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1 [The R.M.C. 803 session was called to order at 0900,  
2 15 February 2018.]

3 MJ [Col SPATH]: Commission is called to order. All the  
4 parties are present who were present yesterday, and General  
5 Martins is not here, as was the case yesterday; so that's  
6 fine.

7 Mr. Miller.

8 TC [MR. MILLER]: We were going to ask permission. Thank  
9 you, Your Honor.

10 MJ [Col SPATH]: That's fine. You are more than welcome  
11 to -- as long as you have one counsel here, I just have to  
12 account for them on the record. Is -- are the proceedings  
13 being transmitted?

14 TC [MR. MILLER]: They are, Your Honor.

15 MJ [Col SPATH]: All right. And do we have somebody to  
16 account for Mr. al Nashiri's absence, to explain?

17 TC [MR. MILLER]: Yes, we do, Your Honor, and Colonel  
18 Wells will handle that matter.

19 MJ [Col SPATH]: Great. Let's do it. And it's going to  
20 be 375J, Juliet, Colonel Wells.

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

22 MJ [Col SPATH]: Thank you.

23 MATC [COL WELLS]: Your Honor, good morning. May I

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1 approach the witness?

2 MJ [Col SPATH]: You may.

3 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
4 was reminded of his oath, and testified as follows:

5 **DIRECT EXAMINATION**

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

7 Q. Major, good morning.

8 A. Good morning, sir.

9 Q. You appeared before this commission before, and I  
10 remind you you're still under oath. I've passed you what has  
11 been marked Appellate Exhibit 375J. It's three pages. Do you  
12 see it?

13 A. I do see it.

14 Q. Did you have occasion to meet with the accused this  
15 morning?

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

17 Q. Okay. Did you speak with him?

18 A. I did speak to him.

19 Q. And what did you tell him?

20 A. I got there. I advised him -- I introduced myself.  
21 Said hello to -- to Mr. al Nashiri. He was laying in his  
22 bunk. I advised him he had a military commission this  
23 morning. He said he understood. I asked him if he would be

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1 coming to the military commission, and he advised that he did  
2 not want to come to the military commission.

3 He asked me if I knew if this was going to be the  
4 last day or if we were going to go tomorrow, and I said I'm 99  
5 percent sure that today would be the last day. I said,  
6 "There's always a slim chance we could go tomorrow." And then  
7 he said he didn't want to come to the commission; he wanted me  
8 to let his attorneys know that if anything important happens  
9 today, they can simply write him a letter and let him know.  
10 But he didn't want to come.

11 Q. Were you able to speak with his attorney before this  
12 session?

13 A. Before court started I talked to him out in the  
14 lobby.

15 Q. Okay. And then did he record his decision not to  
16 come today using this form?

17 A. He did. So I advised him that I had to read the form  
18 to him, and he actually said I should just record my voice and  
19 play it every day because it would save me some time. But I  
20 read him both pages and asked him if he had any questions, and  
21 he said he had no questions. And then, again, he had followed  
22 along with the Arabic version. I read him the English  
23 version, and he signed and dated page 2 of the document above

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1 the word "ACCUSED."

2 Q. In this process were you able to form an opinion  
3 whether or not he was exercising his right not to attend  
4 today's session voluntarily?

5 A. I do. I believe that after I read the document to  
6 him he had no questions; he signed the document. So I believe  
7 he did voluntarily waive his right to attend the commission.  
8 I then advised him that if he wanted to go to a legal meeting  
9 today he could do that. And I told him that Dr. Crosby was on  
10 island, if he wanted to meet her, and he thought about that  
11 and again said, "I'll meet with her next time. If there's  
12 anything important, have her or the attorney write me a  
13 letter."

14 MATC [COL WELLS]: Okay. Your Honor, may I approach the  
15 witness?

16 MJ [Col SPATH]: You may. Thanks.

17 MATC [COL WELLS]: I've retrieved Appellate Exhibit 375J  
18 and returned it to the court reporters, and they've now passed  
19 it to the judge. Thank you, Major. The commission may have  
20 some questions.

21 WIT: Yes, sir.

22 MJ [Col SPATH]: I don't. Defense Counsel, any questions?

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

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1 MJ [Col SPATH]: As always, thanks for your testimony.

2 You're excused.

3 WIT: Thanks, Judge.

4 [The witness was excused.]

5 MJ [Col SPATH]: I again find Mr. al Nashiri has waived  
6 his right to be present at this pretrial hearing knowingly,  
7 intelligently, and consciously, and it's voluntary.

8 Let me get a couple updates, see where we're at. Any  
9 update regarding Mr. Koffsky, at least the capability to have  
10 the video teleconference this afternoon?

11 MATC [COL WELLS]: Yes, sir. We're on for 1300, and I  
12 understand that we do have a stable, as tested this morning,  
13 VTC link. And I'm informed that it will have the capability  
14 of classified communications, if needed.

15 MJ [Col SPATH]: Okay. That's good. I can't imagine  
16 we'll have those discussions, but thank you.

17 MATC [COL WELLS]: Yes, sir.

18 MJ [Col SPATH]: For people interested in our trip home,  
19 and I know there are some, it appears it's going to be  
20 Saturday. I do want to thank the Office of Military  
21 Commissions. OMC worked to move it to Friday, given the  
22 weather. There were some logistical issues that I am not part  
23 of nor do I get involved in. I assume it had something to do

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1 with contracts and the like with the airlines. But for  
2 whatever reason, it is what it is. But I know there were a  
3 lot of efforts made, and I do appreciate it. But it looks  
4 like we're departing on Saturday, so pay attention to the  
5 weather and plan accordingly for our arrival in D.C., because  
6 I have every confidence we'll land there, given where we're  
7 heading. So we'll find our way home depending on the weather.  
8 It doesn't look that bad, from what I can tell, but again, I  
9 know a lot of people are traveling out from D.C. It could be  
10 a little harder for you all.

11 I assume that, Defense Counsel, the other person in  
12 the courtroom is Dr. Crosby?

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

14 MJ [Col SPATH]: Okay. And she's not a party; I didn't  
15 introduce her as such. I just want to make sure I know who's  
16 here and welcome Dr. Crosby. I knew you were here. We had  
17 some conversation about you yesterday. So I haven't met you  
18 before. Good to see you. Okay.

19 I think that's it for right now. We'll just -- we  
20 will move forward, we'll get your testimony going, Mr. Miller,  
21 with the witnesses, and then we'll see where we're at.

22 TC [MR. MILLER]: Thank you, Your Honor. The government  
23 calls Lisa LoCascio, Special Agent.

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1 MJ [Col SPATH]: All right. If you would get Ms.  
2 LoCascio, Special Agent LoCascio.

3 TC [MR. MILLER]: Ask permission, Your Honor, to use the  
4 monitor to show the witness some photographs.

5 MJ [Col SPATH]: You may. Of course.

6 For me -- I know some other commission judges feel  
7 differently -- you are welcome to pre-stage your witnesses any  
8 time at all. It does not concern me. I do not speak for the  
9 other commission judges because I know that some of them have  
10 a different take, but ----

11 TC [MR. MILLER]: Thank you. I would rather do it that  
12 way.

13 MJ [Col SPATH]: It's easier, and I don't mind at all.

14 Agent LoCascio, just come on in and take your seat  
15 again. I know you were just testifying yesterday. Just  
16 remind you, you are still under oath, okay?

17 WIT: Yes, sir.

18 [Lisa LoCascio resumed her seat on the witness stand.]

19 MJ [Col SPATH]: Thanks for coming back this morning.

20 WIT: Of course.

21 MJ [Col SPATH]: Mr. Miller.

22 TC [MR. MILLER]: Thank you.

23

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1   **DIRECT EXAMINATION CONTINUED**

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

3           Q.   Agent, now you have taken your seat.  Can you please  
4 go over to the chart.  We are going to start there.

5           TC [MR. MILLER]:  And if we could put the mobile  
6 microphone on the witness?

7           Q.   Yesterday we had you referring to the blowup of  
8 Agent Metts' drawing, rendition based on your sketch, I guess  
9 we'll call it, 713B.  I'm going to ask you, as we go through  
10 the photographs, if you could, when I give you the number, if  
11 you could mark on the chart or on the schematic where what's  
12 contained in that picture.

13          A.   Yes, sir.

14          Q.   I think when we stopped yesterday you were describing  
15 for His Honor, for the court, where those particular doors  
16 were and what they representative -- represented.  So let's go  
17 back to that.

18                 There's a red door and a blue door.  Could you  
19 indicate what the red door allowed entry into and what the  
20 blue door did?

21          A.   So the blue door was another apartment that we  
22 weren't searching.  The red door that you can see is ajar,  
23 that's the apartment.  And I use that word lightly,

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1 "apartment." It was a very rough-constructed living  
2 arrangement.

3 Q. Could you just mark 394 on the chart itself?

4 A. 394?

5 Q. 394.

6 A. And that will be the red door?

7 Q. Yes, please.

8 A. Okay.

9 TC [MR. MILLER]: Please show the witness 392 for  
10 identification.

11 Q. Do you recognize that ----

12 A. Yes.

13 Q. ---- photograph?

14 And what is that photo -- what is represented in that  
15 photograph, Agent?

16 A. So we called this area the courtyard. And when you  
17 look at the other picture where you saw the blue door and the  
18 red door, that area here, we called that the courtyard; and  
19 that is the area that we labeled Room D, which is our standard  
20 search procedure.

21 Q. It appeared to be still under construction. Would  
22 that be a fair statement?

23 A. So it appears that way, but I think in this instance

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1 in these -- these communities, everything always looks like  
2 it's under construction.

3 Q. All right. If you could mark 392, please.

4 A. [Did as directed.]

5 Q. And the marking of the rooms -- again, just briefly,  
6 we mark each room for what purpose? What area?

7 A. Our standard search procedure, we put signs up with  
8 "Room" -- we label them Room A, B, C, D so we can discern in  
9 the photographs and -- where we collected evidence.

10 Q. And would each agent collecting evidence then use  
11 those references?

12 A. They would try to do so, yes.

13 Q. 393, please. Recognize that photograph, what is  
14 contained in 393?

15 A. Yes.

16 Q. If you could, please, describe what it is.

17 A. That was an item that we found in the courtyard area.  
18 You can see the blue door. So it was to the right, like if  
19 you were looking straight on.

20 Q. All right. Please mark it on that chart.

21 A. The number again, sir?

22 Q. 393. 395, please.

23 A. That's the red door to the apartment.

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1 Q. All right. Is it a double, sort of a double door?  
2 A. Yes.  
3 Q. All right. Was it locked when you arrived there?  
4 A. I don't believe so.  
5 Q. Mark it on the chart, please.  
6 A. And that number was again?  
7 Q. 395.  
8 A. Okay.  
9 Q. 396?  
10 A. That's the door when it's ajar.  
11 Q. All right. Again, on the chart, 396.  
12 398, recognize that?  
13 A. Yes.  
14 Q. What's that?  
15 A. That's the entranceway and some light switches and  
16 some exposed plumbing.  
17 Q. Is that what we might call a rough-in plumbing?  
18 A. Rough-in, yes.  
19 Q. If you would mark that, please, 398.  
20 A. **[Did as directed.]**  
21 Q. 397, please. Agent, do you recognize that  
22 photograph?  
23 A. Yes.

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1 Q. All right. If you could describe that view, please,  
2 from where it is and what we're looking at?

3 A. So when you open the door, this is the view that you  
4 have looking straight ahead. That's the entire apartment,  
5 looking straight.

6 Q. Let me stop you there. We'll get into it a little  
7 later, but does that window have certain significance?

8 A. Yes.

9 Q. All right. If you could, please, mark it 397.

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

11 Q. 404, please. Do you recognize that?

12 A. Yes.

13 Q. What is that?

14 A. That's a depiction of Room A. And that door went to  
15 the other apartment. It was locked.

16 Q. It was locked?

17 A. Yes.

18 Q. If you could mark that on the photograph, please?

19 A. Yes.

20 Q. 405, please. Do you recognize that photograph?

21 A. Yes.

22 Q. Would you describe what is shown in that particular  
23 photograph?

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1       A.    So that's, again, looking straight into the apartment  
2 but on the left side.  And the items on the floor was -- we  
3 called it their little kitchen area.

4       Q.    Was there a stove there or were they just ----

5       A.    It -- it looked like camping.  Like -- I think there  
6 was like a little thing that you could heat things up, but it  
7 was just an area where they would have cooked food.

8       Q.    All right.  If you could mark, please, on the chart,  
9 405.

10      A.    [**Did as directed.**]

11      Q.    Prosecution Exhibit 402 for Identification.  Do you  
12 recognize that photograph, Agent?

13      A.    Yes.

14      Q.    What is that?

15      A.    We called it the kitchen area.  It was where it  
16 looked like food or drinks were prepared.

17      Q.    All right.  It appears that there is some water or  
18 something in the bottle -- excuse me -- in the clear sort  
19 of -- or opaque jug; is that correct?

20      A.    Yes.

21      Q.    All right.  If you would mark that, please, 402.

22      A.    [**Did as directed.**]

23      Q.    Prosecution Exhibit 409 for Identification, please.

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1 What is depicted in 409, Agent?

2 A. This was the room that we labeled B, and this was the  
3 sleeping area.

4 Q. That's how it appeared that day?

5 A. Yes.

6 Q. All right. If you would, please, mark 409 on the  
7 chart.

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

9 Q. Prosecution Exhibit 410, please. Do you recognize  
10 that photograph?

11 A. Yes.

12 Q. And what is depicted in it?

13 A. That same sleeping area, just another angle.

14 Q. Mark it, please.

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

16 Q. 412 for Identification. Do you recognize that  
17 photograph?

18 A. Yes.

19 Q. All right. And what is in that photograph?

20 A. So that's the view from the window where you can see  
21 the USS COLE with the blast in the side.

22 Q. You could actually see the COLE clearly from that  
23 window?

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1 A. Very clearly, yes.

2 Q. 412, please.

3 A. [Did as directed.]

4 Q. Prosecution Exhibit 4 -- excuse me, 848 for  
5 Identification, do you recognize that? Is that the same  
6 window?

7 A. Yes.

8 Q. Is it?

9 A. Yes.

10 Q. All right. Again, what can you see through that  
11 window?

12 A. So what number did you say that was, sir?

13 Q. That's 848.

14 A. Yes. It's the same view and you can see the ship  
15 with the dark -- the dark spot in the middle is the hole from  
16 the explosion.

17 Q. And did you actually look out that window?

18 A. I did.

19 Q. All right. And could you clearly see the COLE?

20 A. Very clearly.

21 Q. All right. Would you mark that on the chart, please.

22 A. That's 848?

23 Q. 848, Agent. Thank you.

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1 A. [Did as directed.]

2 Q. Prosecution Exhibit 413, please. Is this photograph  
3 taken from that window?

4 A. Yes.

5 Q. All right. Again, for the record, could you describe  
6 what's in Prosecution Exhibit 413.

7 A. This is the view from the area -- sleeping area in  
8 the back where you can see the ship.

9 Q. Would you mark that, please.

10 A. Yes. 413?

11 Q. Yes, ma'am.

12 A. [Did as directed.]

13 Q. Prosecution Exhibit 418. Appears to be from the roof  
14 of the apartment; is that correct?

15 A. Yes.

16 Q. And can you also see the COLE in it?

17 A. Yes.

18 Q. All right. If you would mark that, please, 418.

19 A. [Did as directed.]

20 Q. Prosecution 411. Describe what's in the photograph,  
21 411, if you recognize it.

22 A. This is the area we called the -- their sleeping  
23 area.

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1 Q. And was there like a mattress on the floor?

2 A. It's a -- a mattress and some mats and blankets.

3 Q. If you would, please, mark 411 on the chart.

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

5 Q. Prosecution Exhibit 406 for Identification. What's  
6 depicted in that photograph?

7 A. So this is a photo standing in the back where the  
8 sleeping area is looking forward towards the front of the  
9 apartment.

10 Q. Mark that photograph on the chart, please.

11 A. Is that 40 ----

12 Q. 406. I'm sorry.

13 A. 6.

14 Q. Prosecution Exhibit 400 for Identification. Do you  
15 recognize what's contained in this photograph?

16 A. Yes.

17 Q. What's contained in this photograph?

18 A. So we labeled this Room C. We -- this is the  
19 bathroom.

20 Q. Would you mark that on the chart. It's number 400.

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

22 Q. Would "primitive" be a description of that bathroom?

23 A. That would be a nice word to use, sir.

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1 Q. All right. Prosecution Exhibit 399, please. Do you  
2 recognize that photograph?

3 A. Yes.

4 Q. And what's contained in photograph 399?

5 A. That would be the shower area, sir.

6 Q. All right. Could you mark that on the chart, please.

7 A. Yes. 399?

8 Q. Yes, ma'am.

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

10 Q. Prosecution Exhibit 408, please, for Identification.  
11 Do you recognize this photograph?

12 A. Yes.

13 Q. What do you recognize it to be?

14 A. That's another view looking towards the front, and --  
15 and that's me on the -- on the left.

16 Q. All right. And there's a door in the photograph,  
17 correct?

18 A. Yes.

19 Q. And it has a word on it?

20 A. Yes.

21 Q. What's that word?

22 A. "Gentlemen."

23 Q. "Gentlemen," all right. And what was behind that

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1 door?

2 A. That was to another apartment.

3 Q. All right. If you could, please, mark it on the  
4 chart.

5 A. Is that 406?

6 Q. It is 408.

7 A. 408?

8 Q. Yes, ma'am.

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

10 Q. Prosecution Exhibit 407 for Identification. And,  
11 again, if you could indicate what wall this depicts.

12 A. Hold on. I can't see the label on there, but -- it's  
13 A or B. I cannot see the label on it.

14 Q. Using the "Gentlemen" door as a ----

15 A. I think it's A.

16 Q. All right.

17 A. Yes.

18 Q. If you could mark it on the chart, please.

19 A. And the number is 407?

20 Q. 407.

21 A. All right.

22 Q. That would be the wall next to the "Gentlemen" -- or  
23 sort of where the "Gentlemen" door is located?

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1 A. Yes.

2 Q. Prosecution Exhibit 401, please, for Identification.

3 Do you recognize that?

4 A. Yes.

5 Q. And what's depicted in that photograph?

6 A. That's another view looking out towards the front of  
7 the apartment, and you can see the -- the kitchen area on the  
8 right.

9 Q. And is that -- which room is that?

10 A. That is A.

11 Q. All right. If you could mark it, please, on the  
12 chart, 401.

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

14 Q. Prosecution Exhibit 386 for Identification, please.

15 Do you recognize that photograph, ma'am?

16 A. Yes.

17 Q. And what is that?

18 A. That's a picture looking towards where the apartment  
19 was located.

20 Q. From?

21 A. The ship.

22 Q. Mark that, please.

23 A. Is that 396?

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1 Q. Actually, you don't need to mark that one.

2 A. Okay.

3 Q. There's nowhere to mark it.

4 Could we look at Prosecution Exhibit 387. That is a  
5 photograph of what?

6 A. That's the hill all the apartments were on, including  
7 the one we searched.

8 Q. Looking from the COLE?

9 A. Yes. It's a closeup.

10 Q. I'm going to circle an area and ask you if you  
11 recognize this part of the photograph. It's the center of it.

12 A. Yes.

13 Q. What's there?

14 A. That the -- that's where the apartment was that we  
15 searched.

16 Q. For the record, that would be the building in the  
17 center of the photograph; is that correct?

18 A. Yes.

19 Q. Thank you. You may return to your seat.

20 A. Thank you.

21 Q. Yesterday while you were -- during your testimony,  
22 you indicated that the search occurred over a two-day period,  
23 correct?

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1 A. Yes, sir.

2 Q. You also indicated that there were some security --  
3 serious security concerns?

4 A. Yes.

5 Q. Did that cause, in any way, for you and the team to  
6 shorten the time in which you conducted your search?

7 A. Yes.

8 Q. You indicated you were the team leader. Were you the  
9 team leader on both days?

10 A. I believe so, yes.

11 Q. And did you establish, for lack of a better term, a  
12 procedure or a protocol for conducting the search?

13 A. Yes.

14 Q. And if you could briefly describe for His Honor what  
15 that procedure was.

16 A. So we didn't know how much time we would have, and we  
17 were under a lot of duress for security. So we -- I came up  
18 with a plan to get in and out as fast as we could. So  
19 basically we photographed the scene, the entrance photographs,  
20 put the room signs up and collected the evidence that we  
21 could. And then, time permitting, we took more photographs,  
22 and then -- actually, the first day we were told to leave.

23 Q. Was there a central repository or a single agent

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1 responsible for the collection of the evidence?

2 A. Yes. Usually we work on a team, a team concept,  
3 where people have different duties. But in this instance, it  
4 was severely condensed because of, A, a lack of personnel; and  
5 B, because of the security concerns.

6 Q. Were you always able to get the evidence to that  
7 person who had been designated? By that I mean if you  
8 collected the evidence, generally you would give it to the  
9 person responsible for collection, correct?

10 A. Right. We had a -- like a box we would try to put  
11 all the evidence in.

12 Q. All right.

13 A. So if we had to leave suddenly, we could make sure we  
14 took everything with us.

15 Q. During the search, were any Yemeni enforcement  
16 personnel present?

17 A. Yes. Yes.

18 Q. You had occasion to seize evidence?

19 A. I did.

20 TC [MR. MILLER]: Your Honor, we're going to ask  
21 permission to use the ELMO.

22 MJ [Col SPATH]: You may.

23 TC [MR. MILLER]: All right. Provide the witness, please,

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1 with Prosecution Exhibit 300 for Identification.

2 Q. Take a look at that, please.

3 A. [Did as directed.]

4 Q. Do you recognize that?

5 A. Yes.

6 Q. Did you seize it?

7 A. Yes.

8 Q. How do you know that you seized it?

9 A. My name is on the chain of custody.

10 Q. Now, the form that's used on the chain of custody on  
11 the exhibit itself, 300, is that an FBI form?

12 A. The label or the -- the chain, the 192?

13 Q. Not the 192, the other one, the one that's actually  
14 on the evidence, Agent.

15 A. Yeah, the evidence label is not an FBI form.

16 Q. And what form is used?

17 A. It's an NC -- a Naval Criminal Investigative Service,  
18 NCIS, evidence tag.

19 Q. And why were you using NCIS tags?

20 A. Because we ran out of equipment.

21 Q. All right.

22 A. And supplies.

23 Q. I'm placing on the ELMO at this time Prosecution

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1 Exhibit 300A for Identification. Do you recognize that item?

2 A. Yes, sir.

3 Q. And what do you recognize that item to be?

4 A. It's like a plastic material bag.

5 Q. All right. Was that -- is that the item contained in  
6 Prosecution Exhibit 300?

7 A. Yes.

8 Q. See if we can make this out. Is there a K tag number  
9 with the item?

10 A. Yes.

11 Q. Can you make that out?

12 A. K401.

13 Q. Looking at the bag itself, the actual exhibit,  
14 Prosecution Exhibit 300, does it have a K number on it?

15 A. Yes.

16 Q. And what is that number?

17 A. K401.

18 Q. So it matches the number in Prosecution Exhibit 300A?

19 A. Yes, sir.

20 Q. Again, looking at the exhibit itself, 300, does it  
21 have a YM4 number on it? If you can make one out. Would it  
22 be helpful to open it for you?

23 A. No, the -- the writing on here looks like some -- it

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1 didn't -- it's hard to read, but I can see 183. I can see YM  
2 and then 183.

3 Q. All right. And does it have a 1B number?

4 A. Yes.

5 Q. What's that number?

6 A. 1B463.

7 Q. Is there a chain of custody, an FD-192, attached to  
8 the exhibit?

9 A. Yes.

10 Q. Look at that, please. Does it contain a 1B number?

11 A. Yes.

12 Q. And what does -- does it match -- what is that  
13 number?

14 A. 1B463.

15 Q. Does that match the number on the actual Exhibit 300?

16 A. Yes.

17 Q. And does it have YM4 number? Does the chain of  
18 custody have YM4 number?

19 A. Yes.

20 Q. What is that number?

21 A. YM4-183.

22 Q. And does that match the one contained on the exhibit,  
23 Prosecution Exhibit 300?

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1 A. Yes.

2 Q. I'm placing on the ELM0 Prosecution Exhibit 300C for  
3 Identification. Do you recognize that form?

4 A. Yes.

5 Q. Is that an exact duplicate of the chain of custody  
6 for Prosecution Exhibit 300?

7 A. Yes.

8 Q. Does it contain your signature?

9 A. Yes.

10 Q. And where is your signature?

11 A. The first line.

12 Q. And did you then surrender the object or the evidence  
13 to the person underneath?

14 A. Yes.

15 Q. Lastly, as best as you can tell, looking at  
16 Prosecution Exhibit 300 -- oh, I'm sorry. Do you recognize  
17 that tag?

18 A. Yes.

19 Q. That would be -- excuse me, the photograph is  
20 Prosecution Exhibit 300B. Do you recognize that photograph?

21 A. Yes.

22 Q. What's contained in it?

23 A. That's the evidence tag on the item.

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1 Q. Fair and accurate depiction of it?

2 A. Yes.

3 TC [MR. MILLER]: The government would move, Your Honor,  
4 for the admission of Prosecution Exhibit 300A, B, and C.

5 MJ [Col SPATH]: Noted. Thank you.

6 TC [MR. MILLER]: Provide the witness with Prosecution  
7 Exhibit 301.

8 Q. Have you had an opportunity to look at that, ma'am?

9 A. Yes.

10 Q. What's contained in Prosecution Exhibit 301?

11 A. These are various swabbings.

12 Q. And were there personnel on scene to take swabbings?

13 A. Yes.

14 Q. Are you familiar with an individual by the name of  
15 Leo West?

16 A. Yes.

17 Q. And who is Leo West?

18 A. He was there. He was from our laboratory.

19 Q. Now, you indicated there are swabbings. If you could  
20 describe the packaging for the record, please.

21 A. Can I open this?

22 Q. You may.

23 A. So there are little glass vials where they put each

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1 sample inside, and then we -- I packed it with this paper so  
2 it wouldn't -- wouldn't rattle around.

3 Q. All right.

4 A. And then put that inside the plastic box.

5 Q. And did you initial the box?

6 A. This box, I do not believe I initialed this box.

7 Q. Did anyone -- do you see any other initials on there  
8 that you believe are significant?

9 A. Yes, Leo West.

10 Q. All right. You packaged that up; is that correct?

11 A. Right. After he gives it to me, yes.

12 Q. And was it then forwarded to an evidence collection  
13 person?

14 A. Yes.

15 Q. All right. I'm going to show you a photograph,  
16 Prosecution Exhibit 301A, and ask you if you recognize that  
17 photograph.

18 A. Yes.

19 Q. And what do you recognize that photograph to be?

20 A. That's this box.

21 Q. Is it the -- it's a top view?

22 A. Yes.

23 Q. Placing on the ELMO Prosecution Exhibit 301B for

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1 Identification. Do you recognize that?

2 A. Yes.

3 Q. All right. And what is contained in that photograph?

4 A. This box.

5 Q. And it has some K numbers on the side; is that  
6 correct?

7 A. Yes.

8 Q. What are those K numbers?

9 A. Those K numbers are all of the samples.

10 Q. All right. And if you could read into the record the  
11 numbers that are shown on the photograph itself, Prosecution  
12 Exhibit 301B.

13 A. K402 through K408.

14 Q. Thank you. Placing on the ELM0 Prosecution  
15 Exhibit 301C for Identification. Do you recognize that?

16 A. Yes.

17 Q. What do you recognize that to be?

18 A. It's the bottom of the box.

19 Q. Now, looking at the exhibit itself, does the exhibit  
20 itself contain a 1B number?

21 A. Like on the box?

22 Q. Yeah. On the exhibit itself, either the packaging or  
23 the box.

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- 1 A. Yes.
- 2 Q. What is that number, Agent?
- 3 A. 1B464.
- 4 Q. Does it have a YM number, per chance?
- 5 A. Yes.
- 6 Q. What is that?
- 7 A. YM4-184.
- 8 Q. Is there a chain of custody form attached to it?
- 9 A. Yes.
- 10 Q. Take a look at that, please. Looking at that chain
- 11 of custody form, does it have a 1B number?
- 12 A. Yes.
- 13 Q. And what is that number?
- 14 A. 1B464.
- 15 Q. And does it have YM number?
- 16 A. Yes. YM4-184.
- 17 Q. And, Agent, do those match the numbers contained on
- 18 the actual exhibit, Prosecution Exhibit 301?
- 19 A. Yes.
- 20 Q. Placing on the ELM0 Prosecution Exhibit 301E for
- 21 Identification. Do you recognize that form, Agent?
- 22 A. Yes, I do.
- 23 Q. And is that an exact duplicate of the form that

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1 you've just described?

2 A. Yes.

3 Q. Is your signature contained on that form?

4 A. Yes, sir.

5 Q. And where?

6 A. On the first line.

7 Q. All right. And did you then surrender the object  
8 approximately an hour later to the person underneath?

9 A. Yes.

10 Q. Placing on the ELMO Prosecution Exhibit 301D for  
11 Identification. Do you recognize that photograph, Agent?

12 A. Yes.

13 Q. And what is contained in that photograph?

14 A. It's the box and the evidence label.

15 TC [MR. MILLER]: Your Honor, the prosecution would move  
16 for the admission of Prosecution Exhibits 301A, B, C, D, and  
17 E.

18 MJ [Col SPATH]: Noted. Thank you.

19 TC [MR. MILLER]: If you could provide the witness with  
20 Prosecution Exhibit 305A.

21 Q. Do you have 305?

22 A. Yes.

23 Q. Do you recognize 305?

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1 A. Yes.

2 Q. What do you recognize it to be?

3 A. Shampoo bottle top.

4 Q. Is that something that you seized?

5 A. Yes.

6 Q. And how do you know that you seized it?

7 A. My name is on the evidence label and, also, I signed  
8 for it on the chain of custody.

9 Q. Placing on the ELM0 Prosecution Exhibit K4 -- excuse  
10 me, Prosecution Exhibit 305A. Do you recognize that?

11 A. Yes.

12 Q. All right. And is that the item contained in the  
13 actual exhibit, 305?

14 A. Yes.

15 Q. Is there a K number attached to it?

16 A. K423.

17 Q. Thank you. If you would look at the actual exhibit,  
18 is there a K number attached to it?

19 A. Yes. The same, K423.

20 Q. So the one on the exhibit, Prosecution Exhibit 305,  
21 matches that on the photograph, 305A, correct?

22 A. Yes.

23 Q. Again looking at the actual exhibit, 305, does it

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1 have a -- does it have a 1B number?

2 A. Yes. 1B447.

3 Q. And does it have a YM number?

4 A. YM4-167.

5 Q. Is there a chain of custody form attached to it?

6 A. Yes.

7 Q. Could you, please, take a look at that. Does it have  
8 a 1B number?

9 A. Yes. 1B447.

10 Q. And does it have a YM4 number?

11 A. YM4-167.

12 Q. Does the YM -- do those numbers match the ones  
13 contained on the actual exhibit, 305?

14 A. Yes.

15 Q. Placing on the ELM0 Prosecution Exhibit 305C. Do you  
16 recognize that?

17 A. Yes.

18 Q. Is that an exact duplicate of the form that you have  
19 just described, the chain of custody form you've just  
20 described?

21 A. Yes.

22 Q. Is your signature contained on it?

23 A. Yes, in the first line.

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1 Q. All right. And did you surrender it to the person  
2 underneath?

3 A. Yes.

4 Q. Lastly, I want to place on the -- at least as to this  
5 exhibit, Prosecution Exhibit 305B for Identification. Do you  
6 recognize that?

7 A. Yes.

8 Q. Is that a fair and accurate depiction of the evidence  
9 tag for Prosecution Exhibit 305?

10 A. Yes.

11 TC [MR. MILLER]: Your Honor, the government would move  
12 for the introduction of Prosecution Exhibits 305A, B, and C.

13 MJ [Col SPATH]: Noted. Thank you.

14 TC [MR. MILLER]: Please go back for a moment and provide  
15 the witness with Prosecution Exhibit 302.

16 Q. Do you have before you Prosecution Exhibit 302?

17 A. Yes.

18 Q. Are those additional swabs that were packaged with  
19 Prosecution 301, or are they their own separate ----

20 A. This is the same -- yeah, the same box from before.

21 Q. Four of those swabs are designated as 302, correct?

22 A. Yes.

23 Q. And I'll ask you the same questions. Were those

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1 provided to you by Special Agent Leo West?

2 A. Yes.

3 Q. All right. I will just show you one photograph for  
4 the record. It's Prosecution Exhibit 302A. Do you recognize  
5 that photograph?

6 A. Yes.

7 Q. All right. And that's a photograph of the container  
8 holding 301 and 302, correct?

9 A. Yes.

10 Q. Fair and accurate depiction of it?

11 A. Yes, sir.

12 Q. Show you -- if you would look at the chain of custody  
13 form for it, please. Does it have a 1B number and a YM4  
14 number?

15 A. Yes. 1B464, YM4-184.

16 Q. And does that match the numbers contained on the box  
17 itself -- or the exhibit itself, according to the packaging?

18 A. According to the packaging, yes.

19 Q. All right. I'll show you what's marked as  
20 Prosecution Exhibit -- excuse me -- 402E for Identification.  
21 Do you recognize that?

22 A. Yes.

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

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1 A. It's a copy of the chain of custody.

2 Q. For the four vials marked 40 -- 302, correct?

3 A. Yes.

4 Q. Is that an exact duplicate of the FD-192?

5 A. Yes.

6 Q. And is that your signature on the top?

7 A. Yes.

8 Q. Again, you then surrendered it to the person  
9 underneath you, underneath your name, for storage?

10 A. Yes.

11 Q. For the record, showing you Prosecution Exhibit 402D  
12 for Identification -- excuse me, 403 for Identification. Do  
13 you recognize that?

14 A. Yes.

15 Q. And is 403D -- what is depicted in 403D?

16 A. It's the box with -- containing the swabs.

17 TC [MR. MILLER]: Your Honor, may I have a minute?

18 MJ [Col SPATH]: You may.

19 [Pause.]

20 Q. I believe I was asking you about 402. Let me -- let  
21 me go back and change this. I showed you a photograph of  
22 302A. I'm going to show you 302D -- excuse me. I'm sorry,  
23 I'm a little confused here.

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1           Show you a photograph of 302D. Do you recognize that  
2 photograph?

3           A. Yes.

4           Q. And what is contained in that photograph?

5           A. A box containing the samples, swabs.

6           Q. Fair and accurate depiction of it?

7           A. Yes.

8           Q. So that I'm clear, 302E is an exact duplicate of the  
9 chain of custody for that form -- for that exhibit, correct?

10          A. Yes.

11          TC [MR. MILLER]: Your Honor, the prosecution would move  
12 for the admission of 402D -- excuse me, 302D, 302E, and 302A.

13          MJ [Col SPATH]: I understand. Noted. Thank you.

14          TC [MR. MILLER]: I'm confused. They broke this into  
15 little pieces.

16          Q. If we could -- if you could continue to hold the --  
17 or continue with that particular exhibit, there are also four  
18 of those vials marked Prosecution Exhibit 303 [sic]; is that  
19 correct? It may be marked on the bag, too.

20          A. Not on the vials. The bag indicates 402 through  
21 40 -- 408.

22          Q. All right. Let's start with 403A. In looking at the  
23 box, do you recognize the box as -- as the prosecution exhibit

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1 containing the vials? Do you recognize that?

2 A. Yes.

3 Q. I'll show you a photograph of that box. Again, for  
4 the record, it contains Prosecution Exhibits 303; is that  
5 correct?

6 MJ [Col SPATH]: Is it 4? Is it 403 or 303?

7 TC [MR. MILLER]: 303.

8 A. So this box contains 403 through 408.

9 Q. All right.

10 A. That's all that's in here.

11 Q. That's correct.

12 A. Okay.

13 Q. I'm going to keep asking. Got to get them into  
14 evidence.

15 MJ [Col SPATH]: I just want to make sure we're talking  
16 about the right numbers. I keep hearing 303.

17 A. Sir, the exhibit ----

18 MJ [Col SPATH]: Tell me, yeah.

19 TC [MR. MILLER]: Then I'm mistaken ----

20 MJ [Col SPATH]: That's all right. She's got it. Okay.

21 WIT: The yellow -- the yellow exhibit says Exhibit 301  
22 through 304.

23 MJ [Col SPATH]: Perfect.

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1 WIT: Inside the box, the box vials, these little glass  
2 things are labeled K402 through 408.

3 MJ [Col SPATH]: Perfect. That helps. So the  
4 K numbers ----

5 WIT: It's the same box.

6 MJ [Col SPATH]: Got it. The K numbers are 400s.

7 WIT: Right. And the prosecution exhibit is 301 through  
8 304.

9 MJ [Col SPATH]: Okay. That helps me a lot. Thank you.  
10 Trying to keep track here. Thanks.

11 WIT: I was confused, so ----

12 MJ [Col SPATH]: You weren't alone. All right. Keep  
13 going.

14 TC [MR. MILLER]: Actually -- all right.

15 Q. So as to 303, that's contained in the photograph  
16 303A, correct?

17 A. Repeat the question, sir.

18 Q. All right. The photograph on the ELM0 is Prosecution  
19 Exhibit 303A. Does that contain the vials?

20 A. Yes.

21 Q. And it contains vial 303, correct, to the best of  
22 your knowledge?

23 A. So the vials are marked the 400 numbers.

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1 Q. All right. I'm talking about the packaging -- let me  
2 walk up.

3 A. Okay.

4 TC [MR. MILLER]: Permission to approach, Your Honor?

5 MJ [Col SPATH]: You may.

6 WIT: That is what I've got on here, exhibits, and  
7 then ----

8 Q. Right. The joint exhibit contains a series of vials.  
9 Could you count the vials, please?

10 A. There's -- there's eight vials in here.

11 Q. All right. Those vials are contained in a package  
12 that has the -- has four exhibit numbers, correct?

13 A. Yes, sir.

14 Q. And those four exhibit numbers are?

15 A. 301, 302, 303, and 304.

16 Q. The photograph that is contained on the ELMO is  
17 marked Prosecution Exhibit 303A, correct?

18 A. Yes, sir.

19 Q. So the vials are contained in that plastic container  
20 that you have there, correct?

21 A. Yes. All of the vials, yes.

22 Q. And is there -- there's a chain of custody attached  
23 for the vials marked 303 -- or that the lab has marked as 303,

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1 correct?

2 A. Yes, sir.

3 Q. If you would take a look at that. Does it have the  
4 same 1B464 number and YM4-184 number?

5 A. Yes, sir.

6 Q. I'm placing on the ELM0 Prosecution Exhibit 303E.  
7 Does that reflect -- is that an exact duplicate of the chain  
8 of custody for the vials that are going to be referred to as  
9 Exhibit 303?

10 A. Yes.

11 Q. And again, for the record, is this the evidence tag  
12 for the Exhibit 303?

13 A. Yes.

14 TC [MR. MILLER]: Your Honor, the government would move  
15 for the admission of Prosecution Exhibits 303A, D, and E.

16 MJ [Col SPATH]: Noted. Thank you.

17 Q. All right. Lastly, again placing on the ELM0 the  
18 same photograph, Prosecution Exhibit 304E. That's the same  
19 box to which you've referred, correct?

20 A. Yes.

21 Q. Contains the swabs that are -- that would be used as  
22 304, correct?

23 A. Yes.

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1 Q. Is this the evidence receipt for it, the 302 -- the  
2 192?

3 A. Yes.

4 Q. Again, it has the 1B464 number and the 4 -- YM4-184  
5 number, correct?

6 A. Yes, sir.

7 Q. And do you recognize the photograph, 304D?

8 A. It's 304A. Yes.

9 Q. Do you recognize this photograph?

10 A. I do.

11 Q. And what do you recognize 304D to be, this  
12 photograph?

13 A. This photograph is 304A.

14 Q. All right. The photograph is marked as 304D, all  
15 right?

16 A. Okay. There.

17 Q. I'm going to ask you, do you recognize -- I just want  
18 to know if you recognize what's in the photograph.

19 A. I do, sir.

20 Q. And what's in it?

21 A. The box that's here.

22 TC [MR. MILLER]: All right. We'd move for the admission  
23 of Prosecution 304A, D, and E, Your Honor.

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1 MJ [Col SPATH]: Noted. Thank you.

2 Q. Prosecution Exhibit 306 for Identification, I believe  
3 it has one object in it. Do you recognize that, Agent?

4 A. Yes.

5 Q. All right. Did you seize that item?

6 A. Yes.

7 Q. And what is that item?

8 A. I labeled it as a clothesline.

9 Q. Placing on the ELMO Prosecution Exhibit 306A. Do you  
10 recognize that?

11 A. Yes.

12 Q. What do you recognize that to be?

13 A. It's the item in this bag.

14 Q. When you say "the item in this bag," it's the item  
15 contained in Prosecution Exhibit 306?

16 A. Yes.

17 Q. Can you read the K number attached or contained in  
18 the photograph, Prosecution Exhibit 306A?

19 A. K425.

20 Q. If you look on the exhibit itself, Prosecution  
21 Exhibit 306, do you recognize that?

22 A. Yes.

23 Q. What do you recognize that to be? Or excuse me. You

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1 do recognize the -- let me back up.

2 The exhibit itself, does it contain a K number?

3 A. Yes.

4 Q. What's that K number?

5 A. K425.

6 Q. Does that match the K number contained in the  
7 photograph, Prosecution Exhibit 306A?

8 A. Yes.

9 Q. Looking again at the actual exhibit, 306, does it  
10 contain a 1B number and a YM number?

11 A. Yes.

12 Q. Let's start with the YM number. What is that, Agent?

13 A. YM4-169.

14 Q. And the 1B number?

15 A. 1B449.

16 Q. Is there a chain of custody form attached to that?

17 A. Yes.

18 Q. All right. And what is that -- what are the 1B and  
19 YM numbers on the chain of custody form?

20 A. 1B449 and YM4-169.

21 Q. And do those numbers match the numbers contained on  
22 the exhibit, Prosecution Exhibit 306?

23 A. Yes.

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1 Q. Placing on the ELM0 Prosecution 306C. Do you  
2 recognize this form?

3 A. Yes.

4 Q. Is that an exact duplicate of the form that you've  
5 just described?

6 A. Yes.

7 Q. Your signature contained on it?

8 A. Yes, sir.

9 Q. Where is that contained?

10 A. The first line.

11 TC [MR. MILLER]: Your Honor, the prosecution would move  
12 for the admission of Prosecution Exhibits 306A, B, and C.

13 MJ [Col SPATH]: Noted. Thank you.

14 TC [MR. MILLER]: Provide the witness with Prosecution  
15 Exhibit 30 -- 307A.

16 Q. Do you recognize 307A -- or excuse me, 307.  
17 Prosecution Exhibit 307, do you recognize that?

18 A. Yes.

19 Q. And did you seize that?

20 A. Yes.

21 Q. And what is that item?

22 A. I labeled it a coat hanger.

23 Q. And your handwriting is on the evidence bag itself;

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1 is that correct?

2 A. Yes.

3 Q. Placing on the ELM0 Prosecution Exhibit 307A. Do you  
4 recognize that?

5 A. Yes.

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

7 A. The item in the bag.

8 Q. All right. And when you say "in the bag," it's the  
9 item in 307?

10 A. Yes, 307.

11 Q. Is there a K number associated with that item in the  
12 photograph, Prosecution Exhibit 307? Hold on. I will get it  
13 to you.

14 Can you read that? If you can.

15 A. It's K42-something.

16 Q. All right. Fairly blurred?

17 A. Yes.

18 Q. All right. Let's move on to the actual exhibit  
19 itself, 307. You indicated that's your handwriting on the  
20 evidence bag, correct?

21 A. Yes.

22 Q. Does it contain a 1B number and a YM4 number?

23 A. Yes. 1B452 and K428.

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1 Q. You have the 1B number. What is the YM number -- YM4  
2 number?

3 A. YM4-172.

4 Q. Is there a chain of custody form attached to it?

5 A. Yes.

6 Q. If you would, please, look at that form and see  
7 whether or not it contains a 1B number and a one -- YM number.

8 A. 1B452, YM4-172.

9 Q. So does it match the numbers contained on the actual  
10 exhibit, 307?

11 A. Yes.

12 Q. Placing on the ELM0 Prosecution Exhibit 307C. Do you  
13 recognize that form?

14 A. Yes.

15 Q. Is that an exact duplicate of the chain of custody  
16 form you've just described?

17 A. Yes, sir.

18 Q. And does that contain your signature on the first  
19 line?

20 A. Yes.

21 Q. Lastly, I'm placing on the ELM0 Prosecution  
22 Exhibit 307B. Do you recognize that?

23 A. Yes.

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1 Q. And what is that?

2 A. That's a part of an evidence bag.

3 Q. Is that the evidence bag in 307?

4 A. Yes.

5 Q. And is that your handwriting?

6 A. Yes.

7 TC [MR. MILLER]: Your Honor, the prosecution would move  
8 for the admission of 307A, B, and C.

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

10 TC [MR. MILLER]: Provide the witness, please, with  
11 Prosecution Exhibit 308.

12 Q. Do you recognize 308?

13 A. Yes.

14 Q. Did you seize that?

15 A. Yes.

16 Q. "Collected," I guess, is a better word. And how do  
17 you know that you collected it?

18 A. I signed the chain of custody.

19 Q. And what is contained in Prosecution Exhibit 308?

20 A. A curtain.

21 Q. Placing on the ELMO a photograph, Prosecution 308A.  
22 Do you recognize that?

23 A. Yes.

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Q. And what is contained in the photograph, 308A?

2 A. This is the curtain that's in this bag, 1B454.

3 Q. All right. All right. And this is the Prosecution  
4 Exhibit 308, correct?

5 A. Yes.

6 Q. And this is the item you seized?

7 A. Yes.

8 Q. If you would, please, look at the bag itself. Does  
9 it have a YM number and a 1B number?

10 A. 1B454, YM4-174.

11 Q. Is there a chain of custody form associated with that  
12 or attached to that exhibit?

13 A. Yes.

14 Q. Would you take a look at it, please. Does it have a  
15 1B number and a YM number?

16 A. Yes.

17 Q. What is the 1B number?

18 A. 1B454.

19 Q. And the YM number?

20 A. YM4-174.

21 Q. And do those match the numbers contained on the  
22 actual exhibit for -- excuse me -- Prosecution Exhibit 308?

23 A. Yes.

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Q. Placing on the ELM0 Prosecution Exhibit 308C for  
2 Identification. Do you recognize that?

3 A. Yes.

4 Q. Is that an exact duplicate of the chain of custody  
5 form you've just described?

6 A. Yes, sir.

7 Q. Placing on the ELM0 Prosecution Exhibit 308B, as in  
8 boy. Do you recognize that?

9 A. Yes.

10 Q. And what is that?

11 A. That's the evidence label on this item.

12 Q. Fair and accurate depiction of it?

13 A. Yes.

14 TC [MR. MILLER]: Move for the admission, Your Honor, of  
15 Prosecution Exhibit 308A, B, and C.

16 MJ [Col SPATH]: Noted. Thanks.

17 TC [MR. MILLER]: Provide the witness with Prosecution  
18 Exhibit 309 for Identification.

19 Q. Do you recognize that, Agent?

20 A. Yes.

21 Q. Prosecution Exhibit 309, did you seize that item,  
22 collect that item?

23 A. Yes.

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1 Q. And how do you know that you did so?

2 A. I signed the chain of custody.

3 Q. Place on the ELM0 Prosecution Exhibit 309A. Do you  
4 recognize that item?

5 A. Yes.

6 Q. And is that the item that you seized, Prosecution  
7 Exhibit 309?

8 A. Yes, sir.

9 Q. There's a K number, appears to be written on the --  
10 written on the exhibit itself. Can you read that?

11 A. Yes, K431.

12 Q. If you would take a look at the actual exhibit, 309.  
13 Do -- is there a K number contained on it?

14 A. Yes, K431.

15 Q. So it matches the one written on the exhibit; is that  
16 correct?

17 A. Yes, sir.

18 Q. And contained in the photograph, too, correct?

19 A. Yes, sir.

20 Q. Directing your attention again back to the actual  
21 Exhibit 309, is there a 1B and a YM number on it?

22 A. 1B455.

23 Q. And the YM number?

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1 A. YM4-175.

2 Q. If you would look, see if there is a chain of custody  
3 form attached to that exhibit.

4 A. Yes.

5 Q. All right. And does it have a 1B and a YM number?

6 A. Yes 1B455, YM4-175.

7 Q. Do those numbers match the numbers contained on the  
8 exhibit?

9 A. Yes.

10 Q. Placing on the ELMO Prosecution Exhibit 309C. Do you  
11 recognize that?

12 A. Yes, sir.

13 Q. Is that an exact duplicate of the chain of custody  
14 form you've just described?

15 A. Yes.

16 Q. Lastly, placing on the ELMO -- for this exhibit --  
17 Prosecution Exhibit 309B. Do you recognize that?

18 A. Yes, sir.

19 Q. Is that your handwriting?

20 A. I believe so.

21 Q. Is that -- what is depicted in that photograph?

22 A. Yes.

23 Q. What is depicted in it?

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1 A. That is the item that's in this bag.

2 Q. The -- the evidence tag for it?

3 A. The evidence tag is an NCIS evidence tag.

4 Q. Fair and accurate depiction of the evidence tag on  
5 Prosecution Exhibit 309?

6 A. Yes.

7 TC [MR. MILLER]: Your Honor, the prosecution would move  
8 for the admission of 309A, B, and C.

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

10 TC [MR. MILLER]: Provide the witness Prosecution  
11 Exhibit 310 for Identification.

12 Q. Agent, do you recognize 310?

13 A. Yes.

14 Q. And what do you recognize them to be?

15 A. Five pieces of metal cookery.

16 Q. Are those items that you collected?

17 A. Yes.

18 Q. And did you fill out the evidence bag?

19 A. I did.

20 Q. I'll show you a photograph, Prosecution  
21 Exhibit 410A for Identification. Do you recognize that?

22 A. Yes.

23 Q. And what is contained in Prosecution Exhibit 410A?

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1 Excuse me. I keep -- 310A. 310A.

2 A. The pieces of cookery.

3 Q. Are those the same pieces of cookery -- or pieces of  
4 cookery contained in Prosecution Exhibit 310?

5 A. Yes.

6 Q. If you would, please, take a look at the actual  
7 Exhibit 310. Does it have a YM number written on it?

8 A. I don't see one on here.

9 Q. If you would look at the evidence tag itself, the bag  
10 contained in it.

11 A. Okay. Sorry, it's up here. YM4-127.

12 Q. Are you able to make out a 1B number anywhere on it?

13 A. 1B405.

14 Q. Is there a green sheet, an FD-192, attached to that  
15 exhibit?

16 A. Yes.

17 Q. If you would take a look at that, if you would,  
18 please, Agent. Does it have a 1B number?

19 A. 1B405.

20 Q. Does it have YM number?

21 A. YM4-127.

22 Q. And do those match the numbers contained on the  
23 actual Exhibit 410?

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1 A. Yes.

2 Q. Placing on the ELM0 Prosecution Exhibit 410C. Do you  
3 recognize that?

4 A. Yes.

5 Q. All right. And is that an exact duplicate of the  
6 chain of custody form you just described?

7 A. Yes.

8 Q. Placing on the ELM0 Prosecution Exhibit 410B. Do you  
9 recognize that?

10 A. Yes.

11 Q. Excuse me, 310B. Do you recognize that?

12 A. Yes, sir.

13 Q. And is that your handwriting?

14 A. It is.

15 Q. All right. And what is depicted in this photograph?

16 A. This is a piece -- a part of an evidence bag.

17 Q. Is 310B a fair and accurate depiction of the evidence  
18 bag?

19 A. Yes.

20 TC [MR. MILLER]: Move for admission, Your Honor, of 310A,  
21 B, and C.

22 MJ [Col SPATH]: Noted. Thank you.

23 Mr. Miller, this is a good place to take our first

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1 break of the morning. Let's take ten minutes. Commission is  
2 in recess.

3 [The R.M.C. 803 session recessed at 1008, 15 February 2018.]

4 [The R.M.C. 803 session was called to order at 1024,  
5 15 February 2018.]

6 MJ [Col SPATH]: These commissions are called back to  
7 order. All the same parties are present. The witness remains  
8 on the stand. Remember you are still under oath. Mr. Miller.

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

10 Provide the witness, please, with Prosecution  
11 Exhibit 311.

12 **DIRECT EXAMINATION CONTINUED**

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

14 Q. Do you recognize Prosecution Exhibit 311?

15 A. Yes.

16 Q. Did you seize it?

17 A. Yes.

18 Q. All right. And how do you know that?

19 A. My handwriting -- or correct that. Just give me a  
20 second. I need to open this bag, so ----

21 [Pause.]

22 A. My handwriting is on the NCIS label.

23 Q. And what is the item?

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1 A. It's a disposable Gillette razor.

2 Q. Placing on the ELM0 Prosecution Exhibit 311A for  
3 Identification. Do you recognize that?

4 A. Yes.

5 Q. And is that the razor that you have just described?

6 A. Yes, sir.

7 Q. The razor contained in 311?

8 A. Yes.

9 Q. Is there a K number attached to the -- contained in  
10 the photograph?

11 A. K440.

12 Q. Thank you. If you would look at the exhibit itself,  
13 the packaging for 311, does it have a K number on it?

14 A. Yes.

15 Q. And what is that number?

16 A. K440.

17 Q. It therefore matches the one in 311A, the photograph?

18 A. Yes.

19 Q. Looking again at the exhibit itself, does it have a  
20 1B and a YM4 number?

21 A. The packaging has 1B425 and YM4-147.

22 Q. Is there a green sheet attached to the exhibit?

23 A. Yes.

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1 Q. If you would look at it, please. Does it have a 1B  
2 number?

3 A. Yes, 1B425.

4 Q. And does the -- the form have a YM number?

5 A. YM4-147.

6 Q. Do those match the numbers contained on the exhibit  
7 itself?

8 A. Yes.

9 Q. Placing on the ELMO Prosecution Exhibit 311C for  
10 Identification. Do you recognize that, Agent?

11 A. Yes.

12 Q. Is that an exact duplicate of the form you've just  
13 described?

14 A. Yes.

15 Q. Placing on the ELMO Prosecution Exhibit 311B. Do you  
16 recognize that?

17 A. Yes.

18 Q. And what is that?

19 A. That's an NCIS evidence label for this item.

20 Q. Is that the evidence label for 311?

21 A. Yes.

22 Q. And is that your handwriting?

23 A. Yes, part -- some of it's my handwriting, yes.

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1 Q. Which is your handwriting, the one in black or the  
2 one in blue?

3 A. Where I scratched off "NCIS" and put "FBI."

4 Q. That's yours?

5 A. That's my handwriting.

6 Q. Is there any other handwriting on it that's yours?

7 A. I don't believe so.

8 Q. Fair and accurate depiction of the label?

9 A. Yes.

10 TC [MR. MILLER]: Your Honor, the prosecution would move  
11 the admission 311A, B, and C.

12 MJ [Col SPATH]: Noted. Thanks.

13 Q. 312, please. 312. Do you recognize 312?

14 A. Yes.

15 Q. Did you seize that particular item? Or "collect" it,  
16 I guess is a better word.

17 A. Yes.

18 Q. And what is that item?

19 A. White rag.

20 Q. I'll show you a -- a photograph, Prosecution  
21 Exhibit 312A -- Prosecution Exhibit 312A for Identification.  
22 Do you recognize that?

23 A. Yes.

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1 Q. And did you collect that at the site, Site 4?

2 A. Yes, I did.

3 Q. All right. And is that the item contained in the  
4 exhibit, 312?

5 A. Yes.

6 Q. Can you make out the K number contained in the  
7 photograph?

8 A. I can see K44.

9 Q. 44?

10 A. I believe it's a 9.

11 Q. All right. If you would, please, take a look at the  
12 exhibit itself, 312. Is there a K number on it?

13 A. K449.

14 Q. So it matches the one contained in the photograph,  
15 312A; is that correct?

16 A. Yes.

17 Q. Looking at the Exhibit 312, is there a YM number and  
18 a 1B number attached to it?

19 A. Yes. YM4-103.

20 Q. And the 1B number?

21 A. 1B381.

22 Q. If you would, please, is there a chain of custody  
23 form attached to it?

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1 A. Yes.

2 Q. Would you, please, look at it. Does it contain a 1B  
3 number?

4 A. 1B381.

5 Q. And a YM number?

6 A. YM4-103.

7 Q. Are those the same numbers contained on the exhibit,  
8 311?

9 A. Yes.

10 Q. Excuse me, 312.

11 A. I'm sorry. Yes, sir.

12 Q. 312.

13 Placing on the ELM0 Prosecution Exhibit 312C for  
14 Identification. Do you recognize that form?

15 A. Yes.

16 Q. Is it an identical form -- is it identical to the  
17 chain of custody form you've just described?

18 A. Yes.

19 Q. Placing on the ELM0 Prosecution Exhibit 312B. Do you  
20 recognize that?

21 A. Yes.

22 Q. And what is contained in it?

23 A. That's an NCIS evidence label.

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1 Q. Indicates that you seized it in Room A, correct?

2 A. Yes.

3 Q. Is that a fair and accurate depiction of the evidence  
4 tag?

5 A. Yes.

6 TC [MR. MILLER]: Your Honor, the prosecution would move  
7 for the admission of 312A, B, and C.

8 MJ [Col SPATH]: Noted. Thanks.

9 TC [MR. MILLER]: Provide the witness, please, with  
10 Prosecution Exhibit 313.

11 Q. Do you recognize Exhibit 313?

12 A. Yes.

13 Q. Did you seize that item?

14 A. Yes.

15 Q. What is that item?

16 A. A scouring pad -- gray scouring pad.

17 Q. Placing on the ELM0 Prosecution Exhibit 313A. Ask  
18 you, do you recognize that photograph?

19 A. Yes.

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

21 A. The item inside this bag.

22 Q. All right. That's Prosecution Exhibit 313?

23 A. Yes.

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1 Q. The K number contained in the photograph, are you  
2 able to make out that number?

3 A. K452.

4 Q. Looking at the exhibit itself, 313, does it have a K  
5 number?

6 A. Yes.

7 Q. What is it?

8 A. K452.

9 Q. And that's -- does it match the number contained in  
10 the photograph, 313A?

11 A. Yes.

12 Q. Looking at the exhibit itself, does it have a 1B  
13 number and a YM number?

14 A. Yes. YM4-106.

15 Q. And 1B number?

16 A. 1B384.

17 Q. Is there a chain of custody form attached to it?

18 A. Yes.

19 Q. Would you, please, look at it.

20 A. Yes.

21 Q. Does it have a 1B number?

22 A. Yes.

23 Q. What is it?

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1 A. 1B384.

2 Q. Does it have a YM number?

3 A. YM4-106.

4 Q. Does the chain of custody 1B and YM number match the  
5 one contained on the exhibit?

6 A. Yes.

7 Q. Showing you Prosecution Exhibit 313C. Do you  
8 recognize that form?

9 A. Yes.

10 Q. Is it an exact duplicate of the chain of custody form  
11 that you've just described?

12 A. Yes.

13 Q. Placing on the ELM0 Prosecution Exhibit 313B. Do you  
14 recognize that?

15 A. Yes.

16 Q. And what do you recognize it to be?

17 A. This is the item with the NCIS evidence tag.

18 Q. And when you say "the item," are you talking about  
19 313?

20 A. Yes, 313. Sorry.

21 Q. Fair and accurate depiction of it?

22 A. Yes.

23 TC [MR. MILLER]: Move for admission of 313A, B, and C,

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1 Your Honor.

2 MJ [Col SPATH]: Noted. Thanks.

3 TC [MR. MILLER]: Provide the witness with 314, please,  
4 Prosecution 314 for Identification.

5 Q. Do you recognize Prosecution Exhibit 314, Agent?

6 A. Yes.

7 Q. And what is contained in 314?

8 A. Two pillows from Room B.

9 Q. Did you seize those from Room B?

10 A. Yes.

11 Q. Placing on the ELM0 Prosecution Exhibit 314A. Do you  
12 recognize that photograph?

13 A. Yes.

14 Q. What's contained in that photograph?

15 A. The two pillows in this bag.

16 Q. Is there a K number associated with that photograph  
17 or contained in that photograph?

18 A. K453.

19 Q. If you could look at the pillows themselves, the  
20 packaging. Does it have a K number? Look on the front. I  
21 think there's a big one.

22 A. Yes, K453.

23 Q. All right. And do those -- does that match the K

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1 number in the photo -- photograph, Prosecution 314A?

2 A. Yes.

3 Q. Looking at the Exhibit 314, does it have a 1B number  
4 and a DK -- a YM number?

5 A. YM4-107.

6 Q. And a 1B number?

7 A. 1B385.

8 Q. Is there a form 192, a green sheet, attached to it?

9 A. Yes.

10 Q. Take a look at that, if you would, please. Does it  
11 have -- does the chain of custody form have a 1B number?

12 A. Yes.

13 Q. And what is that number?

14 A. 1B385.

15 Q. And does it have a YM number?

16 A. Yes. YM4-107.

17 Q. Do those numbers match the ones contained on the  
18 exhibit, 314?

19 A. Yes.

20 Q. Placing on the ELM0 Prosecution Exhibit 314C. Do you  
21 recognize that?

22 A. Yes.

23 Q. Is that a duplicate original of the green sheet

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1 attached to the exhibit, 314?

2 A. Yes.

3 Q. Placing on the ELM0 Prosecution Exhibit 314B. Do you  
4 recognize that?

5 A. Yes.

6 Q. And what is contained in that photograph?

7 A. This is a part of an evidence bag.

8 Q. Is it the evidence bag for 314?

9 A. Yes.

10 Q. Fair and accurate depiction of it?

11 A. Yes, sir.

12 TC [MR. MILLER]: Government would move for the admission  
13 of 314A, B, and C, Your Honor.

14 MJ [Col SPATH]: Noted. Thank you.

15 TC [MR. MILLER]: Provide the witness with 315, please.

16 Q. Do you recognize that?

17 A. Yes.

18 Q. What is it?

19 A. A blanket.

20 Q. And did you collect that?

21 A. I did.

22 Q. From which room?

23 A. Room B.

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1 Q. Placing on the ELM0 Prosecution Exhibit 315A. Do you  
2 recognize that?

3 A. Yes.

4 Q. Is that the same blanket contained in the Exhibit  
5 315?

6 A. It appears to be, yes.

7 Q. If you could make it out, is there -- it's a little  
8 blurry. Let's move on.

9 The evidence bag itself, can you take a look at the  
10 evidence bag of 315. Does it contain a YM number?

11 A. YM4-108.

12 Q. Does it have a 1B number?

13 A. 1B386.

14 Q. All right. If you would, please, is there a chain of  
15 custody form attached to the blanket?

16 A. Yes.

17 Q. And does it have a YM number?

18 A. YM4-108.

19 Q. And a 1B number?

20 A. 1B386.

21 Q. Do those match the numbers contained on the exhibit  
22 itself, Exhibit 315, Prosecution Exhibit 315?

23 A. Yes.

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Q. Placing on the ELMO Prosecution Exhibit 315C. Do you  
2 recognize that?

3 A. Yes.

4 Q. Is that an exact duplicate of that chain of custody  
5 form you've just described?

6 A. Yes.

7 Q. Placing on the ELMO Prosecution Exhibit 315B, as in  
8 boy. Is that the original packaging for Prosecution  
9 Exhibit 315?

10 A. Yes.

11 Q. Is it a fair and accurate depiction of it?

12 A. Yes.

13 TC [MR. MILLER]: Move for admission of Prosecution  
14 Exhibit 315A, B, and C, Your Honor.

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

16 Q. Placing on the ELMO Prosecution Exhibit 316 -- oh,  
17 excuse me.

18 TC [MR. MILLER]: If you could provide the witness first  
19 with that exhibit, 316. A little ahead of myself.

20 Q. Do you recognize Prosecution Exhibit 316, Agent?

21 A. Yes.

22 Q. And what is it?

23 A. A blanket.

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1 Q. And did you seize or collect that item?

2 A. Yes.

3 Q. From where?

4 A. Room B.

5 Q. Placing on the ELM0 Prosecution -- a photograph,

6 Prosecution Exhibit 316A. Do you recognize that?

7 A. Yes.

8 Q. What is contained in 316A?

9 A. This blanket.

10 Q. All right. Photograph of the blanket, 316?

11 A. Yes.

12 Q. If you would, look at the exhibit itself in its  
13 packaging. Is there a YM number and a 1B number on it?

14 A. So 1B387.

15 Q. And a YM number?

16 A. YM4-109.

17 Q. Is there a chain of custody form attached to the  
18 exhibit?

19 A. Yes.

20 Q. Take a look at it, please. Does it have a YM number?

21 A. YM4-109.

22 Q. Does it have a 1B number?

23 A. Yes, 1B387.

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*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 Q. Do those numbers match the numbers contained on the  
2 exhibit, 316?

3 A. Yes.

4 Q. Placing on the ELM0 Prosecution Exhibit 316C for  
5 Identification. Do you recognize that form?

6 A. Yes.

7 Q. Is that an exact duplicate of the chain of custody  
8 form you just described?

9 A. Yes.

10 Q. Placing on the ELM0 Prosecution Exhibit 316B. Do you  
11 recognize that?

12 A. Yes.

13 Q. And is that the packaging for 316?

14 A. Yes. That's part of an evidence bag.

15 Q. Which would contain the Exhibit 316?

16 A. Yes.

17 Q. Fair and accurate -- fair and accurate depiction of  
18 that packaging?

19 A. Yes.

20 TC [MR. MILLER]: Move for admission, Your Honor, of  
21 Prosecution Exhibits 316A, B, and C.

22 MJ [Col SPATH]: Noted. Thank you.

23 TC [MR. MILLER]: Provide the witness, please, with

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Prosecution Exhibit 317.

2 Q. Agent, do you recognize 317?

3 A. Yes.

4 Q. Did you collect that at Site 4?

5 A. Yes.

6 Q. From Room B?

7 A. Room B, yes.

8 Q. What is it?

9 A. Sheet.

10 Q. All right. Placing on the ELM0 Prosecution  
11 Exhibit 317A. Do you recognize that?

12 A. Yes.

13 Q. Is that a photograph of Prosecution Exhibit 317?

14 A. Yes.

15 Q. If you would, look at the exhibit itself, 317. Does  
16 it have a 1B and a YM number?

17 A. Yes.

18 Q. What are those?

19 A. 1B388, YM4-110.

20 Q. Is there a chain of custody form attached to that  
21 exhibit?

22 A. Yes.

23 Q. All right. And does it have a 1B and a YM number?

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1 A. Yes. 1B388, YM4-110.

2 Q. Do those numbers match the numbers contained on the  
3 exhibit, 317?

4 A. Yes, sir.

5 Q. Placing on the ELM0 Prosecution Exhibit 317C. Do you  
6 recognize that form?

7 A. Yes.

8 Q. Is that, in fact, an exact duplicate of the chain of  
9 custody form for 317?

10 A. Yes.

11 Q. Placing on the ELM0 Prosecution Exhibit 317B. Do you  
12 recognize that?

13 A. Yes.

14 Q. And what is contained in that photograph?

15 A. Part of the evidence bag.

16 Q. For 317?

17 A. Yes.

18 Q. And is that a fair and accurate depiction of  
19 Prosecution -- of the evidence bag for Prosecution  
20 Exhibit 317?

21 A. Yes.

22 TC [MR. MILLER]: Move for the admission, Your Honor, of  
23 Prosecution's 317A, B, and C.

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1 MJ [Col SPATH]: Noted. Thank you.

2 TC [MR. MILLER]: Please provide the witness with  
3 Prosecution Exhibit 318.

4 Q. Do you recognize 318?

5 A. Yes.

6 Q. And did you seize 318?

7 A. Yes.

8 Q. And from where did you seize it? Do you see it's  
9 from Site 4?

10 A. Yes.

11 Q. All right. Placing on the ELM0 Prosecution  
12 Exhibit 318A for Identification. Do you recognize it?

13 A. Yes, sir.

14 Q. What's contained in that photograph?

15 A. A dust brush.

16 Q. Is that the dust brush, or the item you seized, 318?

17 A. Yes.

18 Q. Can you read the K number contained in the  
19 photograph?

20 A. K458.

21 Q. If you would, please, take a look at the actual  
22 Exhibit 318. Does it have a K number?

23 A. K458.

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1 Q. All right. So it matches the number in the  
2 photograph, Prosecution Exhibit 318A, correct?

3 A. Yes, sir.

4 Q. Looking again at the exhibit, does it have a 1B  
5 number and a -- does it have a 1B number and a YM number?

6 A. Yes.

7 Q. What are those?

8 A. 1B390 and YM4-112.

9 Q. Is there a chain of custody form attached to it?

10 A. Yes.

11 Q. If you could look at the chain of custody form  
12 attached to 318, does it have a 1B number?

13 A. Yes, sir.

14 Q. And a YM number?

15 A. Yes. 1B390, YM4-112.

16 Q. Do those match the numbers contained on the actual  
17 exhibit itself ----

18 A. Yes.

19 Q. ---- Prosecution 318?

20 A. Yes, sir.

21 Q. Placing on the ELM0 Prosecution Exhibit 318C for  
22 identification. Do you recognize that form?

23 A. Yes.

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1 Q. Is it an exact duplicate of the form, 318 ---- excuse  
2 me. Is it an exact duplicate of the chain of custody form for  
3 Prosecution Exhibit 318?

4 A. Yes.

5 Q. Lastly, placing on the ELMO Prosecution Exhibit 318B  
6 for Identification. Do you recognize that ----

7 A. Yes.

8 Q. ---- form? And what is that?

9 A. That's the NCIS evidence label.

10 Q. All right. Fair and accurate depiction of the  
11 evidence label in -- contained -- or attached to 318?

12 A. Yes.

13 TC [MR. MILLER]: Move for the admission, Your Honor, of  
14 Prosecution Exhibits 318A, B, and C.

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

16 TC [MR. MILLER]: Provide the witness, please, with  
17 Prosecution Exhibit 319.

18 Q. Have you had a chance to look at the exhibit?

19 A. Yes.

20 Q. What is the exhibit?

21 A. A hairbrush.

22 Q. Did you collect that hairbrush?

23 A. Yes.

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1 Q. All right. From Site 4?

2 A. Yes.

3 Q. Placing the exhibit -- or a photograph on the ELMO,  
4 Prosecution Exhibit 319A for Identification. Do you recognize  
5 that?

6 A. Yes.

7 Q. And is that the same hairbrush, 319?

8 A. Yes.

9 Q. Is there a K number contained in the photograph,  
10 319 -- of 319A?

11 A. Yes, K461.

12 Q. If you would, please, look at the exhibit itself in  
13 its packaging. Is there a K number attached to it?

14 A. K461.

15 Q. Is there a 1B number and a -- excuse me. It's 461?

16 A. K461.

17 Q. So it matches the number contained in the photograph,  
18 319A?

19 A. Yes, sir.

20 Q. If you would, please, is there a 1B number and a YM  
21 number contained on the exhibit itself, 319?

22 A. Yes. 1B393 and YM4-115.

23 Q. All right. If you would, please, is there a chain of

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1 custody form, an FD-192, attached to the exhibit?

2 A. Yes.

3 Q. Would you look at that, please. Does it contain a 1B  
4 number and a YM number?

5 A. Yes.

6 Q. What are they?

7 A. 1B393 and YM4-115.

8 Q. Do those numbers match the ones contained on the  
9 Exhibit 319?

10 A. Yes.

11 Q. Placing on the ELM0 Prosecution Exhibit 319C for  
12 Identification. Do you recognize that?

13 A. Yes.

14 Q. Is that, in fact, an exact duplicate of the chain of  
15 custody form that's attached to the Exhibit 319?

16 A. Yes.

17 Q. Placing on the ELM0 Prosecution Exhibit 319B. Do you  
18 recognize that?

19 A. Yes.

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

21 A. It's the evidence -- NCIS evidence label for this  
22 item.

23 Q. Fair and accurate depiction of it?

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1 A. Yes.

2 TC [MR. MILLER]: Your Honor, the prosecution would move  
3 for the admission of 319A, B, and C.

4 MJ [Col SPATH]: Noted. Thank you.

5 TC [MR. MILLER]: Can I have just a second, Your Honor?

6 [Pause.]

7 TC [MR. MILLER]: Provide the witness, please, with  
8 Prosecution Exhibit 321.

9 Q. Do you recognize 321, Agent?

10 A. Yes.

11 Q. And what is contained in 321? What is 321?

12 A. It's a window curtain and rag.

13 Q. And did you collect those items?

14 A. Yes.

15 Q. From where?

16 A. Room B.

17 Q. Placing on the ELM0 Prosecution Exhibit 321A for  
18 Identification. Do you recognize that?

19 A. Yes.

20 Q. What do you recognize that to be?

21 A. The item in this bag.

22 Q. If you would look at the bag itself, please. Does  
23 the bag have a YM and 1B number on it?

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1 A. Yes. YM4-117, 1B395.

2 Q. And if you could, please, see if there is a chain of  
3 custody form attached to the item.

4 A. Yes.

5 Q. All right. And does it have a 1B number and a YM  
6 number?

7 A. Yes. 1B395, YM4-117.

8 Q. And does that match the numbers contained on the  
9 exhibit itself, 321?

10 A. Yes.

11 Q. Placing on the ELM0 Prosecution Exhibit 321C. Is  
12 that an exact duplicate of the chain of custody form you've  
13 just described?

14 A. Yes.

15 Q. Placing on the ELM0 Prosecution Exhibit 321B. Do you  
16 recognize that?

17 A. Yes.

18 Q. All right. And what is that?

19 A. That's a part of an evidence bag.

20 Q. Is it the evidence bag for -- a piece of the evidence  
21 bag for 321?

22 A. Yes.

23 Q. And is that a fair and accurate depiction of the

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1 evidence bag in Prosecution Exhibit 321?

2 A. Yes, sir.

3 TC [MR. MILLER]: Your Honor, the government would move  
4 for the admission of Prosecution Exhibits 321A, B, and C.

5 MJ [Col SPATH]: Noted. Thanks.

6 TC [MR. MILLER]: Provide the witness, please, with  
7 Prosecution Exhibit 322A.

8 Q. Do you recognize that?

9 A. Yes.

10 Q. What do you recognize it to be?

11 A. Blue-and-white adapter.

12 Q. Did you seize that item or collect that item?

13 A. Yes.

14 Q. From where?

15 A. Room B.

16 Q. Placing on the ELMO a photograph, Prosecution  
17 Exhibit 322A. Do you recognize that?

18 A. Yes.

19 Q. Is that the same blue-and-white adapter contained  
20 in -- or is that the same one as 322?

21 A. Yes.

22 Q. If you would look at the actual exhibit in its  
23 packaging, Prosecution Exhibit 322. Does it contain a YM

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1 number and a 1B number? Does it have one? Excuse me.

2 A. 1B396, YM4-118.

3 Q. Is there a chain of custody form attached to that  
4 exhibit?

5 A. Yes.

6 Q. Take a look at that, if you would, please. Does it  
7 have a 1B and a YM number?

8 A. Yes. 1B396, YM4-118.

9 Q. And do those numbers match the numbers contained on  
10 the actual exhibit, 322?

11 A. Yes.

12 Q. Placing on the ELM0 Prosecution Exhibit 322A --  
13 excuse me, 322C. Do you recognize that form?

14 A. Yes.

15 Q. And is that form an exact duplicate of the chain of  
16 custody form for 322?

17 A. Yes.

18 Q. Placing on the ELM0 Prosecution Exhibit 322B. Do you  
19 recognize this?

20 A. Yes.

21 Q. What do you recognize that to be?

22 A. That is part of the evidence bag for this item.

23 Q. Fair and accurate depiction of it?

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1 A. Yes.

2 TC [MR. MILLER]: Move for the admission of 322A, B, and  
3 C, Your Honor.

4 MJ [Col SPATH]: Noted. Thank you.

5 TC [MR. MILLER]: Placing -- if you could provide the  
6 witness with Prosecution Exhibit 323.

7 Q. Take a look at that, please. Do you recognize it?

8 A. Yes.

9 Q. What is it?

10 A. Says one pillow -- or pillow.

11 Q. Did you collect it?

12 A. Yes.

13 Q. And from where did you collect it?

14 A. Room B.

15 Q. Placing on the ELMO Prosecution Exhibit 323A. Do you  
16 recognize that ----

17 A. Yes.

18 Q. ---- in that photograph?

19 A. Yes.

20 Q. What's in that photograph?

21 A. Yes.

22 Q. What's in it?

23 A. That is the item in this bag.

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1 Q. And is there a K number associated with it and  
2 attached to the photograph?

3 A. K467.

4 Q. If you would take a look at the packaging and the  
5 Exhibit 323. Does it have a K number?

6 A. K4667.

7 Q. So it matches the one on the -- exhibit matches the  
8 one contained in the photograph, 323A, correct?

9 A. Yes.

10 Q. If you would, again, look at the actual exhibit, 323.  
11 Does it have a 1B number and a YM number?

12 A. Yes. 1B399, YM4-121.

13 Q. If you would, please, see if there is a chain of  
14 custody form, an FD-192, green sheet, attached to the exhibit.

15 A. Yes.

16 Q. If you'd look at it, please. Does it have a YM  
17 number?

18 A. YM4-121.

19 Q. Does it have a 1B number?

20 A. 1B399.

21 Q. Do those numbers match the numbers contained on the  
22 exhibit itself, 323?

23 A. Yes.

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1 Q. Placing on the ELMO Prosecution Exhibit 323C for  
2 Identification. Do you recognize that?

3 A. Yes.

4 Q. Is that an exact duplicate of the chain of custody  
5 form for 3 -- Prosecution Exhibit 323?

6 A. Yes.

7 Q. Placing on the ELMO Prosecution Exhibit 323B for  
8 Identification. Do you recognize that?

9 A. Yes.

10 Q. And what is that?

11 A. That is a piece of the evidence bag.

12 Q. For Prosecution Exhibit 2 -- for 323?

13 A. Yes.

14 Q. Fair and accurate depiction of it?

15 A. Yes, sir.

16 TC [MR. MILLER]: Your Honor, the prosecution would move  
17 for admission of Prosecution Exhibit 323A, B, and C.

18 MJ [Col SPATH]: Noted. Thanks.

19 TC [MR. MILLER]: Provide the witness, please, with  
20 Prosecution Exhibit 324.

21 Q. Agent, do you recognize Prosecution Exhibit 324?

22 A. Yes.

23 Q. Did you seize it?

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1 A. Yes.

2 Q. And what is that item?

3 A. It is the floor mat -- floor pads, from Room B.

4 Q. All right. Placing on the ELM0 Prosecution

5 Exhibit 324A. Do you recognize that?

6 A. Yes.

7 Q. And what is that?

8 A. I can't read the K number, but it's the item in this  
9 bag.

10 Q. That's the floor pad that you collected from the  
11 Room B?

12 A. Yes.

13 Q. That is the same exhibit, Prosecution Exhibit 324,  
14 photograph of it?

15 A. Yes.

16 Q. If you would look at the actual evidence packaging,  
17 the exhibit itself. Does it have a 1B number and a YM number?

18 A. YM4-123 and 1B400.

19 Q. Could you check to see if there's a green sheet, a  
20 chain of custody form attached to the exhibit?

21 A. Yes.

22 Q. If you'd look at it, please. Does it contain a 1B  
23 and YM number?

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1 A. Yes.

2 Q. What are those numbers?

3 A. 1B401, YM4-123.

4 Q. Do those numbers match the numbers contained on the  
5 actual exhibit, 424 [sic]?

6 A. Yes.

7 Q. Placing on the ELMO Prosecution Exhibit 324C. Do you  
8 recognize that?

9 A. Yes.

10 Q. Okay. And what do you recognize -- excuse me. What  
11 do you recognize that to be?

12 A. Chain of custody.

13 Q. An exact duplicate of the chain of custody form for  
14 324?

15 A. Yes, sir.

16 Q. Placing on the ELMO Prosecution Exhibit 324B. Do you  
17 recognize that?

18 A. Yes.

19 Q. What do you recognize that to be?

20 A. It's part of the evidence bag for this item.

21 Q. Fair and accurate depiction of it?

22 A. Yes, sir.

23 Q. When you say "evidence bag," that's for Exhibit 324,

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1 correct?

2 A. Yes.

3 TC [MR. MILLER]: Provide the witness with Prosecution  
4 Exhibit 325, please.

5 While they're doing that, Your Honor, I would move  
6 for the admission of Prosecution Exhibits 324A, B, and C.

7 MJ [Col SPATH]: Noted. Thank you.

8 Q. Have you had a chance to look at 325?

9 A. Yes.

10 Q. Did you seize the items contained in Prosecution  
11 Exhibit 325?

12 A. Yes.

13 Q. And from where did you seize them?

14 A. Room B.

15 Q. And what are the items?

16 A. Q-tip.

17 Q. All right. And from where did you seize them?

18 A. Room B.

19 Q. At Room B?

20 Placing on the ELM0 Prosecution Exhibit 325A. Do you  
21 recognize what's in that photograph?

22 A. Yes.

23 Q. What is in that photograph?

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1 A. The Q-tip.

2 Q. Is it the same Q-tip contained in the Exhibit 325?

3 A. Well, the Q-tip's been altered by the lab, so -- but,  
4 yes, it's the same picture of what I seized.

5 Q. All right. So once you -- once you seized it, it was  
6 forwarded to the laboratory?

7 A. Correct.

8 Q. Do you recognize it generally as the same Q-tip?

9 A. This photograph?

10 Q. Yes.

11 A. Yes.

12 Q. If you would, please, there is a Q number -- excuse  
13 me, a K number on the photograph, correct?

14 A. Yes, K470.

15 Q. If you would look at the exhibit itself, the  
16 packaging, is there a K number on it?

17 A. Yes, K470.

18 Q. All right. Would you also look on the packaging and  
19 see if there is a 1B number and a YM number?

20 A. YM4-125, 1B403.

21 Q. Is there a chain of custody form attached or  
22 associated with that exhibit ----

23 A. Yes.

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1 Q. ---- Prosecution Exhibit 325?

2 A. Yes.

3 Q. Would you look at it, please.

4 A. Yes, sir.

5 Q. Does it have a 1B and a YM number?

6 A. Yes.

7 Q. All right.

8 A. 1B403, YM4-125.

9 Q. Does that match the 1B number and the YM number on  
10 the exhibit itself, 325?

11 A. Yes.

12 Q. Placing on the ELM0 Prosecution Exhibit 325C. Do you  
13 recognize that?

14 A. Yes.

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

16 A. A chain of custody for 1B403.

17 Q. Is it an exact duplicate of it?

18 A. Yes.

19 Q. Placing on the ELM0 Prosecution Exhibit 325B. Do you  
20 recognize that?

21 A. Yes.

22 Q. And is that a photograph of the packaging for 325?

23 A. Yes, sir.

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1 Q. Fair and accurate depiction of it?

2 A. Yes.

3 TC [MR. MILLER]: Move for admission, Your Honor, of  
4 Prosecution Exhibit 325A, B, and C.

5 MJ [Col SPATH]: Noted. Thank you.

6 TC [MR. MILLER]: Placing -- if you could provide the  
7 witness with Prosecution Exhibit 326.

8 Q. Do you recognize 326?

9 A. Yes.

10 Q. Did you collect it?

11 A. Yes.

12 Q. From where?

13 A. Room A.

14 Q. What is it?

15 A. A teapot.

16 Q. Placing on the ELMO Prosecution Exhibit 326A. Do you  
17 recognize that?

18 A. Yes.

19 Q. Is that the teapot you recovered?

20 A. Yes, sir.

21 Q. And that's Prosecution Exhibit 326?

22 A. Yes.

23 Q. If you would look at the packaging of the teapot.

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1 Does it have a YM number and a 1B number?

2 A. Yes. YM4-129 and 1B407.

3 Q. Is there a chain of custody or an FD-192 attached to  
4 the exhibit?

5 A. Yes.

6 Q. If you would, please, take a look at them -- take a  
7 look at it, rather. Does it have a 1B number?

8 A. Yes, 1B407.

9 Q. And a YM number?

10 A. YM4-129.

11 Q. And do those numbers match the numbers contained on  
12 the exhibit, the packaging for the exhibit, Prosecution  
13 Exhibit 326?

14 A. Yes.

15 Q. Placing on the ELM0 Prosecution Exhibit 326C for  
16 Identification. Do you recognize that form?

17 A. Yes.

18 Q. And is that an exact duplicate of the chain of  
19 custody form that you've just described?

20 A. Yes, sir.

21 Q. Placing on the ELM0 Prosecution Exhibit 326B. Do you  
22 recognize that?

23 A. Yes.

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1 Q. And is that the packaging for the Exhibit 326?

2 A. Yes.

3 Q. Is that a fair and accurate depiction of it?

4 A. Yes.

5 TC [MR. MILLER]: Move for admission of Prosecution's  
6 Exhibits 326A, B, and C, Your Honor.

7 MJ [Col SPATH]: Noted. Thank you.

8 TC [MR. MILLER]: Provide the witness with 327, please.

9 Q. Do you recognize Prosecution Exhibit 327?

10 A. Yes.

11 Q. Did you collect it?

12 A. Yes.

13 Q. From where?

14 A. Room A.

15 Q. And what is the item?

16 A. One spoon.

17 Q. Placing on the ELM0 Prosecution Exhibit 327A for  
18 Identification. Do you recognize what's in that photograph?

19 A. Yes.

20 Q. What is in that photograph?

21 A. The -- the spoon.

22 Q. The spoon that you seized, 327?

23 A. Yes.

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1 Q. The K number attached to -- or contained in the  
2 photograph?

3 A. Yes, K474.

4 Q. All right. If you look on the item itself, does it  
5 have a K number?

6 A. Yes, K474.

7 Q. And does that match the number in the photograph,  
8 Prosecution Exhibit 327A? Oh, I'll put it back up.

9 A. Yes, sir.

10 Q. Looking at the item itself, does it have a 1B number  
11 and a YM number?

12 A. Yes, 1B408.

13 Q. And YM, what's ----

14 A. YM4-130.

15 Q. Is there a chain of custody form attached to the  
16 exhibit?

17 A. Yes.

18 Q. Take a look at it, please. Does it have a 1B number  
19 and a YM number?

20 A. 1B408, YM4-130.

21 Q. Do those numbers match the numbers contained on the  
22 exhibit and the packaging for 327?

23 A. Yes.

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1 Q. Placing on the ELM0 Prosecution Exhibit 327C for  
2 Identification. Do you recognize that form?

3 A. Yes.

4 Q. Is that an exact duplicate of the form you've just  
5 described, the chain of custody for 327?

6 A. Yes.

7 Q. Placing on the ELM0 Prosecution Exhibit 327B. Do you  
8 recognize that?

9 A. Yes.

10 Q. Excuse me. If -- 327C. Do you recognize that?

11 A. Yes.

12 Q. Is that a fair and accurate depiction of the tag on  
13 the exhibit, 327?

14 A. Yes.

15 TC [MR. MILLER]: Move for the admission, Your Honor, of  
16 Prosecution Exhibits 327A, B, and C.

17 MJ [Col SPATH]: Noted. Thank you.

18 TC [MR. MILLER]: Provide the witness, please, with  
19 Prosecution Exhibit 328. Do you recognize that item?

20 A. Yes.

21 Q. Did you seize that item?

22 A. Yes.

23 Q. Collect that item, I guess, is a better word. Did

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1 you collect it?

2 A. Yes.

3 Q. From where?

4 A. Room A.

5 Q. And what is the item?

6 A. One knife.

7 Q. Placing on the ELMO Prosecution Exhibit 328A for  
8 Identification. Do you recognize that?

9 A. Yes.

10 Q. What do you recognize it to be?

11 A. The item in this bag, K475.

12 Q. That is the knife, Prosecution Exhibit 328, correct?

13 A. Yes.

14 Q. Is there a K number contained on the photograph or in  
15 the photograph?

16 A. K475.

17 Q. If you would look at, please, at the exhibit itself,  
18 Prosecution Exhibit 328. Does it have a K number?

19 A. Yes, K475.

20 Q. Does it match the K number in the photograph, 3 --  
21 328A?

22 A. Yes.

23 Q. Looking again at the photograph, does it have a 1B

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 number and a YM number?

2 A. YM4-131, 1B409.

3 Q. Is there a chain of custody form attached to the  
4 exhibit?

5 A. Yes.

6 Q. Could you look at that. The chain of custody form  
7 have a 1B and a YM number?

8 A. Yes.

9 Q. What are they?

10 A. 1B409, YM4-131.

11 Q. All right. Placing on the ELM0 Prosecution  
12 Exhibit 328C for Identification. Do you recognize that?

13 A. Yes.

14 Q. All right. What do you recognize that to be?

15 A. The chain of custody for this item, K475.

16 Q. Is it an exact duplicate of it?

17 A. Yes.

18 Q. Lastly, Prosecution Exhibit 328B, as in boy. Do you  
19 recognize that photograph?

20 A. Yes.

21 Q. And what is that?

22 A. The evidence label for this item, K475.

23 Q. Fair and accurate depiction of it?

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1 A. Yes, sir.

2 TC [MR. MILLER]: If you can provide -- the government at  
3 this time, Your Honor, would move for the admission of  
4 Prosecution 328A, B, and C.

5 MJ [Col SPATH]: Noted. Thank you.

6 TC [MR. MILLER]: Provide the witness with Prosecution  
7 Exhibit 329.

8 Q. Do you recognize that item, ma'am?

9 A. Yes.

10 Q. Agent, did you seize that item?

11 A. Yes.

12 Q. From where?

13 A. Room A.

14 Q. And what is the item?

15 A. One spoon.

16 Q. Placing on the ELMO Prosecution Exhibit 329A. Do you  
17 recognize that?

18 A. Yes.

19 Q. And what is that?

20 A. That is the item in this bag, K476.

21 Q. And does the photograph have a K number?

22 A. Yes, K476.

23 Q. All right. Looking at the item itself, 329, as well

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1 as its packaging, is there a K number attached to it?

2 A. K4 -- yes, K476.

3 Q. So does the numbers match the one on the package and  
4 the one in the photograph?

5 A. Yes.

6 Q. If you look again at the photograph. Does it have a  
7 YM number and a 1B number?

8 A. The bag?

9 Q. Yes, packaging.

10 A. Evidence bag is YM4-131, and 1B410.

11 Q. Okay. And what is the YM number on this?

12 A. YM4-132. I'm sorry.

13 Q. All right. Is there a chain of custody form attached  
14 to the item?

15 A. Yes.

16 Q. If you'd take a look at that, please. Does it have a  
17 1B and a YM number?

18 A. Yes.

19 Q. All right. And what are those numbers?

20 A. 1B410, YM4-132.

21 Q. Do those numbers match the numbers contained on the  
22 exhibit, Prosecution Exhibit 329B, as -- does it -- do those  
23 numbers match the numbers contained on the exhibit,

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1 Prosecution Exhibit 329?

2 A. Yes, sir.

3 Q. Placing on the ELM0 Prosecution Exhibit 329C. Do you  
4 recognize that photograph?

5 A. Yes.

6 Q. Is that a fair and accurate depiction of the -- or  
7 excuse me. Is that an exact duplicate of the chain of custody  
8 form you've just described?

9 A. Yes.

10 Q. Placing on the ELM0 Prosecution Exhibit 329B. Do you  
11 recognize that?

12 A. Yes.

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

14 A. The NCIS evidence label for this item, K476.

15 Q. All right. And that's Prosecution Exhibit 329,  
16 correct?

17 A. Yes, sir.

18 Q. Fair and accurate depiction of it?

19 A. Yes, sir.

20 TC [MR. MILLER]: Provide the witness, please, with  
21 Prosecution Exhibit 330.

22 We would also move at this time, Your Honor, for the  
23 admission of Prosecution's 329A, B, and C.

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1 MJ [Col SPATH]: Noted. Thank you.

2 Q. Had an opportunity to look at Prosecution

3 Exhibit 330? Do you recognize that item?

4 A. Yes.

5 Q. Did you collect that item?

6 A. Yes.

7 Q. From where?

8 A. Room A.

9 Q. And what is the item?

10 A. One can opener.

11 Q. Placing on the ELM0 Prosecution Exhibit 330A for  
12 Identification. Do you recognize what's in that photograph?

13 A. Yes.

14 Q. What's in that photograph?

15 A. Can opener.

16 Q. The same can opener, Prosecution Exhibit 330?

17 A. Yes.

18 Q. Is there a K number contained in the photograph?

19 A. K478.

20 Q. Looking at the exhibit itself in its packaging, is  
21 there a K number attached to it?

22 A. Yes.

23 Q. What is that?

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1 A. K478.

2 Q. All right. Is there a 1B number and a YM number  
3 contained on the exhibit and packaging itself?

4 A. 1B412, YM4-134.

5 Q. Could you check to see if there is a chain of custody  
6 form attached to the exhibit?

7 A. Yes.

8 Q. All right. Does it have a 1B number and a YM number?

9 A. Yes.

10 Q. What are those?

11 A. 1B412, YM4-134.

12 Q. So the numbers on the chain of custody form match  
13 those contained on the Exhibit 330, correct?

14 A. Yes, sir.

15 Q. Placing on the ELM0 Prosecution Exhibit 330C for  
16 Identification. Do you recognize that form?

17 A. Yes.

18 Q. Is that an exact duplicate of the prosecution  
19 exhibit -- the -- excuse me. Is that an exact duplicate of  
20 the chain of custody form you've just described?

21 A. Yes.

22 Q. Placing on the ELM0 Prosecution Exhibit 330B. Do you  
23 recognize that?

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1 A. Yes.

2 Q. All right. And what is contained in that photograph?

3 A. The NCIS evidence label.

4 Q. Is that the evidence label for Prosecution

5 Exhibit 330?

6 A. Yes.

7 Q. It is a fair -- is it a fair and accurate depiction  
8 of it?

9 A. Yes, sir.

10 TC [MR. MILLER]: Move for the admission of Prosecution  
11 Exhibits 330A, B, and C, Your Honor.

12 MJ [Col SPATH]: Noted. Thank you.

13 TC [MR. MILLER]: Provide the witness with Prosecution  
14 Exhibit 331.

15 Q. Do you recognize Prosecution Exhibit 331?

16 A. Yes.

17 Q. And what's contained in 331?

18 A. One spoon.

19 Q. All right. Did you seize that item?

20 A. Yes.

21 Q. And from where did you collect it?

22 A. Room A.

23 Q. Placing on the ELMO Prosecution Exhibit 331A, as in

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1 Adam. Do you recognize that photograph?

2 A. Yes.

3 Q. What's contained in that photograph?

4 A. The spoon, K479.

5 Q. So that would be the spoon, Prosecution Exhibit 331,  
6 correct?

7 A. Yes.

8 Q. Is there a K number contained in the photograph?

9 A. K479.

10 Q. All right. If you'd look at the actual exhibit,  
11 Prosecution Exhibit 331 and its packaging, is there a K number  
12 attached to it?

13 A. Yes.

14 Q. What is that K number?

15 A. K479.

16 Q. So the number matches the package and the photograph,  
17 331A; is that correct?

18 A. Yes.

19 Q. In looking at the exhibit itself, 331, is there a 1B  
20 number and a YM number?

21 A. Yes. 1B413, YM4-135.

22 Q. And is there a chain of custody form attached to the  
23 exhibit?

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1 A. Yes.

2 Q. Could you take a look at it, please. Does it contain  
3 a YM number and 1B number?

4 A. Yes.

5 Q. What are them?

6 A. 1B413, YM4-135.

7 Q. Do those numbers match the numbers contained on the  
8 actual exhibit and its packaging in Prosecution Exhibit 331?

9 A. Yes.

10 Q. Placing on the ELM0 Prosecution Exhibit 331C. Do you  
11 recognize that form?

12 A. Yes.

13 Q. Is that an exact duplicate of the chain of custody  
14 form you've just described, the chain of custody for  
15 Prosecution Exhibit 331?

16 A. Yes.

17 Q. Placing on the ELM0 Prosecution Exhibit 331B, as in  
18 boy. Do you recognize that?

19 A. Yes.

20 Q. Is that a fair and accurate depiction of the evidence  
21 tag attached to Prosecution Exhibit 331?

22 A. Yes, sir.

23 Q. Could you provide the witness, please, with

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1 Prosecution Exhibit 332.

2 TC [MR. MILLER]: We'd also move for admission, Your  
3 Honor, of Prosecution Exhibits 332A, B, and C.

4 MJ [Col SPATH]: Noted. Thank you.

5 Q. You have before you Prosecution Exhibit 332. Take a  
6 look at that, please. Do you recognize that item?

7 A. Yes.

8 Q. Did you collect that item?

9 A. Yes.

10 Q. And what is that item?

11 A. One brick rock.

12 Q. One brick block?

13 A. Rock.

14 Q. Rock?

15 A. Rock.

16 Q. From where did you collect it?

17 A. It does not indicate on here where it was collected  
18 from.

19 Q. Would it have been somewhere within Site 4?

20 A. I'm sorry. Yes. From Site 4, yes.

21 Q. Placing on the ELMO Prosecution Exhibit 332A. Do you  
22 recognize that, what's in that photograph?

23 A. Yes.

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1 Q. What's contained in that photograph?

2 A. The rock in this bag.

3 Q. Is there a -- a K number in the photograph?

4 A. K482.

5 Q. All right. And if you would look at the actual rock  
6 itself, the rock and the packaging, Prosecution Exhibit 332.  
7 Does it have a K number attached to it?

8 A. K482.

9 Q. So the number on the exhibit matches the number on  
10 the -- in the photograph, Prosecution Exhibit 332A, correct?

11 A. Yes, sir.

12 Q. Looking at the packaging itself again for -- and the  
13 Exhibit 332, does it have a YM number and a 1B number?

14 A. Yes.

15 Q. Could you tell us, please, what those numbers are?

16 A. 1B416, YM4-138.

17 Q. Is there a chain of custody form attached to that?

18 A. Yes.

19 Q. Looking at the chain of custody form, could you tell  
20 us the 1B number and the YM4 number?

21 A. Yes. 1B416, YM4-138.

22 Q. Do those numbers match the numbers on the packaging  
23 and the exhibit itself, Prosecution Exhibit 332?

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1 A. Yes, sir.

2 Q. Placing on the ELMO Prosecution Exhibit 332C. Do you  
3 recognize that?

4 A. Yes.

5 Q. And is that an exact duplicate of the chain of  
6 custody form you've just described?

7 A. Yes.

8 Q. Lastly, placing on the ELMO Prosecution Exhibit 332B.  
9 Do you recognize that item?

10 A. Yes.

11 Q. And what is that?

12 A. The NCIS evidence label for this item.

13 Q. Fair and accurate depiction of it?

14 A. Yes.

15 TC [MR. MILLER]: Your Honor, the prosecution would move  
16 for the admission of 332A, B, and C.

17 MJ [Col SPATH]: Noted. Thanks.

18 Q. Now, on a number of those items, Joe McNamara was  
19 listed as the person who collected them?

20 A. Yes.

21 Q. Why would his name be on the collection list?

22 A. The items that I saw were later in the day on the  
23 first day, which is the day that we were evacuated very

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1 quickly from the apartment. So those chains of custodies were  
2 signed later.

3 Q. And he was -- was he the central repository for the  
4 evidence, the collecting agent?

5 A. To the best of my recollection, he's the one who  
6 carried the box down the stairs to -- so we could leave fast.

7 TC [MR. MILLER]: All right. Your Honor, the government  
8 would also move -- I think we failed to earlier -- the  
9 photographs.

10 Q. The photographs that you were shown regarding Site  
11 Number 4, were they all fair and accurate depictions of what  
12 was contained in them?

13 A. Yes, sir.

14 Q. All right. Was there anything distorting about them?

15 A. No, they were a very good depiction of the scene.

16 TC [MR. MILLER]: Your Honor, the ----

17 Q. And those were fair and accurate depictions of the  
18 scene as it appeared back in October of 2000; is that correct?

19 A. Yes, sir.

20 TC [MR. MILLER]: The government would move, Your Honor,  
21 for the introduction of Prosecution Exhibits 388, 390, 389,  
22 394, 392, 393, 395, 396, 398, 397, 404, 405, 402, 409, 410,  
23 412, 848, 413, 418, 411, 406, 400, 399, 408, 407, 401, 386,

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1 and 387.

2 MJ [Col SPATH]: Noted. Thank you.

3 TC [MR. MILLER]: All right. We'd also move for the  
4 pictures from yesterday, which were Prosecution Exhibits 3 --  
5 excuse me, 447, 448, 449, 446, 451, 453, 452, 450, 440, 438,  
6 802, 803, 439, 443, 444, 442, 441, 445, 454, 455, 456, 800,  
7 857, 858 -- no, excuse me -- 457, 458, 459, and 460.

8 MJ [Col SPATH]: Noted again. Thank you.

9 Q. Again, it's pictures you saw yesterday regarding the  
10 car and trailer itself. Those were taken at the time that you  
11 were all conducting the search, correct?

12 A. Yes, sir.

13 Q. Were those fair and accurate depictions of the  
14 trailer and the vehicle as it appeared that day?

15 A. Yes, sir.

16 Q. All right. Subsequent to the search of the -- or --  
17 in addition to the search of the look -- what we call the  
18 lookout site, did you have occasion to go to a beach site in  
19 Yemen?

20 A. Yes.

21 Q. All right. And what caused you to go to the beach,  
22 this particular site that was chosen?

23 A. We were advised this was the area where they had put

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1 the -- the boat in the water.

2 Q. And how did you travel to this particular site?

3 A. I don't recall, sir.

4 Q. All right. Did you go in a group or did you go  
5 alone?

6 A. We went in a group.

7 Q. All right. And was it a search team?

8 A. Yes.

9 Q. Were there HRT members with you?

10 A. Yes.

11 Q. When you arrived at the site, was there a -- were  
12 there Yemeni law enforcement personnel there?

13 A. Yes.

14 TC [MR. MILLER]: Your Honor, I have a series of  
15 photographs. If you want to take a short break, I think we  
16 can probably finish this up by noon, but ----

17 MJ [Col SPATH]: I understand. About how many pictures do  
18 you have?

19 TC [MR. MILLER]: About 15.

20 MJ [Col SPATH]: Okay. And then after Mr. Koffsky at  
21 1:00, you have a couple witnesses left?

22 TC [MR. MILLER]: We do have a couple witnesses left,  
23 right. We ----

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1 MJ [Col SPATH]: And your impression is those are short?

2 TC [MR. MILLER]: They are. I promise those are short. I  
3 promise.

4 MJ [Col SPATH]: No, not a worry. Just trying to get a  
5 feel for timing.

6 TC [MR. MILLER]: Okay.

7 MJ [Col SPATH]: Yeah, let's try to get this witness done  
8 so we don't continue to have her come back.

9 All right. Take ten and we'll come back. Thanks.

10 We're in recess.

11 [The R.M.C. 803 session recessed at 1131, 15 February 2018.]

12 [The R.M.C. 803 session was called to order at 1142,  
13 15 February 2018.]

14 MJ [Col SPATH]: These commissions are called back to  
15 order. All the same parties are present. The witness remains  
16 on the stand. Remember you're still under oath.

17 Mr. Miller, go.

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

19 **DIRECT EXAMINATION CONTINUED**

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

21 Q. I think we were talking about you went to a beach  
22 site, which you believed was what?

23 A. It was a beach site where we were advised the boat

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1 was put in the water, the boat that had been involved in the  
2 bombing.

3 Q. Let me show you a series of photographs, ask you if  
4 you recognize them.

5 TC [MR. MILLER]: First, again, permission, Your Honor, to  
6 use the equipment?

7 MJ [Col SPATH]: You may.

8 TC [MR. MILLER]: 806, please. Prosecution Exhibit 806.

9 MJ [Col SPATH]: Let's give it a second and we'll get it.  
10 Okay.

11 Q. On the monitor is Prosecution Exhibit 806 for  
12 Identification. Do you recognize that photograph?

13 A. Yes.

14 Q. All right. And what is contained -- what is depicted  
15 in that photograph?

16 A. That's the area we referred to as the beach area.

17 Q. And there seems to be a number of vehicles at that  
18 particular site. To whom did those vehicles belong?

19 A. The Yemeni officials, the ones on the right. And I  
20 don't recall the ones on the left, the vans. Those are  
21 probably the vans we came in.

22 Q. Prosecution Exhibit 807, please. Do you recognize  
23 what's contained in the photograph, 807?

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1 A. Yes.

2 Q. And if you could relate to the court what's in  
3 Prosecution -- the photograph, Prosecution 807? What is  
4 depicted?

5 A. Those are some of the Yemeni officials that were  
6 there.

7 Q. Prosecution 808, again, do you recognize that area?

8 A. Yes.

9 Q. Is that the beach area that was searched?

10 A. Yes.

11 Q. And the officials on the left-hand side of the  
12 photograph?

13 A. Yemeni officials.

14 Q. 811, please. Do you recognize the persons in 811?

15 A. Those are some of our divers.

16 Q. So you did a search of the land as well as the water  
17 surrounding it?

18 A. Yes.

19 Q. All right. If you would, please, go to  
20 Prosecution 420. Again, what's contained in this photograph?

21 A. The -- we call it the beach area.

22 Q. Was it a sandy area, or was it one that appeared  
23 well-traveled?

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1 A. It was sand, but it was packed, so people could drive  
2 on it.

3 Q. Prosecution Exhibit 421, do you recognize that?

4 A. Yes.

5 Q. And what's contained in that photograph?

6 A. The beach area.

7 Q. The one where the search was conducted?

8 A. Yes, sir.

9 Q. 419, do you recognize that?

10 A. Yes, same.

11 Q. There appears to be a number of buildings. Do you  
12 know what was contained in those buildings?

13 A. I do not.

14 Q. All right. Prosecution Exhibit 432, do you recognize  
15 this area?

16 A. Yes.

17 Q. What's contained in this area?

18 A. This is -- we call it the beach area, but this would  
19 be where a boat would be put in.

20 Q. All right. And was that -- appears to be, I guess,  
21 called -- sort of an outbuilding there?

22 A. Yes.

23 Q. Prosecution 433, please. Do you recognize this?

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1 A. Yes.

2 Q. Could you describe for His Honor what's contained in  
3 that photograph?

4 A. It's a rocky beach area.

5 Q. Prosecution Exhibit -- is that part of the area that  
6 was searched?

7 A. Yes.

8 Q. Prosecution Exhibit 425, again, that area?

9 A. Yes, the same search area.

10 Q. 424, do you recognize that?

11 A. Yes.

12 Q. In this particular photograph there appears to be  
13 pointy sort of things at the edge of the sand. Do you recall  
14 what those were?

15 A. They were like jagged pieces of metal or wood or --  
16 indicating that you shouldn't put a boat in at that area.

17 Q. Prosecution 423, please. Again, what's contained in  
18 that photograph?

19 A. The area we searched.

20 Q. And is it more of those sort of pointy warning ----

21 A. Yes.

22 Q. ---- I guess, warning signs?

23 422, again, do you recognize that?

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1 A. The same beach area that we searched.

2 Q. 431, sort of a closeup of those pointed -- almost  
3 look like arrows or spears coming out of the land; is that  
4 correct?

5 A. Yes.

6 Q. All right. 434, again, could you describe that,  
7 please.

8 A. The beach area with the -- this looks like metal,  
9 like rusted metal.

10 Q. And those would be areas where you couldn't put the  
11 boat in, obviously, correct?

12 A. That's correct.

13 Q. 426, Prosecution Exhibit 426 for Identification,  
14 again, the beach area?

15 A. Yes, sir.

16 Q. 427 seems to be a tent. Did you all set up that  
17 tent, or was that tent already there?

18 A. I don't recall setting that tent up, sir.

19 Q. Okay. Prosecution 430, there seem to be some sort of  
20 operation or some sort of equipment. Could you describe for  
21 the court what was there?

22 A. I don't recall, sir.

23 Q. Prosecution 429. All right. This is a little closer

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1 picture. Could you describe what's contained in the  
2 photograph, 429?

3 A. A van, the people from our search team and from the  
4 FBI, and some sort of equipment.

5 Q. 428. And what's contained in that photograph?

6 A. Personnel on the search team. I believe I'm on the  
7 right with the dark shirt. And the equipment and tents.

8 Q. And 437. Do you recognize what's contained in 437?

9 A. I believe it's a piece of red fabric.

10 Q. Was that recovered by another agent, Special Agent  
11 Gaston?

12 A. Yes.

13 Q. All right. Let's -- let me ask you this: How did  
14 you go about deciding how you were going to search this sort  
15 of area, this flat beach area?

16 A. We did what's called a line search.

17 Q. All right. And how do you conduct a line search?

18 A. So we do this in large areas, open areas. We  
19 basically get in a line and walk very slowly.

20 Q. And did you draw a sketch of the area that you  
21 determined was to be searched?

22 A. Yes.

23 TC [MR. MILLER]: Pull that up, please. That's a sketch.

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1 All right.

2 Q. On the screen is Prosecution Exhibit 715A. Do you  
3 recognize that?

4 A. Yes, sir.

5 Q. And could you describe to His Honor what this  
6 represents?

7 A. This is a depiction of the beach area that we  
8 searched, sir.

9 Q. All right. And there's some markings on it. Again,  
10 let's start first with -- it looks like a triangle. Can you  
11 describe what's contained in the triangle? What's the  
12 importance of the triangle?

13 A. So what I was trying to do in this sketch was  
14 triangulation to show measurements of permanent objects,  
15 because there -- none of these areas had any addresses on them  
16 or any kind of markings like we have here. So we shot GPS  
17 coordinates where we were standing and where we went so we  
18 could find it at another time if we had to.

19 Q. There seems to be three coordinates here: A cement  
20 pad; is that correct?

21 A. Yes.

22 Q. Is that a shack?

23 A. Yes.

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1 Q. And a fence corner, correct?

2 A. Yes, sir.

3 Q. And it shows the jagged seawall in the photo -- in  
4 the chart itself, correct?

5 A. Yes.

6 Q. Now, did you search the area inside the triangle? Is  
7 that where the search was coordinated? Or where did you  
8 search?

9 A. We searched the -- we walked the entire beach area,  
10 right in this -- where I have the drawing.

11 Q. Okay. If you could -- we'll mark it. Show the -- if  
12 you would, show the court, marking the exhibit itself, an  
13 outline where it was you searched.

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

15 Q. So it would be essentially the entire middle of the  
16 photograph; is that correct?

17 A. Right. Yes. That was on the land part.

18 Q. On the land part.

19 A. Yes.

20 Q. There was also a search conducted of the water?

21 A. Yes.

22 Q. And who conducted the search of the water?

23 A. The FBI divers.

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1 Q. And approximately how long did the search last?

2 A. To the best of my recollection, a few hours.

3 Q. Now, this particular exhibit, Prosecution  
4 Exhibit 715A, that is a sketch that you drew, correct?

5 A. That is my sketch, yes.

6 Q. And the measurements are -- and coordinates that are  
7 contained on it are yours, correct?

8 A. Yes.

9 Q. Does the sketch, the schematic, fairly represent the  
10 relationship between the various points that are indicated,  
11 the shack, the wall, the bridge, et cetera?

12 A. Yes. I believe we had some sort of measuring device.

13 Q. All right. Okay. You indicated that you used --  
14 employed a method called a line search, correct?

15 A. Yes.

16 Q. Had you -- were you aware of that sort of methodology  
17 prior to? It seems simple, but is that something that was a  
18 standard FBI procedure?

19 A. It is a common law enforcement search method.

20 TC [MR. MILLER]: All right. If you could, please, pull  
21 up Prosecution Exhibit 435. 435, the exhibit, photograph.

22 [Pause.]

23 Q. Do you recognize the photograph, Prosecution

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1 Exhibit 435?

2 A. Yes.

3 Q. And what's contained in that particular photograph?

4 A. That's the beach area, and that is part of doing a  
5 line search.

6 Q. So you employed 10 or 12 agents to do that; is that  
7 correct?

8 A. Yes.

9 Q. Were there HRT members there?

10 A. Yes.

11 Q. Did they assist in the line search?

12 A. They did.

13 Q. 4 -- 814, please. Do you recognize the photograph,  
14 Prosecution 814?

15 A. Yes.

16 Q. All right. And do those involve, again, the  
17 individuals involved in the line search?

18 A. Yes.

19 Q. All right. 815, please. Do you recognize that  
20 photograph?

21 A. Yes.

22 Q. And are those the persons conducting the search?

23 A. Yes, sir.

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1 Q. All right. And lastly, 436, do you recognize that?

2 A. I do, yes.

3 Q. All right. And what's contained in that photograph?

4 A. That's Special Agent Tracy Kneisler conducting a  
5 search.

6 Q. Are the photographs that we have shown you of the  
7 beach and the line search that was conducted, are they fair  
8 and accurate depictions of the beach as it appeared the day it  
9 was searched, as well as the persons who conducted that line  
10 search?

11 A. Yes.

12 Q. All right. Anything distorting about the  
13 photographs?

14 A. No, sir.

15 Q. They are fair and accurate depictions, correct?

16 A. Yes, sir.

17 TC [MR. MILLER]: Your Honor, the prosecution would move  
18 for the admission of 806, 807, 808, 811, Prosecution  
19 Exhibit 420, 421, 419, 432, 433, 435, 425, 424, 423, 422, 431,  
20 434, 426, 427, 430, 429, 428, 437, 8 -- 811 -- I've already  
21 moved for that, excuse me -- 435, 814, 815, and 436.

22 MJ [Col SPATH]: All right. Thank you. Noted.

23 TC [MR. MILLER]: We would also move for the sketch that

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1 was compiled by this agent, which was Prosecution  
2 Exhibit 715A.

3 MJ [Col SPATH]: Thank you. Noted.

4 Q. A couple other matters before we let you go, Agent.

5 A. Yes, sir.

6 Q. Before the court lets you go. Excuse me.

7 TC [MR. MILLER]: If we could provide the witness with  
8 Prosecution Exhibit 430 -- excuse me, Prosecution  
9 Exhibit 333A.

10 Q. I believe yesterday we provided you with the -- one  
11 of the pieces of the trailer, 334 -- 334. You indicated that  
12 there were two pieces, similar pieces. I'm going to show you  
13 today 333. If you would look at that, please. Do you  
14 recognize that?

15 A. Yes, sir.

16 Q. All right. And again, we're talking about the  
17 trailer?

18 A. Right.

19 Q. Was that taken from the trailer?

20 A. That's correct. That was the piece on -- the rusting  
21 piece on the top.

22 Q. All right. There were two of them, correct?

23 A. Yes, sir.

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1 Q. 334, Exhibit 334, was the other one?

2 A. Yes.

3 Q. I'm showing you a photograph, Prosecution  
4 Exhibit 333A. Do you recognize what's contained in those  
5 photographs? I'm sorry. Thank you. Do you recognize what's  
6 contained in that photograph?

7 A. Yes.

8 Q. All right. And what is contained in those  
9 photographs -- in that photograph? Excuse me.

10 A. These are the two sides of the trailer where the red  
11 fabric was on.

12 Q. All right. And it has two K numbers; is that  
13 correct?

14 A. Yes.

15 Q. What are the two K numbers in that photograph?

16 A. They're pretty hard to make out, but it looks like  
17 K274 or 275.

18 Q. All right. If you would, please, look at the exhibit  
19 itself.

20 A. Yes.

21 Q. If you'd look on the evidence tag, is there a K  
22 number on it?

23 A. Yes.

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1 Q. And what is that K number?

2 A. K274.

3 Q. And that would match the K number for the piece of  
4 wood with the red carpet around it, is that correct, the one  
5 on top?

6 A. The one on top, yes.

7 Q. If you would, again, look at the exhibit itself.  
8 Does it have an evidence tag on it?

9 A. Yes.

10 Q. All right. And did you prepare that evidence tag?

11 A. I did.

12 Q. All right. Does it reflect that you seized this  
13 item?

14 A. Yes.

15 Q. All right. And does it have -- does it have a YM  
16 number on it?

17 A. Yes. YM3-104.

18 Q. All right. Is there ---- if you could check, is  
19 there a number right under the YM3 in red?

20 A. Yes.

21 Q. What is that?

22 A. 102.

23 Q. All right. Is there a 1B number on it also?

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1 A. 1B490.

2 Q. All right. If you'd look, is there an evidence  
3 receipt or what I call a green sheet attached to it ----

4 A. Yes.

5 Q. ---- chain of custody?

6 Does it have a 1B number and a YM number on it?

7 A. Yes. 1B490, YM3-102.

8 Q. It appears that the 104 that you previously testified  
9 to -- does it look like it has some lines through it?

10 A. Yeah, it looks like someone scratched off with red  
11 marker.

12 Q. I'm going to place on the ELMO Prosecution  
13 Exhibit 333C. Do you recognize that?

14 A. Yes.

15 Q. Is that an exact duplicate of the chain of custody  
16 receipt for Prosecution Exhibit 333?

17 A. Yes.

18 Q. Placing on the ELMO Prosecution Exhibit 333B. Do you  
19 recognize -- let me make it smaller. Do you recognize that,  
20 ma'am?

21 A. Yes.

22 Q. And did you prepare that receipt?

23 A. Yes. That is my handwriting.

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1 Q. And is it a fair and accurate depiction of the  
2 evidence receipt that you prepared for Prosecution  
3 Exhibit 333?

4 A. Yes.

5 Q. When I say "prepared" it, you prepared it at the time  
6 you seized it? At or near the time?

7 A. Yes.

8 TC [MR. MILLER]: All right. Move for the admission, Your  
9 Honor, of Prosecution Exhibits 333A, B, and C.

10 MJ [Col SPATH]: Thank you. Noted.

11 TC [MR. MILLER]: All right. Provide the witness, please,  
12 with Prosecution Exhibit 320.

13 Q. Do you recognize Prosecution 320?

14 A. I just need a second to look at this. Can you open  
15 this?

16 Q. Do you recognize the exhibit, Prosecution  
17 Exhibit 320?

18 A. Yes.

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

20 A. It's a piece of plastic.

21 Q. And did you seize that piece of plastic?

22 A. Yes.

23 Q. And from where did you seize it?

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1 A. This says "Search Site YM4."

2 Q. All right. So that would have been the -- what we  
3 call the lookout?

4 A. That's correct.

5 Q. All right. In this photograph, I ask you if you --  
6 Prosecution Exhibit 420 [sic], do you see that piece of  
7 plastic?

8 A. You said 320?

9 Q. Yes.

10 A. 320, yes.

11 Q. Okay. Could you look at the photograph?

12 A. Yes.

13 Q. Do you recognize that piece of plastic in that  
14 photograph?

15 A. Yes.

16 Q. All right. If you would look on the exhibit itself,  
17 please. Is there a YM and a 1B number?

18 A. Yes, YM4-116.

19 Q. And is there a 1B number?

20 A. 1B394.

21 Q. All right. Is there a chain of custody form  
22 associated with that exhibit?

23 A. Yes.

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1 Q. If you'd look at it, please. Does it have a YM  
2 number and a 1B number?

3 A. Yes, 1B394, YM4-116.

4 Q. All right. I'm showing you the chain of custody form  
5 for it. I take it the numbers on the chain of custody form  
6 match the ones on the exhibit; is that correct?

7 A. Yes.

8 Q. All right. I've placed on the ELM0 Prosecution  
9 Exhibit 420C. Do you recognize that form? Excuse me, 320C.  
10 I'm sorry. Do you recognize that form?

11 A. Yes.

12 Q. Is 320C an exact duplicate of the chain of custody  
13 form for Prosecution Exhibit 320?

14 A. Yes.

15 Q. Placing on the ELM0 Prosecution Exhibit 320B, as in  
16 boy. Do you recognize that?

17 A. Yes.

18 Q. Is that -- what's contained in that photograph?

19 A. Yes, that's the NCIS evidence tag.

20 Q. For Prosecution Exhibit 320?

21 A. Yes, sir.

22 Q. Fair and accurate depiction of it?

23 A. Yes, sir.

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1 TC [MR. MILLER]: The government would move for the  
2 admission of 320A, B, and C.

3 MJ [Col SPATH]: Noted. Thank you.

4 TC [MR. MILLER]: One last item, Your Honor. Can we  
5 provide the witness with Prosecution Exhibit 311, please.

6 Q. Just for clarification, I think you previously  
7 indicated that there was a razor contained within that  
8 particular item -- evidence bag; is that correct?

9 A. Yes, sir.

10 Q. In addition, is there any other item?

11 A. A blue box.

12 Q. All right.

13 TC [MR. MILLER]: Thank you. I have nothing further, Your  
14 Honor.

15 MJ [Col SPATH]: Okay. Defense Counsel, any questions?

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

17 MJ [Col SPATH]: Special Agent LoCascio, I know I gave you  
18 the order last time: Don't discuss your testimony until we're  
19 finished. As I've said, I know you'll talk to the other  
20 agents who are here. Just don't talk about your testimony  
21 until the matter is resolved. But as I indicated last time, I  
22 expect that's going to take awhile, as you can obviously tell.  
23 So please remember that.

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1           Do you have any questions about the order?

2           WIT: No, sir.

3           MJ [Col SPATH]: Okay. Then again, as I said last time,  
4 and I continue to tell witnesses who come down here to testify  
5 personally, I know it is appreciated by the people who have an  
6 interest in this. It takes some time and effort to get down  
7 here. Thank you again. You are excused.

8           WIT: Thank you, sir.

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

11          MJ [Col SPATH]: We'll take a minute before we go, since  
12 it's going to be abbreviated lunch, anyway. After we broke  
13 yesterday, both sides approached the CISO, a different one  
14 than who is here today, Mr. Lavender; and we were chatting --  
15 and were chatting with him about if he would assist in an  
16 effort to continue to declassify matters surrounding the  
17 alleged intrusion into attorney-client meetings.

18           He came down and talked to me and asked if I had any  
19 objection to his assistance. I said of course not. I think  
20 I've said, and I continue to say -- right? -- declassification  
21 is important. And, frankly, sometimes it is easy to  
22 over-classify. I don't -- I can't order it. I wish I could,  
23 but I can't.

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1           So since I can't, to the extent possible I still urge  
2 the government to declassify the matters surrounding this and,  
3 of course, to look at matters that are supposed to be  
4 classified, protect the national interest and national  
5 security of the United States. What it doesn't do is protect  
6 the confinement facility from things that may or may not have  
7 been going on here.

8           So he is here to help, and they will help. Please  
9 work with them. But the government, hopefully, is also  
10 working with the classification authorities to do it as well,  
11 since I've been asking for that to be done for quite some  
12 time. And I think it's important to get that information to  
13 people who do have an interest in this. But anyway, that  
14 happened over the break last night.

15           And, again, my CISOs stand by to help where they can,  
16 but they have limits as well, and we have lots of people to --  
17 to assist out there on the government side. Please work with  
18 the OCAs to the extent possible. Let's get this information  
19 declassified, or at least get out redacted information from  
20 the one or two classified hearings we had on the matter and  
21 things like that. I know you all are working on it, but  
22 anyway, I wanted you to know kind of the discussions we'd over  
23 the break with the CISOs involved, at least to the trial

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1 judiciary.

2 1300 we've got Mr. Koffsky, so please be in place  
3 just a little bit before that so we're on time for him. Let  
4 me know if there's any issues with the VTC or anything like  
5 that. I will be in chambers until 1300. I will see you then.

6 Anything else we can take up right now, Trial  
7 Counsel?

8 TC [MR. MILLER]: No. Thank you very much, Your Honor.

9 MJ [Col SPATH]: Defense Counsel?

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

11 MJ [Col SPATH]: See you at 1300. We are in recess.

12 [The R.M.C. 803 session recessed at 1212, 15 February 2018.]

13 [The R.M.C. 803 session was called to order at 1258,  
14 15 February 2018.]

15 MJ [Col SPATH]: All right. This commission is called to  
16 order. All the same parties who were present this morning are  
17 again present.

18 Is Mr. Koffsky available by VTC, Mr. Miller?

19 TC [MR. MILLER]: Yes, Your Honor, he is.

20 MJ [Col SPATH]: Okay. Then let's get him up on the VTC.  
21 If you would administer the oath for me, and then I'll take it  
22 from there.

23 TC [MR. MILLER]: I think Colonel Wells will be handling

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1 this portion of the proceedings, Your Honor.

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

3 TC [MR. MILLER]: With the court's permission.

4 [The VTC was commenced with the witness.]

5 MATC [COL WELLS]: Mr. Koffsky, good afternoon. This is  
6 Colonel John Wells. Can you hear me?

7 WIT: I can, Colonel.

8 MATC [COL WELLS]: Sir, before we begin, you are appearing  
9 here at Guantanamo Bay in the military commission case of  
10 United States v. al Nashiri. The presiding judge is Judge  
11 Spath.

12 Sir, you have additional people in the room with you;  
13 is that correct?

14 WIT: I do. I have my colleagues, Cheryl Hipp and Dwight  
15 Sullivan.

16 MATC [COL WELLS]: All right, sir. And I've given their  
17 names to the court reporters and so they have them.

18 Sir, before we begin and I administer an oath, you  
19 were requested to appear to testify. Do you have any  
20 questions about that and other ----

21 WIT: No, sir.

22 MATC [COL WELLS]: ---- expectations? All right, sir.

23 WIT: No, sir.

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1 MATC [COL WELLS]: To cover the formality, please, sir,  
2 would you please stand and raise your right hand.

3 PAUL S. KOFFSKY, civilian, was called as a witness for the  
4 military commission, was sworn, and testified as follows:

5 **DIRECT EXAMINATION**

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

7 Q. Sir, please take your seat. Thank you very much.

8 And I do want to ask: You have some papers in front of you.

9 Do you also have a pen?

10 A. I do.

11 Q. All right, sir. Thank you.

12 MATC [COL WELLS]: Your Honor, would you like to proceed  
13 with the questioning? Okay.

14 MJ [Col SPATH]: Yes, please. Thanks.

15 MATC [COL WELLS]: With that, sir, Judge Spath will start  
16 the questions.

17 WIT: Thank you.

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

19 Q. All right. Mr. Koffsky, in fact, my plan is I'm the  
20 only one who's going to ask questions, because I don't want  
21 you to be cross-examined or asked questions by the  
22 prosecution, given your role -- or I think what your role is  
23 with regard to the military commissions and the defense

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1 office, and the same for the defense counsel, and putting them  
2 in kind of an awkward position. So my plan is I have a little  
3 intro I want to go through and then to ask you some questions,  
4 and we'll move from there, okay?

5 A. Yes, sir.

6 Q. All right. So I'm Colonel Vance Spath. I'm the  
7 Chief Trial Judge of the Air Force. I've been detailed here  
8 to the Military Commissions by the Chief Judge of the  
9 Commissions, Colonel Pohl.

10 Primarily what I'm interested in is trying to make  
11 sure that Mr. al Nashiri is properly and adequately  
12 represented according to the standard set forth in the 2009  
13 Military Commissions Act. That's my end state, and it has  
14 been my end state since around September of 2017 when the  
15 events began to unfold that kind of led you -- or my request  
16 for you to come and testify.

17 I would say that my concern about it is increasing as  
18 time passes since we are, frankly, coming up on half a year in  
19 our current situation here. I say that to explain why I  
20 continue to move forward to have you come testify. And  
21 frankly, it all came to a head when the DoD civilians, two of  
22 them, refused to honor subpoenas and orders of the commission  
23 to appear to explain certain matters that I believed was

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1 necessary -- or were necessary to resolve some of these  
2 issues.

3 I appreciate, I really do -- and I have said this to  
4 the other witnesses as well. I say it all the time -- I  
5 appreciate you adjusting your calendar and schedule. I know  
6 you're busy, and I recognize the impact it takes to come  
7 testify for us. So I appreciate it.

8 For background for everyone, including those  
9 observing, it's important to know -- I think most people know  
10 it, but again, we have a lot of observers who travel down  
11 here -- the United States Government has chosen to try  
12 detainees here at GTMO, and the United States Government has  
13 chosen to refer this case as capital, and frankly, someone  
14 else has determined that I should be detailed to preside over  
15 the case. I think it's fair to say, given the circumstances  
16 of Mr. al Nashiri, that he would qualify as an indigent  
17 defendant anywhere else, and, as such, we certainly owe him  
18 adequate and appropriate resources on his defense team.

19 Also kind of as a background -- I've said it many  
20 times down here -- I strongly -- the commission strongly  
21 believes we owe the victims, family members, frankly, the  
22 U.S., Mr. al Nashiri, and all the other detainees, some  
23 certainty of conclusion with these proceedings, because

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1 they've been ongoing, as you know, for several years. And so  
2 I say all that as kind of what I'm trying to do here and where  
3 I'm trying to go.

4           So let me ask a few questions just for background.  
5 Can you tell me what your current job is?

6           A. Yes, Your Honor. I actually have three current jobs.  
7 I'm the Deputy General Counsel for Personnel and Health Policy  
8 of the Department of Defense. I am also, by appointment of  
9 Secretary Mattis last August 4, the Senior Deputy General  
10 Counsel of the Department of Defense. And I am currently the  
11 Acting Principal Deputy General Counsel of the Department of  
12 Defense.

13          Q. And then, in general, what is your relation to the  
14 defense community for the commissions?

15          A. In general, sir, I am responsible for overseeing the  
16 defense counsel services for military commissions. In that  
17 role I -- in that role I provide advice, support, and, when  
18 requested, advocacy before officials of the Office of the  
19 Secretary of Defense for the chief defense counsel.

20                I do not believe that my role includes directing the  
21 chief defense counsel to perform any act or not perform any  
22 act. I do, however, write his performance appraisal. And  
23 that is pretty much the limit of -- of what -- what I do with

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1 respect to performing traditional supervisory functions.

2 I'm not even allowed to allocate resources to the  
3 defense. I am entitled to receive courtesy copies of the  
4 chief defense counsel's requests to the convening authority  
5 for resources.

6 Q. And then I had an opportunity to look at your bio,  
7 but there -- again, there are people here observing who have  
8 traveled down here. Can you just, in general, give us your  
9 background, or how you kind of got from, you know, law school  
10 to where you currently are?

11 A. I would be glad to, Your Honor. I graduated from  
12 college in 1973, and from law school in 1976. I've been a  
13 member of the bar since June or July of 1977. When I was  
14 first out of law school, I practiced as an associate with a --  
15 a Washington law firm for almost three years.

16 I then joined the Department of Defense to serve on  
17 the staff of a task force inquiring into whether the  
18 department ought to have an Inspector General. That  
19 assignment lasted about 18 months. It was a temporary job.

20 At the end of that period an opening came up in the  
21 Office of General Counsel and the Office of the Deputy General  
22 Counsel, what's now known as the Office of the Deputy General  
23 Counsel for Personnel and Health Policy. I joined that office

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1 in the -- I think it was September of 1980.

2           On December 11, 1994, I was appointed Deputy General  
3 Counsel in charge of that office; have served in that role  
4 continuously since then. And as I previously mentioned, since  
5 August the 4th of last year I have been the Senior Deputy  
6 General Counsel of the Department of Defense, the senior DoD  
7 career lawyer.

8           Q. All right. And then not that -- I don't -- I'm not  
9 asking if you've studied these things closely or anything,  
10 but, in general, are you familiar with the Military  
11 Commissions Act and the Manual for Military Commissions and  
12 the regulations?

13          A. In general.

14          Q. And so for us, I think, just so people understand  
15 kind of your role or why it's there, are you familiar with the  
16 military commission regulation that provides that the chief  
17 defense counsel is going to report directly to you, to the  
18 Deputy General Counsel, Personnel Health and Health Policy, of  
19 the Department of Defense?

20          A. Yes, sir.

21          Q. And so as I read it years ago, I assume that's why  
22 you're lucky enough to have this responsibility, is because of  
23 that regulation?

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1 A. Yes, sir.

2 Q. Okay.

3 A. Uh-huh.

4 Q. So the chief defense counsel overall for the  
5 commissions, your understanding is, that person is who?

6 A. Right now it's Brigadier General John Baker.

7 Q. For the -- for the al Nashiri case, for this case,  
8 Mr. al Nashiri's case, are you aware that he has relinquished  
9 those responsibilities?

10 A. Yes. Yes, Your Honor. And the acting chief defense  
11 counsel for this case is Colonel Wayne [pause] ----

12 Q. Aaron.

13 A. Whose name is ----

14 Q. That's right.

15 A. ---- Aaron, yes.

16 Q. Does that -- does Colonel Aaron sound familiar?

17 A. No disrespect to the good Colonel, please.

18 Q. Not at all. Does that sound familiar, Colonel Aaron  
19 is the, for this case, the acting chief defense counsel?

20 A. [Nodded head.]

21 Q. Okay. And that's positive for the court reporters.

22 So in that role, because he is the acting chief  
23 defense counsel, do you have the same kind of relationship

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1 with him that you would with General Baker?

2 A. Your Honor, for this case, yes.

3 Q. Are you aware of kind of the circumstances that led  
4 to General Baker relinquishing those responsibilities for this  
5 case?

6 A. I am, Your Honor.

7 Q. In relation to other personnel in the military  
8 defense office, do you have any supervisory responsibilities  
9 over those other attorneys?

10 A. Excuse me. Your Honor, with respect to the principal  
11 deputy chief defense counsel, I am the reviewer on -- on that  
12 officer's performance appraisals for those military  
13 departments that have two signatures on the appraisals. For  
14 all the other personnel in the office, I have no supervisory  
15 responsibilities.

16 Q. All right. And again, it's not a homework test, so  
17 I'm going to read you the provision out of the -- the  
18 regulation, because I recognize you've got lots of different  
19 responsibilities. But if -- in the Regulation For Trial By  
20 Military Commissions, are you aware of -- it's 9-1.a.3., and  
21 the language is that, "The chief defense counsel shall ensure  
22 that all personnel assigned to the OCDC," the Office of  
23 Commissions Defense Counsel, will "review and attest that they

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1 understand, and will comply with, the Military Commissions  
2 Act, the Manual for Military Commissions, the Regulation for  
3 Trial by Military Commissions, all Supplementary Regulations  
4 and Instructions issued in accordance with these, and the  
5 orders of the commission"?

6 A. I am aware, Your Honor.

7 Q. And so given that the chief defense counsel's role,  
8 and that seems to be that he will ensure that all personnel  
9 under him will review and attest that they will do those  
10 things, they understand them, they will follow the orders of  
11 the commission. I assume it's your belief General Baker would  
12 have done that with the personnel who work for him within the  
13 defense office.

14 A. Well, Your Honor, that is General Baker's  
15 responsibility. I have no direct knowledge in what way he  
16 fulfilled that responsibility.

17 Q. Understand. And then with the change to Colonel  
18 Aaron, I assume same answer. It would be his responsibility  
19 under the regulation, but you don't know if or how that was  
20 done?

21 A. I -- Your Honor, I assume -- yes. The answer is yes.  
22 I assume, as with General Baker, Colonel Aaron did fulfill  
23 that responsibility. I do not know in what way he did so.

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1 Q. In relation to the issue related to -- and you can  
2 probably tell, I'm being very cautious. I don't -- I am not  
3 trying to infringe on any privileges. I don't even want to  
4 get into where we're discussing whether or not I believe we  
5 should release privileged information.

6 I have crafted my questions today so that, hopefully,  
7 this will keep your guard reasonably down. I am not looking  
8 to ask about privileged conversations or even, ultimately, if  
9 there were some, try to pierce that privilege right now. Not  
10 at all the goal right now. It really is to get some  
11 background and try to understand some road ahead for the  
12 commission, given the framework I talked about at the  
13 beginning.

14 I assume you're aware that -- whether anyone agrees  
15 with it or not, but you're aware that I've ruled that General  
16 Baker does not have -- does not have -- the unilateral and  
17 unreviewable discretion to excuse defense counsel in this  
18 commission case?

19 A. Yes, sir. I am aware, Your Honor.

20 Q. Did you have an opportunity to review that particular  
21 ruling? Did you review it?

22 A. Yes, Your Honor.

23 Q. And so fair -- this is going to summarize it -- I

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1 think maybe oversimplified a bit, but, again, mostly for  
2 people who are kind of paying attention down here -- that my  
3 ruling was based on my determination that the Manual for  
4 Military Commissions, particularly Rule 505(d)(2)(B), contains  
5 an ambiguity both within it, within the rule, and then an  
6 ambiguity within the manual, thus requiring what I believed  
7 was kind of using the rules of statutory construction which  
8 resulted in me determining General Baker does not have that  
9 authority when defense counsel have entered appearances before  
10 the commission but, in fact, I do. And he is not the  
11 authority to excuse outside appointed learned counsel, because  
12 they're kind of a separate entity. Is that a fair summary of  
13 what you remember from that ruling?

14 A. From what I remember, yes, Your Honor. I haven't  
15 read it for quite some time.

16 Q. Okay. And are you aware that I haven't found any  
17 evidence that supports the defense contention that there has  
18 been actual intrusions into attorney-client communications  
19 between this accused and his attorneys detailed to this case?

20 A. Your Honor, that has been reported to me. I have no  
21 direct knowledge of Your Honor's ruling in that respect.

22 Q. Okay. Understand. And that -- so that, I think,  
23 answers the next question. Have you reviewed the filings,

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1 classified and unclassified, related to the issue of alleged  
2 intrusions into attorney-client meetings?

3 A. No, Your Honor.

4 Q. Are you aware that General Baker has not excused --  
5 and maybe because there's been no request -- has not excused  
6 counsel from other accused's cases due to this alleged  
7 intrusion that we are dealing with?

8 A. I have no knowledge of that, Your Honor.

9 Q. Okay. Did anyone make you aware that Colonel Aaron,  
10 again, the acting chief defense counsel for my particular  
11 case, released all detailed defense counsel who had remained  
12 after General Baker's actions? So after General Baker  
13 released the two DoD civilians and the learned counsel, after  
14 that, specifically in January of 2018, Colonel Aaron released  
15 all detailed defense counsel who remained detailed to  
16 represent Mr. al Nashiri?

17 A. I am aware, Your Honor.

18 Q. And that by doing that ----

19 A. I'm ----

20 Q. Sorry.

21 A. I'm sorry, Your Honor. I'm aware that he undetailed  
22 three counsel who had not yet entered appearances in the case.

23 Q. Yes. And that that occurred after I issued an order

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1 requiring anyone detailed to the case to make an appearance at  
2 our next session. Does that kind of conform?

3 A. I was not aware of that, Your Honor.

4 Q. So, sir, kind of given where we are right now, you  
5 are aware, I think, that Lieutenant Piette is the only  
6 detailed military defense counsel to Mr. al Nashiri's capital  
7 case; is that fair?

8 A. Yes, sir.

9 Q. So it appears to me this one's unique, right? We  
10 have -- we have an issue with the orders I've issued, and  
11 we're kind of not getting a lot of traction in getting those  
12 followed. And so I -- I recognize what you said at the  
13 beginning, kind of what your role is in relation to the chief  
14 defense counsel and the defense bar here.

15 I guess I would ask: What do you think your current  
16 role is for this case given its -- I think it's fair to call  
17 it its kind of unique appearance right now? Does that change  
18 your role in regard to this, or ----

19 A. No, sir. My role would be to consult and advise  
20 Colonel Aaron, to the extent that he requests such advice and  
21 consultation. If at any time Colonel Aaron desired to meet  
22 with the General Counsel of the Department of Defense, now the  
23 Acting General Counsel, I would, at his request, facilitate

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1 that meeting. To the extent that Colonel Aaron requests  
2 additional resources, I would advocate for those resources  
3 with the convening authority, again, at his request.

4 Q. All right. Shifting gears to some other personnel,  
5 are you aware of who Ms. Eliades and Ms. Spears are?

6 A. Your Honor, I am aware that they have -- yes, I am  
7 aware.

8 Q. All right. And are you aware those are two of the  
9 counsel who were released by General Baker from representing  
10 the accused in this case?

11 A. Your Honor, yes, I'm aware.

12 Q. Do you know if they are still employed by the  
13 Department of Defense?

14 A. Your Honor, I have no direct information on that, but  
15 my understanding is that the answer to Your Honor's question  
16 is yes.

17 Q. Okay. And then, Mr. Koffsky, is it your belief  
18 they're still employed in the Military Commission Defense  
19 Office?

20 A. Your Honor, again, I have no direct knowledge, but I  
21 believe that they are, and I have recently seen an  
22 organizational chart showing that they are.

23 Q. I think I know the answer to this; I'll ask it: Have

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1 you reviewed the employment documents, the contracts and the  
2 employment documents related to Ms. Eliades and Ms. Spears?

3 A. No, Your Honor, I have not.

4 Q. Were you aware -- I don't know if you were aware of  
5 kind of the issue this week, that those two civilians were  
6 ordered to appear before the commission, had been subpoenaed,  
7 and refused to appear despite the subpoena?

8 A. I have been informed of those -- those facts, Your  
9 Honor.

10 Q. And we kind of laid out the chief defense counsel's  
11 obligations to ensure that people within the organization  
12 comply with commission orders. One of the -- we went through  
13 that regulation. So is it fair to say that Colonel Aaron's  
14 role, given the regulation, is to ensure that people within  
15 the organization comply with commission orders?

16 A. Your Honor, in general I would agree with that. But  
17 the devil, of course, is in the details, and I have no view  
18 on -- on the particular question before Your Honor related to  
19 Ms. Eliades and Ms. Spears.

20 Q. I guess the question would be -- there is no doubt  
21 that people disagree with orders from me. Frankly, when I'm  
22 back doing courts-martial and when I'm sitting here at the  
23 commissions, typically one or the other, right, side do not

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1 like or disagree with the order. That's pretty standard.  
2 Every now and then both sides don't like it. But for the most  
3 part, going in, one side or the other disagree with whatever  
4 order I issue.

5 I guess my -- let me ask this: Are you aware of any  
6 regulatory language that allows people within the defense  
7 organization to disregard the order rather than seek  
8 assistance from an appellate court or a superior court or like  
9 a district court or something like that?

10 A. Your Honor, I'm aware of a canon of professional  
11 responsibility that allows individuals before a court or, in  
12 this case, the commission, who believe the order is invalid  
13 openly to state such and not comply with the order; but I'm  
14 not aware of any language in the commissions regulations that  
15 would allow that. I am not, Your Honor, an expert in the  
16 commissions regulations. There may be such a provision; I'm  
17 just unaware of it.

18 Q. I understand. I guess in that review of professional  
19 responsibilities, they all appear to have Rule 1.16(d). It  
20 appears to be in all of their professional responsibilities,  
21 including my own, and that is that if a commission orders --  
22 or a tribunal, to be accurate -- if a tribunal orders you to  
23 continue representation, even if good cause has been shown not

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1 to, you have to continue representation. Are you familiar  
2 with that provision?

3 A. I am familiar with that provision, Your Honor.

4 Q. Okay. Because where I struggle -- and not with you  
5 at all, it's as I deal with these issues. What I'm trying to  
6 figure out is what ethics -- or what rule of professional  
7 responsibility allows me to simply disagree -- sorry, disobey  
8 a court order if I disagree with it?

9 A. Your Honor, I think that that's a very good but  
10 general question, and I have trouble answering it in the  
11 abstract.

12 Q. I understand. Well, here, of course, it is the  
13 specific: You are ordered to continue to represent your  
14 client until another court steps in and says the commission  
15 doesn't have the authority or you are excused for good cause,  
16 I mean, something like that. Make sense?

17 A. Your Honor, it does make sense. I'm also aware that  
18 General Baker's position -- and I assume, without knowing the  
19 position of the two attorneys you've mentioned, is that  
20 General Baker's -- General Baker has the authority to detail  
21 and to undetail counsel. I mean, that issue is -- was before  
22 Your Honor and is now before Judge Lamberth.

23 Q. That's fair. Kind of before Judge Lamberth. It's --

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1 I'm hoping that Judge Lamberth will rule on that issue. I  
2 fear he's going to rule on one other issue, and that's the  
3 contempt issue, and not help with the -- kind of the  
4 underlying real question we all need answered -- right? -- Am  
5 I right or is General Baker right? I mean, that's fair.

6 I guess my question is, you know, in the -- in where  
7 we are right now, I more than appreciate General Baker and I  
8 disagree. He outranks me, but in this weird structure I'm the  
9 commission. And I'm just -- I'm trying to figure out where  
10 the authority comes from to simply disobey an order you  
11 disagree with, again, absent -- if Judge Lamberth stayed these  
12 proceedings -- I think you know this -- I would stop right  
13 now. I'd walk off the bench. I'd go home.

14 What I would not do is tell Judge Lamberth, thanks  
15 for your input, I disagree with you, so we're going to keep  
16 going until some other court steps in and does something. I  
17 mean, I truly believe that would be my response to that. And  
18 that's what I'm trying to figure out here, is we have an  
19 organization that doesn't have a stay, doesn't have a contrary  
20 ruling, and simply refuses to follow orders from the  
21 commission, and we're in limbo.

22 So tell me if I'm correct. Do you believe that you  
23 can or should -- probably more accurately -- should influence

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1 that behavior in any way, given your role in the regulation?

2 A. With the greatest respect for you and the commission  
3 Your Honor, no, sir.

4 Q. And that -- fair answer, right, given the reading of  
5 the regulation and what your responsibilities are. No -- no  
6 debate.

7 Let me just make sure I don't have anything else.

8 Okay. I know -- I know I told you they're not going  
9 to get to ask questions. They're not. I just want to make  
10 sure they don't want to say anything before I let you go.

11 Colonel Wells, anything?

12 MATC [COL WELLS]: Your Honor, I do have some questions  
13 that I would present to you to consider asking Mr. Koffsky  
14 and, like you do with the panel, share it with both counsel  
15 before it goes to you. You would consider those and then,  
16 whether they're worthy or not, you'd make that determination.

17 MJ [Col SPATH]: Are they in writing?

18 MATC [COL WELLS]: Yes, sir.

19 MJ [Col SPATH]: Okay. Show them to Lieutenant Piette.  
20 Let me look at them. I may or may not ask any of these. I  
21 might have the information I need. I'm just going to see what  
22 it is they're concerned about, Mr. Koffsky.

23 And same for you, Lieutenant Piette. If there's any

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1 issues that you're concerned about, let me know what they are.

2 I don't know if I'll ask anything.

3 [The military judge conferred with courtroom personnel.]

4 MJ [Col SPATH]: First, Lieutenant Piette, any concern  
5 about those? Again, I don't know if I'm going to ask them or  
6 not, but any concern about those questions?

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

8 MJ [Col SPATH]: All right. We'll mark them in a minute.  
9 Let me just see them.

10 The third one down, does that say "qualifying  
11 authority"?

12 MATC [COL WELLS]: Yes, sir.

13 MJ [Col SPATH]: Okay. I think the others are all either  
14 answered or they're easy to answer. I don't know what a  
15 "qualifying authority" is. It just shows my ignorance in the  
16 process, maybe.

17 Q. Is the general counsel the qualifying authority for  
18 Ms. Spears and Ms. Eliades, do you know?

19 A. Your Honor, I believe that question refers to DoD  
20 Instruction 1442.02, which delegates to various general --  
21 deputy general counsels in the Department of Defense the  
22 authority to determine the qualifications of attorneys in  
23 specified organizations. One of the organizations that's

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1 specified under the Deputy General Counsel for Personnel and  
2 Health Policy, one of my jobs, Your Honor, is the -- is the  
3 Office of the Chief Defense Counsel, the Military Commission  
4 Defense Organization as it's now known.

5 That simply means that the deputy general counsel may  
6 determine whether an attorney is qualified to be hired as a  
7 certain grade level: GS-12, GS-13, something like that.

8 Q. And so is that you in relation to Ms. Eliades and Ms.  
9 Spears?

10 A. It would be. I have no recollection whether I  
11 actually approved their qualifications or not. I may very  
12 well have. I just don't know.

13 Q. Sure, I understand. And then the only other piece I  
14 had before I let you go, I don't want to know what actions are  
15 being contemplated, if any, or what impacts this is having on  
16 General Baker, Colonel Aaron, Ms. Eliades, and Ms. Spears. In  
17 a general sense, are you looking at what appropriate actions  
18 should be taken, if any, due to the conduct that is occurring?

19 A. Your Honor, at this point, with the greatest respect  
20 to you and the commission, I believe such consideration would  
21 be premature. And indeed, should it become ripe, I'm not sure  
22 I'm the right person to do it.

23 Q. I understand that because of your role in the

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1 oversight or the supervisory chain of the chief defense  
2 counsel.

3 A. Yes, Your Honor, among other reasons.

4 Q. Okay. I appreciate that.

5 MJ [Col SPATH]: We're going to mark, Colonel Wells, your  
6 questions as Appellate Exhibit 393E.

7 MATC [COL WELLS]: And, Your Honor, the responses were not  
8 satisfactory and they were incomplete as it relates to  
9 qualifying authority.

10 MJ [Col SPATH]: I understand. We're not -- I am just  
11 trying to get some information, and I have exactly what I  
12 needed.

13 Q. Mr. Koffsky, I do appreciate ----

14 A. Yes, sir.

15 Q. ---- I know it takes time to come do this. It's not  
16 fun to get called to testify, I know that. I really did  
17 work -- as I hope you could tell, I did not want to dive into  
18 privileged information or even come close to it. That's been  
19 my goal all along, where I can avoid it. And so thank you.

20 And then I know Mr. Sullivan is there. He and I know  
21 each other as well, so just say hello to him.

22 A. Thank you, Your Honor. I appreciate the commission's  
23 courtesy.

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1 MJ [Col SPATH]: Okay. Thank you very much. You can  
2 disconnect.

3 [The witness was excused and the VTC was terminated.]

4 MJ [Col SPATH]: All right. I appreciate it, Colonel  
5 Wells. I'll tell you what I heard. I heard somebody who is  
6 not going to do anything, that's what I heard. In fact, he  
7 said so. Right? Not only am I not going to -- not doing  
8 anything about misconduct right now, nothing, I also -- what I  
9 hear is General Baker disagrees with you, and so we'll figure  
10 it out. That's what I keep hearing. Status quo from that  
11 crowd.

12 MATC [COL WELLS]: Yes, sir. From the prosecution's  
13 perspective, I think the response, particularly about the  
14 qualifying authority, also includes a professional  
15 responsibility and the conduct of attorneys within DoD, and  
16 that is clearly fixed, I think, within the general counsel's  
17 office.

18 I think the next question, obviously, is who can  
19 direct or order the chief defense counsel to take particular  
20 actions if they are improper? Who can direct, in this  
21 particular case, the acting senior attorney, Colonel Aaron, if  
22 they're believed improper, particularly if they're in  
23 violation of the commission's directives and orders or the

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1 regulation?

2 MJ [Col SPATH]: What I hear is radio silence from the  
3 Pentagon. That's what I hear.

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

5 MJ [Col SPATH]: We've been at this for five months. He  
6 hasn't even reviewed the classified or unclassified issues  
7 that underlie the alleged intrusions that I found didn't  
8 happen seven times. I mean, it's over something that's  
9 important.

10 MATC [COL WELLS]: Hands off sir, laissez faire. We're  
11 going to let the ----

12 MJ [Col SPATH]: Agree.

13 MATC [COL WELLS]: ---- subordinates take the action.

14 MJ [Col SPATH]: And again, what I -- frankly, what I have  
15 from you all right now is the next action is I refer it to  
16 Colonel Pohl, and then Colonel Pohl does whatever Colonel Pohl  
17 does.

18 So we report him for misconduct. So what? What does  
19 that do to get Mr. al Nashiri defense counsel? We've been at  
20 this five months. Colonel Aaron is not going to do it; he's  
21 already said so. In fact, he undetailed everybody right after  
22 I issued an order, of course. He's done nothing to make sure  
23 the two civilians actually show up and testify, because

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1 they're still working. They clearly violated the subpoena,  
2 that's -- right? That's obvious. We know what's going on.

3 The issue is why is it on me? Why is it on me ----

4 MATC [COL WELLS]: Yes, sir.

5 MJ [Col SPATH]: ---- to continue to move a process  
6 forward the DoD doesn't want to move forward? Because that's  
7 how it appears.

8 MATC [COL WELLS]: Sir, if I could address that. The  
9 regulations and manuals structuring the commission are --  
10 provide certain responsibilities and is premised, I believe,  
11 on good faith, a fair reading of the authorities. So this  
12 circumstance, I believe, is built on a false narrative and  
13 belief, which you ruled previously related to intrusions. And  
14 then it stems from a disagreement there. Instead of ask for  
15 reconsideration or stand at the podium and explain that we can  
16 no longer represent our client competently under these  
17 conditions at the Joint Task Force, we're now in the mode of  
18 creating dysfunction by not attending.

19 Now, the other point on this is there has to be  
20 consequences. However, without findings of fact from the  
21 commission that detail the circumstances and the misconduct  
22 that you see, this commission sees, then there is no action  
23 for contempt, there is no action for -- under 109 for

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1 disbarment.

2 MJ [Col SPATH]: But you all can do things, too.

3 MATC [COL WELLS]: Yes, sir. Let me get to that.

4 MJ [Col SPATH]: I know, but -- yeah, I -- but you have  
5 findings of fact for me. I held General Baker in contempt. I  
6 don't know what more -- right? Could I hold Colonel Aaron in  
7 contempt? I guess so. But what if Colonel Lamberth -- or  
8 Judge Lamberth -- sorry, Judge Lamberth. What if Judge  
9 Lamberth says my contempt authority is not as I believe it is?

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

11 MJ [Col SPATH]: Why would I waste time? And that is why  
12 I am pausing, right? That is -- what I don't want to do is  
13 have six contempt hearings and have Judge Lamberth tell me six  
14 times I got it wrong. That's not effective.

15 MATC [COL WELLS]: Sir, absolutely. If I could address  
16 the timing of this. You know, our theme here has been  
17 honoring your rulings. Learned counsel is not released. He  
18 is ----

19 MJ [Col SPATH]: I concur.

20 MATC [COL WELLS]: To the extent practicable, he is  
21 available.

22 MJ [Col SPATH]: And you have findings of fact about that.

23 MATC [COL WELLS]: Yes, sir.

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1 MJ [Co1 SPATH]: Lots of findings of fact.

2 MATC [COL WELLS]: So the posture that we are in are still  
3 in the fact-finding mode, attempting to get the attorneys ----

4 MJ [Co1 SPATH]: We're not. We're not fact-finding. I  
5 have ruled there were no intrusions. What more facts do you  
6 want?

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

8 MJ [Co1 SPATH]: I have ruled there are no intrusions into  
9 attorney-client relationships. I have ruled there is not good  
10 cause to be released. It's not fact-finding. It is  
11 obstinance, and it is abandonment of representation in the  
12 face of court rulings. We're not fact-finding. You all can  
13 fact-find.

14 MATC [COL WELLS]: Your Honor ----

15 MJ [Co1 SPATH]: I am not fact-finding.

16 MATC [COL WELLS]: May I suggest for the commission, I  
17 understand that on the underlying reasons that -- gave for the  
18 counsel ----

19 MJ [Co1 SPATH]: Right.

20 MATC [COL WELLS]: ---- to believe that they could no  
21 longer represent. But the subpoena is always issued to obtain  
22 evidence. Not representation, but evidence.

23 MJ [Co1 SPATH]: Correct.

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1           MATC [COL WELLS]: And you still have not made the final  
2 conclusion whether or not, the attorneys who are requesting in  
3 their application, good cause stands for them. For all we  
4 know, if they appeared at the podium, you might say, well, I  
5 didn't think of it that way. I didn't see it that way.  
6 You've caused me to think about it. By golly, you do have  
7 good cause that prevents you from effectively representing  
8 your client. I am going to take appropriate action in this  
9 commission to ----

10           MJ [Co1 SPATH]: Yes, I could reconsider. But if you go  
11 back to all of the rulings I've already made ----

12           MATC [COL WELLS]: Agreed.

13           MJ [Co1 SPATH]: ---- I have said those two don't have  
14 good cause. What that was was an offer -- not an offer. It  
15 was a direction to come and explain to me what their good  
16 cause is, because General Baker doesn't have the authority.  
17 And I want to know what it is. What am I missing other than  
18 what we've already heard about this alleged intrusion?

19           MATC [COL WELLS]: Sir, I understand. So what has  
20 happened since that time is that you have taken the prudent  
21 steps in your docketing orders to direct and order counsel who  
22 are still detailed to appear, and they have ----

23           MJ [Co1 SPATH]: But they're not coming.

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1           MATC [COL WELLS]: Mr. Kammen has taken collateral action  
2 in Indiana to try to avoid that under the auspices of a habeas  
3 action, and that has yet to play out; and it's a long time to  
4 play out already. We're still in the midst of that; no  
5 decision on that point.

6           Ms. Eliades and Spears also have taken the position  
7 not to comply with the orders, but you prudently have  
8 requested subpoenas to be issued. That was one step. You  
9 also exercised authority under the regulation to ask if the  
10 supervisory chain was going to talk to General Schedule  
11 employees, civilian attorneys, if they would comply with  
12 directives and rulings. That played out this week.

13           And as you have pointed out, Colonel Aaron says that  
14 he took what he believed to be prudent action by building  
15 orders in Defense Travel Service system -- which I think we  
16 know in common experience, when you build orders, electronic  
17 notices are sent to the employees. I don't know if that  
18 occurred. We could ask Colonel Aaron if he followed up with  
19 that. Unanswered questions from Colonel Aaron are: Did you  
20 speak with them? Did you e-mail them? Did you write them and  
21 implore them to comply with the court's order? Those pointed  
22 questions still remain.

23           MJ [Col SPATH]: Let me ask you this: They got a

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1 subpoena. They were ordered to appear, so ----

2 MATC [COL WELLS]: Here's my ----

3 MJ [Col SPATH]: Yes, I understand Colonel Aaron has  
4 responsibilities. We read them. He knows what his  
5 responsibilities are. He works in a supervisory chain that is  
6 telling me they're not going to do anything. That's what I  
7 just heard.

8 MATC [COL WELLS]: So what I would suggest is that the  
9 commission is trying everything prudently to make sure that  
10 all avenues are exhausted, and you are going to come to a  
11 point, perhaps pretty rapidly, where you have exhausted all  
12 avenues to gain essential facts that relate to whether or not  
13 there was good cause and their compliance with rules ----

14 MJ [Col SPATH]: I disagree with that.

15 MATC [COL WELLS]: ---- and you will be left with no other  
16 decision than to make adverse findings to them.

17 MJ [Col SPATH]: I have.

18 MATC [COL WELLS]: Yes, sir.

19 MJ [Col SPATH]: What I have done is given them the  
20 opportunity to come and explain, basically reconsideration,  
21 what was I missing. What I presume I would have heard is the  
22 same: People were listening. Well, there's no evidence of  
23 that. There's no evidence of that, not to their client.

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1           MATC [COL WELLS]: There will come a point in this  
2 process, sir -- just to back up, though, on our linear  
3 sequence here, the employees did not comply with the subpoena.  
4 And I would ask that MCD0 look at 18 U.S.C. 847. And it does  
5 have a requisite that commission or the convening authority  
6 can make specific findings of fact, and there are criminal  
7 penalties that can be referred to the Department of Justice  
8 for failure to adhere to a subpoena.

9           MJ [Col SPATH]: So where is the convening authority on  
10 this?

11          MATC [COL WELLS]: Yes, sir. They are, first and  
12 foremost ----

13          MJ [Col SPATH]: I think you're feeling my frustration, is  
14 it feels like I'm attempting to move this forward. And while  
15 I can keep moving it forward, and Lieutenant Piette can sit  
16 there and take no position, despite what I think are his bar  
17 obligations, nobody seems to care about that either in this  
18 chain. That seems to be the advice. Despite rulings I've  
19 made to the contrary, we're going to take that tack.

20                 We are guaranteeing ourselves, right, delay and delay  
21 and delay if we have a single attorney representing  
22 Mr. al Nashiri in a complex trial. And what we're also  
23 guaranteeing ourselves is, if you all are successful, very few

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1 appellate courts are going to be happy with the process.  
2 Maybe they'll apply a Strickland standard ultimately and go,  
3 well, too bad, Lieutenant Piette. Bad call. But there are as  
4 many cases on the other side that will stand for the  
5 proposition that what they're going to do is make you try it  
6 again, and we're going to go through what we just watched  
7 again.

8           And then we have, right, the strategic: What is the  
9 public perception of a justice system? Which is important in  
10 any justice system. And if I drive Lieutenant Piette into  
11 trial, what is that perception? And is that perception  
12 something that is going to undermine every other commission  
13 proceeding down here? And is what's going on right now in  
14 this proceeding going to infect every other commission  
15 proceeding down here?

16           MATC [COL WELLS]: Sir, I would suggest that we are still  
17 on the path. We haven't arrived at the end yet. The  
18 opportunities for the counsel to turn away from adverse  
19 consequences is narrowing. There will come a time when you  
20 are forced to make adverse rulings as to their conduct, make  
21 specific findings that could support misconduct ----

22           MJ [Col SPATH]: I feel like I've done that. If I were to  
23 just walk away right now, I feel like you all have a record

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1 replete with me stating that they have abandoned their client  
2 and they have refused orders, now refused a subpoena, refused  
3 to resource, undetailed -- Mr. Koffsky didn't know the timing  
4 of that, right? -- undetailed detailed defense counsel as soon  
5 as I said they should make an appearance or would make an  
6 appearance.

7 MATC [COL WELLS]: Sir, I would suggest this: I'm not  
8 sure when he actually undetailed them. I'm not sure the  
9 pointed question to Colonel Aaron was asked.

10 MJ [Col SPATH]: It was asked. He was very -- he was very  
11 up front when he talked to me last time. I asked him, "Did  
12 you undetail them after I gave you -- or that order came out?"  
13 And he said, "Yes."

14 MATC [COL WELLS]: I missed that point, but you ----

15 MJ [Col SPATH]: He was very clear.

16 MATC [COL WELLS]: Sir, I would suggest that the  
17 commission has important power still to implement,  
18 fact-finding to do. It seems that it has been exhausted with  
19 Mr. Koffsky, exhausted with Colonel Aaron, perhaps exhausted  
20 with the two employees. There are other options that relate  
21 to writ of attachment. You said that you were going to  
22 cautiously consider those. I'm not suggesting that that's  
23 appropriate in this circumstance.

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1 MJ [Col SPATH]: That's right. And I -- I thought I was  
2 very clear, right? Apparently there is a lot of confusion  
3 about "I'm going to think about it overnight."

4 MATC [COL WELLS]: Correct, sir.

5 MJ [Col SPATH]: And now that I've had a chance to listen  
6 to audio, I actually know what I said, which is, of course,  
7 what I think you all heard, "if I issue the subpoenas," but  
8 can't listen to audio because we don't put the audio out  
9 there.

10 But, most importantly, I'm going to think about it  
11 overnight. And I am pausing on issuing those writs, because I  
12 have every belief that they are enforceable. I think there's  
13 no doubt you all can get the marshals, we can get the  
14 civilians, we can make them travel all of 10 miles, right, in  
15 this oppressive world to the Mark Center, testify, refuse to  
16 testify, do whatever it is they're going to do. We could do  
17 that. That guarantees a conflict with their client -- it  
18 does -- because of the adverse, right, responses to people who  
19 have to be apprehended because they avoid showing up for  
20 court. It has adverse consequences to them. It relates to  
21 the representation of this client.

22 So if I'm them, of course, what do you do? You turn  
23 around and go, well, there's good cause. I mean, there's good

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1 cause. If nothing else, this has become a different kind of  
2 relationship with our client. And that's why I have paused on  
3 issuing those writs. Because can I blow it up and get rid of  
4 them? Yes. But is that the right answer when they have an  
5 attorney-client relationship with a person nobody's bothered  
6 to get any input from, except for me ----

7 MATC [COL WELLS]: Yes, sir.

8 MJ [Col SPATH]: ---- that has been presented to me about  
9 what does he want in all this. Does he want Mr. Kammen back?

10 And this -- this belief that he doesn't know what the  
11 issue is -- he was in here for Ms. Yaroshefsky's testimony.  
12 He's been in here for multiple discussions, when he chooses to  
13 come, about what the underlying issue is. He knows it has to  
14 do with intrusions into attorney-client discussions. He knows  
15 that. So this belief that he hasn't been informed is wrong,  
16 and we all know that.

17 MATC [COL WELLS]: He's in the hands of his attorneys,  
18 sir.

19 MJ [Col SPATH]: And where is his input? Does he want  
20 Ms. Eliades released? Does he want Ms. Spears released? You  
21 heard his answers, I can't make them come here. Well, that's  
22 self-evident.

23 MATC [COL WELLS]: I think important findings would be

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1 this issue about we cannot advise our client; therefore, there  
2 is a conflict that is created. That to me seems illusory. I  
3 think Ms. Yaroshefsky's opinion ----

4 MJ [Col SPATH]: I've ruled on it.

5 MATC [COL WELLS]: Yes, sir. What I ----

6 MJ [Col SPATH]: I've ruled on it. It's -- it's more than  
7 illusory. I have said there were no attorney-client  
8 intrusions. I've said that in the findings of fact I don't  
9 know how many times.

10 MATC [COL WELLS]: Sir, I understand, and I'm with you.

11 MJ [Col SPATH]: So when you keep saying fact-finding,  
12 I've ruled on it. I have ruled on it over and over and over.  
13 I'm not fact-finding about it.

14 I'm encouraging the government to declassify it,  
15 begging you to. I've declassified what -- my CISO's work to  
16 get an unclassified statement that I could at least let the  
17 public know a little bit about what we're talking about.

18 MATC [COL WELLS]: And that was a good step, sir,  
19 yesterday.

20 MJ [Col SPATH]: Thanks. But what facts -- I don't need  
21 to fact-find on whether or not good cause is shown. I was  
22 giving the two civilians an opportunity to explain. Am I  
23 missing something other than the alleged intrusions?

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1 MATC [COL WELLS]: Absolutely.

2 MJ [Col SPATH]: Is there something else? Because I don't  
3 know. Because General Baker wouldn't tell me anything else  
4 other than what was contained in a short memo that said I have  
5 the authority.

6 MATC [COL WELLS]: Yes, sir.

7 MJ [Col SPATH]: So I was hoping they were going to come  
8 to me, say you only know this much, actually here's why we  
9 have good cause, at which case I could have figured out, okay,  
10 that makes sense to me, and then release them or not, right?  
11 Go read your bar rules, 1.16(d). Maybe I say despite your  
12 good cause, we're too far along in the process and we can't  
13 leave Lieutenant -- or Lieutenant Piette, right, responsible,  
14 for Mr. al Nashiri's life.

15 MATC [COL WELLS]: Yes, sir. So here we are today.

16 MJ [Col SPATH]: We are.

17 MATC [COL WELLS]: Still have a session in March. And the  
18 prosecution believes that further delay and abatement is not  
19 appropriate; we should continue to March.

20 MJ [Col SPATH]: How about -- well, we'll talk about it at  
21 the end of this. Let's get these last two witnesses. Let's  
22 see if we can get wrapped up today. I have some stuff to talk  
23 about at the end. We'll figure out where we're going.

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1 MATC [COL WELLS]: Thank you, sir.

2 MJ [Col SPATH]: Lieutenant Piette, any comments?

3 DDC [LT PIETTE]: Nothing right now, Your Honor.

4 MJ [Col SPATH]: Okay.

5 Let's do this. Hasn't been quite an hour, but I'm going  
6 to refill my coffee. We'll take 10 minutes, get the witness  
7 out here so they're ready to go. And we will move on in 10.  
8 We're in recess.

9 [The R.M.C. 803 session recessed at 1348, 15 February 2018.]

10 [The R.M.C. 803 session was called to order at 1359,  
11 15 February 2018.]

12 MJ [Col SPATH]: Commissions are called to order. Same  
13 parties are present who have been present. I know General  
14 Martins is not here, but he hasn't been all day, so that's  
15 fine.

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

17 MJ [Col SPATH]: All right. Call your next witness.

18 TC [MR. MILLER]: We're going to recall, very shortly -- a  
19 short bit of testimony, Agent Kneisler.

20 MJ [Col SPATH]: Okay.

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

22 MJ [Col SPATH]: Yes. Agent Kneisler, just take a seat.

23 I know you testified this week, I think yesterday. Remember

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1 you are still under oath.

2 WIT: Yes, sir.

3 MJ [Col SPATH]: Sure.

4 TRACY KNEISLER, civilian, was recalled as a witness for the  
5 prosecution, was reminded of her previous oath, and testified  
6 as follows:

7 **DIRECT EXAMINATION CONTINUED**

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

9 Q. I promise this will be brief. Two issues. Yesterday  
10 I believe we showed you Prosecution Exhibit 486 for  
11 identification, and then you identified this picture. I think  
12 during the picture I asked you the question whether or not all  
13 the items were paper items; is that correct?

14 A. Yes, sir.

15 Q. And your response may have been "yes" in response to  
16 the question. But I think that answer was somewhat -- you  
17 have -- do you want to make a clarification?

18 A. Yes, sir. The items in the -- in the picture are all  
19 paper, except for the one on the far right corner; looks like  
20 it has some pattern. I realized once the item was opened,  
21 after I had said "yes," that it was -- it's actually some form  
22 of cloth, which is why I referred to it on the bag as a  
23 "swatch."

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1 Q. Thank you. We also provided you with an item that  
2 you had seized from Prosecution -- excuse me, from the second  
3 site, YM2-491, and you identified it as an item that you had  
4 seized.

5 TC [MR. MILLER]: Do we have that item available to show  
6 the witness? If you could provide it to her, please.

7 Q. You have before you 491; is that correct?

8 A. Yes, sir.

9 Q. Do you recognize that?

10 A. Yes, sir.

11 Q. Is that an item that you recovered?

12 A. Yes, sir.

13 Q. And how do you know that you recovered it?

14 A. My handwriting is on the evidence bag.

15 Q. All right.

16 A. I wrote that it's "clothespins from Room A, hanging  
17 on clothesline stretched east to west."

18 Q. Placing on the ELM0 Prosecution Exhibit 491A, a  
19 photograph. Do you recognize that photograph?

20 A. Yes, sir. Those are the items inside this evidence  
21 bag.

22 Q. I don't know if you can make out the K number. Can  
23 you make that number?

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1 A. Yes, sir, K192.

2 Q. If you would, please, refer to the bag itself. First  
3 off, does it have a K number?

4 A. Yes, sir. It's K192.

5 Q. And if you could, please, indicate whether or not  
6 it's your writing that is contained on the evidence bag  
7 itself?

8 A. Yes, sir. Most of the writing is mine.

9 Q. Can you indicate your description of the item and  
10 where you found it?

11 A. Yes, sir. "Clothespins, Room A, hanging on  
12 clothesline, stretched east to west."

13 Q. And does it show a date of recovery?

14 A. 10/18/00.

15 Q. Does that bag have a Y2 number on it and a 1B  
16 number -- YM2 number and a 1B number?

17 A. It's YM2-126, 1B159.

18 Q. Is there an FD-192, a chain of custody form, attached  
19 to that exhibit?

20 A. Yes, sir, there is.

21 Q. And does that -- could you read those numbers,  
22 please?

23 A. Yes, sir. YM2-126 and 1B159.

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1 Q. So those numbers match -- the numbers on the green  
2 sheet, the chain of custody form, match those on Exhibit 491,  
3 correct?

4 A. Yes, sir, they do.

5 Q. Placing on the ELM0 Prosecution Exhibit 491C for  
6 Identification. Do you recognize that?

7 A. Yes, sir. That's a copy of the chain of custody  
8 associated with this item, 491.

9 Q. And we -- excuse me. You just -- last night there  
10 was a review of the evidence, correct?

11 A. Yes, sir.

12 Q. I believe that the initial chain of custody form that  
13 was handed to you yesterday was the one for 492; is that  
14 correct?

15 A. Yes, sir.

16 Q. All right. So this is the one for 491?

17 A. The numbers match on this one, sir, yes.

18 Q. And is this an exact -- what's on the ELM0, is that  
19 an exact duplicate of the chain of custody form for 491?

20 A. Yes, sir.

21 Q. Lastly, I show you Prosecution Exhibit 491B. Do you  
22 recognize that, Agent?

23 A. Yes, sir. This is the evidence item inside the bag

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1 for 491.

2 Q. A fair and accurate depiction of it?

3 A. Yes, sir, it is.

4 TC [MR. MILLER]: Your Honor, the prosecution -- excuse  
5 me. The prosecution would move for the admission of  
6 Prosecution Exhibits 491A, B, and C.

7 MJ [Col SPATH]: Noted. Thank you.

8 TC [MR. MILLER]: No further questions of this witness.

9 MJ [Col SPATH]: Okay. Lieutenant Piette, any questions?

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

11 MJ [Col SPATH]: I understand.

12 Agent Kneisler, remember the order we've already  
13 talked about a number of times?

14 WIT: Yes, sir.

15 MJ [Col SPATH]: Okay. Thank you again for your  
16 testimony.

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

19 TC [MR. MILLER]: Government calls Special Agent Dan  
20 Gaston.

21 MJ [Col SPATH]: Mr. Miller will swear you in.

22 [END OF PAGE]

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1 DANIEL A. GASTON, 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. Have a seat, please. Will you state your name for  
6 the record.

7 A. Daniel A. Gaston.

8 Q. And are you -- what is your present employment?

9 A. Retired FBI.

10 Q. All right. I want to go a little bit into your  
11 background. You attended university?

12 A. Jackson State University, graduated there in  
13 mid '80s.

14 Q. All right. And your degree?

15 A. Forensic science, criminal justice.

16 Q. Did you have any prior police experience before  
17 joining the FBI?

18 A. I was a police officer for Jacksonville State.

19 Q. At the university?

20 A. Yes.

21 Q. Did you have full authority as a police officer?

22 A. Yes, I did. We went through the Northeast Alabama  
23 Police Academy, and I had full, you know, authority as a

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1 police officer.

2 Q. And if -- you indicated that you did go to the police  
3 academy, the State Police Academy. Did you receive any  
4 evidence -- training in the collection of evidence and the  
5 processing of scenes?

6 A. Yes.

7 Q. How long were you a police officer at Jackson  
8 State ----

9 A. About three years.

10 Q. ---- Jacksonville State? Excuse me.

11 A. About three years.

12 Q. And at the end of that, what did you do?

13 A. Got a job with Office of Personnel Management doing  
14 background investigations.

15 Q. During what time frame did you do that?

16 A. From about '86-87 until 1990.

17 Q. And in 1990 what did you do?

18 A. Joined the FBI.

19 Q. Did you attend the Quantico -- the Basic Agent School  
20 at Quantico?

21 A. Yes, I did.

22 Q. And what was your first office?

23 A. First office was San Antonio, Texas.

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1 Q. What did you do at San Antonio?

2 A. Violent crimes, mostly dealing -- I was assigned to  
3 the military bases -- there's, I think, five bases -- and  
4 worked with CID and OSI.

5 Q. I take it, then, that you had occasion to search  
6 various crime scenes?

7 A. Yes.

8 Q. Process those scenes?

9 A. Yes.

10 Q. Did you have any collateral duties while at  
11 San Antonio?

12 A. I was on the SWAT team.

13 Q. How long did you remain in San Antonio?

14 A. Six years.

15 Q. And at the end of those six years?

16 A. Joined -- got on the HRT, the Hostage Rescue Team, at  
17 Quantico.

18 Q. And what years were you there?

19 A. From 1996 to 2002.

20 Q. During that time frame, did you become a special  
21 agent bomb tech?

22 A. Yes.

23 Q. And were you assigned to any specialized -- any

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1 special duties while at HRT?

2 A. I was a sniper and a bomb tech and EMT.

3 Q. How long did you remain at HRT?

4 A. Six years.

5 Q. At the end of the six years, where did you go?

6 A. Mobile, Alabama.

7 Q. And what did you do at the -- what were your duties  
8 and responsibilities in Mobile?

9 A. I was the bomb tech, domestic terrorism, WMD program.  
10 And I think there was something else, but I can't remember.

11 Q. All right. And at the end ----

12 A. Oh, and SWAT team leader.

13 Q. All right. How long did you remain in Mobile?

14 A. Eight years.

15 Q. At the end of that, where did you go?

16 A. Anchorage, Alaska.

17 Q. And what did you do in Anchorage?

18 A. Violent Crime Squad.

19 Q. For how long?

20 A. For four years.

21 Q. And did you retire out of Anchorage?

22 A. I retired out of Anchorage, yes.

23 Q. All right. And have you had any employment since

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1 retiring from Anchorage from the FBI?

2 A. I worked part-time for security up on the North  
3 Slope, Prudhoe Bay, Alaska.

4 Q. I want to direct your attention back to October of  
5 2000. You were with HRT; is that correct?

6 A. That's correct.

7 Q. Did you have occasion to go to Yemen?

8 A. Yes, I did.

9 Q. And your purpose in going there, sir?

10 A. Provide security for the agents that were coming to  
11 conduct searches for the -- for the incident that occurred  
12 there at the COLE.

13 Q. Was part of that duties and responsibilities to  
14 provide them with security when they traveled away from the  
15 hotel or the place where they were staying?

16 A. Yes.

17 Q. Specifically did you have occasion to travel with  
18 them to a beach site where a search was conducted?

19 A. Yes, I did.

20 Q. And initially what was your purpose in going to that  
21 site?

22 A. Initially it was to provide security for the Evidence  
23 Response Team.

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1 Q. And once you arrived there, did you assist them in  
2 any way?

3 A. Yes, I did.

4 Q. And what was it that you did?

5 A. We conducted a line search along the beach there,  
6 looking for evidence that could have washed up on the shore or  
7 evidence of, you know, any vessel being launched from the  
8 shore there.

9 Q. So you participated in the line search?

10 A. Yes, I did.

11 TC [MR. MILLER]: If we could, please, Prosecution  
12 Exhibit 340 -- excuse me, Prosecution 335, please -- 435. I'm  
13 sorry. The photograph. Okay.

14 Q. I've placed on the screen -- can you see that?

15 A. I see the screen, yes.

16 Q. There is Prosecution 435. Do you recognize what's  
17 contained in that photograph, sir?

18 A. Yes, sir. It looks -- looks like we were doing a,  
19 you know, line search there on the beach.

20 Q. Do you recall -- okay. It just popped up on the  
21 screen behind you. Does that appear to be the persons with  
22 whom you conducted this -- the search?

23 A. Yes.

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1 Q. And the area where the search was conducted?

2 A. Yes.

3 Q. Prosecution Exhibit 436, please. Do you recognize  
4 that photograph?

5 A. It's a photograph -- again, it's there on the beach,  
6 and it appears that someone has found -- or is collecting  
7 evidence.

8 Q. All right. Now, did you have occasion to find any  
9 evidence -- you thought there was something of evidentiary  
10 value?

11 A. Yes.

12 Q. What was it that you found, sir?

13 A. It was a -- looked like fibrous material, red and  
14 black in color, and it looked like something you would find,  
15 you know, like indoor/outdoor carpet from a boat, which I fish  
16 a lot, and I know what -- you know, and it looked similar to  
17 that.

18 Q. And did they mark that evidence?

19 A. Yes.

20 Q. All right. Prosecution Exhibit 437, please. Do you  
21 recognize what's contained in that particular photograph?

22 A. Yes. That's the fibrous material that I found on the  
23 beach.

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1 TC [MR. MILLER]: All right. If you could provide the  
2 witness, please, with Prosecution Exhibit 336.

3 If I could, Your Honor, have permission to use the  
4 ELMO at this point?

5 MJ [Col SPATH]: You may.

6 Q. I've placed before you what has been marked as  
7 Prosecution Exhibit 336. If you could take a look at that,  
8 please.

9 A. [Did as directed.]

10 Q. Sir, do you recognize that item, 336?

11 A. Yes, I do.

12 Q. And if you could, please, describe for the court what  
13 is it that you're looking at.

14 A. Red and black fibrous material in a container.

15 Q. All right. And did you put that in that -- did you  
16 put the fibrous material in the container?

17 A. I either collected it or an evidence custodian -- or  
18 evidence technician, you know, recovered it in the container.  
19 But my name is on the container.

20 Q. All right. I'm placing on the ELMO Prosecution  
21 Exhibit 336A for Identification. Do you recognize that  
22 container and the piece of, looks like, fiber in it?

23 A. Yes.

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1 Q. All right. And is that a picture of the  
2 Exhibit 337 -- excuse me, 336?

3 A. Is that -- yes. Is it the same as this? Is  
4 that 330 -- where is it marked on here?

5 Q. If you look on the bag, the packaging in which the  
6 exhibit came.

7 A. Yes, 336, correct.

8 Q. And there is a K number on a ruler underneath the  
9 exhibit. Do you see that?

10 A. Yes.

11 Q. Could you read that into the record, please.

12 A. K387 001027005 KV.

13 Q. All right. Looking at -- looking at the exhibit  
14 itself or the packaging in which it was contained, is there a  
15 K number?

16 A. Yes.

17 Q. And what is the K number contained on the exhibit,  
18 its packaging?

19 A. K387.

20 Q. All right. So does that K number match the K number  
21 on the photograph, Prosecution Exhibit 336A?

22 A. Yes, it does.

23 Q. Looking at the exhibit itself, does the exhibit have

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1 a YM number on it?

2 A. Yes.

3 Q. And what is the YM number?

4 A. YM5-102.

5 Q. Does it have a 1B number on it also, sir?

6 A. On the container itself?

7 Q. Or on the packaging in which it was ----

8 A. Hold on. Let me find it. Yes, 1B487.

9 Q. All right. Is there a green sheet or a chain of  
10 custody, Form 192, attached to the exhibit?

11 A. Yes, it is.

12 Q. Would you look at that, please. Does it have a YM  
13 number on it?

14 A. Yes, YM5-102.

15 Q. And does it have a 1B number, sir?

16 A. 1B? 1B487.

17 Q. Do those two numbers match the numbers contained on  
18 the exhibit itself, Prosecution Exhibit 336?

19 A. Yes.

20 Q. I'm placing on the ELM0 Prosecution Exhibit 336D,  
21 David. Do you recognize this particular chain of custody  
22 form?

23 A. Yes, I do.

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1 Q. Is it an exact duplicate of the one that you've just  
2 described?

3 A. Yes, it is.

4 Q. Is your signature contained on this ----

5 A. Yes.

6 Q. ---- chain of custody form?

7 A. Yes, it is. The top line there, or top signature.

8 Q. And it indicates that you collected this item,  
9 correct?

10 A. Yes.

11 Q. And does it give the date of the collection?

12 A. 10/21/2000.

13 Q. And did you give the evidence then to the person  
14 whose name or signature is contained underneath yours?

15 A. Yes.

16 Q. I'm going to place on the ELMO Prosecution  
17 Exhibit 336C for Identification -- excuse me -- 336B for  
18 Identification, and ask you to look at that bag. Do you  
19 recognize that bag?

20 A. Yes, evidence collection bag.

21 Q. Is it the one in front of you for Prosecution  
22 Exhibit 336?

23 A. Yes, it is.

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1 Q. Fair and accurate -- is it a fair and accurate  
2 depiction of it?

3 A. Yes, it is.

4 TC [MR. MILLER]: Your Honor, the prosecution would move  
5 for the admission of Prosecution Exhibit 336A, 336B, and 336D,  
6 as in David.

7 MJ [Col SPATH]: Noted. Thank you.

8 TC [MR. MILLER]: We have no further questions of this  
9 witness.

10 MJ [Col SPATH]: Lieutenant Piette, any questions?

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

12 MJ [Col SPATH]: Mr. Gaston, I just want -- oh, let me let  
13 you hand that back. I'll give you a standard order: Don't  
14 discuss your testimony with anyone until this issue is  
15 resolved. As you can probably guess, it's going to be a while  
16 before this issue is resolved, so keep that in mind.

17 And then the other thing I've told all the witnesses  
18 who come down here: Thank you very much for coming down in  
19 person. I know it takes a lot of time, but I know the people  
20 who travel down here appreciate it. Thank you.

21 WIT: Yes, sir. Thank you.

22 MJ [Col SPATH]: You are excused.

23 WIT: Thank you.

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

3 TC [MR. MILLER]: One last witness, Your Honor. It will  
4 be brief.

5 MJ [Col SPATH]: Call your witness.

6 TC [MR. MILLER]: The government calls Ignacio Mendizabal.  
7 **IGNACIO MENDIZABAL**, civilian, was called as a witness for the  
8 prosecution, was sworn, and testified as follows:

9 **DIRECT EXAMINATION**

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

11 Q. Please be seated. And if you would please state your  
12 name for the record.

13 A. I am Ignacio Mendizabal.

14 Q. And you are the same Ignacio Mendizabal who testified  
15 previously in this matter; is that correct?

16 A. That is correct.

17 Q. By way of reintroduction, briefly, you accompanied  
18 the lab personnel to the site to process some of the evidence  
19 for the United States COLE -- USS COLE bombing; is that  
20 correct?

21 A. That is correct.

22 Q. And do you recall when it was that you left the area,  
23 when you left Yemen?

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1           A.   Yes.  I left -- went to Yemen on October 13 until  
2 October 25th.

3           Q.   And on October 25th, were you provided with some  
4 evidence to transport back to the laboratory?

5           A.   That is correct.

6           Q.   And how did you leave Yemen?  Did you -- what sort of  
7 transportation was provided for you?

8           A.   It was via a military aircraft.

9           Q.   Did you go directly from Yemen to the United States?

10          A.   We stopped in Sicily, Italy, the following day  
11 because the aircraft had some mechanical issues.  And so we  
12 overnight in Sicily, and then the next morning, on the 27th,  
13 we departed Sicily to Andrews Air Force Base in Maryland, and  
14 we arrived on 10/27.

15          Q.   The evidence that was transported -- you transported  
16 from Yemen to the United States, was it secured while you were  
17 in Sicily?

18          A.   Yes, it was.

19          Q.   I'm going to show you a series of chain of custody  
20 forms and have you verify your signature on them.  But let me  
21 ask you just a couple more questions.

22                    When you received the evidence in Yemen, was it in a  
23 sealed, secure state?

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1 A. Yes, it was.

2 Q. And did you deliver it in a sealed condition?

3 A. Yes, it was. Yes.

4 Q. Did you or any other persons, to your knowledge,  
5 tamper or otherwise open that evidence?

6 A. No.

7 Q. When you landed at Andrews Air Force Base on the  
8 27th, what did you do with the evidence?

9 A. Okay. My supervisor, Mark Whitworth, and other  
10 explosive unit employees, were waiting for us. They had a --  
11 they brought a truck from the laboratory. So we transported  
12 the evidence from the military aircraft to our truck, into the  
13 lab.

14 Q. As you are a member -- as you testified previously --  
15 a member of the lab team, was there any need for any other  
16 persons to sign that evidence into the laboratory after you  
17 had signed for it?

18 A. That is not necessary, no.

19 Q. I'm showing you Prosecution Exhibit 300C. Do you  
20 recognize your signature on that, sir?

21 A. Yeah. The third line, that is my signature.

22 Q. And does that, by signing that, indicate that you had  
23 received the evidence from the person above you whose

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1 signature is Dayna Sepeck's?

2 A. That is correct, yes.

3 Q. Prosecution Exhibit 301E, is that your signature on  
4 the third line?

5 A. The third line, that is my signature, yes.

6 Q. Prosecution Exhibit 302?

7 A. The third line, that is my signature, yes.

8 Q. Prosecution Exhibit 303?

9 A. The third line, it is my signature, yes.

10 Q. Prosecution Exhibit 304?

11 A. The third line is my signature, yes.

12 Q. Prosecution Exhibit 305?

13 A. The third line is my signature, yes.

14 Q. And, for the record, all of these are going to have  
15 the date of 10/25 at 9:30 p.m., correct?

16 A. Yes, sir.

17 Q. Prosecution Exhibit 306C?

18 A. The third line, it is my signature, yes.

19 Q. Prosecution Exhibit 307C?

20 A. The third line is my signature, yes.

21 Q. Prosecution Exhibit 308C?

22 A. The third line is my signature, yes.

23 Q. Prosecution Exhibit 309C?

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- 1 A. The third line is my signature, yes.
- 2 Q. Prosecution Exhibit 310C?
- 3 A. The third line is my signature, yes.
- 4 Q. Prosecution Exhibit 311C?
- 5 A. The third line is my signature, yes.
- 6 Q. Prosecution Exhibit 312C?
- 7 A. The third line is my signature, yes.
- 8 Q. Prosecution Exhibit 313C?
- 9 A. The third line is my signature, yes.
- 10 Q. Prosecution Exhibit 314C?
- 11 A. The third line is my signature, yes.
- 12 Q. Prosecution 315C?
- 13 A. The third line is my signature, yes.
- 14 Q. Prosecution Exhibit 316C?
- 15 A. The third line is my signature, yes.
- 16 Q. Prosecution Exhibit 317C?
- 17 A. The third line is my signature, yes.
- 18 Q. Prosecution Exhibit 318C?
- 19 A. The third line is my signature, yes.
- 20 Q. Prosecution Exhibit 319C, sir?
- 21 A. The third line is my signature, yes.
- 22 Q. Prosecution Exhibit 320C, sir?
- 23 A. The third line is my signature, yes.

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- 1 Q. Prosecution Exhibit 321C?
- 2 A. The third line is my signature, yes.
- 3 Q. Prosecution Exhibit 322C?
- 4 A. The third line is my signature, yes.
- 5 Q. Prosecution Exhibit 323C?
- 6 A. The third line is my signature, yes.
- 7 Q. Prosecution Exhibit 324C?
- 8 A. The third line is my signature, yes.
- 9 Q. Prosecution Exhibit 325C?
- 10 A. The third line is my signature, yes.
- 11 Q. Prosecution Exhibit 326C?
- 12 A. The third line is my signature, yes.
- 13 Q. Prosecution Exhibit 327C?
- 14 A. The third line is my signature, yes.
- 15 Q. Prosecution Exhibit 328C?
- 16 A. The third line is my signature, yes.
- 17 Q. Prosecution Exhibit 329C?
- 18 A. The third line is my signature, yes.
- 19 Q. Prosecution Exhibit 330C?
- 20 A. The third line is my signature, yes.
- 21 Q. Prosecution Exhibit 331C?
- 22 A. The third line is my signature, yes.
- 23 Q. Prosecution Exhibit 332C for Identification?

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1 A. The third line is my signature, yes.

2 Q. And last, Prosecution Exhibit 336D?

3 A. The third line is my signature.

4 Q. And these are all for the same time, 10/25 at 9:30,  
5 correct?

6 A. That is correct.

7 Q. And this is the evidence that you transported back to  
8 the United States, correct?

9 A. That is correct.

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

11 MJ [Col SPATH]: Lieutenant Piette, any questions?

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

13 MJ [Col SPATH]: Thanks.

14 Agent Mendizabal, let me give you -- I think I did  
15 last time. Do you remember the order I gave you? Don't  
16 discuss your testimony until this issue is resolved, okay? Do  
17 you understand that order?

18 WIT: Yes, sir.

19 MJ [Col SPATH]: All right. And as I've said to the other  
20 agents, I'm not saying don't talk to people who are here on  
21 island. I know you're down here with other agents you  
22 probably haven't seen in awhile, no worries about that. Just  
23 don't talk about your testimony.

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1           And then, as I've said -- probably said it last  
2 time -- thank you for coming in person. I know the people who  
3 have an interest in the proceedings truly appreciate it, given  
4 the time and energy it takes. Thanks.

5           WIT: Thank you, Your Honor.

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

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

9           TC [MR. MILLER]: No further evidence other -- other than  
10 to move for the admission, Your Honor, I don't think I have,  
11 but Prosecution Exhibits 696B, 697B, 712B, and 1030A, which  
12 are the blowups of the various charts that we used. Other  
13 than that, we have nothing further for this session.

14          MJ [Col SPATH]: Thank you. Noted.

15           Oh, where to go, right? I know we have a session in  
16 March, but I -- I think I made clear my feelings of no  
17 position in, frankly, opposition to the orders of the  
18 commission. But nothing is happening.

19           Colonel Wells, we can talk -- I've got quite a bit to  
20 say, and we'll figure out the road ahead; I probably won't  
21 know it today. If you think there are specific findings of  
22 fact I have yet to make, because they -- they do not have to  
23 be in writing. I have made multiple findings of fact on the

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1 record throughout this process since October, because it is  
2 important to get it out to the public. And if I do it in  
3 writing, it takes days to get out; if I do it here, everybody  
4 hears it.

5           And that's why my practice is, when I can, as you  
6 were there for the UI motion, is to get these findings on the  
7 record. And I led off with a series of findings before  
8 General Baker testified, a series of findings before the  
9 contempt proceeding, a series of findings each time we've  
10 started; multiple comments about what I think, frankly, is  
11 unprofessional behavior.

12           MATC [COL WELLS]: Where do we go?

13           MJ [Col SPATH]: Here we are. Where do we go?

14           MATC [COL WELLS]: Sir, I would suggest this: You have  
15 asked that there are certain findings of fact that would be  
16 helpful to declassify. The OCA's work, when those specific  
17 facts -- not documents with redactions, but specific facts are  
18 identified in a laundry list, then they can cross-check and  
19 evaluate national security interest in that.

20           But I would like an opportunity, from the  
21 prosecution, to provide you suggested findings of fact on  
22 those classified matters.

23           MJ [Col SPATH]: Okay. So that has to do with, right,

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1 declassifying this -- this alleged intrusion issue.

2 MATC [COL WELLS]: Correct, sir.

3 MJ [Col SPATH]: Right.

4 MATC [COL WELLS]: And you did a great first quarter,  
5 first half start yesterday.

6 MJ [Col SPATH]: We'll see.

7 MATC [COL WELLS]: We also need to turn and adjust and  
8 consider and apply Mr. Nashiri's meeting space and what the  
9 defense perceives -- by their pleadings, they keep saying it's  
10 our perception. You have made competent, credible findings  
11 already that we ----

12 MJ [Col SPATH]: You know what I care? I don't know if  
13 they're competent or credible. Here's what I want them to be:  
14 Supported by the evidence ----

15 MATC [COL WELLS]: Correct, sir.

16 MJ [Col SPATH]: ---- because there's an abuse of  
17 discretion standard applied to my findings of fact. If  
18 they're reasonably supported by the evidence, no appellate  
19 court is going to disturb them, and we're done. That's how  
20 courts work.

21 MATC [COL WELLS]: Yes, sir.

22 MJ [Col SPATH]: I recognize there is a community that  
23 ignores that, but ----

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1 MATC [COL WELLS]: So it has to be on the record ----

2 MJ [Col SPATH]: So it was, when I read them.

3 MATC [COL WELLS]: ---- Mr. CISO, on the record before the  
4 commission, and that is what we are going to focus, on the  
5 pleadings, the sworn statements that you've been provided, and  
6 the averments that have been made in court under oath, both in  
7 closed session and in open session. That's very important  
8 legally.

9 Number two, as it relates to the attorneys and the  
10 systemic problems that they are exploiting, I would observe  
11 this: That is a separate, discrete issue, not really linked  
12 to the underlying problem that we have here, and it relates to  
13 their conduct. And that has not played out completely with  
14 this commission.

15 And I would observe this, that our structure of our  
16 statute in the military commission requiring learned counsel  
17 and military counsel is something that will be implemented  
18 with the UCMJ. And this, in that respect, is a foray and a  
19 pioneer on that regard.

20 I will observe that our authority in the MCA is  
21 different from learned counsel applied in the federal courts,  
22 18 U.S.C. 3005, because it gives the military judge the  
23 authority to designate and appoint learned counsel. In our

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1 system it seems that primarily it's the responsibility of the  
2 chief defense counsel. And there is some support in our  
3 regulations, implemented by the Secretary, designated for the  
4 convening authority. And if you're a strict constructionist,  
5 then you read those words, and you read them circumspect as to  
6 the authority.

7           So they are still exploring exactly what does this  
8 mean for the convening authority? What is the relationship  
9 with the chief defense counsel in the MCDO organization? And  
10 what is being exposed is that, apparently, since the chief  
11 defense counsel, General Baker, took over, that this is a  
12 loaded gun in the MCA that he has chosen to pick up at this  
13 time, right on the doorstep of having to cross-examine Darbi,  
14 when real evidence could be submitted in this case against the  
15 accused, and it's an attempt to blow up the system.

16           So if this is how it's going to be played out in the  
17 UCMJ when that authority is implemented, I would submit that  
18 you have great responsibility, exercised with great care and  
19 deliberate, as you have already, patiently walking each step  
20 to make sure that these counsel turn away from their conduct,  
21 which could have adverse consequences for their professional  
22 bar, their -- and personal liberty; other consequences also  
23 for the system. We would like a considered opportunity to

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1 bring all the forces and authorities and powers of the  
2 government related to this to this commission. And you've  
3 invited us to make pleadings; we will do that.

4           The other point that I would like to leave with is if  
5 the basis for the withdrawal is valid for those civilian  
6 attorneys, it seems like it would also apply to their detailed  
7 military counsel; that there is no place that they perceive  
8 that they can meet at Guantanamo Bay to have confidential  
9 communications.

10           MJ [Col SPATH]: And that would apply to every other  
11 commission case.

12           MATC [COL WELLS]: Yes, sir. So how we handle it here is  
13 very important.

14           What is revealing is that this probably is a  
15 strategy. It's an abstinence. And, frankly, we should drive  
16 on, if that's the way they want to try their case and defend  
17 their client. The system is set up to say "practicable."  
18 He's not here. He can still consult and advise the military  
19 defense counsel. So -- and I know you've already said that.

20           So at some point, though, you are going to have to be  
21 forced not to be magnanimous with these counsel and patient  
22 with them, and you're going to have to make these findings of  
23 fact that are adverse to them that relate to their

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1 professional bar license.

2 MJ [Col SPATH]: I feel like I have. I held somebody in  
3 contempt, Colonel Wells. And do you know what he is doing?  
4 He's the Chief Defense Counsel of the Military Commission  
5 Defense Organization. That's what he's doing. The response  
6 of DoD is he will keep doing his job in that organization.  
7 The response of DoD is he goes to work every day, period.  
8 What I heard from Mr. Koffsky is we are waiting for Judge  
9 Lamberth. Judge Lamberth is just deciding on one small issue,  
10 the contempt issue.

11 MATC [COL WELLS]: The contempt issue. He was confused.

12 MJ [Col SPATH]: Well, I agree.

13 MATC [COL WELLS]: I don't know who told him that or  
14 advised him of that.

15 MJ [Col SPATH]: That's kind. Here's -- I mean, frankly,  
16 right, forgetting the contempt issue, let's assume I have  
17 defined my contempt authority incorrectly; I'm wrong. I have  
18 been wrong before. I get overturned. Fine. That doesn't  
19 change the fact that the chief of -- the chief defense  
20 counsel, the chief of the Military Commissions Defense  
21 Organization has no problem defying a commission order.  
22 Forget the contempt piece. There is no argument that we have  
23 defied the order.

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1 I read to Mr. Koffsky the chief defense counsel's  
2 requirement to ensure that commission orders are followed.  
3 And we all know what you do if you don't like a court order:  
4 You go to another court; you find another judge above the  
5 judge sitting here. As I have said so long, if a federal  
6 judge steps in and says I'm staying your proceeding, you all  
7 know what I'm not going to do, right? That would be suicide.  
8 Why would you do that? But the defense organization will do  
9 that.

10 And so what we are doing is we are going to sit and  
11 wait for learned counsel. And do you know what happens? Do  
12 you know what happens? They do it again. They do it on the  
13 eve of trial. They do it four weeks into trial. They do it  
14 six weeks into trial. They do it on the eve of findings.  
15 Because we don't have clear guidance, according to the defense  
16 community, and ----

17 MATC [COL WELLS]: I would submit that that's, at this  
18 point, a possible reality. But there are other realities  
19 here.

20 MJ [Col SPATH]: What is the other reality?

21 MATC [COL WELLS]: The other reality is that they are held  
22 responsible for their misconduct ----

23 MJ [Col SPATH]: And -- right. So what actions are

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1 underway to do that?

2 MATC [COL WELLS]: Well, sir, number one, the lead in  
3 this, frankly, is Judge Spath in this commission.

4 MJ [Col SPATH]: I've done it. I can't do more. One  
5 would think if you hold a counsel in contempt, which has  
6 happened, what, four or five times across military practice in  
7 the last 40 years, and first time at the commissions, that  
8 that would cause a bit -- a bit of a stir somewhere, where  
9 people would look in and say, "What is going on?"

10 MATC [COL WELLS]: Sir, I would submit that some of those  
11 adverse consequences have been submitted in the D.C. District  
12 Court, and so I do think that Judge Lamberth's decision is  
13 important. I won't comment further on that, but ----

14 MJ [Col SPATH]: I do, too. Of course.

15 MATC [COL WELLS]: The other aspect of this, this  
16 qualifying authority and who is responsible for supervising  
17 lawyers in their professional conduct and responsibility was  
18 not satisfactorily answered by Mr. Koffsky, and he left out  
19 his professional responsibility over DoD civilians. But for  
20 military members, for General Baker, it's the Navy JAG. For  
21 others in other service, it's the Service Judge Advocate  
22 Generals. There is a process there, and usually that works if  
23 there is a finding of fact from a competent tribunal or

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1 court-martial --

2 MJ [Col SPATH]: I've made those.

3 MATC [COL WELLS]: Yes, sir. But in a nice, neat package,  
4 read out as an indictment, supported with credible  
5 information, is powerful.

6 MJ [Col SPATH]: I thought so the last time. I mean, I've  
7 done it, and then I've done it, and then I've done it.

8 MATC [COL WELLS]: I would ask the commission to be  
9 patient and continue on, because the alternate reality is  
10 learned counsel is detailed to this case.

11 MJ [Col SPATH]: Agreed.

12 MATC [COL WELLS]: They are available, but they're not  
13 showing up.

14 MJ [Col SPATH]: Remember my overarching -- my overarching  
15 direction, when you read the manual, is the fair  
16 administration of justice. And I know this is not popular to  
17 say, but the fair administration piece, it largely relates to  
18 the accused in any proceeding. Because at the end of the  
19 proceeding, you all don't go to confinement, you all don't get  
20 sentenced to go to death row, or whatever the equivalent is in  
21 a commission proceeding. That doesn't fall on you. It falls  
22 on the accused and the fair administration of justice. Can I  
23 drive on? Yes. But is that fair and is it efficient if I

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1 believe the significant weakness is ----

2 MATC [COL WELLS]: Learned counsel.

3 MJ [Col SPATH]: ---- an appellate process that's going to  
4 look in on us? Those are -- I mean, I just have to worry  
5 about those things, right? That's my charter.

6 MATC [COL WELLS]: Sir, I'm really, as I sit here at the  
7 podium, glad that you just pointed that out, because this  
8 illustrates that among all of us litigants here, the judge is  
9 supposed to be the neutral arbiter of this. And by you  
10 pointing to that talisman is -- it gives us pause on whether  
11 or not it is prudent to drive on. And is there a systemic  
12 change? What has to be done? But I think we're still at this  
13 position.

14 MJ [Col SPATH]: Or the ultimate person who owns this  
15 process, right? This is not a comment on the commissions  
16 process. Again, the United States Government, through  
17 Congress and the President, have set this up.

18 I don't want to hear the ad hoc stuff. All that  
19 stuff is such a waste of time. If you don't like the process,  
20 I'd elect somebody else. And I don't mean that in any one  
21 office. I mean across the organization, right? If you don't  
22 like the law, there's something you should do to fix it. Not  
23 my job. My job is a government has said this process exists.

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1 Well, there's somebody in charge of that process. What are  
2 they doing?

3 MATC [COL WELLS]: Yes, sir.

4 MJ [Col SPATH]: I don't know. Here we are.

5 MATC [COL WELLS]: Yes.

6 MJ [Col SPATH]: I mean, we have -- I've ordered --  
7 finding of fact -- and again, I'm open if you want to propose  
8 findings of fact, additional ones. I have ruled there is no  
9 intrusion, multiple times in writing. I've issued those  
10 rulings over and over. I've ruled that counsel need to be  
11 here. Both the learned counsel's not released, both civilians  
12 not released. And they were ordered to be here; they haven't  
13 shown up multiple times, clearly. I've ordered them to the  
14 Mark Center; they disobeyed. I subpoenaed them; they  
15 disobeyed. We've talked to Colonel Aaron; he's not going to  
16 change that. We talked to General Baker; he made clear he  
17 wasn't going to change it, hence the contempt proceeding,  
18 along with the conduct that went on while we were discussing  
19 it.

20 And then I talked to the next boss, Mr. Koffsky. He  
21 said it nicely, and I appreciate that, right, but if you heard  
22 his words, it was ultimately, well, General Baker doesn't  
23 agree with your position. So with all due respect to

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1 commissions, and whatever he said, ultimately, I'm not going  
2 to do anything. Which is the same thing that General Baker  
3 said: With all due respect to your authority as the  
4 commission, I'm not going to do it.

5           Think about what that does to a process if you have  
6 an organization that simply ignores orders. There is no  
7 change there until there are real consequences to whatever  
8 does it. If you all ignored orders, I would hope General  
9 Martins would step in reasonably quickly to fix it. Maybe he  
10 wouldn't. Maybe I've misread that situation. Maybe he would  
11 say, hey, I appreciate your order, sir; I'm not doing it. I  
12 don't know.

13           MATC [COL WELLS]: Sir, good faith is required.

14           MJ [Co1 SPATH]: Agreed.

15           MATC [COL WELLS]: So ----

16           MJ [Co1 SPATH]: All right.

17           MATC [COL WELLS]: We're ready for March, sir.

18           MJ [Co1 SPATH]: I understand.

19           MATC [COL WELLS]: All right, sir. Anything further, sir?

20           MJ [Co1 SPATH]: No. Thank you.

21           MATC [COL WELLS]: Thank you, sir.

22           MJ [Co1 SPATH]: Lieutenant Piette, do you want to say  
23 anything?

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1 DDC [LT PIETTE]: Yes, Your Honor. First, I want to  
2 preface it by saying, as I've said before, defense wants to go  
3 to trial. We want to go to trial.

4 MJ [Col SPATH]: Okay. You can say that. The facts  
5 suggest otherwise.

6 DDC [LT PIETTE]: Right.

7 MJ [Col SPATH]: They do. The facts completely undercut  
8 that, based on the history and the way this has developed over  
9 the years. That -- that is blatantly not supported by the  
10 evidence.

11 Maybe you want to go to trial. Frankly, I suggest  
12 you say I'm ready to go tomorrow. That's what I used to do as  
13 a young counsel. It's surprising. I would be interested to  
14 see how that goes off, but -- so maybe you do want to go to  
15 trial. I don't know if your client wants to go to trial or  
16 not. I would think he would want some resolution in all this.  
17 I would find this whole thing to have been hanging over my  
18 head for a long time. So I will -- maybe you do.

19 DDC [LT PIETTE]: Right. Well, Your Honor ----

20 MJ [Col SPATH]: The organization has demonstrated, as  
21 I've made findings, they have no interest in going to trial.

22 DDC [LT PIETTE]: I think that's ----

23 MJ [Col SPATH]: I understand. You know how findings of

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1 fact work, which is the ----

2 DDC [LT PIETTE]: Right. I mean, I think if we were  
3 looking to delay, I would certainly be cross-examining  
4 witnesses; that would cause an immense delay. We'd still be  
5 talking about 207, probably. But the fact is we want to go to  
6 trial, but that trial needs to be fair.

7 MJ [Col SPATH]: Agreed.

8 DDC [LT PIETTE]: A fair trial will demonstrate that  
9 Mr. al Nashiri is not guilty of what the government says. And  
10 not because of some technicalities, not because of some issues  
11 with chain of custody, but because he is factually and  
12 actually not guilty of what he's accused of.

13 So that's what I wanted to start out by saying, that  
14 the defense, we want to go to trial. Maybe if we thought we  
15 had a terrible case, we'd be trying to avoid  
16 cross-examinations. You heard the direct testimony, and  
17 you've seen, and everybody's seen kind of the way the evidence  
18 is coming out now, which should demonstrate to any outsider or  
19 anybody who's seen that the reasons why we want to go forward.

20 However, there's serious roadblocks. And you asked a  
21 question -- and this was addressed by Colonel Wells, who I  
22 find myself in a strange position of largely agreeing with on  
23 a number of these things -- but you asked a question, why is

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1 it for me to move this forward after Mr. Koffsky was talking.  
2 And the defense's position and my position is that it's not.  
3 It's your job, as you just stated, the fair and efficient  
4 administration of justice.

5 I think your concern seems to be -- is  
6 understandable, probably the government's, too, is with  
7 efficiency. Frankly, the victims and their family members  
8 deserve a ----

9 MJ [Col SPATH]: Yeah, I would say efficiency is  
10 absolutely my concern.

11 DDC [LT PIETTE]: Right.

12 MJ [Col SPATH]: Fairness has been my concern all along.

13 DDC [LT PIETTE]: Yep.

14 MJ [Col SPATH]: We can go back and look at rulings. Do  
15 you know why your client is getting an MRI? I ordered it. Do  
16 you know who dismissed charges in this case, many of them? I  
17 did.

18 DDC [LT PIETTE]: Yes.

19 MJ [Col SPATH]: It is not an effort -- to be clear, I  
20 have ruled against both sides in here, not for any particular  
21 purpose; because that's what I think the right answer is. I  
22 was wrong, apparently, in how I ruled on the dismissal of  
23 charges, right? CMCRC told me I'm wrong.

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1           Do you know what I didn't do the next time we were in  
2 session? Dismiss the charges again and go, thanks for your  
3 input, CMCB, but I really don't like these charges. Of course  
4 not.

5           But I want to be -- efficiency is important, but  
6 efficiency implies efficiency in appeal, efficiency down the  
7 road, efficiency here. There's a lot of aspects to it.  
8 What's important as well is closure for your client and the  
9 people watching this, because it is an ongoing sore spot for  
10 everybody.

11          DDC [LT PIETTE]: Yes.

12          MJ [Col SPATH]: And that is part of the fair  
13 administration piece, I think.

14          DDC [LT PIETTE]: Right. And I think, you know, in order  
15 to -- everybody deserves closure, deserves a reckoning. We  
16 deserve the truth.

17          MJ [Col SPATH]: Agreed.

18          DDC [LT PIETTE]: And I think you understand this, as you  
19 were just alluding to. The only way we get there is if there  
20 is a fair trial. In this case, the only way there's a fair  
21 trial that is efficient, because it's not efficient if it gets  
22 kicked back, is if there is qualified learned counsel on this  
23 case.

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1 MJ [Col SPATH]: But that's the part that we -- the issue  
2 I have with that is I have a law that says "to the extent  
3 practicable." And even though you disagree with my  
4 interpretation of it, in normal practice, right, what do you  
5 do with that? You go to an appellate court and see if they  
6 will step in and do something with some kind of extraordinary  
7 writ. Or you do it at trial; you live with my ruling, and you  
8 build in the appellate record, if there's a conviction. And  
9 hopefully you're wrong -- right, hopefully you're right and  
10 there's not a conviction and your client is acquitted and it's  
11 a non-issue. That's how this process plays out multiple  
12 times, multiple places across the United States.

13 I have told you how I read that statute. And that's  
14 why one of the options, frankly, is to press forward, because  
15 learned counsel are not practicable because they have  
16 abandoned their client. I keep saying it. That's pretty  
17 adverse, by the way. And it's a finding. I've already said  
18 it. I've made it a finding in writing. I keep saying it.  
19 Abandoned his client; after many years and almost two million  
20 dollars, he walked out the door. Left. Left you here.

21 And if the facts are so severe as alleged, all these  
22 other teams just keep marching along. They just keep marching  
23 along. So that is certainly one option, right? And the

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1 unfairness of that process is brought about by conduct of MCD0  
2 and the defense counsel.

3           But then you've got to, you know, factor in  
4 efficient. Ultimately is the appellate court going to say  
5 good call, Judge Spath? Or maybe you should have paused, let  
6 other learned counsel get appointed and not give them all the  
7 prep time because you're sitting here. And they do have  
8 options -- you know, there's other avenues of, you know,  
9 avenues of explanation and avenues of recourse. So that's  
10 what I'm trying to figure out.

11           I assume you've read 1.16(d) in your bar rules and  
12 everybody else's about if you're ordered to represent your  
13 client, even if you've shown good cause to be excused in a  
14 tribunal or a court, you do it. And that's because you're  
15 protected, right? That protects you from the follow-on ethics  
16 complaint from your client, because the decision was made by  
17 not the attorney, but by the presiding official, be it a  
18 tribunal or a court.

19           I mean, it does -- I mean, you have read it, I  
20 assume. You agree those are words on paper at least, right?

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

22           MJ [Col SPATH]: I mean -- and there's a reason they're in  
23 there in our bar rules, because frequently advocates disagree

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1 with rulings from judges. I think I told Mr. Koffsky, right,  
2 usually one half of the room is unhappy. Sometimes the whole  
3 room is unhappy. Rarely does the whole room feel good about  
4 whatever I ultimately rule. That is not an often  
5 occurrence -- or not a recent -- a frequent occurrence, sorry.  
6 Anyway, sorry.

7 DDC [LT PIETTE]: Your Honor, on that note, speaking at  
8 least for myself, and I presume for many defense attorneys, I  
9 mean, I'm not particularly concerned with protecting myself  
10 but with protecting my client. And I would agree with Colonel  
11 Wells in that I think yesterday the findings of fact you laid  
12 out were a good first half, but you left out the actual  
13 reasons that the attorneys left. It had nothing -- well, it  
14 had something to do with this stuff that could have possibly  
15 affected the other teams, but this was very Nashiri-specific.

16 MJ [Col SPATH]: And what have I done about that? I have  
17 begged, asked, and pled to get all this information  
18 declassified to the greatest extent possible.

19 DDC [LT PIETTE]: Yes.

20 MJ [Col SPATH]: But I have seen that. I'm trying to  
21 think how to talk in -- I don't even want to talk in  
22 hypotheticals. I don't want to cause a spill by mistake,  
23 because I've managed not to through this whole process over

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1 the years.

2 I looked at the same stuff. I have Mr. Kammen, who  
3 said I have no evidence that the prosecution has any, any  
4 attorney-client communications; came from your lead counsel.  
5 I have officers of the court sitting over here telling me we  
6 have received no attorney-client information or intrusions.  
7 You know the case law. You need intrusion and prejudice.  
8 That's what it is. Like it or not, that is what it is. I am  
9 not for a moment suggesting there should be intrusion into  
10 attorney-client meetings; I don't think there should. But as  
11 officers of the court they said we are not aware of any, we  
12 don't know of any, we have not been privy to any. That's what  
13 they've said.

14 How do you -- truly, knowing my personality so far in  
15 UI practice and then the MRI and all of that, if in a month or  
16 two you come to me with real evidence of actual intrusions  
17 that the prosecution knew about, how well do you think that's  
18 going to be received by the commission? I think we know: Not  
19 well. We know that.

20 I'm happy to release the whole series. If I could  
21 order declassification, I would. I can't. The law is clear.  
22 And so that is why I have asked. I think I've been asking for  
23 five months: Declassify. And what I get back frequently is

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1 tell us what you want declassified.

2           This issue has caused tremendous tumult in the  
3 commissions. And again, as the presiding officer, it seems  
4 obvious to me from what I've said, it all should be  
5 declassified. This issue of intrusion -- it is not hard to  
6 cut out, right, names of buildings, a room name or a place.  
7 This is easy stuff to declassify. It really is. What  
8 national security interest are we protecting?

9           And we know this: Sometimes it appears -- I'm not  
10 suggesting it's done that way -- classification efforts are  
11 made by OCAs because they don't like the information. That's  
12 how it appears. And I'm not saying in this case; I'm just  
13 saying in a general sense. We have all seen it in the news.  
14 We all see it all the time. Why aren't we declassifying this  
15 stuff? I've asked. They should do it. What they can  
16 release, they should.

17           Certainly if I was the administrator of the facility  
18 I would want information out, because the facility is  
19 constantly under attack for being mismanaged. Wouldn't you  
20 want to tell the public it's not? But who am I, right?  
21 Presiding official for one case, trying to figure out the  
22 right way ahead.

23           DDC [LT PIETTE]: Yes, Your Honor. And I think -- I guess

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1 really the only thing that I have to say here besides -- maybe  
2 we'll figure something out. Maybe I'll work with Colonel  
3 Wells and we will propose some findings of fact we think --  
4 because we agree -- I think what he's saying is something  
5 needs to trigger something else maybe in federal courts to  
6 happen, and I'm not hearing what that is.

7           But I want to say -- I guess the only thing I really  
8 want to say is I know -- I can see why it appears to be a  
9 strategy. I can see why this evidence could support a  
10 finding, if that's what you want that finding to support. But  
11 you know, to anyone -- for what it's worth, no attorney in  
12 their right mind would give up the presumption of evidence and  
13 the beyond every reasonable doubt standard that you get at  
14 trial to gamble on the standard of review, like the Strickland  
15 standard that you get at appeals courts, all to avoid, I don't  
16 know, a cross-examination or a presentation of the evidence  
17 that's -- no attorney in their right mind would do that.

18           I can hope that the courts see that, that the people  
19 see that, that you see that, and understand that this is not a  
20 strategy. There were genuine, legitimate concerns and views  
21 that this was the only way to stop this from steamrolling  
22 forward in an unfair manner. So that's -- I guess that's  
23 really what I wanted to get up here and express to the court.

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1 Thank you.

2 MJ [Col SPATH]: No, I understand. I do think it's an  
3 MCD0 strategy; I know you know that. I have made many  
4 findings.

5 Had you engaged in cross-examination, we would be in  
6 the same place right now. My frustrations would be the same;  
7 and that is the community is leaving you by yourself and no  
8 action is being done to force these issues, it appears. Maybe  
9 they are and I don't see them.

10 But we're months into it. I have been incredibly  
11 patient. I was trying to see -- you know what I mean -- what  
12 are we going to do about this? What are we going to do about  
13 this? Are we going to get any resolution? Are we going to  
14 get some more lawyers? Are we -- and again, I have -- if I  
15 were to keep driving on, why isn't your team resourcing you  
16 with lawyers? I know, because you can't introduce somebody  
17 without learned counsel. But that flies in the face of a  
18 specific ruling from the court and 1.16. You are protected  
19 from the ethics issues, and your client is protected by a  
20 fair, impartial judge.

21 At the end of the day, right, what are the remedies  
22 down the road? We haven't even discussed or debated remedies  
23 for what could be perceived as late discovery, what could be

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1 perceived as problems in the process getting there. Where are  
2 those remedies? We're going to have those discussions, too.

3           You're not the only one interested in protecting your  
4 client's rights. The only difference: I have to protect both  
5 sides' rights, ensure the trial is fair and individual rights  
6 are protected, right? That is, you have a particular job in  
7 this process, and I have encouraged you to do it because I  
8 think it's better for your client, I think it's better for you  
9 professionally. But that -- that is what it is. Thanks.

10           I'm not ruling on anything tonight. I will give you  
11 kind of where I think we're at. I mean, I have ruled multiple  
12 times in multiple manners that outside appointed learned  
13 counsel has not been excused. And it's not based on a belief  
14 that the Regulation for Trial by Commissions somehow overrides  
15 the Manual for Military Commissions, right? We have seen that  
16 in some of the responses, frankly, from the defense. It  
17 isn't. It is based on the fact that I believe the Manual for  
18 Military Commissions has an ambiguity in 506, and I believe it  
19 is ambiguous as you try to read all the provisions together.

20           And it is a fact that I have interpreted the Manual  
21 for Military Commissions based on standard rules for statutory  
22 construction. If it is ambiguous, you've got to figure out  
23 the meaning, through congressional intent, how other

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1 jurisdictions do it, how every other jurisdiction across  
2 America deals with information excusals in trial, right? That  
3 was what the ruling was based on.

4           Additionally, I've ruled that appointed vice detailed  
5 counsel are different in the manual, clearly different. They  
6 are different categories. Outside learned counsel are in a  
7 different contractual relationship with the commission than  
8 any other DoD counsel and detailed military defense counsel.  
9 Frankly, that's the only counsel, right, that I certify the  
10 hours for or the pay for. They come to me to sign. A  
11 significant difference. I don't see anything to do with the  
12 other counsel's pay or hours they spend on a case or anything  
13 like that. I do for learned counsel.

14           In this case outside learned counsel continued  
15 representation for years -- F-0-R, not F-0-U-R -- for years,  
16 collecting 1.8 million dollars; and in the initial motions,  
17 related to the issues at hand, was only requesting different  
18 meeting space as a potential to resolve the issue that I have  
19 found didn't occur. If you go back and look at the motions,  
20 that was one of them. Just let us meet somewhere else, and  
21 we're all happy. That's been occurring consistently since  
22 learned counsel filed that motion. Defense counsel has had  
23 the opportunity to meet in other locations with their client.

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1           Once a case has outside appointed learned counsel,  
2 that individual has some authority to accept or release  
3 counsel from his or her team as learned counsel sees fit. I  
4 think we all agree on that as well. They do have some  
5 authority to release counsel, to build or release from their  
6 team. But here outside learned counsel did not endeavor to do  
7 that with the two civilians who had made an appearance in this  
8 case. General Baker released them; learned counsel did not.

9           I have ruled on multiple occasions the two DoD  
10 civilians have not been released from the case because of that  
11 issue. General Baker didn't have the authority to release  
12 them. Mr. Kammen might have. And I have not, based on what  
13 occurred, especially with Mr. Kammen not showing up for trial  
14 and Ms. Eliades arguably being capable of being a learned  
15 counsel.

16           They have ignored multiple orders to attend  
17 commission hearings, multiple scheduling orders, multiple  
18 docketing orders. They ignored orders to go to the Mark  
19 Center, and now they've ignored subpoenas that were properly  
20 served on them. And they've been reassigned in DoD, still  
21 getting paid at taxpayer expense. Despite all of this, they  
22 continue to go to work in MCDO.

23           Here General Baker, of course, chief defense counsel,

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1 purportedly acted to release outside appointed learned counsel  
2 and the two DoD civilians based on an opinion from  
3 Ms. Yaroshefsky. That opinion was addressed only to  
4 Mr. Kammen, along with some other information he purportedly  
5 reviewed, to include the classified and unclassified  
6 information related.

7           None of the information submitted indicates there  
8 were opinions from any of the state bars for these attorneys.  
9 Apparently, they all relied on Ms. Yaroshefsky. At least  
10 that's the information that was submitted here. As we know,  
11 General Baker refused to explain his rationale or basis to the  
12 commission in any more detail than in the excusal memo, which  
13 of course ultimately led to the contempt issues.

14           Also of note, given his purported stated unilateral  
15 and unreviewable authority to excuse defense counsel -- let  
16 that sink in. Unilateral, unreviewable. Nobody has that  
17 authority, that I know of, across most of any court system. I  
18 don't have that authority; that's for sure. The Supreme  
19 Court, arguably unilateral and unreviewable; but even there,  
20 Congress will step in and act in contravention to them.  
21 Unilateral, unreviewable authority to excuse defense counsel.  
22 However, he left Lieutenant Piette on the case, who has the  
23 very same issues.

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1           The only reasonable explanation is Lieutenant Piette  
2 said he remained on the case in order to continue to represent  
3 his client and that his client had some representation. He  
4 made a choice according to what he has said in here.

5           General Baker also left every other defense team  
6 across the commissions intact, which indicates to me none of  
7 them have asked for a release, based on all of this  
8 information. What this shows me is it's more information that  
9 General Baker, Mr. Kammen, and the two DoD learned counsel's  
10 actions are both arbitrary and purposeful. They are directed  
11 at stopping or mortally harming these proceedings.

12           This commission continues to find, as supported by  
13 significant evidence, this course of conduct shows a  
14 strategic, concerted effort by the Military Commissions  
15 Defense Office, which is different than Lieutenant Piette, a  
16 strategic course of conduct by the Military Commissions  
17 Defense Office to undermine the commissions process and  
18 attempt to halt the only commissions case entering the  
19 evidence pretrial admissions stage -- capital commissions case  
20 entering the pretrial admissions stage.

21           All of this has occurred, also, as the commission was  
22 approaching the deposition cross-examination for Mr. al Darbi  
23 who, according to the defense, is the only eyewitness and most

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1 critical government witness, after months of preparation time  
2 provided at defense request to prepare that cross-examination,  
3 and delays at defense request to prepare that  
4 cross-examination.

5 This decision was also made very soon after the  
6 commission issued what some have called an aggressive 2018  
7 calendar year schedule, with significant time to be spent here  
8 at Guantanamo Bay, to which learned counsel immediately  
9 expressed tremendous reservation, despite an employment  
10 contract that indicates he has to comply by those schedules.

11 After multiple refusals to appear by learned counsel  
12 and DoD civilian counsel, the commission ordered all other  
13 detailed counsel who had yet to make an appearance to do so at  
14 the next scheduled commission proceedings. That would have  
15 been January 2018. Immediately after that order the acting  
16 chief defense counsel for this case released all those counsel  
17 from representing the accused. Of note, when he testified, he  
18 did mistakenly identify how many counsel were released;  
19 Lieutenant Piette properly pointed out actually three were  
20 released, not the two military counsel, leaving the accused  
21 with a single detailed defense counsel. Of note, it's the  
22 least experienced. If you go look at the three who were  
23 detailed, compare them to Lieutenant Piette, as much as I

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1 appreciate Lieutenant Piette and have empathy, those three  
2 have more experience, and MCDO released them rather than have  
3 them make an appearance.

4           As we learned this week, the detailed defense counsel  
5 was comfortable in taking part in that decision regarding the  
6 release of additional counsel and determining this was the  
7 right course of action in a capital case, although he will not  
8 take any other action in this capital case, for the most part.  
9 His explanation was better one attorney saying nothing in  
10 court than more than one just doing the same. But what that  
11 ignores is each defense counsel's independent duty to advocate  
12 and represent for their client zealously.

13           What it does is it shows a coordinated plan on behalf  
14 of the defense community to not defend their client in court  
15 when given the opportunity to do so. It shows a refusal to  
16 acknowledge a ruling by the commission that at the time we're  
17 going to move forward with pretrial admission of real  
18 evidence.

19           As I said multiple times, I believe the way the  
20 statute is written and it is to be applied here, defense  
21 counsel -- or the accused, rather, is entitled to learned  
22 counsel to the greatest extent practicable, and that learned  
23 counsel is not practicable in this proceeding at this time.

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1 And that is based on learned counsel's own conduct and the  
2 Military Commission Defense Organization's conduct.

3           Despite those rulings, Lieutenant Piette refuses to  
4 engage in what I find to be the basic acts or efforts of  
5 advocacy related to real evidence admission only, and that's  
6 all we've done, instead stating that he is not competent or  
7 qualified to handle questions related to real evidence,  
8 photographs, that are all foundational in nature.

9           And as he's demonstrated when he has talked to the  
10 commission, he's quite capable of practicing that portion of  
11 our practice. And Lieutenant Piette has done that despite  
12 understanding that these are -- there are jurisdictions out  
13 there that don't even require learned counsel at any stage of  
14 the proceeding. Again, agree or disagree with it all you  
15 want. I would go work in those jurisdictions to pass a law if  
16 you don't like it. There are jurisdictions that do not  
17 require learned counsel. And in the face, frankly, of his own  
18 bar rules, Navy Rules of Professional Responsibility, and the  
19 directive language you find in the Manual for Military  
20 Commissions and the Regulation for Military Commissions  
21 related to the responsibilities of detailed military defense  
22 counsel and their need to represent their client.

23           I would suggest, though, for any reviewing

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1 authorities down the road, I have great empathy for Lieutenant  
2 Piette, because he was left in this position by the behavior  
3 and conduct of the outside appointed learned counsel, the  
4 chief defense counsel, the acting chief defense counsel, and  
5 the Military Commission Defense Organization as a whole.

6 I know the government keeps indicating we're in fact  
7 finding and we're moving through the process thoughtfully, but  
8 it seems apparent -- I've said it -- learned counsel has  
9 abandoned his client. He's not coming back. The two DoD  
10 civilians simply refuse to obey orders and subpoenas, in clear  
11 contravention of their duties as employees of the Department  
12 of Defense. And they refuse to represent their client  
13 zealously or otherwise, despite multiple rulings from the  
14 commission.

15 And so we arrive here, right? What do we do? After  
16 years of effort, we now have a single detailed military  
17 defense counsel. No end in sight to the behavior of the  
18 Military Commissions Defense Organization, a defense community  
19 that believes it can exercise, and did, unilateral authority  
20 to excuse defense counsel at any stage of the proceeding, to  
21 include learned counsel; and now an approximately  
22 four-and-a-half-month gap in providing additional defense  
23 counsel to this team, despite the commission, frankly,

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1 attempting to push both the Military Commission Defense  
2 Organization, the prosecution, the convening authority to do  
3 something.

4           We also have a process where commission orders are  
5 willfully ignored. Rulings are ignored. No significant  
6 effort is being made to appeal many of these rulings over  
7 which there's disagreement. And the ability of this  
8 commission to move forward efficiently and fairly is clearly  
9 in doubt. We have a process where we continue to attack the  
10 process as if, frankly, the commission -- me -- were the  
11 answer to fix it, that I approve this process, that I detailed  
12 myself to this process, or that I have any stake in this  
13 process.

14           I will tell you, I'm doing what I'm supposed to. My  
15 boss told me you are going to serve as a commissions judge.  
16 The chief judge of the commissions said you're going to serve  
17 on that case. If I had a basis to recuse myself, I would  
18 have. I didn't. And so the way the bar rules read is I don't  
19 recuse myself. You don't do it out of a matter of personal  
20 preference. And frankly, this is no more than any member of  
21 the Armed Forces should do, follow rulings and orders. But  
22 we've seen that we have many who won't.

23           And again, I have said it multiple times: This

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1 commission has been set up -- right? It was set up by  
2 President Bush. It was then reestablished by President Obama.  
3 And clearly President Trump hasn't done anything to alter the  
4 process, and Congress passed it. So what we have done is  
5 given uncertainty to every single person involved in the  
6 process, right, both the accused and the public. It's a  
7 spectacle for the public that infuses doubt into this process,  
8 and it gives us the real likelihood of either continued delays  
9 or roadblocks, more doubts about the process, and an appellate  
10 process that will be vigorous and possibly detrimental to any  
11 finding, if there were one, of guilt.

12           You know the other thing it does? It causes pain,  
13 stress, and uncertainty for every single person involved.  
14 That includes everybody sitting in the room, everybody back  
15 there, and everybody watching, with no apparent purposeful  
16 movement by many involved to fix this. And it is not my job  
17 to press on in the face of constant roadblocks, recalcitrance,  
18 and disobedience of orders. Others have that responsibility,  
19 and somebody ultimately owns this process. Not me.

20           So I have been trying to figure out what are my  
21 options. I managed to come up with seven; there's probably  
22 many more. And some work in concert with each other.

23           One, I can issue writs of attachment, right, for the

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1 two DoD civilians. I believe those are lawful writs of  
2 attachment. The rules clearly contemplate them. I think the  
3 marshals will go get them and they'll bring them to the Mark  
4 Center. I don't know if they'll testify or not. I think it's  
5 telling that there were no filings in federal court to stop  
6 the writs or to preempt the writs, like Mr. Kammen did,  
7 because, frankly, I think that's what the civilian learned --  
8 or the civilian DoD counsel want, because once I do that,  
9 clearly good cause will exist, and I will have to determine if  
10 they should be released. And it's hard to continue to  
11 represent your client if you are facing adverse actions  
12 because of your client's case. I think that's their desired  
13 end state. But on the other hand, let's do it and have them  
14 show cause why they should be released. But again, it's kind  
15 of circular, right? They will have shown cause for their  
16 release by the fact that we've issued a writ and dragged them  
17 over to the Mark Center.

18 Two, maybe we should get the person who owns the  
19 process to testify by VTC. Maybe General Mattis should  
20 testify. Maybe he should explain: What are you doing? It's  
21 your process, sir. It's not mine. Maybe that will help. He  
22 has a rogue defense organization within the process, it would  
23 appear. And so does he know it, is he going to do anything

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1 about it, and are these important?

2 I can abate, just send us all home until somebody  
3 figures it out.

4 I can dismiss with prejudice, because that will force  
5 the government to go get all the answers I want. Because then  
6 I guarantee you someone will file in federal court, someone  
7 will file with CMCR, and somebody will go get some assistance.  
8 I can dismiss without prejudice or with. Concerns there too,  
9 right? Are you going to really reward recalcitrance and  
10 ignoring orders with punishment to the prosecution? But it is  
11 an option, because it will force somebody to go do something.

12 Status quo. We can just keep doing this.

13 Or I can release the three counsel, find good cause  
14 has been shown based on their behavior, and let Lieutenant  
15 Piette move to trial in a capital case until an appellate  
16 court stops the process.

17 I mean, that's kind of the field -- that's kind of  
18 how I see it. Those are multiple options, right? What I know  
19 is we deserve and need some guidance from somebody. We have  
20 courts of higher review. There are writs of mandamus for  
21 exceptional issues. I feel like we have some. I would have  
22 hoped some would have been filed by now. None have, as far as  
23 I can tell.

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1           We need to know are there going to be any actions  
2 taken against what could be viewed as kind of the lawless  
3 defense function who defy orders, defy subpoenas, and ignore  
4 rulings. We need some answers there, or it's going to  
5 continue, and it will slow this process down for another  
6 decade.

7           We need to know who can excuse counsel. I've ruled  
8 on it, but that was the end of it. But if it was really the  
9 end of it, counsel would be here still fighting the issue in  
10 another court, right? They would be saying I can release them  
11 or we will comply with the order until an appellate court says  
12 otherwise. So we need an answer to that question.

13           You want me to file the writ of mandamus to ask have  
14 I properly defined the contempt authority this court has?  
15 Because, frankly, if people can defy orders, with no response  
16 from a court, what is that going to look like when we get to  
17 trial, when I, I don't know, overrule -- or sustain, rather,  
18 an objection, and I tell the defense you are not going to be  
19 able to offer that?

20           Well, there is no contempt authority for disobeying a  
21 commission order. I would just offer it to the members,  
22 right? What's the punishment? I yell at you? I punish you?  
23 What's that going to look like with no contempt authority?

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1 Nobody cares.

2           And again, any tribunal given contempt authority has  
3 to figure out what the limits of it are and use it  
4 judiciously, which is why I've only used it once so far,  
5 because if I don't have it, I'm not going to use it. But we  
6 need to know, and we haven't got any resolution there yet.

7           Are witnesses even going to be amenable to service to  
8 go to the Mark Center? Or are we going to have to drag them  
9 there over and over again with marshals? Or can we get the  
10 message out that we have that authority? I know it's still  
11 pending in Indiana. It was resolved in New York, right?

12           Do I -- do I abate a case based on what I have said  
13 is the voluntary abandonment by learned counsel, or do I keep  
14 moving forward because -- right? Whose fault is that? It's  
15 not the government's fault. It's that learned counsel's  
16 fault. Are learned counsel required in every hearing in every  
17 case, or are they required to the extent practicable, like I  
18 have ruled already? We don't have a final answer on that. If  
19 I'm wrong on that, the case comes back, right? If I'm wrong  
20 on that and I go forward, the case comes back. If I'm right  
21 on that, we will figure out what other issues are out there in  
22 this case, but that one is resolved.

23           I ordered Commander Mizer recalled to active duty

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1 months ago, and what I hear now is, oh, it might take seven or  
2 eight months. We need demonstrated real movement on recalling  
3 him or not doing it. We need demonstrated real movement on  
4 hiring and resourcing additional learned counsel if we're  
5 going to do it. And if we're not going to do it, don't do it.  
6 But this months and months and months, is that fair to these  
7 families? It's important enough for us to come down here  
8 every month, but the people who own these decisions keep  
9 saying it's going to take months to make them. So would a  
10 dismissal or an abatement or something like that force them to  
11 re-look at this process?

12           Interim clearances, who's doing that? Why aren't we  
13 doing it? Read-ons with interim clearances, who is the  
14 approval authority? Why aren't we getting it done? Where is  
15 the fire to move things forward by people who own this other,  
16 frankly, than the trial judiciary who has spent five months  
17 pushing the issues? If these proceedings are important to  
18 DoD, Congress, and the White House, maybe somebody needs to  
19 demonstrate it, or admit the process needs change again and  
20 fix it.

21           And I know this is cold comfort for the people  
22 involved in the process. Believe me, I have great empathy. I  
23 say that a lot, and I mean it. I have no idea what it is like

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1 to be involved in the process from outside. I don't know.  
2 Maybe you all start calling your representatives and trying to  
3 force change.

4 But, wow, that's where we're at. That's the quandary  
5 we're in. I owe you all an answer as to where I'm going, but  
6 those seem to be the options that I can come up with. And  
7 again, some of them work in tandem, right? Maybe we order  
8 General Mattis to come next time before we determine whether  
9 or not we abate the proceedings or dismiss. Maybe we wait a  
10 few weeks to see if anyone is hearing us down here. But I  
11 have waited months, and what I see is that you can violate  
12 orders of the commission, violate subpoenas, violate, frankly,  
13 rulings openly in court, defiantly. And the reaction of it is  
14 you go back to work and you keep doing your job.

15 So I'm going to think about this overnight. As I say  
16 so often, this is not a ruling. I'm thinking about it. If I  
17 get anywhere on it, I plan to come here tomorrow at 9:30 to  
18 give you an idea of what I believe the appropriate road ahead  
19 is. I won't know that for a little while, so you are going to  
20 get notice sometime later this afternoon if you need to be  
21 here at 9:30 or not. If you don't need to be, I'll see you  
22 next time, whenever that is. If you need to be, I'll see you  
23 at 9:30 tomorrow.

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1           For your client, he may well care about the answer,  
2 and I recognize that, but I also know that coming over here  
3 for ten minutes might not be something he wants to do. So you  
4 all can figure that out on your own, whether or not that makes  
5 sense.

6           But we -- we need to figure this out. We are  
7 infecting this process with uncertainty, doubt, and delay.  
8 And I know that is not the fair administration of justice.

9           So Mr. Potter will let you know if we are going to be  
10 here tomorrow at 9:30. We are in recess.

11 [The R.M.C. 803 session recessed at 1519, 15 February 2018.]

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