

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1 So we went to the task of going through every one of
2 those little windows to make sure there wasn't a piece of
3 evidence somehow trapped inside or hidden inside those
4 pockets.

5 Q. Could you circle what areas you're talking about?

6 TC [MR. MILLER]: Your Honor, the record should reflect
7 that he has circled the -- it looks like a panel with black
8 dots or holes in it ----

9 MJ [Col SPATH]: Correct. Thank you.

10 TC [MR. MILLER]: ---- in the middle of the photograph.

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

12 Q. Is that a fair and accurate depiction of the area you
13 searched on the day that you searched it?

14 A. Yes, it is.

15 Q. And that is a portion of the United States COLE; is
16 that correct?

17 A. That is correct.

18 TC [MR. MILLER]: We would move for the admission of
19 Prosecution Exhibit 225, Your Honor.

20 MJ [Col SPATH]: Defense Counsel, do you have any
21 questions about the foundation for this photograph?

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

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1 MJ [Col SPATH]: Okay. Again, I recognize that that is
2 your position by choice.

3 Prosecution Exhibit 225 for Identification is
4 admitted conditionally as Prosecution Exhibit 225.

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

6 Q. And there seems to be sort of streaks up and down the
7 sides of the structure there, correct?

8 A. That's correct.

9 Q. Could you describe what that -- or what you found
10 that to be?

11 A. While I did not do a scientific analysis of it, it
12 appeared to be black soot, kind of an oily film and black
13 carbonous material that I believed to be -- I had seen in
14 other explosions that I had processed as a crime scene. And
15 in some of our classes we set off explosions to teach people
16 how to process a crime scene. It was consistent with some of
17 the residue from an explosion.

18 Q. Were there swabs taken of that?

19 A. I didn't personally observe that. I believe that
20 before we arrived, actually, there was a team of -- an advance
21 team from the FBI laboratory that came out; and part of that
22 was a chemist who actually took swabs for explosive residue of
23 various areas of the USS COLE.

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1 Q. Now, as you were gathering the evidence, what sort of
2 items were you finding?

3 A. I was finding things like what appeared to be
4 blown-apart fiberglass material, because of the strands of
5 fiberglass, and then the resinous white material. I found
6 pieces of burnt carpet, it was red-color burnt carpet. I
7 found pieces of wire, stranded wire. I found pieces of burnt
8 currency.

9 I found at one point a piece -- what appeared to be a
10 piece of skull with hair on it. I believe I found a part of a
11 tooth, or it would appear to be part of a tooth. And then
12 just other pieces of metal that had looked like it had been
13 relatively close proximity to explosion due to the damage that
14 was exhibited in the material.

15 Q. What were you, in a general sense, looking for?

16 A. We were looking for anything that could be identified
17 as being a part of the original explosive device or part of
18 the -- something that would have transported that device to
19 that location, anything that would help us eventually lead to
20 who caused this explosion.

21 Q. Did you put each individual piece of evidence in an
22 individual bag, or did you group evidence together?

23 A. Sometimes I would group like pieces of evidence

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1 together if they were found in the same location. Other times
2 I would just put an individual piece in a single bag.

3 Q. And why would you put like pieces together in a
4 single bag?

5 A. Because they were -- they were -- they were just
6 found in the general area, and that was basically the protocol
7 that we followed and taught, that if you find, for instance, a
8 number of pieces of fiberglass all in the same area, you
9 wouldn't try to pick that apart and put them in individual
10 bags; you would just take in general, since it was the same
11 type of material, and then put it in a bag. It was just the
12 principles or the policy that we used for processing a bombing
13 crime scene.

14 Q. Did you assist in any way in the sifting of evidence?

15 A. Yes, I did.

16 Q. And could you explain to His Honor what you did?

17 A. With sifting of evidence, the debris that was brought
18 out of the galley area in the five-gallon buckets, we would go
19 ahead and we would have these sifters that were, again,
20 pre-made, as I described earlier, and we would take this
21 material and pour it into that sifter area. And then we
22 would, with gloved hands, move it around and see if there was
23 anything that we were looking for; pieces of evidence, pieces

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1 of bomb, maybe even human remains, whatever, and try to sort
2 that out. And then eventually dump that out and then get
3 another batch and put it in the sifter.

4 TC [MR. MILLER]: Permission to publish Prosecution
5 Exhibit 242 to the witness, Your Honor?

6 MJ [Col SPATH]: You may.

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

8 Q. I show you what has previously been admitted as
9 Exhibit 240 -- Prosecution Exhibit 242. Do you recognize
10 that, sir?

11 A. That is one of the FBI sifters that we used on the
12 USS COLE.

13 Q. Is it similar to the one that you showed to the
14 Uzbeks?

15 A. Yes, it is.

16 Q. And what would you do -- with the evidence either
17 that was determined at the sifter to be valuable or things
18 that you were seizing, what did you do with them after you
19 bagged them?

20 A. After we bagged them, I would go ahead and put my
21 initials on that bag, the time that I recovered it, a general
22 location where I recovered it. I had a backpack with me that
23 I would put them in that backpack so I maintained personal

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1 control of it once I seized it.

2 And then either -- whenever I went to the evidence
3 collection area on the USS COLE, either like to take a break
4 to get some -- a lunch break to get MREs or water, or at the
5 end of the day, then I would turn it over to the evidence
6 technicians that were identified to receive the material from
7 us.

8 Q. And where were they located, the evidence
9 technicians?

10 A. They were located in an area that was down inside the
11 hull of the USS COLE. It was a small room that had been used
12 by the ship chaplain for services.

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

14 MJ [Col SPATH]: You may.

15 TC [MR. MILLER]: And permission to publish Prosecution
16 Exhibit 17 through 17C to the witness, Your Honor.

17 MJ [Col SPATH]: You may.

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

19 Q. First I want to show you, if you would look on your
20 screen, sir, what has been marked as Prosecution Exhibit
21 numbered -- Prosecution Exhibit 17A for Identification. Do
22 you recognize that, sir?

23 A. I recognize the burnt material there as being similar

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1 to some of the evidence that I collected on the USS COLE.

2 Q. All right. And do you recognize what we call --
3 there's a ruler and there's a tag on it. Do you recognize
4 that tag?

5 A. Yes. That's normally what they call -- refer to as
6 the Q tag. It has a Q number, in this case Q373, and then a
7 unique individual number for that case, for that piece of
8 evidence. And that's a tag that they use to track the
9 evidence once they take it to the laboratory of the FBI and
10 then process it with various examinations.

11 Q. All right. I'm going to ask you to look at the
12 exhibit in front of you, which would be Prosecution Exhibit
13 numbered -- Prosecution Exhibit 17. Do you recognize that,
14 sir?

15 A. Yes, I do.

16 Q. And can you -- do you recognize the evidence tag on
17 it?

18 A. There's an evidence tag that has a case number. It
19 has a bunch of other information, and it has my initials where
20 I had used that to place a piece of evidence in when we were
21 processing the USS COLE.

22 Q. All right. Do you recognize your handwriting on it?

23 A. Yes, I do.

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1 Q. And could you relate for His Honor, please, what
2 handwriting you have placed on the bag?

3 A. On the bag here, on the recovered by line, my name,
4 Paul H. Fennewald. Down below under the chain of custody
5 where I recovered it from the USS COLE, again my name, the
6 date and time. And then I'm turning it over to somebody else,
7 received from Paul Fennewald, again my name on it.

8 Q. And it indicates it was seized on October the 18th at
9 approximately 11:15 a.m. -- or recovered, I guess is a better
10 way.

11 A. That is correct. And I put that writing on that bag
12 as well.

13 Q. And the location of the recovery?

14 A. Yes, 02/Aft-Port Side.

15 Q. And is there a Q number on that particular evidence
16 bag?

17 A. Yes, there is, Q373, and then the number 001103007.

18 Q. And is there a DK number on it, also?

19 A. DK02-128.

20 Q. Again, going back to Prosecution Exhibit 17A, they
21 have the same two Q numbers?

22 A. Yes, they do.

23 Q. And looking at the evidence, does it appear to be the

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1 same evidence in the bag that's in -- photographed in
2 Prosecution Exhibit 17A?

3 A. Yes, from what I can see without taking the evidence
4 out of the bag, it does appear to be similar to what's
5 pictured in the photograph.

6 Q. Is there a what we call -- refer to as a chain of
7 custody green sheet accompanying that exhibit?

8 A. I -- oh, yeah. Yes, there is.

9 Q. All right. And do you recognize your signature on
10 that green sheet?

11 A. Yes, I do.

12 Q. And where is your signature contained, sir?

13 A. It's contained at the top of the chain of custody
14 log, accepted by Paul Fennewald, the date, and it was
15 collected as evidence.

16 Q. Does it have a -- what we call a 1B number on it?

17 A. Repeat that again.

18 Q. Does it have a 1B number on it?

19 A. 1B?

20 Q. Yes, on your chain of custody. If you look at next
21 to the case number.

22 A. It's 262-NY-277013 and 1B663, yes, I'm sorry. I
23 apologize.

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1 Q. Is there an item number, also?

2 A. Yes, There's an item number, DK02-128.

3 Q. Are you able to associate that green sheet with the
4 Exhibit 17?

5 A. Yes, I am.

6 Q. And how are you able to do that?

7 A. By that DK number and the case number.

8 Q. All right. I want to show you prosecution -- what is
9 Prosecution Exhibit 17C for Identification, at least the first
10 four entries. Are those entries identical to the ones in the
11 original green sheet?

12 A. Yes, they are.

13 Q. All right. And again, the top one is your signature,
14 correct?

15 A. Yes, it is.

16 Q. I'm showing you Prosecution Exhibit 17B, a
17 photograph. Is that a fair and accurate depiction of the
18 actual evidence bag, 17?

19 A. Yes, it is.

20 TC [MR. MILLER]: Your Honor, the government would move
21 for the admission of Prosecution Exhibits 17A, 17B, and 17C.
22 And I understand we are -- you are reserving ruling on the
23 actual Exhibit 17.

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1 MJ [Col SPATH]: Yes, I'm deferring on all of those as I
2 have throughout this process. Thank you. You may continue.

3 TC [MR. MILLER]: The next one is -- permission to publish
4 Prosecution Exhibits 19 through 19C, Your Honor?

5 MJ [Col SPATH]: You may.

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

7 Q. I'm going to show you first, Mr. Fennewald,
8 Prosecution Exhibit numbered 19A and ask you to take a look at
9 that, sir. Does that appear to be the type of evidence you
10 were seizing on the USS COLE?

11 A. Yes, it was.

12 Q. And again, you're familiar with the Q tab system?

13 A. Yes, I am.

14 Q. Does that have a Q tab on the ruler?

15 A. Yes, it does.

16 Q. And what is that number?

17 A. 0406, and then 001103007.

18 Q. All right. I'm going to ask you to take a look at
19 that Q number again, and if you could read that into the
20 record.

21 A. Q406.

22 Q. Okay. Thank you. I wasn't sure. All right.

23 And if you would look at the exhibit itself, 19. Do

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1 you recognize that bag, sir?

2 A. Yes, I do.

3 Q. All right. And what do you recognize it to be?

4 A. It was a bag that I used to collect evidence and put
5 it into it whenever I was on board the USS COLE processing it
6 as a crime scene.

7 Q. Do you recognize the handwriting?

8 A. Yes, I do.

9 Q. And whose handwriting is it?

10 A. It's my handwriting.

11 Q. And does it have a description of the evidence?

12 A. Yes, it does. It describes it as burnt material, or
13 appears to be fiberglass material.

14 Q. Does it give a date and time of the recovery?

15 A. Yes, it has.

16 Q. And what is that, sir?

17 A. October 16th at 1345.

18 Q. The location of the recovery?

19 A. 03/SPY Deck-Port Front.

20 Q. And it shows -- I guess it's recovered by yourself
21 and another agent; is that correct?

22 A. Yes, Lisa LoCascio. Now, I don't recall if that was
23 an agent or sometimes we had some military personnel that were

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1 assisting us, basically looking, but before they were allowed
2 to actually handle anything we would look at it and then
3 actually take control of it. But she was the one that
4 probably -- she was the one that first observed this piece of
5 material and then got my attention to come over and look at
6 it.

7 Q. All right. So you were working both with naval
8 personnel and other FBI agents?

9 A. Yes, I was.

10 Q. As to the chain of custody, is that your handwriting?

11 A. Yes, it is.

12 Q. And if you could relate to the court, please, when it
13 shows you received it, time and date?

14 A. Again, it shows that I recovered the material on
15 10/16 of 2000 at 1345. And then down in the chain of custody,
16 it is exactly the same thing, 10/16 at 1345. And then I would
17 have turned it over to someone at 10/18 at 1:56 or ----

18 Q. Is there a Q number contained on that particular
19 exhibit?

20 A. It's Q406.

21 Q. And does that match the one Q number in Prosecution
22 Exhibit 19A?

23 A. Yes, it does.

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1 Q. Is there a DK number also on that?

2 A. Yes, there is. DK03-136.

3 Q. Looking over that bag, do you see a 1B number
4 anywhere on it?

5 A. On the chain of custody that's included with this,
6 1B697.

7 Q. I'm going to ask you to take a look at Prosecution
8 Exhibit 19C -- Prosecution Exhibit 19C for Identification. Do
9 you recognize that -- excuse me. Do you recognize that as a
10 green sheet?

11 A. Yes, I do.

12 Q. And you have the original green sheet in front of
13 you; is that correct?

14 A. That's correct.

15 Q. Are the first four entries of that identical?

16 A. Yes, they are.

17 Q. Are you able to associate this particular green sheet
18 with your -- with the exhibit, Prosecution Exhibit 19?

19 A. By the DK number and the case number, I'm able to
20 associate this green sheet with this piece of evidence. They
21 are both one and the same.

22 Q. It does not show that you signed that particular
23 green sheet; is that correct?

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1 A. That is correct.

2 Q. Who does it show signed for it?

3 A. It says accepted by, and then it's L-A-C-A-B-I-C-O
4 [sic].

5 Q. LoCascio?

6 A. LoCascio.

7 Q. And lastly -- two last questions. Does the evidence
8 in prosecution 19A appear to be the same evidence that's
9 contained in the bag, 19?

10 A. From what I can tell looking through the clear parts
11 of the bag, they appear similar.

12 Q. And the evidence bag itself -- excuse me.

13 I show you what has been marked as Prosecution
14 Exhibit 19B for Identification, and does that appear to be an
15 accurate depiction of the actual bag itself, Prosecution
16 Exhibit 19?

17 A. Yes, it does.

18 Q. Fair and accurate?

19 A. Fair and accurate.

20 TC [MR. MILLER]: Your Honor, at this time we would move
21 for the admission of Prosecution Exhibit 19A and 19B. We'll
22 reserve on 19B until -- 19C, excuse me, until Ms. LoCascio --
23 Agent LoCascio identifies it.

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1 MJ [Col SPATH]: I understand. And I am going to defer,
2 as you know, on admitting all of it until we move through
3 these sessions. Thank you.

4 TC [MR. MILLER]: Permission to publish to the witness,
5 Your Honor, Prosecution Exhibits 37 through 37C.

6 MJ [Col SPATH]: You may.

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

8 Q. First I want to show you Prosecution Exhibit 37A for
9 Identification and again ask you the same question I asked you
10 before: Does this appear to be the type of evidence you were
11 seizing on the USS COLE?

12 A. Yes, it was.

13 Q. It has a Q number, correct, attached to the ruler?

14 A. Yes, it does.

15 Q. Could you read that into the record, please?

16 A. Q407-00116300 [sic] -- and it appears to be -- 7.

17 Q. Do you have before you Prosecution Exhibit 37?

18 A. Yes, I do.

19 Q. Would you take a look at that, sir. Do you recognize
20 that?

21 A. Yes. It's a bag that I would have used to collect
22 evidence on the USS COLE and place it inside the bag.

23 Q. Do you recognize the handwriting on it?

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1 A. Yes, I do.

2 Q. Whose handwriting is that?

3 A. My own handwriting.

4 Q. And does it give a description of the evidence?

5 A. The description is burnt debris.

6 Q. Date and time of recovery?

7 A. 1316 on 10/16/2000.

8 Q. Location?

9 A. 03/SPY Deck-Port Side-Front.

10 Q. And by whom was it recovered?

11 A. Lisa Co -- C-A-S-C-O [sic] and myself.

12 Q. And the chain of custody shows what?

13 A. It shows that I took the evidence and then I turned
14 it over to someone, S-T-E-R-A-E-E, or -- it appears to be.

15 Q. You turned it over to somebody. Do you know who that
16 person is?

17 A. It would have been somebody that I was authorized to
18 turn it over to, but I don't recognize the writing on that.
19 It's not my writing as far as that name.

20 Q. If you would look at the -- look at the evidence
21 itself, does it appear to be the same evidence in 19 -- excuse
22 me, Prosecution 37, does it appear to be the same evidence as
23 pictured in 37A?

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1 A. Yes, it does.

2 Q. Does the evidence bag itself, 37, have a Q number on
3 it?

4 A. Yes, it does.

5 Q. What is that number?

6 A. Q407-001103007.

7 Q. Does the bag have a DK number on it?

8 A. The bag does have a DK number, DK03-138.

9 Q. Does it have -- does the bag have a 1B number, by any
10 chance?

11 A. Let's see. On the chain of custody, 1B699.

12 Q. What I am asking, on the bag itself.

13 A. On the bag itself?

14 Q. See one on that front or the back?

15 A. Yes, on the back of the bag encircled is 1B699.

16 Q. You have the green sheet there in front of you; is
17 that correct, the original?

18 A. That's correct.

19 Q. Are you able to associate that green sheet with the
20 exhibits, Exhibit 37?

21 A. Yes, I am.

22 Q. How are you able to do that?

23 A. By the -- the FBI case number, 262-NY-277013; and

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1 then the 1B number, 1B699; and then the DK number, DK03-138.

2 Q. And it shows -- is your signature contained on that
3 green sheet?

4 A. Yes, it is.

5 Q. I'm going to show you Prosecution Exhibit 37C for
6 Identification. Is that a exact duplicate of the green sheet?

7 A. It appears to be a fair and accurate representation
8 of it.

9 Q. All right. And lastly, show you Prosecution
10 Exhibit 37B for Identification, which is a picture of the bag.
11 Is that a fair and accurate depiction of the actual bag, 37?

12 A. Yes, it is.

13 TC [MR. MILLER]: Your Honor, move for the admission of
14 37A, 37B, 37C at this time.

15 MJ [Col SPATH]: I understand.

16 Q. I show you Prosecution Exhibit ----

17 TC [MR. MILLER]: I'm sorry, Your Honor. Before that, ask
18 permission to publish to the witness Prosecution Exhibits 39
19 through 39C.

20 MJ [Col SPATH]: You may. And no need to ask permission.
21 I know it's coming in here, and they've been cleared. Thank
22 you.

23 TC [MR. MILLER]: Thank you.

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

2 Q. Before you is Prosecution Exhibit numbered 39A and
3 ask you if you recognize that as the type of evidence you were
4 seizing on the COLE?

5 A. Yes, I recognize that as the type of evidence I was
6 collecting on the USS COLE.

7 Q. All right. And the Q number, is there a Q number in
8 that photograph?

9 A. In the photograph it's Q455-001103007.

10 Q. All right. And do you have before you the actual
11 Exhibit 39?

12 A. Yes, I do.

13 Q. Do you recognize that, sir?

14 A. Yes. It's a evidence bag that I used to collect
15 evidence in on the USS COLE.

16 Q. And do you recognize the handwriting?

17 A. Yes, I do.

18 Q. And whose handwriting is it?

19 A. My own.

20 Q. And if you could, give the description, the date and
21 type of recovery, the location of the recovery and by whom it
22 was recovered.

23 A. The description is burnt material. It was recovered

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1 on October 17, 2000, around 1325 hours. It was recovered on
2 the 04/Port Side -- I can't really read; it's pretty
3 obliterated -- front. It looks like front something.

4 Q. And chain of custody?

5 A. Yes. On that I -- on the chain of custody I released
6 it to -- it just says storage and some initials on it on
7 10/17 -- I'm sorry, yeah, 10/17 at 1325.

8 Q. I'm going to ask you just to look at the bag itself,
9 not the green sheet.

10 A. Okay.

11 Q. Chain of custody ----

12 A. Chain of custody has my name on it and the date
13 10/17/2000, 1325.

14 Q. And does that bag have a Q number on it?

15 A. Yes, it does.

16 Q. What is that Q number?

17 A. The Q number is Q455-001103007.

18 Q. Does the Q number on Prosecution Exhibit 39 match the
19 Q number on Prosecution Exhibit numbered 39A?

20 A. Yes, it does.

21 Q. Is there a -- by any chance, a 1B number on that
22 exhibit anywhere, either on the front or back?

23 A. Let me see if I can find one here.

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1 Q. And I'm talking about Exhibit 39 ----

2 A. Yes, 1B766.

3 Q. Now, can you take a look at the original green sheet?
4 Does that contain your signature?

5 A. Yes, it does.

6 Q. On the top line?

7 A. Yes, it does.

8 Q. And are you able to associate that green sheet with
9 the Exhibit 39?

10 A. Yes, I am, by the ----

11 Q. How are you able to do that, sir?

12 A. It's associated by the case ID number, 262-NY-277013,
13 1B766; and then there's a DK number both on the evidence bag,
14 DK04-134, and that same DK number is on the chain of custody
15 green sheet.

16 Q. All right. And I may have already asked this, but
17 again, looking at the Prosecution Exhibit 39A and looking at
18 the contents of the bag, 39, do they appear to be the same
19 items?

20 A. From what I can tell, yes.

21 Q. I'm going to show you Prosecution Exhibit 39C, sir.
22 Is that an exact duplicate of the first four entries on the
23 chain of custody that you have in front of you?

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1 A. Yes, it is.

2 Q. All right. And again, for the record, your signature
3 is on the top entry?

4 A. That's correct.

5 Q. Show you a photograph, Prosecution 39B. Last
6 question on these exhibits. Is that a fair and accurate
7 depiction of the actual bag, 39?

8 A. Yes, it is a fair and accurate representation of it.

9 TC [MR. MILLER]: Again, Your Honor, move for the
10 admission of Prosecution Exhibits 39A, 39B, and 39C.

11 MJ [Col SPATH]: I understand. Thank you. You may
12 proceed.

13 Q. Sir, I'm placing on the ELM0 Prosecution Exhibit 66A
14 for identification. Again, is this the sort of evidence that
15 you were seizing off the United States -- the USS COLE?
16 Excuse me.

17 A. Yes, it is.

18 Q. If you could, please, does it have a Q number?

19 A. Yes, it does.

20 Q. And what is that Q number?

21 A. Q410-001103007.

22 Q. I've placed before you Prosecution Exhibit 66A. I'd
23 ask you, sir, to take a look at that. Do you recognize that,

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1 sir?

2 A. That's an evidence bag containing material that I
3 would have used to collect evidence on board the USS COLE.

4 Q. All right. And you recognize it as the type of
5 evidence that you were seizing, correct?

6 A. That's correct.

7 Q. Does that bag have a Q number on it?

8 A. Yes, it does.

9 Q. All right. And what is the Q number on Prosecution
10 Exhibit 66A?

11 A. Q410-001103007.

12 Q. And the pouch number, is that contained on the bag?

13 A. The pouch number?

14 Q. 66A.

15 A. The DK number?

16 Q. The DK number, yes.

17 A. DK03-135.

18 Q. Does the Exhibit 66A also contain a 1B number?

19 A. Yes, it does. 1B696.

20 Q. Looking at the contents contained in the actual bag,
21 Prosecution Exhibit 66A, do they appear to be the same items
22 contained in the photograph, Prosecution Exhibit 66A?

23 A. Without removing it from the envelope, it does appear

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1 to be a fair and accurate representation of what's pictured in
2 the photograph.

3 Q. On the evidence tag in Prosecution Exhibit 66A, whose
4 handwriting is that?

5 A. That is my own handwriting.

6 Q. All right. And could you relate to the court what is
7 stated as to the description, the date and time and recovery,
8 the location, and by whom it was recovered?

9 A. Okay. It's -- the description of evidence is
10 miscellaneous pieces of material, metallic material, as
11 recovered on 1330 on 10/16/2000 on the 03/SPY Deck-Port-Bow,
12 and it was recovered by Lisa LoCascio and myself.

13 Q. And then there's a chain of custody section, correct?

14 A. Correct.

15 Q. Did you fill that out, also?

16 A. Yes, I did.

17 Q. And could you relate to the court what entry you
18 made?

19 A. I made on there that it was recovered from the COLE
20 by myself. The date was 10/16/2000, the time is 1320. And
21 then I turned it over to someone on 10 -- looks -- 10/16/2000
22 at 1:55.

23 Q. You have the original green sheet in front of you?

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1 A. Yes, I do.

2 Q. All right. And do you recognize your signature on
3 it?

4 A. Yes, I do.

5 Q. Is it the first entry?

6 A. Yes, it is.

7 Q. Are you able to associate that green sheet with the
8 exhibit, Prosecution Exhibit 66A?

9 A. Yes, I am, by virtue of the fact it has the same case
10 number, the same 1B number, and the same DK number.

11 Q. Placing on the ELM0 Prosecution Exhibit numbered --
12 Prosecution Exhibit 66C for Identification. Does that -- is
13 that a duplicate of the first three entries -- or excuse me,
14 four entries on the green sheet in front of you, the original
15 green sheet?

16 A. Yes, it is.

17 Q. And again for the record, your -- that's your
18 signature as the first entry on that?

19 A. It is, correct.

20 Q. Lastly, showing you Prosecution Exhibit 66B for
21 Identification. It is a photograph. Is that a fair and
22 accurate depiction of the actual evidence bag, Prosecution
23 Exhibit 66A?

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1 A. Yes, it is.

2 TC [MR. MILLER]: Move for the admission, Your Honor, of
3 66A, 66B, and 66C.

4 MJ [Col SPATH]: Thank you.

5 Q. I'm showing you Prosecution Exhibit 67A for
6 Identification. The same question: Is this the sort of
7 evidence that you were seizing or gathering on the USS COLE?

8 A. Yes, it is.

9 Q. Does this have a Q number attached to the ruler
10 underneath?

11 A. Yes, it does.

12 Q. And what is that Q number?

13 A. Q444-001103007.

14 Q. I've placed before you Prosecution Exhibit 67 for
15 Identification. What is that, sir?

16 A. It's an evidence bag that contains evidence that I
17 collected on the USS COLE.

18 Q. Does it appear to be the same evidence contained in
19 the photograph, Prosecution Exhibit 67A?

20 A. Yes, it does.

21 Q. And does that evidence bag contain a DK number?

22 A. It does. DK04-133.

23 Q. Does it contain a Q number?

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1 A. It does. Q number 444-001103007.

2 Q. And does that number match the -- does the number on
3 Prosecution Exhibit 67 match the number on the photograph,
4 Prosecution Exhibit 67A?

5 A. Yes, it does.

6 Q. Is there a 1B number, also, on that evidence bag,
7 67?

8 A. Yes, there is. 1B765.

9 Q. Now, is there an evidence tag contained on that
10 evidence bag -- evidence tag, I guess is what I call it?
11 Evidence form. A chain of custody form.

12 A. Oh, there's a -- at the bottom, yes, there is a chain
13 of custody. I collected it. It shows that I -- and that's my
14 signature there, my handwriting -- collected it on 10/17/2000
15 at 10:39 a.m.

16 Q. Location of the recovery?

17 A. The 04 Level-Port Side Front.

18 Q. All right. And it shows that it was recovered by
19 whom?

20 A. By myself.

21 Q. And a description of it?

22 A. Description was metallic material.

23 Q. And did you complete the chain of custody form?

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1 A. Yes, I did.

2 Q. If you would, please, take a look at the green sheet.

3 Do you recognize your signature on that green sheet?

4 A. Yes, I do.

5 Q. And does it show you as having collected that

6 evidence?

7 A. It does. My name and then the date and time.

8 Q. All right. Your name is at the -- is the first

9 entry; is that correct?

10 A. That's correct.

11 Q. Now, are you able to associate that green sheet with
12 the evidence bag, the bag of evidence, Prosecution Exhibit 67?

13 A. Yes, I am, by virtue of the fact that it has the same
14 file number, the same 1B number, and the same DK number.

15 Q. I'm going to show you Prosecution Exhibit 67C for
16 Identification. Is that an exact duplicate of the first three
17 entries or four entries on the green sheet in front of you?

18 A. Yes, it is.

19 Q. And that's the one that you've associated with
20 Prosecution Exhibit 67, correct?

21 A. Correct.

22 Q. And that is your signature on the first line?

23 A. Yes, it is.

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1 Q. Lastly I'm going to show you a photograph,
2 Prosecution Exhibit 67B for Identification. Do you recognize
3 that photograph, sir?

4 A. That photograph is a fair and accurate representation
5 of the evidence bag that I have in front of me.

6 Q. Prosecution Exhibit 67?

7 A. Yes.

8 TC [MR. MILLER]: Move for the admission, Your Honor, of
9 67A, 67B, and 67C at this time.

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

11 Defense Counsel -- or, I'm sorry, Trial Counsel -- I
12 was looking at defense counsel. Given the time, I assume we
13 have no problem with witness availability as we go through
14 today?

15 TC [MR. MILLER]: No, we don't.

16 MJ [Col SPATH]: Then it seems to be the perfect time,
17 we've been in here quite a bit over an hour, to take our lunch
18 recess. We'll come back at 1300, an hour and 15 minutes.
19 We'll see you at 1300. We're in recess.

20 [The R.M.C. 803 session recessed at 1145, 8 November 2017.]

21 [END OF PAGE]

22

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1 [The R.M.C. 803 session was called to order at 1302,
2 8 November 2017.]

3 MJ [Col SPATH]: The commission is called back to order.
4 All the parties who were present before the recess are again
5 present. Special Agent Fennewald remains on the stand. Just
6 remember, you're still under oath.

7 You may proceed.

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

9 **DIRECT EXAMINATION CONTINUED**

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

11 Q. I'm going to place before you Prosecution Exhibit 89
12 for Identification.

13 TC [MR. MILLER]: Your Honor, may we use the ELM0?

14 MJ [Col SPATH]: You may.

15 Q. First, I've placed on the ELM0 Prosecution
16 Exhibit 89A for Identification. Do you recognize that item?
17 Is that the type of item -- let me ask it a different way. Is
18 that the sort of item that you were seizing on the -- from the
19 COLE?

20 A. Yes, it is.

21 Q. And does that particular photograph contain a ruler
22 with a Q number on it?

23 A. Yes, it does.

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1 Q. And what is that Q number?

2 A. Q412-001103007.

3 Q. All right. I want to ask you to take a look at the
4 package that's been placed before you, Prosecution Exhibit
5 numbered 89 -- or Prosecution Exhibit 89 for Identification.
6 Do you recognize that, sir?

7 A. Yes, I do.

8 Q. What do you recognize that to be?

9 A. It is an evidence bag that I used to collect evidence
10 when I was processing the USS COLE.

11 Q. Are you able to see what's contained in that bag?

12 A. There is a small container that has metal and
13 cardboard, and it has my initials on it and some writing.

14 Q. And does it appear to be the same object that's
15 contained in Prosecution Exhibit 89A?

16 A. I can't see an individual piece of stranded wire in
17 here, but maybe if I could manipulate this to open it up.

18 Q. All right. If you would.

19 A. Well ----

20 Q. Hold on for a second.

21 [Conferred with courtroom personnel.]

22 TC [MR. MILLER]: Your Honor, for the record, the witness
23 is putting on a pair of gloves and opening the exhibit, the

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1 bag.

2 A. Okay. Yes, I have this container open now, and there
3 appears to be a piece of stranded wire inside the container
4 that appears in the photograph.

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

6 Q. Appear to be the same item?

7 A. Yes, it does.

8 Q. If you could go ahead and package it back up.

9 A. Okay.

10 Q. Thank you. The evidence bag itself, do you recognize
11 the evidence bag?

12 A. Yes, I do.

13 Q. And is that your handwriting that's contained on the
14 bag?

15 A. Yes, it is.

16 Q. Is there a DK number on it?

17 A. Yes, there is.

18 Q. What is it?

19 A. DK03-137.

20 Q. Is there a Q number on it?

21 A. There is a Q number, Q412-001103007.

22 Q. Is there also a 1B number on it?

23 A. There is a 1B number, 1B698.

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1 Q. And I think you've indicated the handwriting you
2 recognize on the bag?

3 A. Yes, I do.

4 Q. Whose handwriting is that?

5 A. My own handwriting.

6 Q. And could you relate the description that you wrote,
7 the time and date of recovery, the location of the recovery,
8 and who recovered it?

9 A. Yes, the description is a piece of double-stranded
10 wire. It was recovered on 10/16/2000 at 1424 hours. It was
11 recovered from the SPY Deck-Level 03/Port Side-Front by Lisa
12 LoCascio and myself.

13 Q. And the chain of custody, did you complete that
14 section?

15 A. Yes, I did.

16 Q. And what does it indicate?

17 A. It indicates I seized this piece of evidence on
18 10/16/2000 at 1424 hours.

19 Q. And then did you surrender it to another party after
20 that?

21 A. Yes, I did.

22 Q. Go ahead.

23 A. On the same date, 10/16/2000, time is 1:57 p.m.

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1 Q. The Q number on the evidence bag, is it the same Q
2 number that's contained on -- the evidence bag in 89, the same
3 as the Q number on Prosecution Exhibit 89A?

4 A. Yes, it is.

5 Q. Do you have a -- is there attached a green sheet to
6 that exhibit?

7 A. Yes, there is.

8 Q. All right. Would you take a look at that, please.
9 Is your name contained on that?

10 A. Yes, it is.

11 Q. And is it the first entry?

12 A. Yes, it is.

13 Q. Can you associate that green sheet with -- that green
14 sheet with Prosecution Exhibit 89?

15 A. Yes, I can, by virtue of the fact that it has the
16 same file number, the same 1B number, and the same DK number.

17 Q. I'm going to place on the ELMO Prosecution
18 Exhibit 89C for Identification and ask you if that is a exact
19 duplicate of the first four entries on the green sheet in
20 front of you?

21 A. Yes, it is.

22 Q. And again, for the record, your signature is
23 contained as the first entry?

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1 A. Yes, it is.

2 Q. Lastly, I'm going to show you Prosecution Exhibit 89B
3 for -- oh, sorry -- for Identification. Do you see that
4 photograph?

5 A. Yes, I do.

6 Q. Is that an accurate depiction of the evidence bag in
7 Prosecution Exhibit 89?

8 A. Yes, it's a fair and accurate representation of the
9 evidence bag.

10 Q. Thank you.

11 TC [MR. MILLER]: Move for the admission, Your Honor, at
12 this time of Prosecution Exhibits 89A, 89B, and 89C.

13 MJ [Col SPATH]: Thank you.

14 Q. Placing on the ELMO Prosecution Exhibit numbered
15 110 -- Prosecution Exhibit 110A for Identification. I'm
16 placing before you a Prosecution Exhibit 110.

17 First, as to the photograph, Prosecution Exhibit 110A
18 for Identification, does the material in the photograph appear
19 to be the type that you were seizing on the COLE?

20 A. Yes, it is.

21 Q. Is there a Q number in that photograph?

22 A. Yes, there is.

23 Q. All right. And just as to the Q number, what is that

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1 Q number?

2 A. Q372-001103007.

3 Q. I'd ask you to take a look at the exhibit placed
4 before you, Prosecution Exhibit 110. Do you recognize that,
5 sir?

6 A. Yes. This is an evidence bag that I would have used
7 to collect evidence on board the USS COLE.

8 Q. Do you recognize the handwriting on the bag?

9 A. Yes, I do.

10 Q. And whose handwriting is it?

11 A. My own.

12 Q. Is there a Q number on it?

13 A. Yes, there is.

14 Q. And what is that Q number?

15 A. The Q number is Q372-001103007.

16 Q. Does that number match the number in Prosecution
17 Exhibit 110A?

18 A. Yes, it does.

19 TC [MR. MILLER]: Okay. Your Honor, I think our
20 monitors -- at least my monitor has kind of gone de -- to
21 sleep.

22 MJ [Col SPATH]: All right. Hold on. Let's see if I can
23 get some help.

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1 TC [MR. MILLER]: All right. Thank you. It's back.

2 Thank you, Your Honor.

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

4 Q. Do those numbers match?

5 A. Yes, they do.

6 Q. Can you see the contents of Prosecution Exhibit 110?

7 A. I can see part of the contents of this prosecution
8 exhibit.

9 Q. Does it appear to be the same contents as those
10 contained in the photograph, Prosecution Exhibit 110A?

11 A. They appear to be consistent with the material
12 depicted in the photograph I have in front of me.

13 Q. Could you indicate on the record the following
14 information that you provided on the evidence tag: the
15 description of the evidence ----

16 A. Yes.

17 Q. ---- the date and time of recovery, the location of
18 recovery, and by whom it was recovered?

19 A. It was described as fibrous burnt material. It was
20 recovered on 10/18 of 2000 at 11:30. It was recovered on the
21 02/Aft Deck-Starboard Side by myself. My name is -- I put on
22 there.

23 Q. Did you fill out the chain of custody section?

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1 A. Yes, I did.

2 Q. All right. And what does that indicate, sir?

3 A. It indicates that on 10/18 I recovered it at 11:30,
4 and I put a.m., and I had put my name on it.

5 Q. I'm going to ask you to take a look at the green
6 sheet that's attached to that exhibit. Do you recognize your
7 signature on that?

8 A. Yes, my signature is on the first line where
9 signatures appear.

10 Q. Are you able to associate that particular green sheet
11 with the evidence bag, the evidence pouch, Exhibit 110?

12 A. Yes, I am, by virtue of the fact of the file number,
13 the 1B number, and the DK -- and the DK number are all the
14 same, so they're -- this is the green sheet for this piece of
15 evidence.

16 Q. And what is that DK number?

17 A. DK02-127.

18 Q. And the 1B number again for the record?

19 A. The 1B number is 1B662.

20 Q. I'm showing you Prosecution Exhibit 110C for
21 Identification. Ask you, are the first four entries exact
22 duplicates of the green sheet that you have just reviewed?

23 A. Yes, it is.

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1 Q. And is that -- for the record, the first entry is
2 your signature?

3 A. Yes, it is.

4 Q. I show you Prosecution Exhibit 110B for
5 Identification. Do you recognize that photograph?

6 A. That photograph is a depiction of the evidence bag
7 that I'm holding in my hand.

8 Q. Is it an accurate depiction?

9 A. Yes, it is. It's a fair and accurate depiction of
10 the bag that I hold.

11 TC [MR. MILLER]: Your Honor, we'd move for the admission
12 of Prosecution Exhibits 110A, 110B, and 110C.

13 MJ [Col SPATH]: Thank you.

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

15 Q. You've been handed Prosecution Exhibit 113 -- you are
16 at this time. I'd ask you to take a look at that. Also ask
17 you to take a look, if you would, first at the photograph on
18 the ELM0, Prosecution Exhibit 113A for Identification. And do
19 you recognize the item as the sort of thing that you were
20 seizing or you were collecting on the COLE?

21 A. That -- the metal container there is consistent with
22 the types of metal containers we used to put evidence in. The
23 pictures is [sic] not very clear as to what's contained inside

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1 it, but it's consistent with, again, the types of things that
2 I was collecting.

3 Q. All right. And do you see the Q number underneath?

4 A. Yes, I do.

5 Q. And could you read that into the record, please?

6 A. Q409-001103007.

7 Q. Now, do you -- you have the Exhibit 113 in front of
8 you?

9 A. Yes, I do.

10 Q. Do you recognize the evidence bag?

11 A. Yes, I do.

12 Q. What do you recognize it to be, sir?

13 A. It's a -- an FBI evidence collection bag that I would
14 have used to collect evidence on board the USS COLE.

15 Q. And what does it contain?

16 A. It contains a metal canister that has apparently --
17 it appears to have my initials on the metal canister and a
18 piece of evidence tape on it.

19 Q. Appear to be the same kind of canister that's
20 contained in Prosecution Exhibit 113A?

21 A. Yes, it does.

22 Q. And does the evidence bag, Prosecution Exhibit 113,
23 have a Q number on it?

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1 A. Yes, it does.

2 Q. What's that Q number?

3 A. Q409-001103007.

4 Q. And does that match the Q number on Prosecution
5 Exhibit 113A?

6 A. Yes, it does.

7 Q. Does the evidence bag also contain a DK number?

8 A. It does. It contains a DK number, DK03-132.

9 Q. Does it have a 1B number?

10 A. Yes, it does. 1B694.

11 Q. You noted -- do you recognize the handwriting on the
12 bag?

13 A. The handwriting on the bag is my own under -- down
14 under chain of custody.

15 Q. All right. And what does it reflect?

16 A. It reflects that I seized this on 10/16/2000 at
17 something-35. 2:35 from the SPY Deck-03/Port. And it was
18 recovered by D.O. Cocascio [sic] and then my name is under --
19 my initials -- or my first initial and my name are underneath
20 that.

21 Q. Do you have the green sheet that's -- green sheet
22 that's attached to the exhibit?

23 A. Yes, I do.

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1 Q. And does that reflect whether or not you signed that
2 green sheet?

3 A. Yes, it reflects that I did sign the green sheet.

4 Q. And does it give a date and time?

5 A. 10/16/2000 at 2:35 p.m.

6 Q. And does it indicate -- or can you associate this
7 particular green sheet with the evidence bag, Prosecution
8 Exhibit 113?

9 A. Yes, I can, by virtue of the file number, the 1B
10 number, 1B694, and the DK number, DK03-132.

11 Q. I'm going to show you Prosecution Exhibit 113C for
12 Identification and ask you if the first four entries on that
13 chain of custody form are identical to the ones that you are
14 reviewing in front of you?

15 A. Yes, they are.

16 Q. And for the record, your signature is the first
17 entry?

18 A. Yes, it is.

19 Q. Placing on the ELM0 Prosecution Exhibit 113B for
20 Identification. Do you recognize that photograph, sir?

21 A. That's a depiction of the evidence bag that I hold in
22 my hand.

23 Q. Fair and accurate depiction of the evidence bag?

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1 A. It is a fair and accurate depiction of the evidence
2 bag.

3 TC [MR. MILLER]: Your Honor, the government at this time
4 would move for the admission of Prosecution Exhibits 113A,
5 113B, and 113C.

6 MJ [Col SPATH]: Thank you.

7 TC [MR. MILLER]: If you could, please, hand the witness
8 Prosecution Exhibit 116.

9 Q. Placing before you Prosecution Exhibit 116A for
10 Identification. Do you recognize that type of container?

11 A. That type of container is the type of container I
12 would have used on board the USS COLE when I was collecting
13 small pieces of evidence to contain them so they wouldn't be
14 lost.

15 Q. Was it similar to the ones that you just identified
16 in Prosecution Exhibit 113?

17 A. Yes, it is.

18 Q. And does that particular photograph contain a Q
19 number?

20 A. Yes, it does.

21 Q. And what is that Q number, sir?

22 A. Q454-001103007.

23 Q. I ask you to take a look at Prosecution Exhibit 116,

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1 please. Do you recognize that, sir?

2 A. Yes. This is an evidence bag that I used when I was
3 collecting evidence on board the USS COLE.

4 Q. Is that your handwriting on the evidence bag?

5 A. Yes, it is.

6 Q. And could you recite for the court, please, for His
7 Honor, the description of the evidence, the date and time of
8 recovery, the location of recovery, and the recovered by that
9 you indicate on that form?

10 A. The description -- burnt fiber material is the
11 description of the evidence. It was recovered on 10/17/2000
12 at 11:45 a.m. It was recovered on the 04/Port Side-Front by
13 myself.

14 Q. And did you fill out the chain of custody?

15 A. Yes, I did.

16 Q. All right. And what does that indicate?

17 A. It was -- indicated that I recovered this evidence on
18 board the USS COLE on 10/17/2000 at 11:45 a.m.

19 Q. And what is contained within the bag?

20 A. Inside this bag is a small metal container with some
21 evidence tape on it, and then there is some writing on the
22 front, including my name and the date and the time and a
23 description, fibrous material.

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1 Q. Is there also a Q number on it?

2 A. On the bag there's a Q number.

3 Q. What is that?

4 A. Q454-001103007.

5 Q. Is there a DK number or a -- and a 1B number on it?

6 A. There is a DK number, DK04-131; and there's a 1B
7 number, 1B763.

8 Q. And I think I may have asked it, but I'll ask it
9 again. Does the container appear to be the same sort of --
10 the container in 116 appear to be the same kind of container
11 contained in the photograph 116A?

12 A. Yes, it does.

13 Q. If you could look at the chain of custody receipt
14 that's with it. Does it indicate whether or not you signed
15 that green sheet?

16 A. Yes, my signature is on the first line of the
17 signature area of the green sheet.

18 Q. Are you able to associate that with the evidence bag?

19 A. I'm able to associate it with the evidence bag by the
20 New York case number, 262-NY-277013; the 1B number, 1B763; and
21 the DK number, DK04-131.

22 Q. Placing on the ELM0 Prosecution Exhibit 116C for
23 Identification and ask you if that is an exact duplicate of

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1 the first four entries on the green sheet that you have just
2 reviewed?

3 A. Yes, it is.

4 Q. And for the record, is that your signature in the
5 first or the top line?

6 A. Yes, it is.

7 Q. Placing on the ELM0 Prosecution 116B for
8 Identification and ask you if you recognize that photograph.

9 A. That's a fair and accurate depiction of the evidence
10 bag with the evidence that I hold in my hand.

11 Q. And in 116B, there is -- you can see the -- I guess
12 you call it the container, correct?

13 A. That is correct.

14 Q. There's some handwriting on it; is that correct?

15 A. That is correct.

16 Q. And whose handwriting is that?

17 A. That is my handwriting.

18 Q. And can you read what it says?

19 A. It says fibrous materials, 10/17/00, and then the
20 initials PHF and then the time, 11:45.

21 Q. Then next there's something in blue handwriting,
22 also?

23 A. Yes, there is.

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1 Q. What is that?

2 A. I assume that somebody else that opened that
3 container or did something with it added that handwriting. I
4 did not put that on there.

5 Q. Can you read it?

6 A. It says Q454 ----

7 Q. All right.

8 A. ---- it looks like.

9 Q. Is that consistent with the Q tab -- Q tabs on the
10 exhibit?

11 A. Yes, it is.

12 TC [MR. MILLER]: Your Honor, we would move for the
13 admission of Government's 116A, 116B, and 116C.

14 MJ [Col SPATH]: Thank you.

15 Q. Sir, I'm placing before you Prosecution Exhibit 122A
16 on the ELM0, and I'd ask that the Exhibit 122 be handed to
17 you. Do you have 122 in front of you?

18 A. Yes, it is.

19 Q. I'd like to start first with Prosecution Exhibit
20 122A, ask you the same question I've asked you a number of
21 times: Does that appear to be the same type of material that
22 you were seizing from -- or recovering from the COLE?

23 A. Yes, it is.

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1 Q. Is there a Q number on that item, on that
2 photograph ----

3 A. Yes, there is.

4 Q. ---- 122A?

5 What is that Q number?

6 A. Q391-001103007.

7 Q. I'd ask you to take a look, if you would, please, at
8 Prosecution Exhibit 122. Do you have that in front of you?

9 A. Yes, I do.

10 Q. Do you recognize that, sir?

11 A. Yes. This is an evidence bag that I used to collect
12 evidence on board the USS COLE.

13 Q. Do you recognize the handwriting on the bag?

14 A. Yes, I do.

15 Q. And whose handwriting is that?

16 A. My own handwriting.

17 Q. Could you please read into the record the description
18 of the evidence that you wrote, the date and time of recovery,
19 the location of the recovery, and by whom it was recovered?

20 A. Okay. The description is burnt fibrous material from
21 foam rubber on SPY Deck. It was recovered on 10/18/2000 at
22 1530 hours from the 03/SPY Deck-Center by myself, Paul
23 Fennewald.

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1 Q. Is there a Q tab number on that bag?

2 A. Yes, there is.

3 Q. What is it?

4 A. Q391-001103007.

5 Q. And is that the same number -- the Q tab number on
6 Prosecution Exhibit 122, the same number that's on the
7 photograph, Prosecution Exhibit 122A?

8 A. Yes, it is.

9 Q. Is there a DK number on that bag?

10 A. There is. DK03-161.

11 Q. And is there a 1B number on that exhibit?

12 A. Yes, there is. 1B721.

13 Q. Can you see the contents of the bag?

14 A. I can see some of the contents of the bag.

15 Q. Do they appear to be the same contents that are
16 contained in the photograph?

17 A. They appear to be consistent with the same contents
18 that appear and are depicted in the photograph in front of me.

19 Q. And the photograph in front of you is Prosecution
20 Exhibit 122A; is that correct?

21 A. That's correct.

22 Q. You have the green sheet -- green sheet there with
23 it?

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1 A. Yes, I do.

2 Q. And does that contain your signature?

3 A. Yes, my signature is on the first line as the person
4 that collected this evidence.

5 Q. And can you associate that green sheet with the
6 Prosecution Exhibit 122?

7 A. 122 is the evidence bag?

8 Q. Yes.

9 A. Okay. Yes. Yes, I can, by virtue of the case
10 number, 262-NY-277013; the DK number is DK03-161 on both; and
11 the 1B number is 1B721 on both pieces of evidence.

12 Q. I've placed on the ELM0 Prosecution Exhibit 122C and
13 ask you if the first four entries on 122C are exact duplicates
14 of the evidence receipt or the green sheet that you have just
15 reviewed.

16 A. Yes, they are.

17 Q. And does that reflect that your signature is on the
18 top line?

19 A. Yes, it does.

20 Q. I've placed on the ELM0 Prosecution Exhibit 122B for
21 Identification. Do you recognize that photograph, sir?

22 A. That's a fair and accurate depiction of the evidence
23 bag that I hold in front of me.

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1 TC [MR. MILLER]: Your Honor, we would move for the
2 admission at this time of Prosecution Exhibit 122A, 122B, and
3 122C.

4 MJ [Col SPATH]: Thank you.

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

6 Q. Although I don't want to get into what you did, did
7 you remain on the ship the entire time?

8 A. We every day went back and forth from the hotel to
9 the ship, but I was there the whole time when the evidence
10 team was there processing evidence. That is -- was my work
11 location, yes.

12 Q. And did you ever -- I think you indicated you
13 assisted taking some of the evidence off the ship?

14 A. At the end of the shift each day the evidence was
15 removed from the staging area on board the ship to the
16 evidence container down at the staging area port side, and I
17 assisted carrying those boxes of evidence down while they were
18 in the custody of the evidence custodians.

19 Q. As to any of the exhibits to which you have testified
20 here today, do you have any reason to believe that any of them
21 were altered or changed in any way?

22 A. No, I do not.

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

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1 MJ [Col SPATH]: Defense Counsel, you may cross-examine.

2 DDC [LT PIETTE]: Your Honor, the defense takes no
3 position.

4 MJ [Col SPATH]: Again, the commission has recognized a
5 number of times that is taking a position, particularly given
6 the subject matter of this current hearing and the amount of
7 time everyone has had to prepare for it.

8 Special Agent Fennewald, thanks for your testimony.
9 I think we'll probably see you again at some point in the
10 future as we move forward.

11 I'm going to give you a standard order. Don't
12 discuss your testimony until we get through this part of the
13 process. You probably can imagine that might take quite some
14 time given where we are. Do you understand?

15 WIT: Yes, I do.

16 MJ [Col SPATH]: All right. As I've said to all of the
17 witnesses that come here in person, I appreciate you traveling
18 here in person to testify; it is very much appreciated by the
19 commission. Thank you so much.

20 WIT: Thank you for allowing me to serve the commission.
21 [The witness was warned, temporarily excused, and withdrew
22 from the courtroom.]

23 MJ [Col SPATH]: Trial Counsel, call your next witness.

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1 TC [MR. MILLER]: Government calls Robert Holley.

2 ROBERT J. HOLLEY, civilian, was called as a witness for the
3 prosecution, was sworn, and testified as follows:

4 DIRECT EXAMINATION

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

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

8 A. Robert J. Holley.

9 Q. And you are the Robert J. Holley that previously
10 testified here?

11 A. Yes, sir.

12 Q. I am not going to go back through your background. I
13 just want you to briefly indicate, if you could again, what
14 areas of the ship that you searched.

15 A. The -- some of the lower decks and did some sifting
16 on the forward part of the ship.

17 Q. All right.

18 TC [MR. MILLER]: Your Honor, going to ask permission to
19 publish to the witness Prosecution Exhibits 23 through 23C.

20 MJ [Col SPATH]: You may.

21 TC [MR. MILLER]: Permission to use the ELM0 with this
22 witness, Your Honor.

23 MJ [Col SPATH]: You may.

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

2 Q. First, Agent, I'm going to show you Prosecution
3 Exhibit 23A for Identification. Is this the sort of material
4 that you were seizing or you were gathering on the COLE back
5 in October of 2000?

6 A. Yes, sir.

7 Q. Now, this particular exhibit has a Q number; is that
8 correct?

9 A. That is correct.

10 Q. All right. Could you read that Q number into the
11 record, please?

12 A. Q497.

13 Q. Now, you have before you Prosecution Exhibit 23; is
14 that correct?

15 A. Correct.

16 Q. Do you recognize that exhibit?

17 A. I recognize the handwriting; yes, sir, I do.

18 Q. And whose handwriting is it?

19 A. That is mine.

20 Q. And if you could, please, relate to the court what
21 description of evidence, date and time of recovery, location
22 of recovery and recovered by, what you put in those entries?

23 A. Description of evidence is fiberglass material. Date

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1 and time of recovery was 16 October 2000, 1530, on Deck 05-FS.
2 I don't recall what FS stands for. But recovered by myself
3 and Special Agent Jeff Miller.

4 Q. Do you know Special Agent Jeff Miller?

5 A. Yes, sir, I do.

6 Q. Were you working with him?

7 A. Yes, sir.

8 Q. And there's also a chain of custody section. Did you
9 complete that, also?

10 A. I have, but in this particular chain of custody form,
11 although it is my name, it is not my signature.

12 Q. All right. Now, does that particular exhibit,
13 Prosecution Exhibit 23, does it have a Q number on it?

14 A. Yes, sir.

15 Q. And what is that Q number?

16 A. Q497.

17 Q. All right. Can you see the contents of the bag?

18 A. Yes, sir. Yep.

19 Q. And do they appear to be the same contents that are
20 contained in the photograph, Prosecution Exhibit 23A?

21 A. They are the same.

22 Q. Does that particular bag also have a DK number on it?

23 A. Yes, sir.

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1 Q. What is that number?

2 A. DK05-101.

3 Q. And does it have a 1B number?

4 A. Let's see. It should. Oh, I'm sorry, yeah. 1B536.

5 I guess that could be a G.

6 Q. Can you -- there's a chain of custody, what we call
7 green sheet, associated -- attached to that particular
8 exhibit, is there not?

9 A. Yes, sir.

10 Q. There is a signature that purports to say Robert
11 Holley. Is that your signature?

12 A. That is not.

13 Q. There is, however, some numbering on the top of it;
14 is that correct?

15 A. That's correct.

16 Q. Are you able to associate that numbering with the
17 exhibit, Prosecution Exhibit 23?

18 A. I am through the 1B and the DK number.

19 Q. Are they the same?

20 A. Yes, sir.

21 Q. I'm going to show you Prosecution Exhibit 23C for
22 Identification. Are those first three -- or four entries
23 identical to the green sheet that you have just described?

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1 A. Yes, sir, they are.

2 Q. All right. I'm going to show you a photograph,
3 Prosecution Exhibit 23B for Identification. Is that a
4 photograph of Prosecution Exhibit 23?

5 A. Yes, sir, it is.

6 Q. Fair and accurate depiction of it?

7 A. It is.

8 TC [MR. MILLER]: Your Honor, at this time we would move
9 for the admission of 23A and 23B and reserve the right to
10 enter 23C at a later time.

11 MJ [Col SPATH]: Thank you.

12 TC [MR. MILLER]: If you could hand the witness, please,
13 Prosecution Exhibit 24. And we'd ask permission to publish 24
14 through 24C, Your Honor.

15 MJ [Col SPATH]: You may. And again, no need to ask
16 permission to publish these exhibits. They have been cleared
17 and I know which ones are coming. Thanks.

18 TC [MR. MILLER]: Thank you, sir.

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

20 Q. I'd ask you again, does this appear to be the type of
21 evidence that you were seizing from the COLE, or gathering
22 from the COLE back in October of 2000?

23 A. Yes, sir.

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1 Q. All right. And it may be a little difficult, but is
2 there a Q number on this particular exhibit, also?

3 A. Yes, sir.

4 Q. Are you able to make it out?

5 A. Looks like Q169.

6 Q. All right.

7 A. I couldn't ----

8 Q. Now if you would, please, take a look at the exhibit
9 itself, Prosecution Exhibit 24. Does it have a Q number on
10 it?

11 A. Yes, sir. Q169.

12 Q. And that would be the same as in Prosecution
13 Exhibit 24A?

14 A. That is correct.

15 Q. Do you recognize the handwriting on the bag itself?

16 A. Yes, sir, I do -- I do not. It is not my handwriting
17 on the bag.

18 Q. Were you working with Special Agent Miller?

19 A. Yes, sir, I was.

20 Q. I think you indicated earlier that you had.

21 A. Yes.

22 Q. And is there an indication on this bag what type of
23 evidence, date and time of recovery, by whom it was recovered?

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1 A. Yes, sir.

2 Q. All right. And could you relate that, please, to the
3 court?

4 A. Sure. Description of evidence is fiberglass. Date
5 and time of recovery is 16 October 2000, 1335. Location is
6 Deck 05-FP, recovered by myself and SA Miller.

7 Q. All right. Is there a DK number or a -- yeah. Is
8 there a DK number on that particular evidence bag?

9 A. Yes, sir, DK05-112.

10 Q. And is there a 1B number?

11 A. There is.

12 Q. And what is that 1B number?

13 A. 1B20.

14 Q. Now, is there a what we call a green sheet or a chain
15 of custody form there with it?

16 A. Yes, sir.

17 Q. And do you recognize the signature on the top line?

18 A. I do.

19 Q. And whose signature is that?

20 A. It is mine.

21 Q. All right. Would it be unusual for you to sign the
22 green sheet and have somebody else fill out the evidence form
23 on the bag?

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1 A. No, sir.

2 Q. Are you able to associate that particular green sheet
3 with the exhibit, Prosecution Exhibit 24?

4 A. Yes, sir, I am.

5 Q. And how are you able to do that?

6 A. Through the DK05-112 number.

7 Q. And it also -- okay. I want to show you -- I think I
8 may have already asked that.

9 You are able to see the material inside; is that
10 correct?

11 A. Yes, sir.

12 Q. And does it appear to be the same material that's
13 contained in the prosecution picture at 120 -- or excuse me,
14 24A?

15 A. Yes, sir, it does.

16 Q. I place before you Prosecution Exhibit 24C for
17 Identification. And does that appear to be an exact
18 duplicate, at least as to the first four entries, as the chain
19 of custody or green sheet which you were just presently
20 reviewing?

21 A. Yes, sir, it does.

22 Q. I'm lastly going to show you a photograph. Do you
23 recognize that photograph?

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1 A. I do.

2 Q. And what is it?

3 A. It's a -- it's a photograph of the evidence that's in
4 front of me right here.

5 Q. Fair and accurate depiction?

6 A. It is, yes, sir.

7 TC [MR. MILLER]: Your Honor, I would move for the
8 admission of Prosecution Exhibits 24A, 24B, and 24C.

9 MJ [Col SPATH]: I understand. Thank you.

10 TC [MR. MILLER]: If you could please hand the witness
11 Prosecution Exhibit 70. Thank you, Sergeant.

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

13 Q. First I'm showing you on the ELMO a photograph,
14 Prosecution Exhibit 70A for Identification. Again, is this
15 the type of evidence that you were collecting on the COLE?

16 A. Yes, sir.

17 Q. And does this particular photograph contain a Q
18 number?

19 A. Yes, sir, it does, Q488.

20 Q. I'd ask you, if you would, please, take a look at the
21 evidence bag in front of you. Do you recognize that?

22 A. Yes, sir, I do.

23 Q. And do you recognize the handwriting?

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1 A. I do. It is mine.

2 Q. And if you could read into the record, please, the
3 description of the evidence, the time and date of recovery,
4 the location of the recovery, and by whom it was recovered.

5 A. Yes, sir. It is -- date and time of recovery is 16
6 October 2000, 1530. Location of recovery, Deck 05-FS.
7 Recovered by myself and SA Jeff Miller. And the description
8 is numbered piece of metal.

9 Q. There's also a chain of custody section on that,
10 also, on the bag?

11 A. Yes, sir.

12 Q. And does it indicate who seized it?

13 A. Yes, sir. Myself.

14 Q. All right. At the same time and date, the 16th at
15 1530?

16 A. That is correct.

17 Q. And can you see what's contained in that bag?

18 A. Yes, sir, I can.

19 Q. And does it appear to be the same item that's
20 contained in the picture of Prosecution Exhibit 70A?

21 A. Yes, sir, it does.

22 Q. Now, does the evidence bag, Prosecution Exhibit 70,
23 have a DK number?

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1 A. I see the Q number and the 1B, but I do not see the
2 DK number.

3 Q. Let's start first with the 1B number.

4 A. All right, sir. 1B535.

5 Q. And I think the Q number?

6 A. Q488.

7 Q. Which is the same as in the photograph, correct?

8 A. That is correct.

9 Q. All right. The photograph being 70A.

10 If you'd look where it says description of the
11 evidence.

12 A. I see, yes, DK05-100.

13 Q. Do you have a chain of custody receipt there?

14 A. Yes, sir, I do.

15 Q. And then the first line, it purports to show the
16 signature of a Robert Holley. Is that your signature?

17 A. That is my name but not my signature.

18 Q. I'm going to ask you, if you could -- can you
19 associate this particular chain of custody green sheet with
20 the Exhibit 70 -- Prosecution Exhibit 70?

21 A. Yes, sir, through the 1B535 and the DK05-100 numbers.

22 Q. Placing on the ELM0 Prosecution Exhibit 70C and ask
23 you if that is an exact duplicate of the evidence receipt that

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1 you just reviewed?

2 A. Yes, sir.

3 Q. I'm also placing on the ELM0 at this time Prosecution
4 Exhibit 70B for Identification and ask you if you recognize
5 that, sir.

6 A. I do.

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

8 A. It is a depiction of the actual evidence bag here in
9 front of me.

10 Q. Fair and accurate depiction?

11 A. It is, yes, sir.

12 TC [MR. MILLER]: Move for the admission of 70A --
13 Prosecution Exhibit 70A, 70B, and 70C, Your Honor.

14 MJ [Col SPATH]: I understand. Thank you.

15 TC [MR. MILLER]: If you could hand him 71, please.

16 Q. You've been handed Prosecution Exhibit Number 70; is
17 that correct, sir -- or excuse me, 71?

18 A. Yes, sir.

19 Q. First I would ask you, however, to take a look at the
20 photograph I have placed on the ELM0, Prosecution Exhibit 71A.
21 Is this the sort of material that you were seizing from or
22 gathering from the COLE?

23 A. Yes, sir.

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1 Q. Does this particular photograph contain a Q number?

2 A. Yes, sir, it does. Q493.

3 Q. If you'd take a look at Prosecution Exhibit 71,
4 please. Do you recognize that bag?

5 A. I do.

6 Q. And what do you recognize it to be?

7 A. Q493, as recognized through my handwriting.

8 Q. All right. And if you could, please, recite for His
9 Honor the description of evidence that you entered, the date
10 and time of recovery, the location of the recovery, and by
11 whom it was recovered.

12 A. Sure. Description of evidence is metal fragments.
13 Date and time of recovery, 16 October 2000, 1530. Location of
14 recovery is Deck 05, recovered by myself and Special Agent
15 Jeff Miller.

16 Q. And as to the chain of custody section?

17 A. It is, yes, sir.

18 Q. What does that indicate?

19 A. It says received from USS COLE by myself on
20 16 October 2000 at 1530 hours.

21 Q. Are you able to see inside the bag?

22 A. Yes, sir, I am.

23 Q. And is -- are those items the same items that are

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1 contained in the photograph?

2 A. Yes, sir, they are.

3 Q. And that photograph being Prosecution Exhibit 71A?

4 A. Correct.

5 Q. Now, does that bag contain a -- I think we -- I may
6 have asked it, but I'm going to do it one more time. Does it
7 have a Q number, that bag?

8 A. Yes, sir, it does. Q493.

9 Q. And does that match the Q number on the Exhibit 71A?

10 A. Yes, sir, it does.

11 Q. Is there a DK number on that particular bag,
12 Prosecution 71?

13 A. Let's see. Yes, sir.

14 Q. What is that number?

15 A. DK05-102.

16 Q. And does it have a 1B number?

17 A. Yes, sir, it does. It is 1B537.

18 Q. Is there a green sheet or a chain of custody sheet
19 there with it?

20 A. Yes, sir.

21 Q. The first line purports to have the signature of a
22 Robert Holley. Is that your signature?

23 A. It is not.

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1 Q. Are you able to associate this -- or that particular
2 green sheet with the Prosecution Exhibit 71?

3 A. Yes, sir. Through the 1B and the DK number I am.

4 Q. Are they the same?

5 A. Yes, sir, they are.

6 Q. Placing on the ELM0 Prosecution Exhibit 71C for
7 Identification and ask you if the first four entries are -- or
8 the first four entries are the exact duplicates as to the
9 chain of custody form that you are reviewing.

10 A. Yes, sir, they are.

11 Q. I'm showing you a photograph, Prosecution 71B for
12 Identification, ask you if you recognize that, sir.

13 A. Yes, sir. It is a photo of the bag I'm holding in
14 front of me.

15 Q. Fair and accurate depiction of it?

16 A. It is, yes, sir.

17 TC [MR. MILLER]: Move for the admission, Your Honor, of
18 Prosecution's 71A, 71B, and 71C.

19 MJ [Col SPATH]: I understand. Thank you.

20 TC [MR. MILLER]: If you'd hand the witness Prosecution
21 Exhibit 72 for Identification.

22 Q. First I'd ask you, please, sir, to take a look at the
23 photograph on the ELM0, Prosecution Exhibit numbered --

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1 Prosecution Exhibit 72A for Identification. Are those the
2 type of items you were collecting on the COLE?

3 A. Yes, sir.

4 Q. Does that photograph contain a Q number?

5 A. Yes, sir. Q496.

6 Q. If you would, please, take a look at the actual
7 evidence bag, Prosecution Exhibit numbered 72 -- Prosecution
8 Exhibit 72 for Identification.

9 A. Okay.

10 Q. Do you recognize the handwriting?

11 A. Yes, sir.

12 Q. And whose handwriting is it?

13 A. It is mine.

14 Q. Could you recite, please, for the record the
15 description of the evidence you entered, the date and time of
16 recovery, the location of the recovery and by whom it was
17 recovered?

18 A. Yes, sir. The description is metal fragments. Date
19 and time of recovery, 16 October 2000, 1335. Location of
20 recovery, Deck 05-FP, recovered by myself and Special Agent
21 Jeff Miller.

22 Q. And what about the chain of custody section of the
23 form?

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1 A. It says received from the USS COLE by myself, 16
2 October 2000, time 1335, received by myself.

3 Q. Does that particular bag, Prosecution Exhibit 72,
4 have a Q number on it?

5 A. Yes, sir. Q496.

6 Q. Is that the same Q number that's contained in
7 Prosecution Exhibit 72A?

8 A. Yes, sir, it is.

9 Q. Are you able to see the items?

10 A. Yes, sir, I am.

11 Q. Are those the same items that are contained in the
12 photograph, Prosecution Exhibit 72A?

13 A. Yes, sir, they are.

14 Q. Now, on the bag itself, does it contain a DK number?

15 A. Yes, sir. DK05-111.

16 Q. And does it contain a 1B number?

17 A. Yes, sir, it does. 1B544.

18 Q. Is there a chain of custody form there?

19 A. Yes, sir.

20 Q. Can you take a look at it, please. Again, the first
21 line purports to have your signature, Robert Holley. Is that
22 your signature?

23 A. No, sir, it is not.

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1 Q. Are you able to associate that particular chain of
2 custody form with the exhibit, Prosecution Exhibit 70 --
3 Prosecution Exhibit 70?

4 A. Yes, sir, through the DK number and the 1B number.

5 Q. They all match?

6 A. Yes, sir.

7 Q. I've put on the ELMO Prosecution Exhibit 72C for
8 Identification and ask if the first four entries are identical
9 to the entries contained on the chain of custody form about
10 which you just testified.

11 A. Yes, sir, they are.

12 Q. Lastly I'm going to show you -- for this exhibit,
13 Prosecution Exhibit 72B, ask you if you recognize that
14 photograph.

15 A. I do. It is a depiction of what I'm holding in my
16 hand.

17 Q. Fair and accurate depiction?

18 A. Yes, sir, it is.

19 TC [MR. MILLER]: Move for the admission of 72A, 72B, and
20 72C at this time, Your Honor.

21 MJ [Col SPATH]: Thank you. I appreciate it.

22 TC [MR. MILLER]: And hand the witness Prosecution
23 Exhibit 73 for Identification.

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1 Q. Placing on the ELM0 Prosecution Exhibit 73A for
2 Identification and ask you: Is that the type of evidence you
3 were gathering on the COLE?

4 A. Yes, sir.

5 Q. Does that photograph contain a Q number?

6 A. It does, sir. Q504.

7 Q. If you would, please, take a look at Prosecution
8 Exhibit 73. Do you recognize Prosecution Exhibit 73?

9 A. Yes, sir, I do.

10 Q. And what do you recognize it to be?

11 A. Metal fragments.

12 Q. And can you see those metal fragments?

13 A. Yes, sir, I can.

14 Q. Are they the same fragments that are contained in the
15 photograph, Prosecution 73A?

16 A. Yes, sir, they are.

17 Q. Is there a Q number on that bag?

18 A. Yes, sir. Q504.

19 Q. Does that match the Q number on Prosecution
20 Exhibit 73A?

21 A. Yes, sir, it does.

22 Q. Do you recognize the handwriting?

23 A. Yes, sir. It is mine.

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1 Q. And if you could for His Honor read into the record
2 the description of the evidence, the date and time of
3 recovery, the location of the recovery, and by whom it was
4 recovered.

5 A. Sure. So description of evidence is metal. Date and
6 time of recovery, 17 October 2000, 1300. Location of
7 recovery, 05 Level/Forward Stack, recovered by SA Holley.

8 Q. And then it has chain of custody?

9 A. Yes, sir. Received from the USS COLE by myself on 17
10 October 2000 at 1300, received by myself.

11 Q. Is there a DK number on that bag?

12 A. Yes, sir. DK05-117.

13 Q. Is there a 1B number?

14 A. Yes, sir. 1B549.

15 Q. Is there a chain of custody form there?

16 A. Yes, sir.

17 Q. Would you take a look at that, please. The first
18 line purports to have a signature of a Robert Holley. Is that
19 your signature?

20 A. No, sir, it is not.

21 Q. Are you able to associate that chain of custody form,
22 that green sheet, with the exhibit, Prosecution 73?

23 A. Yes, sir. Through the 1B number and the DK number.

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1 Q. They both match?

2 A. Yes, sir, they do.

3 Q. Placing on the ELM0 a photograph, Prosecution 73C.

4 Is that 73C -- Prosecution 73C for Identification, is it
5 identical to the first three -- first four entries on the
6 green sheet you were just testifying from?

7 A. Yes, sir, it is.

8 Q. Placed on the ELM0 Prosecution Exhibit 73B for
9 Identification. Do you recognize that photograph, sir?

10 A. Yes, sir. It is identical to the bag I'm holding.

11 Q. Fair and accurate depiction?

12 A. Yes, sir.

13 TC [MR. MILLER]: Your Honor, we would move for the
14 admission of Prosecution 73A, 73B, and 73C.

15 MJ [Col SPATH]: Thank you.

16 TC [MR. MILLER]: If you could hand the witness, please,
17 Prosecution Exhibit 158.

18 Q. Sir, you have before you 158?

19 A. Yes, sir.

20 Q. I'd first ask you to take a look at the photograph
21 I've placed on the ELM0, Prosecution Exhibit 158A. The items
22 contained in that photograph, are those the type of items that
23 you were recovering from the COLE?

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1 A. Yes, sir, they are.

2 Q. Does that particular photograph contain a Q number?

3 A. Yes, sir. Q483.

4 Q. If you would take a look, please, at Prosecution
5 Exhibit 158. Do you recognize that, sir?

6 A. Yes, sir.

7 Q. And do you recognize the handwriting?

8 A. It is mine.

9 Q. And could you please, for the court, relate the
10 description of evidence you gave, the date and time of
11 recovery, the location of the recovery, and by whom it was
12 recovered.

13 A. Yes, sir. Description of evidence, rubber material.
14 Date and time of recovery, 16 October 2000, 1530. Location of
15 recovery, Deck 05-FS, recovered by myself and SA Jeff Miller.

16 Q. And can you see the items contained in it?

17 A. Yes, sir, I can.

18 Q. Are they the same items that are contained in the
19 photograph ----

20 A. Yes, they are.

21 Q. ---- Prosecution Exhibit 158A?

22 A. Yes, sir, they are.

23 Q. I may have asked this. Is there a Q number on the

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1 bag?

2 A. Yes, sir. Q483.

3 Q. And is that the same number that's contained on
4 Prosecution Exhibit 158 ----

5 A. Yes, sir, it is.

6 Q. ---- 158A?

7 A. Yes, sir, it is.

8 Q. Is there a DK number on that particular bag?

9 A. Yes, sir. DK05-127.

10 Q. And is there a 1B number?

11 A. Yes, sir. 1B158.

12 Q. Is there a chain of custody receipt there?

13 A. Yes, sir.

14 Q. I'd ask you to take a look at that, please. The
15 first line purports to contain the signature of Robert Holley.
16 Is that your signature?

17 A. No, sir, it is not.

18 Q. Are you able to associate that chain of custody form
19 with the Exhibit 158?

20 A. Yes, sir, through the 1B and the DK number.

21 Q. They all match?

22 A. Yes, sir, they do.

23 Q. I'm placing on the ELM0 Prosecution Exhibit 158C for

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1 Identification. Are the first four entries on that form
2 identical to the form that you have just reviewed?

3 A. Yes, sir, they are.

4 Q. Placing on the ELM0 Prosecution Exhibit 158B. Do you
5 recognize this photograph, sir?

6 A. Yes, sir. It is identical to the evidence bag I'm
7 holding right now.

8 Q. So it's identical. It is a fair and accurate
9 depiction of that bag, correct?

10 A. Yes, sir, it is.

11 TC [MR. MILLER]: Government would move for the admission
12 of 158A, 158B, and 158C, Your Honor.

13 MJ [Col SPATH]: Thank you. I understand.

14 TC [MR. MILLER]: And if we could hand the witness
15 Prosecution Exhibit 159A.

16 Q. Do you have 159 in front of you, sir?

17 A. Yes, I do.

18 Q. I'm going to ask you first to take a look at a
19 photograph, 159A, and ask you if you recognize that material
20 or the items contained in the photograph as the type of
21 materials you were seizing?

22 A. Yes, sir, it is.

23 Q. Does the photograph contain a Q number?

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1 A. Yes, sir. Q505.

2 Q. I'd ask you to take a look at the exhibit, the actual
3 exhibit, 159. Do you recognize that, sir?

4 A. I do, yes, sir. It's my writing.

5 Q. Your writing on the bag?

6 A. Yes, sir.

7 Q. If you could, please, read into the record the
8 description of evidence you gave, the date and time of
9 recovery, the location of the recovery, and by whom it was
10 recovered.

11 A. Sure. Description of evidence is foil. Date and
12 time of recovery is 17 October 2000, 1300. Location of
13 recovery, 05 Level/Forward Stack, recovered by myself.

14 Q. And the chain of custody section?

15 A. Yes, sir. Received from the USS COLE by myself on
16 17 October 2000, time 1300. Received from myself.

17 Q. Does it contain a Q number?

18 A. Yes, sir. Q505.

19 Q. And does that match the Q number in the Prosecution
20 Exhibit 159A?

21 A. Yes, sir, it does.

22 Q. And can you see the items inside the bag?

23 A. Yes, sir, I can.

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1 Q. And are those the same items that are contained in
2 the photograph Prosecution Exhibit 159A?

3 A. Yes, sir, they are.

4 Q. Does the bag itself contain a DK number?

5 A. Yes, sir. DK05-123.

6 Q. And does it contain a 1B number?

7 A. Yes, sir. 1B554.

8 Q. Is there a chain of custody form there?

9 A. Yes, sir.

10 Q. I ask you to take a look at it. In the first line it
11 purports to have the signature of Robert Holley. Is that your
12 signature?

13 A. No, sir, it is not.

14 Q. Are you able to associate that chain of custody
15 receipt with the exhibit, Prosecution 159?

16 A. Yes, sir, through the 1B and the DK number.

17 Q. They all match?

18 A. Yes, sir, they do.

19 Q. I'm placing on the ELM0 Prosecution Exhibit 159C and
20 ask you if that's identical -- the first four entries are
21 identical to the green sheet that you have just spoken about?

22 A. Yes, sir, they are.

23 Q. Placing on the ELM0 Prosecution Exhibit 158B, ask you

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1 if you recognize that photograph, sir?

2 A. Yes, sir. It is identical to the evidence bag I'm
3 holding.

4 Q. So it's a fair and accurate depiction of that
5 evidence bag; is that correct?

6 A. Yes, sir, it is.

7 TC [MR. MILLER]: Your Honor, at this time the government
8 would move for the admission of 159A, 159B, and 159C.

9 MJ [Col SPATH]: Thank you.

10 Q. Agent, do you have any reason to believe that any of
11 the -- as to any of the exhibits you have reviewed today, that
12 any of them have been changed or altered in any way?

13 A. No, sir, I do not.

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

15 MJ [Col SPATH]: Thank you.

16 Defense Counsel, you may cross-examine.

17 DDC [LT PIETTE]: Your Honor, the defense has no position.

18 MJ [Col SPATH]: Again, just for the record, I believe
19 that that is your position, despite what is a standard
20 evidentiary hearing related to real evidence being offered at
21 this point in the proceeding.

22 Mr. Holley -- or Special Agent Holley, sorry.

23 WIT: I'm retired now, but thank you anyway.

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1 MJ [Col SPATH]: No worries. Still deserving of it, of
2 course. I appreciate it. I know I said this last time, thank
3 you for coming down in person to offer testimony; it is much
4 appreciated. If you would, remember the order I gave you last
5 time. Don't discuss your testimony until this issue is
6 resolved, which, as you can tell, is going to take us a little
7 bit of time.

8 WIT: Yes, sir.

9 MJ [Col SPATH]: All right. Thanks again.

10 WIT: Thank you, sir.

11 [The witness was warned, temporarily excused, and withdrew
12 from the courtroom.]

13 MJ [Col SPATH]: All right. I know the next witness there
14 were -- we were going to try to figure out if it was going to
15 work by VTC. So before we take a recess, do we have an
16 update?

17 TC [MR. MILLER]: Only that he's available, but we do need
18 a few minutes to sort of set things up. This might be a good
19 time, Your Honor.

20 MJ [Col SPATH]: That's perfect. For now let's say 15
21 minutes. If you need more, just let the bailiff know. He'll
22 let me know.

23 TC [MR. MILLER]: Thank you, sir.

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1 MJ [Col SPATH]: Okay. See you then. We're in recess.

2 [The R.M.C. 803 session recessed at 1408, 8 November 2017.]

3 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1433,
2 8 November 2017.]

3 MJ [Col SPATH]: These commissions are called back to
4 order. All the parties who were present before the last
5 recess are again present.

6 Trial Counsel, or Government, call your next witness.

7 TC [MR. MILLER]: Government calls Michael Marks, Your
8 Honor.

9 MJ [Col SPATH]: And he's going to be by ----

10 TC [MR. MILLER]: ---- by VTC.

11 MJ [Col SPATH]: Okay.

12 TC [MR. MILLER]: Two items just briefly, Your Honor.

13 We're asking the court's permission to do this; and secondly,
14 we moved the tables, just for the court's edification, because
15 we are going to have to open some exhibits and it just would
16 be a cleaner process.

17 MJ [Col SPATH]: No worries. Thank you.

18 MICHAEL C. MARKS, civilian, was called as a witness for the
19 prosecution, was sworn, and testified as follows:

20 DIRECT EXAMINATION

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

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

23 A. Michael C. Marks, M-A-R-K-S.

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1 Q. And how are you presently employed, sir?

2 A. I'm self-employed as a security consultant.

3 Q. I want to talk a little bit about your background.

4 Did you attend university?

5 A. Yes, sir, University of Wyoming, Bachelor of Science
6 in history.

7 Q. I'm going to ask you to pull the microphone a little
8 closer to you. Maybe ----

9 Again, you went to where?

10 A. University of Wyoming with a Bachelor of Science in
11 history.

12 Q. And did you -- have you had any service in the
13 military?

14 A. I had service in the U.S. Navy Reserve.

15 Q. And during what time frame?

16 A. It would have been from 1987 until 1993.

17 Q. After college, did you have any employment as a law
18 enforcement officer?

19 A. I did. I was employed by the Teton County Sheriff's
20 Office in Jackson, Wyoming from 1981 until 1989.

21 Q. And what did you do for the sheriff's department?

22 A. I was a deputy sheriff with normal road
23 responsibilities. I went into the investigative end of the

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1 department, and I was also the explosives technician for
2 northwestern Wyoming.

3 Q. Let me stop you there. Did you have to attend any
4 sort of law enforcement academy?

5 A. I did. I attended the Wyoming Law Enforcement
6 Academy, Douglas, Wyoming, for basic.

7 Q. And did that include any evidence collection
8 training?

9 A. It did.

10 Q. You indicated also you became a bomb tech?

11 A. Yes, sir, I did.

12 Q. And did you receive any specialized training in that
13 area?

14 A. I did. I became a bomb technician through the
15 Hazardous Devices School in Huntsville, Alabama.

16 Q. And what did that training entail?

17 A. It entailed response to improvised explosive devices,
18 rendering safe of explosive devices, and evidence collection
19 in post-blast scenes.

20 Q. How long did you remain with the sheriff's
21 department?

22 A. I remained there until 1989, January.

23 Q. And what did you do in January of 1989?

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1 A. I joined Naval Criminal Investigative Service, NCIS.

2 Q. And were you required to go to any basic training for
3 that?

4 A. I was, at Federal Law Enforcement Training Center in
5 Glynco, Georgia.

6 Q. And did you -- could you describe for the court,
7 please, what sort of training or basic investigative course
8 you had to take before becoming a special agent?

9 A. Yes, sir. It was -- it's called criminal
10 investigative basic course. All federal agents who are 1811
11 outside of the FBI and DEA go through the same course. It
12 involves everything from constitutional law to evidence
13 collection to tactical issues.

14 Q. And where was your first assignment out of the
15 academy?

16 A. At Naval Submarine Base, Bangor, Washington.

17 Q. And what were your duties and responsibilities, just
18 briefly, there?

19 A. I was assigned to the foreign counterintelligence
20 section of NCIS. And I also acted as a general criminal agent
21 for NCIS.

22 Q. And after your time there, what was your next
23 assignment, sir?

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1 A. From there I was on the USS NIMITZ from 1990 to 1991.

2 Q. And what did you do ----

3 A. Excuse me, 1993, I beg your pardon.

4 Q. And what did you do on the NIMITZ?

5 A. I was what was termed as an agent afloat, which
6 provided everything from criminal to counterintelligence
7 support to the USS NIMITZ while it was deployed.

8 Q. After the NIMITZ, where did you go, sir?

9 A. 1993, I transferred to Middle East field office in
10 Bahrain.

11 Q. How long were you in Bahrain?

12 A. Nine years.

13 Q. Do you speak Arabic?

14 A. Very poorly.

15 Q. All right. What did you do in Bahrain?

16 A. I did everything from, once again, criminal
17 investigations, foreign counterintelligence investigations;
18 but most of our attention was focused on terrorism and force
19 protection.

20 Q. Did you do any training in bomb -- in the area of
21 bombs or bomb detection?

22 A. Yes. I went to the ATF -- Alcohol Tobacco &
23 Firearms -- post-blast investigative course, held at FLETC, in

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1 1995.

2 Q. Did you train any of the persons in -- any of the
3 government agents in the Middle East?

4 A. I did, in -- I provided numerous classes in explosive
5 recognition and initial steps in bomb crime scene and
6 collecting of evidence.

7 Q. And how long did you remain in Bahrain?

8 A. Until 2002 ----

9 Q. And where did you ----

10 A. ---- July.

11 Q. ---- go from there?

12 A. From there I went to Seattle, Washington, where I was
13 assigned to the FBI Joint Terrorism Task Force in Seattle.

14 Q. How long did you remain with the JTTF?

15 A. Until 2008 when I was assigned to Afghanistan ----

16 Q. What did you do there?

17 A. ---- for six months.

18 I was an interrogator.

19 Q. And after Afghanistan?

20 A. I came back and was assigned to Naval Air Station
21 Whidbey Island, Washington, until I retired.

22 Q. And when did you retire?

23 A. 2012.

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1 Q. And you indicated now that you are a consultant?

2 A. I am. I have a security consulting business.

3 Q. I want to draw your attention -- or take you back to
4 October of 2000. Where were you working at that time?

5 A. I was assigned to the Middle East field office in
6 Bahrain, and part of my responsibilities also included Yemen.

7 Q. And do you recall receiving information that there
8 had been a bombing of a U.S. warship?

9 A. I do. Vividly.

10 Q. All right. And could you relate to the court how you
11 learned of it, of the bombing?

12 A. I was notified by our field office that the USS COLE
13 had been attacked in the harbor at Aden at the fueling dolphin
14 and that I was expected to be in the office within the hour to
15 join other agents to go down and respond to the -- to the
16 crime scene.

17 Q. And did you go to Aden?

18 A. I did.

19 Q. And when you arrived, what did you first do?

20 A. Initially we arrived at the airport and helped with
21 the transfer of some wounded onto a French military aircraft
22 that were taking at least one sailor who was too severely
23 wounded to wait to try and get to Germany. So the French came

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1 over and hauled him to Djibouti. From there we went and
2 staged all our gear, and at dawn we went on board the
3 USS COLE.

4 Q. Did you arrive prior to the FBI?

5 A. I arrived prior to the FBI evidence collection to the
6 main unit. There were two FBI legats, as I recall, who were
7 already there. They went on the ship with me at the same
8 time.

9 Q. And what did you see on the ship?

10 A. Well, initially when we approached the ship it was
11 obvious that she had taken a lot of water. It was listing
12 heavily to the port. It was difficult to get up the gangway
13 to get on board the ship. Once we were on board the ship we
14 were met by ship's officers and master at arms.

15 We were taken on a tour to show the damage, just to
16 try and get an initial appraisal of how big a crime scene this
17 really was and how many resources were probably going to have
18 to be devoted to it.

19 The ship was -- it was an incredible scene. There
20 was -- below decks, especially. It was dark; they still
21 didn't have any power. So our initial assessment was done
22 with flashlights. The top of the ship was covered with a film
23 of oil. It was dirty. There was blast debris. It was a

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1 mess.

2 Q. Did you begin to -- did you undertake to begin the
3 collection of evidence at that time?

4 A. No, we did not.

5 Q. And why was that?

6 A. We had -- the -- we were waiting for the evidence
7 collection team of the FBI who were actually going to be in
8 charge of the overall crime scene. We wanted to make sure
9 that we identified places and made sure that the command was
10 aware that nothing could be moved. The command had already
11 taken proactive measures to make sure everything -- nothing
12 was disturbed via the master at arms.

13 Q. How long after you arrived did the FBI arrive, sir?

14 A. As I recall, it was the next day. We spent several
15 hours, and I don't remember how long we were on board the
16 ship, before going back and regrouping. But I believe they
17 were there that evening or the next day.

18 Q. And did you receive any instructions as to what was
19 going to be expected of you, what your duties, what your
20 responsibilities were going to be?

21 A. Yes, sir. I was introduced to -- once the Bureau got
22 there, I was introduced to their crime scene leader, Leo West,
23 and he just integrated me into his team. I was assigned to

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1 the sifting bin at the -- on the bow of the ship.

2 Q. Had you ever -- were you aware of the process of
3 sifting prior to this time?

4 A. Yes, I was. It's standard procedure that you're
5 taught in Post-Blast School and is done at larger crime
6 scenes.

7 Q. And if you could relate to the court, what did you do
8 at the sifting station?

9 A. What we would do is the evidence would be collected
10 on the ship, and it would be noted where it was taken, where
11 it was gathered. It would be brought up to the bow where the
12 sifting station was. We would go through it. We would use
13 the sifters.

14 We would shake the -- try and separate the wheat from
15 the chaff, if you will, looking for anything that looked like
16 it was of possible evidentiary value, whether it was wiring,
17 whether it was possible pieces of the boat, whether it was
18 biological remains that were clearly identifiable.

19 Q. Do you know why you were placed at the sifting
20 station?

21 A. Because I was a bomb tech, I was one of the bomb
22 techs that was there.

23 Q. Did you take any samples or any swabs?

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1 A. I did, along with the FBI chemist.

2 Q. And when did you do that?

3 A. I would have to refresh my memory from the notes,
4 because it all kind of blends together, especially after the
5 years. But it was soon after their arrival.

6 Q. Let me ask you about the scene itself. You sort of
7 gave a general description. Was it a difficult scene to work?

8 A. Yes, it was. Not only was it a large scene, and we
9 had -- we knew we still had victims trapped in the wreckage,
10 people that were -- that had been killed, sailors that had
11 been killed; but it was also a precarious crime scene.

12 I remember talking to one of the damage control
13 engineers that came in from Bahrain the next day, asking him
14 how long it would be before we could move the ship, perhaps to
15 a safer location where we didn't have the force protection
16 concerns. And he told me, Mike, I don't know if we can even
17 keep it afloat. So that was two days after the bombing, and
18 they were still -- it was still a very, very tender situation.

19 So not only do we have a large crime scene, not only
20 did we have decomposing bodies, we had decomposing food,
21 because it was attacked at lunchtime and the blast carried up
22 and through the galley. We also had the danger of our crime
23 scene sinking beneath our feet. So it was a bunch of

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1 different problems on multiple levels.

2 Q. Were you able to limit the personnel that were in
3 your crime scene? I guess my ----

4 A. Yes.

5 Q. All right. Were there ----

6 A. Go ahead.

7 Q. No, you go ahead.

8 A. Yes, we were. They kept a very -- I mean the ship's
9 crew was there, performing necessary functions, but the only
10 other people that were there were there under FBI direction or
11 FBI control.

12 Q. When you did the swabbing, did you do the swabbing
13 alone or did you do it with somebody?

14 A. As I recall, I did it with the FBI chemist.

15 Q. Do you remember that person's name?

16 A. Steve, and I can't remember. His last name escapes
17 me.

18 Q. And how do you -- how did you take swabs? If you
19 could explain that process to His Honor, please.

20 A. Normally what you will do is you will have a kit that
21 has the swabs already in them, and you'll use a little
22 denatured alcohol to moisten the end and then you'll rub it
23 over the area where you think it may be affected.

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1 A crime scene -- normally in a bombing crime scene
2 you're looking for any flat surface, preferably metal, because
3 that's where a great deal of the residue will adhere to. As
4 the explosive waves carries it forward, it will get stuck or
5 embed onto the surfaces. And that's what you are trying to
6 do, is you're trying to remove little traces of that and
7 putting it back in the container and then sending it back to
8 the lab.

9 Q. Did it appear that the ship had been washed down in
10 any way?

11 A. No. As a matter of fact, the master at arms informed
12 us on the first day that he stressed to Commander Lippold and
13 to the XO that the crime scene had -- could not be altered in
14 any way, that they had to leave everything in place and not
15 wash the ship. And it was a great thing, because if any of
16 you have been on Navy ships, you know that Navy commanders
17 like their ships clean. And this was the filthiest ship I had
18 ever seen, for good reason.

19 TC [MR. MILLER]: Permission, Your Honor, to publish to
20 the witness Prosecution Exhibits 149 through 149C.

21 MJ [Col SPATH]: You may.

22 TC [MR. MILLER]: And permission to use the ELMO, sir.

23 MJ [Col SPATH]: Yes.

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1 Q. First, I'm going to show you what has been marked as
2 Prosecution Exhibit 149A for Identification. Is this the sort
3 of swabs that you were taking on the COLE?

4 A. Yes, sir.

5 Q. And this particular photograph has a -- what I call a
6 Q number on the bottom. Do you see that?

7 A. Yes, sir, I do.

8 Q. And could you read that, please?

9 A. Q475.

10 Q. I'm now going to show you an evidence bag,
11 Prosecution Exhibit 149, and ask you: Do you recognize that
12 bag, sir?

13 A. I do.

14 Q. And what do you recognize that bag to be?

15 A. That is a standard evidence bag that we were using
16 with evidence tape. It also has my name and my handwriting on
17 it and my signature.

18 Q. All right. Are you able to read your handwriting on
19 that?

20 A. I am.

21 Q. All right. First off I'm going to ask you: Do you
22 see a Q number on it?

23 A. I do. Q475.

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1 Q. And is that the same number that was in the
2 photograph, Prosecution's Exhibit 149A?

3 A. Yes, sir, it is.

4 Q. All right. And you say you recognize the
5 handwriting, correct?

6 A. I do.

7 Q. All right. And could you relate, for the record, the
8 description of the evidence, the date and time of the
9 recovery, the location, and the recovered by?

10 A. Right. It's description 1 with parens and the
11 numeral 1 inside, swab of residue, recovered from the
12 USS COLE. And that would be the frame number where it was on
13 the ship, where -- the location of recovery. Date and time of
14 recovery was 18 October at 1012. That's -- location was the
15 USS COLE, her hull number, and then the frame number next to
16 it where it was at. Recovered by myself, NCIS, received from
17 USS COLE by me, and it was put into the evidence system from
18 there.

19 Q. Up under where it says pouch number, there is a DK
20 number. What is that DK number, if you could just read it
21 into the record?

22 A. I don't see where you're talking, sir.

23 Q. Go to the top where it says case number and right

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1 underneath that DK number.

2 A. Oh, I'm sorry, right in front of me. Yeah.

3 DK05-131.

4 Q. And on the back of the bag, is there a 1B number?

5 A. 1B781.

6 Q. Now, when you would take the swab, I know you've
7 described it sort of generally, but physically what would you
8 do with the swab? How would you treat it, and then what would
9 you do when you were finished with it?

10 A. You would air dry it slightly and then you would put
11 it in the tube, put the topper on the tube, seal it. Then you
12 would put it in an evidence bag, make the notations that you
13 see on the bag, and then place it in the evidence system.

14 And in this case we would take the evidence from
15 where the shift -- sifting station was, excuse me, down below
16 decks to where the FBI had an office set up to where they
17 could log evidence in.

18 TC [MR. MILLER]: Open it, please.

19 Q. I'm placing on the ELMO the contents of Prosecution
20 Exhibit numbered 149. Do you recognize that, sir?

21 A. Yes, sir.

22 Q. What ----

23 A. That's a swab inside a bottle, an evidence-collection

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1 swab, with 18 October, 1012, and my initials next to it.

2 Q. Any reason to believe it's been altered or changed in
3 any way?

4 A. No, sir.

5 Q. Did you fill out what they call an FBI green sheet on
6 this?

7 A. I believe I did. I would have to look at it to make
8 sure. It's been a while.

9 Q. All right. I'm going to show you what has been
10 marked as Prosecution Exhibit 49C [sic], and ask you if you
11 recognize that, sir.

12 A. I do. That was their chain of custody sheet. I
13 didn't recognize the term green sheet. Sorry. We had a
14 different form.

15 Q. All right.

16 A. Accepted by myself, M.C. Marks, reason collected,
17 with the date and time at the top.

18 Q. Are you able to associate that with the exhibit we
19 just showed you?

20 A. Yes, sir.

21 Q. All right. Does it contain the same DK number?

22 A. Yes, it does.

23 Q. Does it contain the same 1B number?

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1 A. Yes, sir, it does.

2 Q. Does the swab and the container in Prosecution
3 Exhibit 149A appear to be the same one that I showed you from
4 the bag 149?

5 A. Yes, it does. Yes, sir.

6 Q. And lastly, does Prosecution Exhibit 149B appear to
7 be a fair and accurate depiction of the bag, Prosecution
8 Exhibit ----

9 A. Yes, sir.

10 Q. ---- 149?

11 A. Yes, sir, it does.

12 TC [MR. MILLER]: Your Honor, at this time the government
13 would move for the admission of Prosecution Exhibits 1 --
14 excuse me, 149A, 149B, and 149C.

15 MJ [Col SPATH]: Thank you.

16 Q. Next I want to show you --

17 TC [MR. MILLER]: Permission to publish Prosecution
18 Exhibits 150 through 150C.

19 MJ [Col SPATH]: You may.

20 Q. Showing you what has been -- show you Prosecution
21 Exhibit 150A for Identification and ask you if you recognize
22 that, sir.

23 A. I do.

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1 Q. All right. What do you recognize that to be?

2 A. It's a swab collection kit for evidence residue.

3 TC [MR. MILLER]: May I have the bag, please?

4 Q. Showing you Prosecution Exhibit Number 150 and ask
5 you if you recognize that bag, sir.

6 A. I do.

7 Q. All right. And what do you recognize it to be?

8 A. An evidence bag, collected by me, containing
9 evidence.

10 Q. Do you recognize the handwriting?

11 A. I do. It's my handwriting and my signature.

12 Q. I'll try to get as much shine off it as I can. There
13 we go.

14 Can you read the description?

15 A. One swab of residue.

16 Q. And the date and time?

17 A. 18 October 2000, 1030.

18 Q. Location of the recovery?

19 A. USS COLE with the frame number next to it.

20 Q. And recovered by?

21 A. Myself and NCIS.

22 Q. And then is the chain of custody section filled out?

23 A. Yes, it is.

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1 Q. All right. And did you fill that out?

2 A. I filled it out and signed it, yes, sir.

3 Q. And what does it reflect?

4 A. It reflects that it -- it was took from the USS COLE,
5 the date and time, and when I last physically had the material
6 and submitted it for evidence.

7 Q. Does it have a DK number on it?

8 A. It does. DK05-129.

9 Q. Does it also have a 1B number on the back of it?

10 A. It does. 1B779.

11 TC [MR. MILLER]: Open it, please.

12 Q. I've now opened the bag. Ask you to take a look at
13 this. Do you recognize that, sir?

14 A. Yes, sir, I do. It is an evidence swab kit taken by
15 me with my initials.

16 Q. Does it match the item contained in Prosecution
17 Exhibit 150A?

18 A. Yes, sir, it does.

19 Q. Do you have any reason to believe this has been
20 altered or changed in any way?

21 A. No, sir.

22 Q. After you sealed these in these various vials, what
23 did you do with them?

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1 A. Once they were placed in the bags, then they would be
2 taken down below decks to the room that the evidence custodian
3 had set up. The FBI took one of the spaces over, and it was
4 logged into their system at that point.

5 Q. Did you file what I'll call an FBI chain of custody
6 form with this?

7 A. Yes, sir.

8 Q. I'm going to show that to you. Do you recognize your
9 signature on it?

10 A. Yes, sir, I do.

11 Q. All right. And where is your signature?

12 A. At the top left, accepted by, reason collected.

13 TC [MR. MILLER]: May I have just a second, sir?

14 [Pause.]

15 TC [MR. MILLER]: Sorry, Your Honor.

16 MJ [Col SPATH]: No, no worry.

17 Q. Can you read the 1B number there, please?

18 A. 1B779.

19 Q. 1B number on the bag?

20 A. 1B779.

21 Q. All right. And is this, at least for the first four
22 entries, an exact duplicate of the signature chain of custody
23 sheet that you have just reviewed?

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1 A. Yes, sir, it is.

2 Q. For the record, do you recognize that bag?

3 A. I do.

4 Q. Is that the bag you just reviewed ----

5 A. Yes, sir, it is.

6 Q. ---- Prosecution Exhibit numbered 150?

7 A. Yes, sir.

8 Q. A fair and accurate depiction of it?

9 A. It is.

10 TC [MR. MILLER]: Move for the admission, Your Honor,
11 150A, 150B, and 150C.

12 MJ [Col SPATH]: I understand. Thank you.

13 TC [MR. MILLER]: 158.

14 Q. I show you a photograph marked as Prosecution Exhibit
15 157 -- excuse me, 127A. Do you recognize that as the type of
16 evidence you were seizing?

17 A. Yes, sir.

18 Q. And does that have a Q number on it?

19 A. It does. Q158.

20 TC [MR. MILLER]: 158 -- or 127, excuse me. 127.

21 Q. I'm going to show you what has been marked as
22 Prosecution Exhibit numbered 127 and 128. Do you recognize
23 this bag, sir?

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1 A. I do.

2 Q. What do you recognize it to be?

3 A. An evidence bag collected by me on the dates and time
4 indicated on the front.

5 Q. All right. And description of the evidence?

6 A. Two cans of fluid.

7 Q. Date and time of the recovery?

8 A. 17 October. I can't quite read the time, sir.

9 Q. Here, let me ----

10 A. 10, I think, 10-something.

11 Q. Is that helpful?

12 A. 1045. Thank you.

13 Q. All right. Recovered by whom?

14 A. SA Marks, Special Agent Marks. Would be me.

15 Q. And does it have the chain of custody on there, also?

16 A. It does.

17 Q. And does it show that you filled that part out, also?

18 A. Yes, sir, it does. It's my handwriting at the top.

19 Q. And it's also -- it looks like there's a notation,

20 received from. Is that your signature there, sir?

21 A. Yes, sir, it is.

22 Q. Now, this particular bag has two Q numbers; is that

23 correct?

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1 A. I see Q158 and Q159.

2 Q. All right. Going back to Prosecution Exhibit 127A,
3 again, the Q number in that particular item is?

4 A. Q158.

5 Q. Does this particular exhibit, Exhibit 127 and 128,
6 have a 1B number on it?

7 A. Yes, sir. 1B131.

8 Q. And does it also have a DK number on it -- hold on,
9 let me see. Can you read that?

10 A. There we go. DK02-116.

11 Q. And do you remember collecting this particular
12 exhibit?

13 A. I do.

14 Q. All right. And do you remember from where you
15 collected it?

16 A. It was on the ship's superstructure, but I could not
17 tell you exactly where on the ship's superstructure ----

18 Q. And what was ----

19 A. ---- at this time.

20 Q. I'm sorry. What was your interest in collecting
21 this?

22 A. It was fluid that was -- that was puddled up and we
23 thought it might have some evidentiary value.

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1 Q. All right. Did you fill out an FBI chain of custody
2 form with this?

3 A. Yes, sir.

4 Q. Do you recognize your signature on that?

5 A. I do.

6 Q. All right. And is it on the first line?

7 A. It is, yes, sir, right above collected.

8 Q. All right. And does it contain a DK number?

9 A. It does. DK02-116.

10 Q. And a 1B number?

11 A. 1B131.

12 Q. Does that match the number on this bag ----

13 A. Yes, sir, it does.

14 Q. ---- the 1B number?

15 And does the DK number also match?

16 A. Yes, sir, it does.

17 Q. Showing you Prosecution -- excuse me, Prosecution
18 Exhibit 127C, asking you is that the same or a duplicate of
19 the chain of custody form you just testified about?

20 A. Yes, sir, it is.

21 Q. Showing you a photograph, 127B. Do you recognize
22 that photograph?

23 A. Yes, sir, I do.

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1 Q. Is it a fair and accurate depiction of the
2 Prosecution Exhibit 127?

3 A. Yes, sir, it is.

4 TC [MR. MILLER]: Move for the admission, Your Honor, of
5 Prosecution Exhibit 127, 127B, and 127C.

6 MJ [Col SPATH]: I understand. Thank you.

7 Q. Show you Prosecution Exhibit numbered 128A, ask you
8 if you recognize that, sir.

9 A. I do.

10 Q. And is it the sort of material that you were seizing
11 or gathering on the USS COLE?

12 A. Yes, it is.

13 Q. And does this particular photograph, 128A -- excuse
14 me, 128A, have a Q number?

15 A. Yes. Q159.

16 Q. I'm going to show you the same bag. Do you see a Q
17 number -- Q numbers on this particular bag?

18 A. Yes, sir. 158 and 159.

19 Q. And that would match the Q number in Prosecution
20 Exhibit numbered 128A, correct?

21 A. Yes, sir, it does.

22 Q. And for the record, this bag has two markings on it.
23 It has a Prosecution Exhibit 127 and 128; is that correct?

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1 A. Yes, sir.

2 Q. It also contains a 1B number; is that correct?

3 A. It does. 1B131.

4 Q. And it contains a DK number, also; is that -- is that
5 correct?

6 A. Yes, sir. DK02-116.

7 Q. I think you previously testified regarding the
8 handwriting but I'd ask you again: Do you recognize the
9 handwriting on Prosecution Exhibit -- now we're referring to
10 it as 128?

11 A. I do. It's mine.

12 Q. And again, for the record, the date and time of
13 recovery, the location, and by whom it was recovered?

14 A. 17 October 2000 at 1045. Location of recovery, which
15 is the deck and frame number, recovered by myself, NCIS, for
16 analysis.

17 Q. And the chain of custody, did you fill that out also?

18 A. Yes, sir, I did. That's my handwriting and my
19 signature.

20 Q. As with the other exhibits, did you fill out a chain
21 of custody form?

22 A. I did.

23 Q. Showing you that chain of custody form. Do you

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1 recognize your handwriting?

2 A. Yes, sir. That's my signature above collected.

3 Q. And does it contain the same DK number and 1B number
4 as is contained on the Exhibit 128?

5 A. It does.

6 Q. Showing you Prosecution Exhibit numbered 128C. As to
7 the first four entries, are they identical to the ones that
8 you've just described?

9 A. Yes, sir.

10 Q. Again, as to 128, do you recognize this photograph?

11 A. I do.

12 Q. What is it?

13 A. The bag that we collected for evidence ----

14 Q. 127 -- that contains 127 and 128?

15 A. Yes, sir. That's correct.

16 Q. Is that a fair and accurate depiction of it?

17 A. It is.

18 TC [MR. MILLER]: Move for the admission, Your Honor, of
19 128A, 128B, and 128C.

20 MJ [Col SPATH]: Thank you.

21 TC [MR. MILLER]: 151.

22 Q. I am going to show you a photograph, sir, Prosecution
23 Exhibit numbered -- Prosecution Exhibit 151A for

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1 Identification. Do you recognize that type of material?

2 A. Yes, I do.

3 Q. What do you recognize it to be? The type of material
4 that you were seizing at the COLE?

5 A. Yes, sir, it was the type of material we were looking
6 for.

7 Q. Does it have a Q number on it?

8 A. It does. Q163A and 163B.

9 Q. And on the ruler itself, does it have a Q number?

10 Excuse me.

11 A. Q163.

12 Q. I'm placing on the ELMO Prosecution Exhibit Number --
13 Prosecution Exhibit 151 for Identification. Do you recognize
14 that bag, sir?

15 A. I do.

16 Q. And do you recognize the handwriting?

17 A. I do. That is my handwriting.

18 Q. And could you read into the record the description of
19 the evidence, the date and time, the location, and by whom it
20 was recovered?

21 A. One can of residue, taken on 18 October at 1110 -- or
22 18 October 2000, sorry, at 1110, USS COLE. The hull -- the
23 deck and frame number next to it, recovered by SA Marks,

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1 that's me, and that's my signature.

2 Q. And chain of custody?

3 A. Yes, sir. I filled out the chain of custody.

4 Q. And does that contain your signature where it says
5 by?

6 A. It does.

7 Q. Does this particular exhibit contain a Q number?

8 A. It does. Q163.

9 Q. And does that match the Q number in Prosecution
10 Exhibit numbered 151A?

11 A. It does.

12 Q. Does 151 also have a 1B number on it?

13 A. It does. 1B132.

14 Q. Does it also -- excuse me -- have a DK number?

15 A. It does. DK03-129.

16 Q. Did you fill out a FBI chain of custody form for this
17 particular exhibit?

18 A. I did.

19 Q. I'm placing before you a chain of custody exhibit.

20 Do you recognize your signature?

21 A. I do, right above collected, with the date and time
22 to the right.

23 Q. All right. And are you able to associate it with the

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1 Exhibit 151?

2 A. I am.

3 Q. All right. Does it have the same 1B -- 1B number?

4 A. It does.

5 Q. And does it have the same DK number?

6 A. It does.

7 Q. I've placed on the ELM0 Prosecution Exhibit 151D for
8 Identification, and is that a duplicate of the form that you
9 just identified?

10 A. Yes, sir, it is.

11 Q. I show you a photograph here, 151B, ask you if you
12 recognize that.

13 A. Yes, it is.

14 Q. And what do you recognize ----

15 A. Yes, I do. Sorry. It's an evidence bag used by me
16 to collect.

17 Q. And it is a duplicate of the bag that you just
18 identified?

19 A. Yes, sir, it is.

20 Q. Fair and accurate depiction of it?

21 A. It is.

22 TC [MR. MILLER]: Your Honor, we would move for the
23 admission of Prosecution Exhibit 151A, 151B, and 151B [sic].

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1 MJ [Col SPATH]: Thank you.

2 Q. Placing on the ELM0 Prosecution Exhibit 154A, ask you
3 if you recognize that, sir.

4 A. I do.

5 Q. What do you recognize that to be?

6 A. It's an evidence collection tin with my handwriting
7 and initials on it.

8 Q. Did you use those sort of tins in collecting evidence
9 on the USS COLE?

10 A. We did.

11 Q. Placing before you Prosecution Exhibit 154 for
12 Identification, ask you if you recognize that bag, sir. Hold
13 on.

14 A. I do. Sorry, sir.

15 Q. Let me -- what do you recognize that to be?

16 A. It's an evidence bag filled out by me, containing one
17 suspect residue, 20 October 2000 at 1430. It has the
18 description of where it was taken, on the port side, and it
19 has my name and then initials and then my signature down below
20 through the chain of custody.

21 Q. Does this particular exhibit have a Q number?

22 A. Q289.

23 Q. Does it have a 1B number?

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1 A. 1B789.

2 Q. And does it have a D -- DK or an MDK number?

3 A. MDK-101.

4 TC [MR. MILLER]: Open it.

5 Q. For the record, I have removed from the bag
6 Prosecution Exhibit 154. This particular item, do you
7 recognize that?

8 A. I do.

9 Q. What do you recognize that to be?

10 A. It's an evidence tin that we used to collect evidence
11 on board the COLE.

12 Q. And how are you able to recognize it? Do you
13 recognize the handwriting?

14 A. I recognize the handwriting, yes, sir.

15 Q. And is that the same item that's contained in
16 Prosecution Exhibit 154A?

17 A. It is.

18 Q. Did you fill out an evidence chain of custody form
19 for this?

20 A. I did.

21 Q. Before we do that, however ----

22 TC [MR. MILLER]: Give me the bag.

23 Q. I think I may have already done this, but I just want

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1 to make sure. This has an MDK number; is that correct?

2 A. MDK-101.

3 Q. And a 1B number of?

4 A. 1B789.

5 Q. Do you recognize your signature on that form?

6 A. I do, right at the top above collected, with the date
7 and time to the right.

8 Q. And are you able to associate that chain of custody
9 form with the evidence bag, Prosecution Exhibit 154?

10 A. Yes, sir, I can.

11 Q. And how are you able to do that?

12 A. With my signature and handwriting.

13 Q. They also contain -- do they also contain the same
14 MDK number?

15 A. They do.

16 Q. And do they contain the same 1B number?

17 A. They do.

18 Q. I've placed on the ELM0 Prosecution Exhibit 154C. Is
19 that a duplicate of the chain of custody form you just
20 testified about?

21 A. Yes, sir, it is.

22 Q. And I'm placing on the ELM0 Prosecution Exhibit
23 numbered 154B and ask you: Do you recognize that photograph?

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1 A. I do.

2 Q. And what is it?

3 A. The evidence bag that I used containing the suspect
4 residue; has the same MDK number, 101.

5 Q. All right. And is it an accurate depiction, a fair
6 and accurate depiction of the actual Exhibit 154?

7 A. Yes, sir.

8 Q. Putting on the ELMO Prosecution Exhibit 1A, ask you:
9 Is this the sort of evidence that you were collecting on the
10 USS COLE?

11 A. Yes, sir, it is.

12 Q. And why were you interested in this sort of evidence?

13 A. Well, it looks to be white fiberglass, and with the
14 color of white impregnated in it at some point. We were aware
15 from witness interviews that the boat that detonated next to
16 the hull of the USS COLE was a white, most likely fiberglass
17 boat. So we were looking for residue from that craft.

18 Q. All right. And does it have a Q number on it?

19 A. It does.

20 Q. All right.

21 A. Q -- I'm having a little trouble with it.

22 Q. Let me see if I can get it for you. Can you read
23 that?

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1 A. There we go, Q157. Thank you.

2 Q. I'm placing before you -- do you recognize this bag,
3 sir?

4 A. I do.

5 Q. What do you recognize it to be?

6 A. Evidence bag that we used on board the USS COLE.

7 Q. And does it describe the evidence?

8 A. It does. Fiberglass fragment.

9 Q. All right. I take it, is this your handwriting?

10 A. It is.

11 Q. All right. And the time and date of recovery?

12 A. 17 October 2000, 1050 in the morning.

13 Q. All right. And it shows the location?

14 A. Location -- shows a location on board the ship,
15 recovered by myself, and underneath is Steve Greenberg of the
16 FBI.

17 Q. All right. And is there a -- shows received from.

18 Did you fill out the chain of custody, also?

19 A. I did.

20 Q. Is there a Q number on this particular evidence bag?

21 A. Yes, sir. Q157.

22 Q. And is there a 1B number?

23 A. Yes, sir. 1B130.

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1 Q. Is there also a DK number on it?

2 A. Yes, sir. DK02-113.

3 Q. Now, does the Q number, 157, match the Q number in
4 this exhibit, Prosecution Exhibit 1A?

5 A. Yes, sir. Q157.

6 Q. And the evidence bag to which you have been referring
7 is Prosecution Exhibit Number 1. Excuse me.

8 What did you do with this exhibit once you had
9 gathered up the various pieces of fiberglass?

10 A. We sealed it, and then we filled out a custody sheet
11 and transported it down to the evidence room.

12 Q. Did you fill out an evidence form regarding
13 Prosecution Exhibit 1?

14 A. Yes, sir, we did.

15 Q. Placing a chain of custody form on the ELM0. Do you
16 recognize your signature?

17 A. Yes, sir. It's at the top right above collected, the
18 date and time to the right.

19 Q. And are you able to associate that with the exhibit,
20 Prosecution Exhibit 1?

21 A. Yes, sir, I can.

22 Q. Do they contain the same 1B number?

23 A. They do.

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1 Q. Do they contain the same DK number?

2 A. They do.

3 Q. I'm placing on the ELM0 a Prosecution Exhibit 1C for
4 Identification. Is that an exact duplicate of the chain of
5 custody form you've just described?

6 A. It is.

7 Q. I'm also placing on the ELM0 Prosecution Exhibit 1B
8 for Identification. Do you recognize that, sir?

9 A. I do.

10 Q. What do you recognize that to be?

11 A. As the bag we were just referring to with the Q
12 number of 157.

13 Q. And is it a fair and accurate depiction of it?

14 A. Yes, sir.

15 TC [MR. MILLER]: Your Honor, we would move for the
16 admission of Prosecution Exhibit 1A, 1B, and 1C.

17 MJ [Col SPATH]: Thank you.

18 TC [MR. MILLER]: I've just been informed I did not move
19 for the submission of 154A, 154B, and 154C. I would move for
20 their admission also, Your Honor.

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

22 Q. I've placed on the ELM0 Prosecution Exhibit 63A for
23 Identification. Do you recognize that, sir?

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1 A. I recognize it as the type of evidence we'd collect
2 on the USS COLE.

3 Q. All right. And is there a Q number associated with
4 that picture?

5 A. Yes, sir. Q288.

6 Q. I'm placing on the ELMO Prosecution Exhibit 63 for
7 Identification and ask you if you recognize that, sir?

8 A. I do.

9 Q. What do you recognize that to be?

10 A. The evidence bag that I filled out with my name and
11 signature on it containing one piece of blue metal.

12 Q. And the date and time of recovery?

13 A. I believe it's -- is it 18 October? It's kind of
14 shiny on it -- 2000 at ----

15 Q. Let's ----

16 A. 20 October, sorry. It was 20 October at 1425.

17 Q. And does it show that it was recovered by you?

18 A. Yes. Yes, sir, on board the USS COLE.

19 Q. And you signed the chain of custody form at the
20 bottom; is that correct?

21 A. I did, indeed.

22 Q. And it contains a Q number; is that also correct?

23 A. It does.

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1 Q. And what is that Q number?

2 A. Q288.

3 Q. And does that match the Q number on Prosecution
4 Exhibit numbered 63A?

5 A. Yes. Yes, sir, it does.

6 Q. Does Prosecution Exhibit 63 have a MDK number?

7 A. It does. MDK-100.

8 Q. Does it have a 1B number?

9 A. It does. 1B788.

10 Q. I've opened the outer bag. I'm showing you the inner
11 bag.

12 TC [MR. MILLER]: Open it up. Too shiny.

13 Q. I've now placed that on the board. Does this appear
14 to be the same item that's contained in Prosecution Exhibit
15 63A?

16 A. Yes. Yes, sir.

17 Q. All right. And this is the item I took out of
18 Prosecution Exhibit 63, correct?

19 A. Correct.

20 Q. Did you fill out a chain of custody form for this
21 also?

22 A. I did.

23 Q. Placing on the ELMO a chain of custody form. Do you

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1 recognize your signature on that?

2 A. I do, on the top line over collected, and the date
3 and time.

4 Q. And can you associate it with the exhibit,
5 Prosecution Exhibit 63?

6 A. I can.

7 Q. And how are you able to do that?

8 A. Through the 1B and the MDK number, and my signature.

9 Q. All right. So the 1B number and the MDK number, they
10 match?

11 A. Yes, sir.

12 Q. All right. I'm placing on the ELMO Prosecution
13 Exhibit 63C for Identification. Is that a duplicate of the
14 chain of custody form that you've just testified regarding?

15 A. Yes, sir.

16 Q. I'm placing on the ELMO Prosecution Exhibit 63B. Do
17 you recognize that, sir?

18 A. I do.

19 Q. Is it a fair and accurate depiction of Prosecution
20 Exhibit 63, the evidence bag containing the piece of metal?

21 A. Yes, sir, it is.

22 TC [MR. MILLER]: Move for the admission, Your Honor, of
23 Prosecution Exhibits 63A, 63B, and 63C.

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1 MJ [Col SPATH]: Thank you.

2 Q. Agent Marks, I'm placing on the ELMO Prosecution
3 Exhibit 142A for Identification. Again, do you recognize this
4 as the type of evidence you were collecting on the USS COLE?

5 A. Yes, sir.

6 Q. Is there a Q number attached to a ruler in that
7 photograph?

8 A. Yes, sir. I believe it's Q -- I'm sorry, it has to
9 be a little bit bigger. Q530. Sorry.

10 Q. This is marked biohazard. This is Prosecution
11 Exhibit 142. I'm going to ask you if you recognize that, sir.

12 A. Yes, I do. It's an evidence bag filled out by me.

13 Q. All right. Does it have a Q number on the top -- on
14 the front of it?

15 A. It does. Q530.

16 Q. Does that match the Q number in Prosecution
17 Exhibit 142A?

18 A. It does.

19 Q. And do you recognize the handwriting?

20 A. I do. It's mine.

21 Q. And what does it indicate? What type of evidence had
22 you seized?

23 A. Some type of burnt material.

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1 Q. And the date you seized it?

2 A. 22 October 2000.

3 Q. The area?

4 A. I can't -- the area was the galley, and my name
5 underneath.

6 Q. And there's a chain of custody section. Did you fill
7 that out and sign it?

8 A. I did.

9 Q. Does this particular exhibit have a GA number?

10 A. It does. GA110.

11 Q. Does it have a 1B number?

12 A. 1B582.

13 Q. Did you fill out a chain of custody form as to this
14 particular exhibit?

15 A. I did, yes, sir.

16 Q. Do you recognize your signature on that?

17 A. I do. The top line with my signature and the date
18 and time to the right.

19 Q. Are you able to associate that chain of custody form
20 with Prosecution Exhibit numbered 142?

21 A. I can.

22 Q. And how are you able to do that?

23 A. Through my signature and the numbers.

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1 Q. The 1B number matches?

2 A. Yes, sir.

3 Q. And the GA number matches?

4 A. Yes, sir.

5 Q. I've placed on the ELM0 Prosecution Exhibit 142C. Is
6 that a duplicate original of the chain of custody form that
7 you've just testified regarding?

8 A. Yes, sir, it is.

9 Q. I'm placing on the ELM0 Prosecution Exhibit Number
10 142B. Do you recognize that, sir?

11 A. I do.

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

13 A. To be an evidence log filled or -- sorry, bag filled
14 out by me.

15 Q. And is it a fair and accurate photograph of
16 Prosecution Exhibit numbered 142?

17 A. It is.

18 TC [MR. MILLER]: Your Honor, the government would move
19 for the admission of Prosecution Exhibits 142A, 142B, and
20 142C.

21 MJ [Col SPATH]: Noted. Thank you.

22 Q. As to any of these exhibits, sir, do you have any
23 reason to believe that they were altered or changed in any

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1 way?

2 A. No, sir.

3 Q. And what would you -- as typically when you would bag
4 these evidence, where would you take it?

5 A. We would take it -- the FBI had set up, below decks,
6 an evidence log-in room where they had, I believe, two
7 technicians at the time processing all the evidence, logging
8 it into their system and relieving me from custody.

9 Q. Did you ever help them move the evidence off the
10 ship?

11 A. I believe I may have.

12 Q. Do you have any recollection -- direct recollection
13 of it?

14 A. I don't, no, sir. I -- it probably would have been
15 the type of thing I would have helped with.

16 TC [MR. MILLER]: All right. Nothing further, Your Honor.
17 Thank you.

18 MJ [Col SPATH]: Thank you.

19 Defense Counsel, you may cross-examine.

20 DDC [LT PIETTE]: Your Honor, the defense has no position.

21 MJ [Col SPATH]: I understand. And again, the commission
22 finds it is a position not to cross-examine, particularly in
23 an area of evidentiary foundation related to real evidence,

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1 something we all deal with in our normal course of practice.

2 Mr. Marks, this is Judge Spath. Can you hear me?

3 WIT: Yes, sir, I can.

4 MJ [Col SPATH]: All right. I'm just going to give you a
5 standard order. And the order is not to discuss your
6 testimony until this issue has been resolved. Here what I
7 can't tell you is how long that's going to be, so the order
8 would be in place for some time. Do you understand the order?

9 WIT: Yes, sir, I do.

10 MJ [Col SPATH]: All right. I appreciate you appearing to
11 testify, and we will disconnect the feed here soon. Thank you
12 very much.

13 WIT: Thank you, sir.

14 TC [MR. MILLER]: Just one second before we go?

15 MJ [Col SPATH]: Do you want me to keep the witness?

16 TC [MR. MILLER]: Yes, keep the witness for just one
17 second.

18 MJ [Col SPATH]: Okay. Mr. Marks, don't move.

19 WIT: Okay.

20 TC [MR. MILLER]: We found more evidence, Your Honor, just
21 two more.

22 MJ [Col SPATH]: Mr. Marks, I think we're going to go
23 through a couple more exhibits, so bear with us.

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1 WIT: No problem.

2 MJ [Col SPATH]: All right. Mr. Miller, you may continue.

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

4 Q. Almost done, sir.

5 A. No problem.

6 Q. Thank you.

7 I'm placing before you a photograph, Prosecution
8 Exhibit 77A. Do you recognize that as the type of evidence
9 you were seizing from the COLE?

10 A. Yes, sir.

11 Q. Does it have a Q number at the bottom of the
12 photograph?

13 A. Q570.

14 Q. I've now placed on the ELMO Prosecution Exhibit 77
15 and ask you if you recognize that bag, sir.

16 A. I do.

17 Q. What do you recognize it -- do you recognize it to be
18 a bag that you -- evidence bag that you completed?

19 A. It is, containing possible boat parts. And it was --
20 date and time of recovery is 22 October 2000 at 1420. And
21 recovery, it was recovered underwater at the aft of the ship,
22 and I filled out the chain of custody beneath it, sir.

23 Q. Was this, after having been underwater -- I take it

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1 you did not recover this yourself?

2 A. No, sir. The FBI divers brought it up. We had two
3 FBI divers and I believe two Navy EOD divers, who were
4 assisting trying to get some evidence from the sea floor.

5 Q. Would you have received this at the sifter?

6 A. Yes, sir, I would have.

7 Q. And you recognize the handwriting?

8 A. Yes, it's my handwriting with my signature.

9 Q. And does this particular exhibit have a Q number?

10 A. It does. Q570.

11 Q. And does the Q number on Prosecution Exhibit 77 match
12 the Q number on Prosecution Exhibit 77A?

13 A. It does.

14 Q. Does Prosecution Exhibit 77 have a 1B number?

15 A. It does. 1B950.

16 Q. Does it have a W number, which I take it stands for
17 water?

18 A. It does. W118.

19 TC [MR. MILLER]: Go ahead and open it.

20 Q. For the record, I have opened the bag in Prosecution
21 Exhibit Number 77, taking out those items. The items in the
22 bag appear to be the same items in Prosecution Exhibit 77A --
23 oops, let me ----

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1 A. I need -- need to zoom out a bit.

2 Q. There we go.

3 A. Yes, sir, they are.

4 Q. Why were you interested in these exhibits?

5 A. We believed they may have been part of the boat
6 motor, part of the superstructure of the boat itself.

7 Q. Did you fill out an evidence form for these?

8 A. Yes, sir, we did.

9 Q. I've placed a chain of custody form on the ELM0. Do
10 you recognize this particular form?

11 A. On that one, that does not have my signature on it,
12 sir.

13 Q. All right. But I want to ----

14 TC [MR. MILLER]: Could I have the bag back?

15 Q. Does it contain the same 1B number, 1B590?

16 A. Yes, sir.

17 Q. Does it also contain the same W118 number?

18 A. It does.

19 Q. So it does not contain your signature?

20 A. No, sir, it does not.

21 Q. But you can associate it with this particular item?

22 A. I can.

23 Q. Again, I have placed on the ELM0 Prosecution

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1 Exhibit 77C. Is that an exact duplicate of the chain of
2 custody form that you have just testified regarding?

3 A. Yes, it is.

4 Q. I'm also placing on the ELM0 Prosecution Exhibit 77B.
5 Is that a fair and accurate depiction of Prosecution Exhibit
6 77?

7 A. Yes, it is.

8 TC [MR. MILLER]: Move for the admission of 77A, 77B, and
9 77C, Your Honor.

10 MJ [Col SPATH]: Noted. Understand. Thanks.

11 TC [MR. MILLER]: I believe this is the last one, Your
12 Honor.

13 Q. Placing before you Prosecution Exhibit 86A for
14 Identification. Is this the type of evidence that you were
15 seizing?

16 A. Yes, sir.

17 Q. All right. On the COLE, I guess, I should ----

18 A. Yes, sir. It was, yeah.

19 Q. And is this particular photograph, Prosecution
20 Exhibit 86A, does it have a Q number?

21 A. Yes, sir. Q362.

22 Q. I'm placing on the ELM0 Prosecution Exhibit numbered
23 86. Do you recognize this bag, sir?

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1 A. I do.

2 Q. And what do you recognize it to be?

3 A. An evidence bag filled out by me, containing some
4 suspected -- some wire, apparent wire, collected on 17 October
5 2000, at 11:00 a.m. It's got the location on board the ship
6 where it was, my name, and also SA Greenberg of the FBI's
7 name. And then the chain of custody was filled out by me.

8 Q. There's a Q number on it; is that also correct?

9 A. Yes, sir. Q362.

10 Q. And does that match the Q number on Prosecution
11 Exhibit numbered 86A?

12 A. It does.

13 Q. Does Prosecution 86 also have a DK number on it?

14 A. It does. DK02-111.

15 Q. Does it also have a Q number?

16 A. Q362.

17 TC [MR. MILLER]: Open it.

18 Q. Can you see that substance in there?

19 A. Yes, sir, I can.

20 Q. Does it appear to be the same substance -- this is --
21 we've opened the bag in Prosecution Exhibit 86; that is the
22 context of 86. Does it appear to be the same items that are
23 contained in Prosecution Exhibit 86A, the photograph?

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1 A. It does, yes, sir.

2 Q. Did you fill out a FBI chain of custody form in this
3 case ----

4 A. I would have, yes, sir.

5 Q. ---- for this exhibit?

6 Do you recognize your signature?

7 A. I do, on the top line above collected with the date
8 and time to the right.

9 Q. Are you able to associate this particular chain of
10 custody form with Prosecution Exhibit numbered 86?

11 A. Yes, sir, I can.

12 Q. And how are you able to do that?

13 A. Via the DK and 1B number as well as my signature.

14 Q. Showing you Prosecution Exhibit 88 -- 86 -- excuse
15 me, 86C. Is that a duplicate of the chain of custody form
16 that you've just testified regarding?

17 A. It is, indeed.

18 Q. And that is your signature on the first line; is that
19 correct?

20 A. Yes, sir.

21 Q. Lastly, I'm going to show you Prosecution Exhibit 86B
22 for Identification, and ask you if you recognize that, sir.

23 A. I do.

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1 Q. And is that a fair and accurate photograph of
2 Prosecution Exhibit 86?

3 A. It is.

4 TC [MR. MILLER]: No others, Your Honor. I move for the
5 admission of 86A, 86B, and 86C. I have not been moving for
6 the actual real evidence because my understanding, we're going
7 to discuss that at a little bit later time.

8 MJ [Col SPATH]: Yes. And again, I've deferred on all of
9 it in both of the hearings related to 207, which I'll continue
10 to do. Thank you.

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

12 MJ [Col SPATH]: Defense Counsel, cross-examination?

13 DDC [LT PIETTE]: Your Honor, again, the defense takes no
14 position due to the lack of learned counsel present.

15 MJ [Col SPATH]: I appreciate that. Again, I find it's a
16 position. In fact, as I work through my findings of fact, I
17 believe it's a strategic position not supported by the rulings
18 or the law. But I appreciate you continuing to let me know
19 your position.

20 All right. I believe that's the last witness. Let
21 me do this.

22 Mr. Marks, you remember the order I gave you just a
23 few minutes ago, I assume?

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1 WIT: Yes, sir, I do.

2 MJ [Col SPATH]: All right. I appreciate your testimony
3 again, and we will disconnect the feed here in just a moment.
4 Thanks.

5 WIT: Thank you.

6 [The witness was warned, temporarily excused, and the VTC was
7 terminated.]

8 MJ [Col SPATH]: Colonel Wells, I'll just ask you, since
9 you seem to be kind of coordinating the planning of witnesses,
10 that is all the witnesses for today, correct?

11 MATC [COL WELLS]: Yes, Your Honor.

12 MJ [Col SPATH]: Okay. Tomorrow, at least right now, we
13 don't have any?

14 MATC [COL WELLS]: Correct, sir.

15 MJ [Col SPATH]: All right. And then Friday, at least
16 right now, how many witnesses do you intend?

17 MATC [COL WELLS]: Sir, we have none confirmed at this
18 moment. I hope I can confirm tonight or tomorrow morning, but
19 we had planned for two, Mr. Morgan Bodie, who is traveling, I
20 believe, from Louisiana; and then Mr. Mulry, who is also
21 traveling from New Jersey.

22 Mr. Mulry's circumstance is he is an emergency room
23 nurse practitioner, and it's difficult on his schedule. We

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1 hope that Mr. Mulry can be available by VTC. Both of these
2 witnesses are planned for Friday. It has been raised to my
3 attention, though, that Friday is a holiday. But we have
4 these witnesses here and we would like to proceed.

5 MJ [Col SPATH]: We're here, so while I recognize it is a
6 holiday, if we have them available, we'll take them on Friday.

7 MATC [COL WELLS]: And then I would raise to the
8 commission's attention, we do have some protective orders that
9 we've requested, appropriate for a closed session at some time
10 during our hearings here. Perhaps not relevant for these
11 witnesses in the 207, but as we move off of the COLE elsewhere
12 and -- we will need to address those.

13 And we are interested in this session in getting the
14 commission's intent, make sure that we've met it with those
15 protective orders, or make some adjustments as you direct,
16 sir.

17 MJ [Col SPATH]: I understand. All right. And those
18 don't relate to the 207 series, though?

19 MATC [COL WELLS]: Correct, sir.

20 MJ [Col SPATH]: Then yes, we will -- we'll attempt to
21 address those as well.

22 Then as we did yesterday, as you confirm those two
23 witnesses, let the trial judiciary know through my staff. I

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