

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

UNITED STATES OF AMERICA,)
) Criminal Action
) No. 21-00175
Plaintiff,)
)
vs.)
)
ETHAN NORDEAN, JOSEPH R. BIGGS,) Washington, D.C.
ZACHARY REHL, ENRIQUE TARRIO and) March 8, 2023
DOMINIC J. PEZZOLA,) 1:49 p.m.
)
Defendants.)
)
* * * * *

TRANSCRIPT OF JURY TRIAL - DAY 44
AFTERNOON SESSION
BEFORE THE HONORABLE TIMOTHY J. KELLY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: JASON B.A. McCULLOUGH, ESQ.
ERIK M. KENERSON, ESQ.
CONOR MULROE, ESQ.
NADIA MOORE, ESQ.
UNITED STATES ATTORNEY'S OFFICE
FOR THE DISTRICT OF COLUMBIA
555 Fourth Street, Northwest
Eleventh Floor
Washington, D.C. 20530

FOR THE DEFENDANT NICHOLAS D. SMITH, ESQ.
NORDEAN: DAVID B. SMITH, PLLC
1123 Broadway
Suite 909
New York, New York 10010

APPEARANCES, CONT'D:

FOR THE DEFENDANT
BIGGS: JOHN D. HULL, IV, ESQ.
HULL MCGUIRE, P.C.
1420 N Street, Northwest
Washington, D.C. 20005

NORMAN A. PATTIS, ESQ.
PATTIS & SMITH, LLC
383 Orange Street
First Floor
New Haven, Connecticut 06511

FOR THE DEFENDANT
REHL: CARMEN D. HERNANDEZ, ESQ.
7166 Mink Hollow Road
Highland, Maryland 20777

FOR THE DEFENDANT
TARRIO: NAYIB HASSAN, ESQ.
LAW OFFICES OF NAYIB HASSAN, P.A.
6175 Northwest 153rd Street
Suite 209
Miami Lakes, Florida 33014

SABINO JAUREGUI, ESQ.
JAUREGUI LAW, P.A.
1014 West 49th Street
Hialeah, Florida 33012

FOR THE DEFENDANT
PEZZOLA: STEVEN METCALF, II, ESQ.
METCALF & METCALF, P.C.
99 Park Avenue
Sixth Floor
New York, New York 10016

ROGER ROOTS, ESQ.
LAW OFFICES OF ROGER ROOTS
113 Lake Drive East
Livingston, Montana 59047

1 REPORTED BY: LISA EDWARDS, RDR, CRR
2 Official Court Reporter
3 United States District Court for the
4 District of Columbia
5 333 Constitution Avenue, Northwest
6 Room 6706
7 Washington, D.C. 20001
8 (202) 354-3269
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I N D E XDirectCrossRed.WITNESSES FOR THE GOVERNMENT:

Nicole Miller

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1 THE COURTROOM DEPUTY: We're back on the record in
2 Criminal Matter 21-175, United States of America versus
3 Ethan Nordean, et al.

4 THE COURT: All right. Good afternoon.

5 I appreciate what Mr. Smith sent on email and what
6 the Government sent on email.

7 Here's what I'm going to do: Look, I do think --
8 number one, I do think the Government should have -- let's
9 put it this way: I think the admissibility of that video
10 was close enough that it would have behooved the Government,
11 even despite the fact that I understand they provided the
12 exhibits to the Defendant, for the Government to have raised
13 it beforehand.

14 By the same token, I also think we have a record
15 in this case of very robust defense objections to exhibits,
16 including at times to things embedded in exhibits. And so,
17 you know, I think it would have behooved the Defendants to
18 have objected to it beforehand.

19 All of that said, I think, considering 403 -- if
20 it had been raised with me beforehand, I would have excluded
21 it under 403.

22 So I am going to strike it. I'm going to deny the
23 motion for a mistrial.

24 The question, I think, is -- let me tell you what
25 I am proposing, and I will hear from anyone as to this --

1 any edits to this proposal. "Members of the jury: Before
2 the lunch break, the Government played a video for you that
3 a member of a Telegram group chat sent to Defendant Tarrio.

4 "The video was not sent by Defendant Tarrio or any
5 of the other Defendants in this case. I've stricken that
6 video from the record, and you are instructed to disregard
7 it. You may not consider that video during your
8 deliberations."

9 Would anyone make any edits to that?

10 Mr. Smith.

11 MR. SMITH: Your Honor, there were a couple videos
12 played. I don't know if the jury is going to understand
13 what the Court is alluding to. And I would just -- this was
14 a very graphic image of Adolf Hitler and marching storm
15 troopers, so I would say "the Nazi video that the Government
16 played."

17 THE COURT: A video depicting Nazis.

18 MR. SMITH: Depicting Nazis, yeah. Because
19 otherwise, I think that could just go right over the heads
20 of some --

21 THE COURT: All right. Any responses to that edit
22 or any other responses?

23 MR. PATTIS: One moment.

24 THE COURT: Yes. Or from the Government as well.
25 I'll read it -- should I read it again?

1 MR. KENERSON: Please.

2 THE COURT: "Members of the jury: Before the
3 lunch break, the Government played a video depicting Nazis
4 for you that a member of a Telegram group -- group chat sent
5 to Defendant Tarrio.

6 "The video was not sent by Defendant Tarrio or any
7 other Defendants in this case. I've stricken that video
8 from the record, and you are instructed to disregard it.
9 You may not consider that video during your deliberations."

10 Mr. Roots?

11 MR. ROOTS: It needs to be pointed out to the jury
12 that that individual who sent that is not a January 6th
13 Defendant. He was out of state. He was not at January 6th.
14 And so even the -- you know, that needs to be pounded into
15 the jury, that this was sent by a guy out of state, not
16 charged. We don't even -- there's been no discussion of his
17 relationship even with these guys.

18 THE COURT: I can't -- I can't say things that are
19 not in evidence. Right? I mean, this is what we know. It
20 wasn't sent by any of your clients.

21 I can't just inject facts into the record through
22 the instruction. I can't.

23 Anyone else? Mr. Pattis?

24 MR. PATTIS: We discussed it with Mr. Biggs. We
25 had pink elephant problems: Ignore the pink elephant in the

1 room. But we join Mr. Smith in his concerns and we would
2 not object to inserting the term "Nazi."

3 THE COURT: All right. Yes. I understand the
4 pink elephant.

5 MR. JAUREGUI: Tarrio is in agreement, Judge. And
6 we want to make sure that no other Nazi-type videos are
7 going to be played to the jury by the Government.

8 THE COURT: I was going to say -- I'm laughing,
9 but this is serious. I think -- you know, one rule of thumb
10 for the Government might be, if it's Nazis, let's talk about
11 it beforehand. And, I mean, we're all kind of chuckling
12 because you're working really hard. But I do think that
13 that's a fair rule of thumb.

14 Ms. Hernández?

15 MS. HERNANDEZ: Your Honor, along the lines of
16 what Mr. Roots said, I think the Court could tell the jury
17 that this gentleman is not charged in this case or is not --
18 he's not alleged to have been -- to --

19 THE COURT: Well, I said that's -- that's in what
20 I said.

21 MS. HERNANDEZ: Okay. All right.

22 THE COURT: It wasn't sent by Defendant Tarrio or
23 any of the other Defendants in this case. So by definition,
24 it could not have been.

25 MS. HERNANDEZ: And I guess Biggs, Pezzola and

1 Mr. Rehl are not in that particular chat.

2 THE COURT: Okay.

3 MS. HERNANDEZ: That's fine.

4 THE COURT: Mr. Roots?

5 MR. ROOTS: How about saying something like "by an
6 individual who is not a known participant in any events of
7 January 6th"?

8 THE COURT: But again, I can't -- those are facts,
9 and maybe they're true -- I don't know whether that's true
10 or not. I'm not disputing what you're saying, but it's
11 certainly not in the record one way or the other.

12 MR. ROOTS: Well, right now, the jury would be, I
13 think, reasonably believing that that individual who sent
14 that was somehow either at January 6th, he was with the
15 Defendants or something.

16 THE COURT: Well, I don't know what to tell you
17 other than all we can do is say -- I mean, all I can do is
18 strike it and say it wasn't sent to any of your clients. I
19 mean, it kind of doesn't matter that much, it seems to me,
20 whether that person was there, not there, or whether he's
21 charged or uncharged or anything else.

22 The point is that -- I mean, I think, from your
23 perspective, the point is there's the gap between that video
24 and your clients.

25 Anything further?

1 MR. KENERSON: I think two kind of related
2 requests from the Government. I understand the Court has
3 ruled that it's going to strike the testimony. As you saw
4 from the email, our position is that that's not required;
5 but nonetheless, we're not asking the Court to revisit that.

6 Our two requests would be that the instruction --
7 one, say that you're finding that the Government engaged in
8 no misconduct in doing so. I think, given the record,
9 that's warranted. That's part of our concern in the Court
10 striking the testimony this far afterwards. I understand
11 they made whatever calculation they made to not raise this
12 until the lunch break, but the moment it switched to that
13 portion of the video, they could have objected at that
14 point, and they did not.

15 So that's one.

16 THE COURT: All right.

17 MR. KENERSON: We'd also ask that the wording of
18 what the Court say at the beginning be slightly tweaked to,
19 rather than "the Government played," "you saw a video" or "a
20 video was played."

21 MR. SMITH: Your Honor, the Court has struck
22 evidence before without any suggestion of misconduct by the
23 parties. The jury did not hear any suggestion of
24 misconduct. And in fact, the fact that an objection was
25 raised at the first break would not lead the jury to

1 conclude that there's a suggestion of misconduct, because
2 there's been no quarrel in front of them.

3 So --

4 THE COURT: I'm going to sort of split the baby on
5 this one.

6 I guess -- I'm going to take out "the Government
7 played" and just say "you saw." But I'm not going to say
8 anything -- I mean, I'm not going to say anything about
9 misconduct one way or the other. It's -- it's an
10 evidentiary ruling that I'm making now that this has been
11 raised. I understand, normally, you know, there are waiver
12 issues that come into play, obviously. But I think this
13 is -- I think the situation warrants it here.

14 I mean, I don't think -- let me put it this way:
15 I hear what you are saying, but I don't know that that's
16 language that's appropriate here.

17 But I'll take out "the Government played" and it
18 will just read, "Members of the jury: Before the lunch
19 break, you saw video depicting -- you saw a video depicting
20 Nazis that a member of a Telegram -- a Telegram group chat
21 sent to Defendant Tarrio.

22 "The video was not sent by Defendant Tarrio or any
23 of the other Defendants in this case. I've stricken that
24 video from the record. You are instructed to disregard it.
25 You may not consider it in your deliberations."

1 MR. PATTIS: And in an abundance of caution, they
2 should not associate the FBI with Nazi-like characteristics
3 or behaviors. That might be appropriate, Judge.

4 MR. JAUREGUI: Judge, just one small issue. The
5 video was sent to the group, to the chat group. I don't
6 want it to say it was sent to Tarrio. It was sent in a
7 group chat.

8 THE COURT: It was sent to, among others,
9 Defendant Tarrio.

10 MR. JAUREGUI: No.

11 MR. HASSAN: No.

12 MR. JAUREGUI: Just to -- I would ask that it was
13 sent to that group.

14 THE COURT: Okay. That's fair.

15 MR. JAUREGUI: Thank you, your Honor.

16 THE COURT: The Government doesn't have any
17 objection to that. Right?

18 MR. KENERSON: I'm sorry. Could you read out the
19 language that it would say once --

20 THE COURT: Yes.

21 I can hear you, Mr. Pattis.

22 "Members of the jury: Before the lunch break, you
23 saw a video depicting Nazis that a member of a Telegram
24 group chat sent to the group.

25 "The video was not -- well -- the video was not

1 sent by Defendant Tarrio or any of the other Defendants in
2 this case. I've stricken the video from the record. You
3 are instructed to disregard it," blah, blah, blah.

4 MR. JAUREGUI: Thank you, your Honor.

5 MR. KENERSON: That's fine.

6 THE COURT: Very well. Let's bring in the jury
7 and we'll bring in -- oh, not the witness just yet. I think
8 I should give this instruction outside the witness's
9 presence unless someone objects.

10 Mr. Kenerson, what's your estimate of time left,
11 if you know? I know you're covering a lot of ground.

12 MR. KENERSON: Yes. I told defense counsel before
13 the break probably somewhere between 45 minutes and an hour.
14 I wish I had timed the length of each video. The problem
15 is, I just don't remember how long each of the videos are
16 until we play them.

17 THE COURT: Okay. Okay. And, Mr. Smith, for your
18 benefit, I have to make it a 5:00 day today as well. I'm
19 sure no one is disappointed in that.

20 THE COURTROOM DEPUTY: Jury panel.

21 (Whereupon, the jury entered the courtroom at 2:04
22 p.m. and the following proceedings were had:)

23 THE COURT: All right. Everyone may be seated.

24 Welcome back, members of the jury.

25 Members of the jury, before the lunch break, you

1 saw a video depicting Nazis that a member of a Telegram
2 group chat sent to the group.

3 The video was not sent by Defendant Tarrio or any
4 of the other Defendants in this case. I've stricken that
5 video from the record, and you're instructed to disregard
6 it. You may not consider that video during your
7 deliberations.

8 With that, Mr. Kenerson, we can bring in the
9 witness and you may proceed.

10 MR. KENERSON: Thank you, your Honor.

11 (Thereupon, Special Agent Miller entered the
12 courtroom and the following proceedings were had:)

13 CONTINUED DIRECT EXAMINATION

14 BY MR. KENERSON:

15 Q. Good afternoon, Agent Miller.

16 A. Good afternoon.

17 Q. I think just before lunch we left off with a photo of
18 Mr. Biggs in the Senate gallery. Correct?

19 A. Yes.

20 Q. Did Mr. Biggs and the group he was with leave the
21 gallery thereafter?

22 A. They did.

23 MR. KENERSON: Could we have Exhibit 132x, please,
24 I think just for the witness. I think this has been
25 provisionally admitted.

1 And seek permission to publish. Sorry. 132x.

2 THE COURT: It will be admitted and permission to
3 publish.

4 (Whereupon, Government's Exhibit No. 132x was
5 entered into evidence.)

6 BY MR. KENERSON:

7 Q. And can you tell us what time it is at the beginning of
8 this exhibit?

9 A. 2:45:24 p.m.

10 Q. And those sets of doors on the right, are those the same
11 doors we looked at just before lunch?

12 A. They are.

13 MR. KENERSON: Can we play the exhibit, please.

14 (Whereupon, segments of Government's Exhibit No.
15 132x were published in open court.)

16 BY MR. KENERSON:

17 Q. We can leave this playing. But at eight seconds, who is
18 circled right there?

19 A. Joseph Biggs.

20 Q. And who else has just come out the door?

21 A. Jackman.

22 Q. And can you tell us where that group winds up next?

23 A. They end up in the offices across the hall, the
24 chaplain's area.

25 Q. Okay. And we'll come back to this in just a moment.

1 But I think that you had previously testified Mr. Nordean
2 went back into the Rotunda?

3 A. He did.

4 MR. KENERSON: Could we have Exhibit 410M, as in
5 Mary, please, which I think was provisionally admitted.

6 Ask to publish.

7 THE COURT: It will be admitted. And permission
8 to publish.

9 (Whereupon, Government's Exhibit No. 410M was
10 entered into evidence.)

11 BY MR. KENERSON:

12 Q. Special Agent, do you recognize the individuals in this
13 photo?

14 A. I do.

15 Q. Who are they?

16 A. Nicholas Ochs, Ethan Nordean and Paul Rae.

17 Q. And that's from left to right as we look at the photo?

18 A. Correct.

19 Q. Do you recognize where this photo was taken?

20 A. In the Rotunda.

21 Q. And remind us, was Mr. Ochs in the marching group?

22 A. He was not.

23 Q. But -- what was his position within the Proud Boys?

24 A. He was an elder.

25 Q. And are you familiar with the Ministry of Self-Defense

1 chat?

2 A. I am.

3 Q. Do you know one way or the other whether Mr. Ochs was in
4 that chat?

5 A. Yes, he was.

6 Q. What type of look do we see on Mr. Nordean's face here?

7 A. He appears happy.

8 Q. Now, we previously looked at some text messages between
9 Enrique Tarrio and Jeremy Bertino. Do you remember those
10 texts?

11 A. I do.

12 Q. Were Mr. Tarrio and Mr. Bertino still texting around
13 this time?

14 A. They were.

15 MR. KENERSON: Can we go back to 530-5, please,
16 and scroll down to texts beginning at 2:45:22.

17 BY MR. KENERSON:

18 Q. Can you read, Special Agent, starting with the text at
19 2:45:23 through the end?

20 A. Sure. Bertino says: "Dude. Did we just influence
21 history?"

22 Tarrio responds: "Let's first see how this plays
23 out."

24 Bertino says: "They have to certify today or it's
25 invalid."

1 MR. KENERSON: Could we go to 530-6, please.

2 BY MR. KENERSON:

3 Q. Can you tell us what Enrique Tarrio sent to Mr. Bertino
4 at 2:46:26?

5 A. Sure. So this is a screenshot of Enrique Tarrio's
6 Parler account. And it says, "Proud of my boys and my
7 country," followed by, "Don't fucking leave."

8 Q. And are there any metrics associated with these posts in
9 the screenshot?

10 A. What do you mean?

11 Q. For example, does it show how many people have seen it?

12 A. Yes. So the first post, which is "Proud of my boys and
13 my country," is 4.6 thousand. The second, being "Don't
14 fucking leave," is 16,000.

15 Q. And that's as of when the screenshot was taken?

16 A. Yes.

17 Q. All right. I think you mentioned that the group
18 involving Mr. Biggs had gone to the chaplain's office. Is
19 that correct?

20 A. Correct.

21 MR. KENERSON: Can we see Exhibit 130, please.

22 BY MR. KENERSON:

23 Q. And while this is --

24 MR. KENERSON: Oh -- yes, I think this is in
25 evidence.

1 Can we play, Ms. Rohde?

2 BY MR. KENERSON:

3 Q. And while this is playing, can you describe for us where
4 we are?

5 (Whereupon, segments of Government's Exhibit No.
6 130 were published in open court.)

7 THE WITNESS: So this is a hallway and then this
8 is going to be a bathroom.

9 BY MR. KENERSON:

10 Q. And is this near any particular office?

11 A. It's near the chaplain's office.

12 Q. Do you recognize any of the individuals who just walked
13 down the hall?

14 A. I do. So this is Kevin Tuck, Eddie George, Jackman and
15 Biggs.

16 MR. KENERSON: Can we skip to a minute 20, please.

17 (Whereupon, segments of Government's Exhibit No.
18 130 were published in open court.)

19 BY MR. KENERSON:

20 Q. And who do we see at the bottom of the screen here at a
21 minute 20?

22 A. Joseph Biggs.

23 MR. KENERSON: Can we play till -- well, keep
24 playing, please.

25 (Whereupon, segments of Government's Exhibit No.

1 130 were published in open court.)

2 BY MR. KENERSON:

3 Q. Is Mr. Biggs standing next to an object right now?

4 A. He is. An American flag.

5 (Whereupon, segments of Government's Exhibit No.

6 130 were published in open court.)

7 BY MR. KENERSON:

8 Q. Starting now at about 2:00, what do we see going on with
9 that -- or two minutes; excuse me -- what do we see going on
10 with that flag?

11 A. Jackman is messing with it. He's eventually going to
12 remove it.

13 (Whereupon, segments of Government's Exhibit No.

14 130 were published in open court.)

15 BY MR. KENERSON:

16 Q. You see Mr. Biggs walking towards the camera right now.
17 What is he doing?

18 A. He's on his phone.

19 MR. KENERSON: If we could pause the video right
20 here.

21 BY MR. KENERSON:

22 Q. What time is it on the video?

23 A. 2:49:33 p.m.

24 MR. KENERSON: If we can have Exhibit 405BB, which
25 I believe is in evidence.

1 BY MR. KENERSON:

2 Q. Tell us where this was recovered, Agent Miller.

3 A. From Biggs's Google.

4 Q. And who do we see in the photo?

5 A. Joseph Biggs.

6 Q. And looking at the background of this photo, how does
7 that background compare to what we just saw on the CCTV
8 footage?

9 A. It's the same. And this is that bathroom door.

10 Q. And you've indicated the door behind Mr. Biggs's left
11 shoulder as we look at it. His actual right shoulder.
12 Correct?

13 A. Yes.

14 Q. Can you tell us, according to the metadata provided by
15 Google, what time was this photo taken?

16 MR. PATTIS: Objection, Judge. 403.

17 THE COURT: Overruled.

18 THE WITNESS: January 6th, 2021, at 2:47:56 p.m.

19 MR. KENERSON: Can we have 136x, please? I
20 believe this was provisionally admitted.

21 Seek permission to publish.

22 THE COURT: It will be admitted. And permission
23 to publish.

24 (Whereupon, Government's Exhibit No. 136x was
25 entered into evidence.)

1 (Whereupon, segments of Government's Exhibit No.
2 136x were published in open court.)

3 BY MR. KENERSON:

4 Q. Agent Miller, can you tell us what we are looking at
5 right now?

6 A. So we're back in the hallway where the Senate gallery is
7 going to be on your left. Those doors before you had viewed
8 were on your right-hand side; now they're on the left. So
9 this camera is just at the other end of the hallway.

10 MR. KENERSON: If we could play at three seconds.
11 And keep playing.

12 (Whereupon, segments of Government's Exhibit No.
13 136x were published in open court.)

14 BY MR. KENERSON:

15 Q. Who's circled?

16 A. Joseph Biggs.

17 Q. Did anyone else just leave the door with him?

18 A. Jackman.

19 Q. Who's that?

20 A. Tuck, and then George.

21 Q. Starting now at 34 seconds, where do we see that group
22 going?

23 A. They're running towards the end of the hallway. They're
24 going to end up in the Ohio Clock Corridor, where we saw
25 Pezzola earlier.

1 Q. Thank you.

2 MR. KENERSON: If we could pause it and go back
3 just so we have the timestamp at the end.

4 (Whereupon, segments of Government's Exhibit No.
5 136x were published in open court.)

6 BY MR. KENERSON:

7 Q. What timestamp did this video end?

8 A. 2:51:47 p.m.

9 Q. And of that group that you just described running down
10 the hallway, was any of them carrying anything?

11 A. Yes. Eddie George was carrying the American flag.

12 Q. Did Zachary Rehl enter the Capitol as well?

13 A. He did.

14 Q. Through which door?

15 A. He goes through the same door Biggs did.

16 MR. KENERSON: May we have Exhibit 115x, please?

17 BY MR. KENERSON:

18 Q. Can you tell us what door we're looking at here?

19 A. We're looking at the Senate wing door. So Pezzola
20 entered through this window and Biggs came through here.

21 Q. What time does this exhibit start?

22 A. 2:53:16 p.m.

23 Q. And have we seen CCTV of this door before?

24 A. We have.

25 Q. How does the size of this -- the crowd in this hallway

1 compare to the size of the crowd in the hallway when we've
2 seen it before?

3 A. It's much larger.

4 MR. KENERSON: If we could play, please.

5 (Whereupon, segments of Government's Exhibit No.
6 115x were published in open court.)

7 BY MR. KENERSON:

8 Q. At 12 seconds, who do we just see become highlighted on
9 the screen?

10 A. Rehl and Giddings.

11 Q. Have we mentioned Giddings before?

12 A. We have.

13 Q. In connection with whom?

14 A. With Rehl.

15 (Whereupon, segments of Government's Exhibit No.
16 115x were published in open court.)

17 BY MR. KENERSON:

18 Q. Starting at about 53 seconds, two other individuals
19 became highlighted. Do you recognize them?

20 A. I do. That's Healion and Vy.

21 Q. And where have we seen them before?

22 A. They were just in the photo you saw of Rehl with the
23 guys at the upper west terrace.

24 Q. Thank you.

25 MR. KENERSON: Ms. Rohde, can we speed this up to

1 double time for the rest of this exhibit.

2 (Whereupon, segments of Government's Exhibit No.
3 115x were published in open court.)

4 BY MR. KENERSON:

5 Q. And of those four individuals who were highlighted, who
6 came in the door first?

7 A. Rehl.

8 (Whereupon, segments of Government's Exhibit No.
9 115x were published in open court.)

10 MS. HERNANDEZ: Sorry, your Honor. I'm going to
11 object to speeding up the video because it sort of distorts
12 what's happening. It almost seems like there's...

13 THE COURT: Overruled.

14 (Whereupon, segments of Government's Exhibit No.
15 115x were published in open court.)

16 MS. HERNANDEZ: Sorry, your Honor. May we be
17 heard?

18 (Whereupon, the following proceedings were had at
19 sidebar outside the presence of the jury:)

20 MS. HERNANDEZ: Your Honor, this is a peaceful
21 scene. Most of these people in here are not Proud Boys.
22 There's no fighting. There's no -- there's no alarm through
23 the door. And the way it's being played, it almost -- you
24 can see jerking motions by the individuals and make it look
25 like they're shouting or fighting or something. It just --

1 I think it's completely distorting the video.

2 THE COURT: I think the Government, as long as
3 they're clear about what they're doing, they're playing it
4 double time. If you want to play it on cross --

5 MS. HERNANDEZ: It's going to be a waste of time,
6 it seems to me, for me to have to play it at a slow version.

7 THE COURT: It's possible they think it's a waste
8 of time to do the slow version as well.

9 MS. HERNANDEZ: I just think -- I just think it --
10 if you look at it, there's jerking motions by the people.
11 And it may be -- maybe they can speed it up without doubling
12 it or something.

13 THE COURT: They're not suggesting there was any
14 fighting going on there. They just showed your client
15 moving in a particular direction off the screen. So I'm
16 going to overrule the objection.

17 MS. HERNANDEZ: If -- again, if none of this is
18 relevant, then they should just end the video. I think it
19 distorts the picture.

20 Thank you.

21 THE COURT: The objection is overruled.

22 MS. HERNANDEZ: Thank you.

23 (Whereupon, the following proceedings were had in
24 open court:)

25 MR. KENERSON: Ms. Rohde, if we can have the end

1 of that video up again, please.

2 (Whereupon, segments of Government's Exhibit No.
3 115x were published in open court.)

4 BY MR. KENERSON:

5 Q. All right. Do you see the location where this video
6 ends?

7 A. I do.

8 Q. At what time is that?

9 A. 2:56:05 p.m.

10 Q. Have you been, Special Agent, to that area of the
11 Capitol where the individuals are circled right now?

12 A. I have.

13 Q. What's over in that area?

14 A. Offices.

15 Q. Were there any photos or videos recovered of Mr. Rehl in
16 an office at the Capitol on January 6th?

17 A. There was.

18 MR. KENERSON: Can we go to 415x, please, which I
19 believe is in evidence.

20 If it's not, I seek to admit it -- it was
21 provisionally admitted. Seek permission to publish.

22 THE COURTROOM DEPUTY: Provisionally, it's in.

23 THE COURT: It will be admitted and permission to
24 publish.

25 (Whereupon, Government's Exhibit No. 415x was

1 entered into evidence.)

2 MR. KENERSON: Thank you.

3 If we could play the video, please.

4 (Whereupon, segments of Government's Exhibit No.
5 415x were published in open court.)

6 BY MR. KENERSON:

7 Q. Pausing at seven seconds. There are two individuals
8 highlighted. Who are those?

9 A. Rehl is on the left and Giddings is on the right.

10 Q. Thank you.

11 MR. KENERSON: Continue.

12 (Whereupon, segments of Government's Exhibit No.
13 415x were published in open court.)

14 MR. KENERSON: Ms. Rohde, can we have 456, please.

15 BY MR. KENERSON:

16 Q. Does this appear to be the same area?

17 A. It does.

18 Q. Do you see anyone you recognize on here?

19 A. I do.

20 Q. Who do you see?

21 A. This is Rehl and Giddings.

22 Q. All right. Thank you.

23 What's Mr. Rehl doing in this photograph?

24 A. Smoking. And he's on his phone.

25 MR. KENERSON: Ms. Rohde, if we could zoom in to

1 the photo above Mr. Rehl.

2 BY MR. KENERSON:

3 Q. Can you read us what the title of that poster is on the
4 top?

5 A. "Capital city of Oregon."

6 Q. Thank you.

7 MR. KENERSON: Ms. Rohde, if we could zoom into --
8 up here.

9 BY MR. KENERSON:

10 Q. Do you recognize that state?

11 A. The state of Oregon.

12 Q. Thank you.

13 MR. KENERSON: Can we have 420B, as in boy,
14 please. Excuse me. 402B, as in boy.

15 BY MR. KENERSON:

16 Q. Do you recognize this?

17 A. I do.

18 Q. Who is depicted here?

19 A. You have Brian Healion; this is Vy; Rehl; and Giddings.

20 Q. And what are Mr. Healion and Mr. Rehl doing -- and
21 Mr. Giddings?

22 A. They're doing the Proud Boys hand gesture.

23 Q. Thank you.

24 MR. KENERSON: All right. Ms. Rohde, if we could
25 go to Exhibit 124, please.

1 (Whereupon, segments of Government's Exhibit No.
2 124 were published in open court.)

3 BY MR. KENERSON:

4 Q. What are we looking at here?

5 A. This is the Ohio Clock Corridor.

6 Q. At what time?

7 A. 2:52:13 p.m.

8 Q. And can you tell us -- I think you testified
9 previously that we had seen Mr. Pezzola in this corridor.
10 Can you just show us where?

11 A. Down in this vicinity.

12 Q. So you've drawn a stick figure in the far end. Correct?

13 A. Yes.

14 MR. KENERSON: Can we play, please.

15 (Whereupon, segments of Government's Exhibit No.
16 124 were published in open court.)

17 BY MR. KENERSON:

18 Q. Who did we just see come on the screen here at the --
19 about the five- to six-second mark?

20 A. Biggs, Jackman.

21 Q. Still carrying that flag?

22 A. Yes.

23 (Whereupon, segments of Government's Exhibit No.
24 124 were published in open court.)

25

1 BY MR. KENERSON:

2 Q. At the end of the video, they just exited through the
3 far end?

4 A. Yes.

5 Q. Where does the group go from there?

6 A. They go down the stairwell, the same stairwell Pezzola
7 took up and down.

8 MR. KENERSON: Could we go to Exhibit 119, please.

9 (Whereupon, segments of Government's Exhibit No.
10 119 were published in open court.)

11 BY MR. KENERSON:

12 Q. And can you tell us where we are here?

13 A. We are at the same set of doors we were earlier when
14 Biggs exited the first time. He's about to exit again.

15 MR. KENERSON: Could we play, please.

16 (Whereupon, segments of Government's Exhibit No.
17 119 were published in open court.)

18 MR. KENERSON: Pause at seven seconds.

19 BY MR. KENERSON:

20 Q. Do you recognize the person in plaid who just walked
21 onto the screen?

22 A. I do. That's Biggs.

23 MR. KENERSON: And for the record, we actually
24 paused at six seconds, actually.

25 Go ahead. Thank you.

1 (Whereupon, segments of Government's Exhibit No.
2 119 were published in open court.)

3 BY MR. KENERSON:

4 Q. Who else followed out after Biggs?

5 A. Eddie George, Tuck and Jackman.

6 Q. Is the flag still there?

7 A. It is. Well, they're taking it with them out of the
8 building.

9 MR. KENERSON: Can we have that exhibit back up at
10 the end again, Ms. Rohde? I apologize.

11 BY MR. KENERSON:

12 Q. What time was it when this group left the building?

13 A. 2:53:44 p.m., approximately.

14 Q. Have you had a chance to review phone records from
15 Enrique Tarrío?

16 A. I have.

17 Q. Did he make any calls on January 6th?

18 A. He did.

19 MR. KENERSON: Could I have Exhibit 653-1, which I
20 think has been provisionally admitted.

21 Seek permission to publish.

22 MR. JAUREGUI: Prior objection, Judge.

23 THE COURT: Understood.

24 It will be admitted and permission to publish.

25 (Whereupon, Government's Exhibit No. 653-1 was

1 entered into evidence.)

2 BY MR. KENERSON:

3 Q. Special Agent, can you tell us what we're looking at on
4 the screen here?

5 A. Sure. So these are going to be Tarrío's call records
6 from January 6th, 2021.

7 Q. And at 2:53:28 p.m., did he attempt to make a call?

8 A. He did.

9 Q. To who?

10 A. Ethan Nordean.

11 Q. And there's a third column in here that says "Connect,"
12 with a question mark, and in that column there's a "no."
13 What does that mean?

14 A. They did not speak.

15 Q. At 2:54:01 p.m., did Mr. Tarrío try to contact someone?

16 A. Yes.

17 Q. Who?

18 A. Joseph Biggs.

19 Q. Did that call connect?

20 A. It did not.

21 Q. At 2:54:03, did Mr. Tarrío try to contact someone?

22 A. He did.

23 Q. Who?

24 A. Joseph Biggs.

25 Q. Did that call connect?

1 A. No.

2 MR. JAUREGUI: Judge, I'm going to object. I'd
3 like to go to the phones before we reach the last one.

4 (Whereupon, the following proceedings were had at
5 sidebar outside the presence of the jury:)

6 MR. JAUREGUI: Judge, based on the line of
7 questioning so far and the answer given by the Government
8 where the Government -- or where the FBI agent said, No,
9 they didn't speak, I foresee her saying that at 2:54:36 they
10 did, in fact, speak. She does not know that. She has no
11 personal knowledge of that. And any of the -- any of this
12 would be speculation.

13 THE COURT: Well, when we get to that, you can
14 object. I think that is probably a fair objection. I mean,
15 I don't know that you can -- whether they spoke. The call
16 connected for 42 seconds. Fair enough. It could have been
17 in his pocket. You know, who knows? But I think that's
18 fair. We'll -- when we get to that, we'll see.

19 MR. JAUREGUI: Thank you.

20 THE COURT: Mr. Kenerson, just so we can get this
21 out of the way now, don't you think that's a fair objection?

22 MR. KENERSON: As a general matter, that she can't
23 say whether they show that, no. The records indicate there
24 was a call that was connected for 42 seconds.

25 THE COURT: Right.

1 MR. KENERSON: Yeah.

2 (Whereupon, the following proceedings were had in
3 open court:)

4 BY MR. KENERSON:

5 Q. Special Agent, before I ask you the next question, I was
6 remiss earlier. Can you move Mr. Rehl's magnet to where he
7 wound up when he entered the building?

8 MS. HERNANDEZ: Sorry. I didn't hear, your
9 Honor -- oh, the magnet. I see. Sorry.

10 THE WITNESS: It's going to be in the offices
11 right now, is where we are.

12 BY MR. KENERSON:

13 Q. Thank you.

14 Now, at 2:54:36 p.m., do the records show an
15 interaction between Mr. Tarrío and Mr. Biggs?

16 A. It does.

17 Q. And who called whom?

18 A. Biggs called Tarrío.

19 Q. According to the records, yes or no, did their phones
20 connect?

21 A. Yes.

22 Q. For how long?

23 A. 42 seconds.

24 Q. Was Enrique Tarrío still active on Parler around this
25 point in time?

1 A. He was.

2 MR. KENERSON: Could we go to 600-60?

3 And I would -- this has been provisionally
4 admitted. Would seek permission to publish.

5 THE COURT: It shall be admitted. And permission
6 to publish.

7 (Whereupon, Government's Exhibit No. 600-60 was
8 entered into evidence.)

9 BY MR. KENERSON:

10 Q. What's the date of this post?

11 A. January 6th, 2021.

12 Q. And on what medium did Mr. Tarrío post?

13 A. Parler.

14 Q. Can you tell us what he posted at 2:57:04?

15 A. He posted a picture of somebody on the Senate floor.

16 Q. And where is that individual in the Senate floor?

17 A. In the chair.

18 Q. What did he post below that at 2:57:16?

19 A. "1776."

20 Q. All right. Special Agent, the last time you testified
21 about Mr. Rehl, he was in the office near where he entered.
22 Correct?

23 A. Correct.

24 MR. KENERSON: Could we go to 116x. And I think
25 this has been provisionally admitted.

1 Seek permission to publish.

2 THE COURT: It's admitted. And permission to
3 publish.

4 (Whereupon, Government's Exhibit No. 116x was
5 entered into evidence.)

6 (Whereupon, segments of Government's Exhibit No.
7 116x were published in open court.)

8 BY MR. KENERSON:

9 Q. Are we looking at the Senate wing door again?

10 A. We are.

11 Q. What time now?

12 A. 3:04:20 p.m.

13 MR. KENERSON: And can we start playing, please.

14 (Whereupon, segments of Government's Exhibit No.
15 116x were published in open court.)

16 BY MR. KENERSON:

17 Q. Who is that person who is circled currently?

18 A. Rehl.

19 Q. Where has he gone?

20 A. Across the hall to the other door.

21 (Whereupon, segments of Government's Exhibit No.
22 116x were published in open court.)

23 BY MR. KENERSON:

24 Q. Does Mr. Rehl actually go in whatever is behind that
25 other door?

1 A. He does not.

2 (Whereupon, segments of Government's Exhibit No.
3 116x were published in open court.)

4 BY MR. KENERSON:

5 Q. While this is playing, can you tell us where Mr. Rehl
6 goes from here?

7 A. He goes to the Crypt, where we saw Pezzola earlier.

8 Q. What does he do after the Crypt?

9 A. He leaves.

10 Q. Where does he leave from?

11 A. He leaves out -- well, he leaves out the window that
12 Pezzola smashed.

13 Q. And do you remember about what time he left?

14 A. 3:13, roughly, p.m.

15 Q. Thank you.

16 (Whereupon, segments of Government's Exhibit No.
17 116x were published in open court.)

18 BY MR. KENERSON:

19 Q. If we could move both Mr. Pezzola and Mr. Rehl's magnets
20 outside of the building, please.

21 MS. HERNANDEZ: Sorry. I can't hear Mr. Kenerson.
22 If he could just speak into the microphone.

23 THE COURT: We all have that problem sometimes,
24 Mr. Kenerson.

25 MR. KENERSON: It happens to the best of us.

1 THE WITNESS: (Complies.)

2 BY MR. KENERSON:

3 Q. Was Mr. Tarrio still posting things on Parler around
4 this point in time?

5 A. He was.

6 MR. KENERSON: Could we have 600-61, please.

7 BY MR. KENERSON:

8 Q. At 2:58:43, what does Mr. Tarrio post on January 6th?

9 A. "Revolutionaries are now at the Rayburn Building."

10 THE COURTROOM DEPUTY: This was not admitted.

11 MR. KENERSON: Oh, I'm sorry. I apologize.

12 This has been provisionally admitted. I'd ask for
13 permission to publish.

14 THE COURT: Yes. It shall be admitted. And
15 permission to publish.

16 (Whereupon, Government's Exhibit No. 600-61 was
17 entered into evidence.)

18 BY MR. KENERSON:

19 Q. If you can read the message from Mr. Tarrio at 2:58:43
20 again, please.

21 A. "Revolutionaries are now at the Rayburn Building."

22 Q. What does he post at 3:00 and 26 seconds?

23 A. "Follow," a series of numbers, "@MurderTheMedia for live
24 updates."

25 Q. Are you familiar with MurderTheMedia?

1 A. I am.

2 Q. What's that?

3 A. That is the site belonging to Nicholas Ochs and Nicholas
4 DeCarlo.

5 Q. And we've talked about Nicholas Ochs before. Who is
6 Nicholas DeCarlo?

7 A. Nicholas DeCarlo was with Mr. Ochs. When they met up
8 with the girls by the Columbus door, he was with them as
9 well. He had a big kind of hat on.

10 Q. And then if you could read Mr. Tarrio's messages below
11 that at 3:02:09 and 3:03:40.

12 A. At 3:02:09 he says, "This is no longer Washington, D.C.
13 This is the city of the people of the United States of
14 America. Come and take it."

15 He then writes, "Make America great again."

16 MR. KENERSON: Can we go to 530-7.

17 BY MR. KENERSON:

18 Q. Back to text messages between Mr. Tarrio and
19 Mr. Bertino.

20 A. Yes.

21 Q. What's the date?

22 A. January 6th, 2021.

23 Q. And at 3:03:59, Mr. Bertino sends a video. Correct?

24 A. Correct.

25 Q. Have you watched that video?

1 A. I have.

2 Q. What is it of?

3 A. It's the video of Pezzola smashing the window.

4 Q. What's -- and then what question does Mr. Bertino ask?

5 A. "Recognize anyone? LMFAO."

6 Q. If you could read the text down through the bottom,
7 please.

8 A. At 3:04:28 p.m. Tarrio responses, "Nope."

9 Jeremy Bertino responds with a blank message,
10 followed by, "I do. Maybe."

11 At 3:05:25 p.m., Bertino says, "I'm so proud."

12 Tarrio replies, "That looks like George
13 Washington, Sam Adams and Franklin."

14 Q. Who are -- sorry. Go ahead.

15 A. No. You're good.

16 Q. Who are George Washington, Sam Adams and Franklin?

17 A. They're the founding fathers.

18 Q. Did Bertino react to that comment?

19 A. He did. He laughed at it.

20 Q. The last time we discussed Mr. Nordean, he was inside
21 the Rotunda. Did he remain in that general area?

22 A. In the area, yes. He leaves the Rotunda briefly and
23 then returns.

24 Q. Is he back in the Rotunda by shortly before 3:00?

25 A. He is.

1 MR. KENERSON: Can we have 167x, please, which I
2 think is provisionally admitted.

3 Seek to admit.

4 THE COURT: Admitted and permission to publish.

5 (Whereupon, Government's Exhibit No. 167x was
6 entered into evidence.)

7 BY MR. KENERSON:

8 Q. What time is it at the beginning of this exhibit?

9 A. 2:54:05 p.m.

10 MR. KENERSON: Ms. Rohde, if we could skip to
11 maybe 20 seconds before the end. Just back a little bit
12 from there. I'm sorry.

13 (Whereupon, segments of Government's Exhibit No.
14 167x were published in open court.)

15 BY MR. KENERSON:

16 Q. Starting here at 4:12 of the exhibit, what time is it
17 currently?

18 A. 2:58:16 p.m. again.

19 Q. And do you recognize anyone who is circled at this
20 point?

21 A. I do.

22 Q. Who's that?

23 A. So this is going to be Ethan Nordean. These are the two
24 women we saw him with earlier. And they also entered the
25 building with Biggs. And then you have Paul Rae. And Nate

1 Tuck is going to be with Paul Rae.

2 Q. Thank you.

3 MR. KENERSON: We can clear that. And if we could
4 just play this through the end, Ms. Rohde.

5 (Whereupon, segments of Government's Exhibit No.
6 167x were published in open court.)

7 MR. KENERSON: If we could pause right here,
8 Ms. Rohde.

9 BY MR. KENERSON:

10 Q. We paused at 4:56. We've just seen that group that you
11 identified earlier go to the left of our screen. Correct?

12 A. Correct.

13 Q. What time is it on the timestamp of the CCTV video?

14 A. 2:58:58 p.m.

15 Q. Now, are you able to show us on the map behind you what
16 direction the camera we are looking at faces in the Rotunda?

17 A. (Witness indicates.) Oh. North, I believe, is what
18 we're looking at.

19 Q. And just for the record, you have indicated from the
20 right side of the map as we look at it towards the left side
21 of the map. Correct?

22 A. Yes.

23 Q. Okay. Do you see a door on the other side of the
24 exhibit as we look at it now?

25 A. I do.

1 Q. Is there a camera mounted above that door as well?

2 A. There is.

3 MR. KENERSON: Can we go to Exhibit 181, please.

4 MR. PATTIS: 403, Judge.

5 MR. SMITH: No objection from Nordean.

6 THE COURT: It's admitted and permission to
7 publish.

8 MR. KENERSON: Thank you.

9 THE COURT: The objection is overruled.

10 MR. KENERSON: Thank you.

11 (Whereupon, Government's Exhibit No. 181 was
12 entered into evidence.)

13 BY MR. KENERSON:

14 Q. What time is this exhibit starting?

15 A. 3:00 p.m.

16 Q. And is this the other camera we talked about?

17 A. It is.

18 Q. All right. And I think on the last video, we had seen
19 the group that you -- that was circled going off to the left
20 of our screen. Can you point us to the approximate route
21 that they walked as we look at it from this opposite view?

22 A. Sure. So they would have walked this way.

23 Q. And for the record, you've indicated from the doorway we
24 can see on the opposite side of this video along the wall to
25 the right as we look at the video. Correct?

1 A. Correct.

2 Q. Okay. And can you just give us an overview of what this
3 video is about to show?

4 A. Sure. So the POW flag right here, this is going to end
5 up getting pulled down.

6 MR. KENERSON: Can we skip to about 37 seconds,
7 Ms. Rohde.

8 (Whereupon, segments of Government's Exhibit No.
9 181 were published in open court.)

10 MR. KENERSON: And can we zoom in on the top right
11 quadrant.

12 BY MR. KENERSON:

13 Q. Can you point again to the POW flag for us?

14 A. (Complies.)

15 Q. Do you see anyone you recognize in this view?

16 A. I do. So this is Nordean and this is Paul Rae. And I
17 believe Tuck might be next to him as well, in the khakis.

18 Q. And for the record, you have drawn a circle next to
19 someone to the right of the white statue towards the middle
20 of the screen right now as we look at it and someone just to
21 the right of him. Correct?

22 A. Yes.

23 MR. KENERSON: We can pause. And if we could play
24 till about 46 seconds.

25 (Whereupon, segments of Government's Exhibit No.

1 181 were published in open court.)

2 MR. KENERSON: Pause right there.

3 BY MR. KENERSON:

4 Q. Were you able to keep track of Mr. Nordean there?

5 A. Yes. He's still right here.

6 Q. Did we just see him do something?

7 A. Turned around towards -- and faced the flag.

8 Q. Did he make any gestures towards his face?

9 A. He pulled his mask up.

10 Q. Thank you.

11 MR. SMITH: Foundation, your Honor.

12 THE COURT: Overruled.

13 MR. KENERSON: If we could keep playing, please.

14 (Whereupon, segments of Government's Exhibit No.

15 181 were published in open court.)

16 BY MR. KENERSON:

17 Q. Still able to see Mr. Nordean?

18 A. I am.

19 Q. Can you point him out?

20 A. (Witness indicates.)

21 Q. Thank you.

22 (Whereupon, segments of Government's Exhibit No.

23 181 were published in open court.)

24 BY MR. KENERSON:

25 Q. Still able to see Mr. Nordean?

1 A. (Witness indicates.)

2 Q. Thank you.

3 (Whereupon, segments of Government's Exhibit No.
4 181 were published in open court.)

5 (Witness indicates.)

6 BY MR. KENERSON:

7 Q. Thank you.

8 (Whereupon, segments of Government's Exhibit No.
9 181 were published in open court.)

10 (Witness indicates.)

11 BY MR. KENERSON:

12 Q. Thank you.

13 (Whereupon, segments of Government's Exhibit No.
14 181 were published in open court.)

15 BY MR. KENERSON:

16 Q. At 2:26, what did we just see happen to the flag?

17 A. The flag got pulled down.

18 (Whereupon, segments of Government's Exhibit No.
19 181 were published in open court.)

20 MR. KENERSON: Ms. Rohde, if we could zoom out now
21 very quickly.

22 (Whereupon, segments of Government's Exhibit No.
23 181 were published in open court.)

24 BY MR. KENERSON:

25 Q. Here at 3:03:13, what do we see happening coming from

1 the door on the other side of the Rotunda from the camera?

2 A. Law enforcement is starting to come in.

3 Q. Thank you.

4 (Whereupon, segments of Government's Exhibit No.
5 181 were published in open court.)

6 MR. KENERSON: And we can pause this video here.

7 BY MR. KENERSON:

8 Q. Have you reviewed Ethan Nordean's phone for any text
9 messages?

10 A. I have.

11 MR. KENERSON: Can we pull up Exhibit 552, please,
12 which I believe has been provisionally admitted.

13 And seek to publish.

14 MR. SMITH: No objection.

15 THE COURT: It will be admitted and permission to
16 publish.

17 (Whereupon, Government's Exhibit No. 552-1 was
18 entered into evidence.)

19 THE COURTROOM DEPUTY: 552 or --

20 MR. KENERSON: 552-1. I apologize.

21 BY MR. KENERSON:

22 Q. Do you recognize what you're looking at, Agent Miller?

23 A. I do.

24 Q. What are these?

25 A. These are text messages between Ethan Nordean and an

1 individual titled Karin Drive-In on his phone from
2 January 6th, 2021.

3 Q. And what was the message that Karin Drive-In sent at
4 7:12:12 p.m.?

5 A. Karin Drive-In says, "Hope you're safe. Everything has
6 been blocked for the last hour. No live streams, Facebook,
7 of course, no Parler for the last 45 minutes."

8 Q. What does Mr. Nordean say at 7:12:39?

9 A. Mr. Nordean says, "It was crazy. We stormed the
10 Capitol. I grabbed a flag from the building."

11 Q. How does Karin Drive-In respond at 8:02:38?

12 A. She says, "For once, there was nothing negative at all
13 about the Proud Boys today."

14 MR. KENERSON: Could we go, Ms. Rohde, to
15 Exhibit 168x.

16 (Whereupon, segments of Government's Exhibit No.
17 168x were published in open court.)

18 BY MR. KENERSON:

19 Q. And we've now seen two different cameras from the
20 Rotunda here. Are we looking at the first view we saw or
21 the second view we saw?

22 A. This is the first view -- actually, this is the second
23 view.

24 Q. Are you sure?

25 A. No. Can you go back to the one we were just looking at?

1 Q. Sure.

2 MR. KENERSON: Can we look at the first exhibit,
3 181, again.

4 THE WITNESS: Okay. So, yeah, first view.

5 BY MR. KENERSON:

6 Q. Thank you.

7 And what time is it right now?

8 A. 3:04:10 p.m.

9 MR. KENERSON: Can we skip to 55 seconds.

10 (Whereupon, segments of Government's Exhibit No.
11 168x were published in open court.)

12 BY MR. KENERSON:

13 Q. There's a circle in the middle of this. Do you
14 recognize anyone in that circle?

15 A. I do. This is Paul Rae and this is Ethan Nordean.

16 MR. KENERSON: Clear those out.

17 BY MR. KENERSON:

18 Q. There is a line of police officers kind of going down
19 the center of the screen. Do you see that?

20 A. I do.

21 Q. Do you see anyone who's not in uniform behind that line?

22 A. I do not.

23 MR. KENERSON: Can we go to a minute 47, please.

24 And can we play from here.

25 (Whereupon, segments of Government's Exhibit No.

1 168x were published in open court.)

2 BY MR. KENERSON:

3 Q. Now, while this is playing, do we see officers coming in
4 from the left?

5 A. We do.

6 Q. How does the line that's forming now compare to the line
7 that we just saw a few seconds earlier?

8 A. More law enforcement is coming in.

9 (Whereupon, segments of Government's Exhibit No.
10 168x were published in open court.)

11 BY MR. KENERSON:

12 Q. There's now a circle on the screen. Do you recognize
13 anyone in that circle?

14 A. I do. I see Paul Rae and there's Nordean.

15 MR. KENERSON: If we can pause it now at about
16 2:26.

17 BY MR. KENERSON:

18 Q. Do you recognize that woman who's also in the circle?

19 A. I do. She was the one who had met up with Nordean
20 earlier and she entered the building with Biggs.

21 Q. How is that person's demeanor?

22 A. She's angry.

23 MR. KENERSON: Could we go to Exhibit 250, please.

24 BY MR. KENERSON:

25 Q. And what type of camera are we looking at here?

1 A. This is body camera from an officer.

2 MR. KENERSON: This has been, I think,
3 provisionally admitted. Seek permission to publish.

4 MR. PATTIS: The number again, please?

5 MR. KENERSON: 250.

6 MR. SMITH: No objection.

7 THE COURT: It will be admitted and permission to
8 publish.

9 (Whereupon, Government's Exhibit No. 250 was
10 entered into evidence.)

11 (Whereupon, segments of Government's Exhibit No.
12 250 were published in open court.)

13 BY MR. KENERSON:

14 Q. What is the time on this video?

15 A. 3:06:22 p.m.

16 Q. Do you recognize anyone in the view we have right now?

17 A. I do. That's going to be the same woman who entered
18 with Biggs and who we just saw with Nordean. This one, too.

19 Q. Thank you.

20 MR. KENERSON: If we can skip to about 42 seconds.
21 If we can play from here, please.

22 (Whereupon, segments of Government's Exhibit No.
23 250 were published in open court.)

24 MR. KENERSON: Pause here.

25

1 BY MR. KENERSON:

2 Q. This individual who just put his hand up behind two
3 women, who is that?

4 A. Nordean.

5 Q. And do you recognize anyone else on your screen here?

6 A. I do. This is Paul Rae.

7 Q. Thank you.

8 MR. KENERSON: Can we play.

9 (Whereupon, segments of Government's Exhibit No.
10 250 were published in open court.)

11 MR. KENERSON: If we can pause right there.

12 BY MR. KENERSON:

13 Q. Who has just been yelling "oath over a paycheck"?

14 A. The individual who entered with Biggs and who is with
15 Nordean.

16 Q. Thank you.

17 MR. KENERSON: If we can play from here.

18 (Whereupon, segments of Government's Exhibit No.
19 250 were published in open court.)

20 MR. KENERSON: Pause right there.

21 BY MR. KENERSON:

22 Q. Did you hear something being said just there?

23 A. I do. "You guys are a fucking joke."

24 Q. Did you recognize the voice?

25 A. Ethan Nordean.

1 MR. KENERSON: Can we go to Exhibit 256, please.

2 MR. SMITH: Objection to foundation -- I
3 apologize, your Honor. I object to the last bit of
4 testimony.

5 THE COURT REPORTER: Judge, I apologize. I'm
6 having a technical issues. Could I just have one minute?

7 THE COURT: You may.

8 Hold on one second.

9 (Brief pause in the proceedings.)

10 THE COURT: Let's go to the phones for a sidebar.

11 (Whereupon, the following proceedings were had at
12 sidebar outside the presence of the jury:)

13 THE COURT: Mr. Smith, we're going to sidebar for
14 your objection.

15 MR. SMITH: Oh, your Honor. I just -- I was
16 objecting a little bit later because I was using the
17 headphones to hear what was said. It's kind of difficult,
18 with the cross-talk, to hear.

19 THE COURT: I understand.

20 MR. SMITH: So I was just objecting late. I
21 didn't need to -- that's just for the record.

22 THE COURT: All right. Very well.

23 (Whereupon, the following proceedings were had in
24 open court:)

25 THE COURT: The objection is overruled.

1 You may proceed.

2 MR. KENERSON: Thank you, your Honor.

3 BY MR. KENERSON:

4 Q. I think 256 is on your screen.

5 MR. KENERSON: This has been provisionally
6 admitted, and would seek permission to publish.

7 THE COURT: It will be admitted and permission to
8 publish.

9 (Whereupon, Government's Exhibit No. 256 was
10 entered into evidence.)

11 BY MR. KENERSON:

12 Q. Agent Miller, what type of video are we looking at?

13 A. Body camera from an officer.

14 Q. And where in the Capitol is this?

15 A. The Rotunda.

16 Q. And what time?

17 A. 3:06:02 p.m.

18 MR. KENERSON: Ms. Rohde, can we play to 23
19 seconds.

20 (Whereupon, segments of Government's Exhibit No.
21 256 were published in open court.)

22 BY MR. KENERSON:

23 Q. Pausing at 23 seconds. Do we just hear "oath over a
24 paycheck" a couple of times?

25 A. We do.

1 Q. Do you see anyone you recognize on the screen now?

2 A. I do.

3 Q. Who?

4 A. Nordean, Rae, Nate Tuck, two women who entered with
5 Biggs and who have been with Nordean.

6 Q. Thank you.

7 MR. KENERSON: Can we play until 48 seconds,
8 please.

9 (Whereupon, segments of Government's Exhibit No.
10 256 were published in open court.)

11 MR. KENERSON: Actually, if we can play from here.
12 Sorry.

13 (Whereupon, segments of Government's Exhibit No.
14 256 were published in open court.)

15 MR. KENERSON: Pause it right here.

16 BY MR. KENERSON:

17 Q. Do you recognize the person who is on the other end of
18 the officer's hands right now?

19 A. Yeah. This is going to be Nordean.

20 Q. At this point, is he making any attempt to leave the
21 building?

22 A. He's not.

23 MR. KENERSON: Can we play, please.

24 (Whereupon, segments of Government's Exhibit No.
25 256 were published in open court.)

1 MR. KENERSON: Pause here.

2 BY MR. KENERSON:

3 Q. At 2:03, did you hear something said?

4 A. Yes. "Thin blue line is dead."

5 Q. Did you recognize the voice?

6 A. Ethan Nordean.

7 MR. SMITH: Objection, your Honor. It's not the
8 Defendant.

9 (Whereupon, the following proceedings were had at
10 sidebar outside the presence of the jury:)

11 THE COURT: Yes, Mr. Smith.

12 MR. SMITH: Your Honor, that's not the Defendant's
13 voice. I know it's not. If we can play it again. This is
14 just not an accurate identification.

15 THE COURT: I mean, she's saying she can tell it
16 is. And why can't you -- it seems to me, at a minimum, if
17 the question has a good-faith basis as you've been talking
18 about -- they have a good-faith basis.

19 MR. SMITH: Your Honor, it just -- anyone who
20 knows this man knows that's not his voice.

21 THE COURT: I think this is cross-examination
22 fodder. You can have fun with it.

23 MR. SMITH: All right. Thank you.

24 (Whereupon, the following proceedings were had in
25 open court:)

1 BY MR. KENERSON:

2 Q. Are you familiar with the term "thin blue line"?

3 A. I am.

4 Q. What does that mean?

5 A. Support for law enforcement.

6 Q. Did Mr. Nordean immediately leave the area after this
7 interaction?

8 A. He does not.

9 MR. KENERSON: Can we skip to 3:37. Play for just
10 a moment, please.

11 (Whereupon, segments of Government's Exhibit No.
12 256 were published in open court.)

13 MR. KENERSON: Stop here.

14 BY MR. KENERSON:

15 Q. Is Mr. Nordean still here?

16 A. He is.

17 Q. Can you point him out?

18 A. (Witness indicates.)

19 MR. KENERSON: Play to the end, please.

20 (Whereupon, segments of Government's Exhibit No.
21 250 were published in open court.)

22 MR. KENERSON: If we can go back up just so that
23 we have the very end again.

24 BY MR. KENERSON:

25 Q. What time does this video end?

1 A. 3:10:10 p.m.

2 MR. KENERSON: And can we have 143x.

3 To the extent that's been provisionally admitted,
4 I would seek permission to publish.

5 THE COURT: It will be admitted. And permission
6 to publish.

7 (Whereupon, Government's Exhibit No. 143x was
8 entered into evidence.)

9 BY MR. KENERSON:

10 Q. Can you tell us what this shows?

11 A. This is going to be leaving the Rotunda. So this is
12 going to be the hallway; the Columbus doors are facing this
13 way.

14 Q. The same doors that --

15 A. That they entered through earlier. And this is the same
16 hallway we saw Nordean and gang, in this vicinity.

17 Q. Thank you.

18 What time does this start?

19 A. 3:11:14 p.m.

20 Q. How close to that last interaction?

21 A. Very close.

22 Q. Thank you.

23 MR. KENERSON: If we can play this at double
24 speed, Ms. Rohde.

25 (Whereupon, segments of Government's Exhibit No.

1 143x were published in open court.)

2 BY MR. KENERSON:

3 Q. A circle just came on the screen. While this is
4 playing, can you just tell us if you recognize any of the
5 people in the circle?

6 A. I do. You've got the two women, Rae, Nordean and Tuck.
7 Nordean just pulled his mask down.

8 Q. Does this group eventually leave the building?

9 A. They do.

10 Q. At about what time?

11 A. 3:13 p.m.

12 Q. Move Mr. Nordean's magnet outside, please.

13 A. (Witness complies.)

14 Q. Thank you.

15 Could you point out the doors on the map through
16 which he left?

17 A. He left through these doors.

18 Q. Thank you.

19 And you've indicated towards the top of the map at
20 the middle. Correct?

21 A. Yes. The east side.

22 Q. Now, it looks like all of the magnets for the Defendants
23 are out of the building at this point. Correct?

24 A. Correct.

25 Q. Were -- at this point, were any of the people marching

1 to the Capitol with Nordean, Rehl and Biggs still attempting
2 to get in?

3 A. Yes.

4 MR. KENERSON: Could we go to 461, please.

5 MR. PATTIS: Objection. Vague, Judge.

6 "Associated with."

7 THE COURT: Sustained.

8 MR. KENERSON: Can we be heard for a brief
9 clarification at sidebar?

10 (Whereupon, the following proceedings were had at
11 sidebar outside the presence of the jury:)

12 MR. KENERSON: I thought the question was -- I'm
13 not sure what the realtime says -- "marched with."

14 THE COURT: Right. As -- just as you asked for
15 clarification, I looked at the realtime.

16 It does say "march," not "associated with,"
17 Mr. Pattis.

18 MR. PATTIS: I heard wrong. It was an honest
19 mistake.

20 THE COURT: Well, I made a mistake in sustaining
21 your objection.

22 MS. HERNANDEZ: Your Honor, the MOSD members who
23 went to the Capitol with Mr. Rehl are gone and they're not
24 trying to get in. So I would object.

25 THE COURT: I'll overrule that objection.

1 MS. HERNANDEZ: Thank you.

2 THE COURT: Mr. Kenerson, you may proceed.

3 (Whereupon, the following proceedings were had in
4 open court:)

5 THE COURT: The objection is overruled.

6 MR. KENERSON: Thank you.

7 I can't recall if the witness answered the
8 question before the objection.

9 BY MR. KENERSON:

10 Q. So were any of the people who marched with Nordean,
11 Biggs and Rehl to the Capitol still attempting to get in?

12 A. Yes.

13 MR. KENERSON: We have 461.

14 This has been provisionally admitted. I would
15 seek to publish it to the jury.

16 THE COURT: It will be admitted. And permission
17 to publish.

18 (Whereupon, Government's Exhibit No. 461 was
19 entered into evidence.)

20 (Whereupon, segments of Government's Exhibit No.
21 461 were published in open court.)

22 BY MR. KENERSON:

23 Q. Special Agent, can you tell us where in the Capitol this
24 is being filmed at?

25 A. Can I show you?

1 Q. Sure. Please.

2 A. It would be right here. This tunnel.

3 Q. And if you could go from the other side as well.

4 THE COURT: And loud enough for the court reporter
5 to hear you, because you're far from the mic.

6 THE WITNESS: It's on the west side of the tunnel
7 here.

8 BY MR. KENERSON:

9 Q. Thank you.

10 And for the record, you've indicated an entrance
11 to the building near the center of the inaugural stage on
12 that map. Correct?

13 A. Correct.

14 Q. Do you know the approximate time of this?

15 A. 3:16 p.m.

16 MR. KENERSON: Ms. Rohde, can we play.

17 (Whereupon, segments of Government's Exhibit No.
18 461 were published in open court.)

19 MR. KENERSON: Pause here. Actually, go back
20 about a half-second.

21 BY MR. KENERSON:

22 Q. The person off to the far right here paused at 19
23 seconds, do you recognize that person?

24 A. I do. That's AJ Fischer, a Florida Proud Boy who's with
25 the marching group.

1 Q. And do you recall whether he's in any of the chat groups
2 we've been talking about?

3 A. Yes. He's in MOSD.

4 Q. Thank you.

5 MR. KENERSON: Can we go, I think, back just a
6 tiny bit, Ms. Rohde.

7 (Whereupon, segments of Government's Exhibit No.
8 461 were published in open court.)

9 BY MR. KENERSON:

10 Q. There we go. Here -- I guess slightly earlier, still at
11 19 seconds, though, this individual in the backwards cap and
12 the camouflage, do you recognize him?

13 A. I do. That's Zack Johnson, Florida Proud Boy. He was
14 with the marching group as well.

15 Q. Is he in any of the chats we've been talking about?

16 A. He is. He's in Boots on Ground.

17 MR. KENERSON: If we could play, please.

18 (Whereupon, segments of Government's Exhibit No.
19 461 were published in open court.)

20 MR. KENERSON: Stop right there, Ms. Rohde.

21 BY MR. KENERSON:

22 Q. This individual -- do we just hear that person yell
23 something?

24 A. We did. He yelled, "Push."

25 Q. And who's that?

1 A. AJ Fischer.

2 Q. Special Agent, is there also video from the front of
3 this tunnel?

4 A. There is.

5 MR. KENERSON: Can we have 481B, as in boy,
6 please, which I believe is provisionally admitted.

7 Seek permission to publish.

8 MS. HERNANDEZ: Your Honor, we object under 403
9 and 402 or -- relevance and 403.

10 THE COURT: The objection is overruled.

11 This exhibit is admitted and you may publish it.

12 (Whereupon, Government's Exhibit No. 481B was
13 entered into evidence.)

14 BY MR. KENERSON:

15 Q. Special Agent, can you tell us where we are now relative
16 to the last video we were looking at?

17 A. So we're still in the same tunnel, but we're at the
18 front of it. This is where the law enforcement is. And
19 what we were just watching would have been coming from this
20 direction.

21 Q. And for the record, for law enforcement, you drew an
22 arrow towards the left center and, for what we were just
23 watching, you drew an arrow off to the right. Correct?

24 A. Correct.

25 MR. KENERSON: Ms. Rohde, can we play.

1 MS. HERNANDEZ: I'm sorry, your Honor. May we be
2 heard on this?

3 THE COURT: No. We've already litigated this.

4 (Whereupon, the following proceedings were had at
5 sidebar outside the presence of the jury:)

6 MS. HERNANDEZ: I understand we litigated it. But
7 the manner in which Mr. Kenerson introduced these videos was
8 where there's still people marching with the -- with the
9 Defendants who were trying to get into the Capitol. That
10 seems like a completely different relevance ground than we
11 had litigated over.

12 So --

13 THE COURT: What else could it --

14 MS. HERNANDEZ: I don't understand what difference
15 it makes. So my understanding of how the testimony has come
16 out, which I don't think is the way the Government argued it
17 to the Court on Monday, is that he's now said all the
18 Defendants have left the building.

19 And he said, are there still people -- so I don't
20 know what trying to get into the building -- how that has
21 anything to do with the case, particularly these images that
22 we're seeing that are unduly prejudicial. That's what I'm
23 saying. I don't believe that this was the argument that was
24 raised for the Court or that we discussed on Monday.

25 THE COURT: Yes, it was. And --

1 MS. HERNANDEZ: This --

2 THE COURT: -- these are individuals who marched
3 with them, and that was one of the connections. And we've
4 seen other evidence that they were present moving together
5 all around outside.

6 And --

7 MS. HERNANDEZ: The guys --

8 THE COURT: I'm sorry. Then we litigated whether
9 this scene could come in by virtue of their connections to
10 the Defendants.

11 Now this scene is them trying to enter the
12 Capitol, albeit in a very difficult way.

13 So, Mr. Kenerson, you may proceed.

14 MR. KENERSON: Thank you.

15 (Whereupon, the following proceedings were had in
16 open court:)

17 MR. KENERSON: Ms. Rohde, could we play until
18 about 16 seconds.

19 (Whereupon, segments of Government's Exhibit No.
20 481B were published in open court.)

21 BY MR. KENERSON:

22 Q. I'll circle these people to the left of the bald eagle
23 as we are looking. Do you recognize that person?

24 A. It's AJ Fischer.

25 MR. KENERSON: Ms. Rohde, if we could play.

1 (Whereupon, segments of Government's Exhibit No.
2 481B were published in open court.)

3 MR. KENERSON: Pause right here, Ms. Rohde. Back
4 up a half-second.

5 BY MR. KENERSON:

6 Q. Do you recognize that person next to the bald eagle?

7 A. AJ Fischer.

8 MR. KENERSON: Keep playing, please.

9 (Whereupon, segments of Government's Exhibit No.
10 481B were published in open court.)

11 MR. SMITH: Objection. The objection is
12 cumulative evidence. Yeah.

13 THE COURT: Overruled. I couldn't hear you.
14 Overruled.

15 You may proceed.

16 MR. KENERSON: Thank you.

17 (Whereupon, segments of Government's Exhibit No.
18 481B were published in open court.)

19 MR. SMITH: Your Honor, objection. This is beyond
20 what the parties litigated.

21 (Whereupon, the following proceedings were had at
22 sidebar outside the presence of the jury:)

23 MR. SMITH: Your Honor, actually, Mr. Kenerson
24 made a representation, when we were litigating this issue,
25 that the film would stop when we first saw the camera first

1 panned up to the roof. And now we believe what he's
2 attempting to do is to keep playing the video until Officer
3 Fanone is dragged out of this -- dragged out of this tunnel.
4 And we didn't litigate this, your Honor.

5 THE COURT: Mr. Kenerson?

6 MR. KENERSON: First of all, there's only a couple
7 of seconds left. It stops before Officer Fanone is dragged
8 out, number one.

9 Number two, I was literally, when there was the
10 objection, about to say, Turn it off, Ms. Rohde. Let's move
11 on.

12 THE COURT: All right, sir. So let's move on,
13 since you're doing it anyway.

14 (Whereupon, the following proceedings were had in
15 open court:)

16 THE COURT: The objection is overruled.

17 MR. KENERSON: Ms. Rohde, we can take this down.

18 THE COURT: It's 3:15, so we need to take our
19 afternoon break for the court reporter. So we'll take ten
20 minutes.

21 (Whereupon, the jury exited the courtroom at 3:15
22 p.m. and the following proceedings were had:)

23 THE COURT: Agent, you may step down.

24 We'll take a ten-minute recess.

25 MR. KENERSON: Thank you.

1 (Thereupon a recess was taken, after which the
2 following proceedings were had:)

3 THE COURTROOM DEPUTY: Jury panel.

4 (Whereupon, the jury entered the courtroom at 3:36
5 p.m. and the following proceedings were had:)

6 THE COURTROOM DEPUTY: We are back on the record
7 in Criminal Matter 21-175, United States of America versus
8 Ethan Nordean, et al.

9 THE COURT: Mr. Kenerson, you may proceed.

10 MR. KENERSON: Thank you.

11 BY MR. KENERSON:

12 Q. Special Agent, before we move on, just one more question
13 about those videos that we just watched from the tunnel. Do
14 you remember those?

15 A. Yes.

16 Q. Were the police ultimately able to hold that particular
17 door?

18 A. They were.

19 MR. KENERSON: Can we go to Exhibit 512-11,
20 please.

21 And I believe this has been provisionally
22 admitted. Ask to publish.

23 THE COURT: It will be admitted. And permission
24 to publish.

25 (Whereupon, Government's Exhibit No. 512-11 was

1 entered into evidence.)

2 BY MR. KENERSON:

3 Q. Still January 6th, 2021?

4 A. Yes.

5 Q. What chat?

6 A. Boots on Ground.

7 Q. And at 3:21:09, what does Charles Donohoe post?

8 A. "Yo. If you are boots on ground, roger up."

9 Q. Remind us of Mr. Donohoe's position within the Ministry
10 of Self-Defense.

11 A. He's a leader.

12 MR. KENERSON: Can we scroll down, please.

13 BY MR. KENERSON:

14 Q. And can you read the chat starting with the one at
15 3:36:42.

16 A. An individual with a lot of turtle emojis and four
17 degrees says, "Woman shot in the Capitol Building."

18 At 3:38:23, The Medium Daddy says, "Top steps
19 under the seats helping wounded. They're using
20 40-millimeter foam rounds."

21 Donohoe responds, "Roger."

22 He then says, "We're regrouping with a second
23 force."

24 Matthew the People's Chairman Walter says, "Local
25 guy just said, Fuck storming the Capitol. He said we should

1 get the mayor's office."

2 Donohoe responds, "Incoming National Guard and DHS
3 agents."

4 And then says, "Us" -- snake emoji.

5 Conflict Observer, "Intelwave on Twitter.
6 Hashtag, breaking: Security forces staging. Ready to move
7 in."

8 Blank message from Donohoe.

9 Followed by Conflict Observer, "Disclose TV on
10 Twitter. Hashtag, urgent. Virginia National Guard and 200
11 state troopers are now being deployed to Washington, D.C."

12 At 3:45:42, Donohoe says, "Trump ordering National
13 Guard to attack. Trump supporters?"

14 Conflict Observer, "Disclose TV on Twitter.
15 Hashtag, breaking: President Trump orders the deployment of
16 the National Guard."

17 Q. Remind us, was Mr. Donohoe in Washington, D.C., on
18 January 6th?

19 A. He was.

20 MR. KENERSON: Can we have Exhibit 600-62, please.

21 I believe this was provisionally admitted. Seek
22 to publish.

23 THE COURT: It will be admitted. And permission
24 to publish.

25 (Whereupon, Government's Exhibit No. 600-62 was

1 entered into evidence.)

2 BY MR. KENERSON:

3 Q. And, Special Agent, what's the date here?

4 A. January 6th, 2021.

5 Q. What type of account are we looking at?

6 A. Parler, for Tarrío.

7 Q. Can you tell us what Mr. Tarrío posted at 3:39:29?

8 A. He posted a photograph of an individual on the Senate
9 floor.

10 Q. What about at 3:39:51?

11 A. "Hero. Proud of your boy."

12 Q. Do you have any reason to believe the individual
13 pictured above is a Proud Boy?

14 A. No.

15 MR. KENERSON: Go to 509-35, please.

16 This, I believe, has been provisionally admitted.
17 Seek to publish.

18 THE COURT: All right. It will be admitted. And
19 permission to publish.

20 (Whereupon, Government's Exhibit No. 509-35 was
21 entered into evidence.)

22 BY MR. KENERSON:

23 Q. What's the date of this chat?

24 A. January 6th, 2021.

25 Q. What group?

1 A. New MOSD.

2 Q. And which is -- which version of MOSD?

3 A. The leaders chat.

4 Q. What does Aaron Wolkind post at 3:35:46?

5 A. "Suck it up. Your country needs you to do cocaine."

6 Q. Is there a message by John Stewart shortly thereafter?

7 A. There is.

8 Q. Can you remind us John Stewart's position within MOSD?

9 A. He was a leader.

10 MR. KENERSON: Can we play that message, please,
11 Ms. Rohde.

12 (Whereupon, segments of Government's Exhibit No.
13 509-35 were published in open court.)

14 MR. KENERSON: Can we continue down?

15 Can we play the message from Mr. Stewart at
16 3:36:56?

17 (Whereupon, segments of Government's Exhibit No.
18 509-35 were published in open court.)

19 BY MR. KENERSON:

20 Q. Remind us, was Mr. Stewart in Washington, D.C., on
21 January 6th?

22 A. He was not.

23 Q. Can you read the messages starting with the next one
24 from Mr. Donohoe?

25 A. At 3:44:15 p.m., Donohoe says, "Incoming National Guard

1 and DHS agents."

2 He posts a photo of "Breaking news: Protesters
3 now in Rotunda of U.S. Capitol."

4 Followed by "Us" -- snake emoji.

5 Conflict Observer, "Intelwave on Twitter.
6 Hashtag, breaking: Security forces staging, ready to move
7 in."

8 3:46:32, Donohoe posts, "Trump ordering National
9 Guard to attack. Trump supporters?"

10 Conflict Observer, "Disclose TV on Twitter.
11 Hashtag, breaking: President Trump orders the deployment of
12 the National Guard."

13 Q. Did Mr. Stewart post a message at 3:57:55?

14 A. He did.

15 MR. KENERSON: Can we play that, please,
16 Ms. Rohde.

17 (Whereupon, segments of Government's Exhibit No.
18 509-35 were published in open court.)

19 BY MR. KENERSON:

20 Q. Had we heard language about choosing sides earlier in
21 your testimony?

22 A. We have, from the marching group and then Pezzola when
23 he had the shield under the scaffolding area, talking to the
24 police officer.

25 MR. KENERSON: Can we go to 510-38, which I

1 believe has been provisionally admitted.

2 Seek to publish.

3 THE COURTROOM DEPUTY: Not provisionally yet.

4 BY MR. KENERSON:

5 Q. Do you recognize these?

6 A. I do.

7 Q. What are they?

8 A. They're chat messages within the Ministry of
9 Self-Defense, which is the members chat, from January 6th,
10 2021.

11 MR. KENERSON: Move to admit 510-38.

12 THE COURT: All right. It will be admitted and
13 permission to publish.

14 (Whereupon, Government's Exhibit No. 510-38 was
15 entered into evidence.)

16 BY MR. KENERSON:

17 Q. January 6th, 2021?

18 A. Yes.

19 Q. Could you read the message that starts at 3:49:36?

20 A. NH Prez Warlock says, "Capitol. Murdered Trump
21 supporter."

22 Q. And who posts the next message?

23 A. DickTits.

24 Q. At what time?

25 A. 3:51:06 p.m.

1 MR. KENERSON: Can we play that message,
2 Ms. Rohde.

3 (Whereupon, segments of Government's Exhibit No.
4 510-38 were published in open court.)

5 MR. KENERSON: Ms. Rohde, if we could just scroll
6 down.

7 BY MR. KENERSON:

8 Q. What's the response from Jeremy Bertino?

9 A. At 3:51:23, Bertino responds, "Never."

10 Q. Could you read the messages to the bottom, please?

11 A. 3:52:43, turtle, President-Elect Leo Kuznetsov, turtle
12 says, "Fuck the blue line and their faggot supporters."

13 Gimili says, "Agreed. We see which side they have
14 chosen."

15 Dick Sweats responds, "Fuck Coptifa for life.
16 These are not our friends, our people. They are our
17 enemies."

18 President-Elect Leo Kuznetsov says, "These are
19 tyrants and they will hang."

20 DickTits responds, "1312."

21 And then Goat Farmer responds, "Oath breakers,
22 honorless scum."

23 MR. KENERSON: Thanks, Ms. Rohde. We can take
24 that down.

25

1 BY MR. KENERSON:

2 Q. Other than Mr. Biggs, did any of the Defendants in this
3 case enter the Capitol a second time?

4 A. No.

5 Q. Did Biggs enter a third time?

6 A. He did not.

7 Q. After Mr. Rehl left the building, did he immediately
8 leave Capitol grounds?

9 A. He did not.

10 Q. Where was he for a period of time after he left?

11 A. Upper west terrace.

12 Q. Thank you.

13 MR. KENERSON: Can we have Exhibit 401BB, as in
14 boy-boy, please.

15 BY MR. KENERSON:

16 Q. Do you recognize this photo?

17 A. It's a photo recovered from Rehl's device.

18 MR. KENERSON: And I believe this is in evidence.
19 But to the extent it's not, we would move for its admission.

20 THE COURT: All right.

21 MS. HERNANDEZ: Sorry. What was that? What
22 number?

23 THE COURT: 401BB.

24 MS. HERNANDEZ: Do we know what time this is from?

25 THE COURT: That's not the question before you.

1 Is there any objection?

2 MS. HERNANDEZ: I think it's 403, waste of time,
3 repetitive, not relevant, especially if we don't know what
4 time it is, your Honor.

5 THE COURT: Overruled. It will be admitted. And
6 permission to publish.

7 (Whereupon, Government's Exhibit No. 401BB was
8 entered into evidence.)

9 BY MR. KENERSON:

10 Q. Who is this?

11 A. Zach Rehl. It's a selfie.

12 Q. And does the chart with you indicate what the metadata
13 says?

14 A. It does not. But this would have been after he exited,
15 and he exited at 3:13.

16 Q. Thank you.

17 MS. HERNANDEZ: Do you have metadata on it?

18 THE WITNESS: It's not on here.

19 MR. KENERSON: Could we have 401CC?

20 And to the extent that this one has not been
21 previously admitted, we would seek to publish. Or would
22 seek admission.

23 Has it not?

24 THE COURTROOM DEPUTY: It hasn't.

25

1 BY MR. KENERSON:

2 Q. Do you recognize this?

3 A. I do. A photo recovered from Zachary Rehl's device.

4 Q. And is the metadata on the chart?

5 A. It is not.

6 Q. Do you recall -- have you reviewed the metadata
7 associated with this photo?

8 A. I have.

9 Q. Do you recall whether it's from before he entered the
10 Capitol or after?

11 A. It's after.

12 MR. KENERSON: Move for admission of 401CC.

13 MS. HERNANDEZ: 403, your Honor. I think we've
14 seen -- this is -- I think we've seen this picture before.
15 Repetitive.

16 THE COURT: Overruled.

17 The exhibit is admitted and you have permission to
18 publish it.

19 (Whereupon, Government's Exhibit No. 401CC was
20 entered into evidence.)

21 BY MR. KENERSON:

22 Q. Can you tell us who we see in this photo?

23 A. You see Zack Rehl, Vy, Giddings, Healion, and we don't
24 know who this guy is.

25 Q. And what hand gesture are they making?

1 A. The Proud Boys hand gesture.

2 Q. All right. You testified about Nordean and Biggs
3 leaving the building at different times. Is that right?

4 A. That's correct.

5 Q. Do they eventually meet back up?

6 A. They do.

7 Q. Where?

8 A. On the west lawn.

9 MR. KENERSON: Could we have Exhibit 405FF, which
10 I believe has been admitted.

11 If not, we would seek to publish.

12 MR. SMITH: No objection.

13 THE COURTROOM DEPUTY: It's already in.

14 BY MR. KENERSON:

15 Q. Do you recognize this photo?

16 A. I do.

17 Q. Where was this recovered?

18 A. From Biggs's Google.

19 Q. And does the metadata you have with you indicate when
20 that was taken?

21 A. It does. January 6th, 2021, at 3:37:38 p.m.

22 Q. And could you point us on the map to where the camera is
23 in this photo?

24 A. It's facing this direction. This direction.

25 Q. And for the record, you've indicated an area kind of on

1 the west lawn or northwest lawn of the Capitol. Correct?

2 A. Correct.

3 Q. And do you see a flag behind Mr. Biggs?

4 A. I do.

5 Q. And as far as the features you can tell, how does it
6 compare to the flag that we saw in previous surveillance
7 videos?

8 A. It's consistent with the one removed from the Capitol.

9 MR. KENERSON: Could we have Exhibit 449, please.
10 I believe this was provisionally admitted. Would
11 seek permission to publish.

12 THE COURTROOM DEPUTY: It's not.

13 THE COURT: It will be admitted. And permission
14 to publish.

15 (Whereupon, Government's Exhibit No. 449 was
16 entered into evidence.)

17 MR. KENERSON: To the extent it's not been
18 provisionally admitted.

19 BY MR. KENERSON:

20 Q. Do you recognize this?

21 A. I do.

22 Q. Do you recognize the people in this?

23 A. I do.

24 Q. Do you recognize the location?

25 A. I do.

1 Q. How does the location compare to what we just saw from
2 Mr. Biggs's Google account?

3 A. Same location.

4 Q. Do you see Mr. Biggs?

5 A. I do.

6 Q. Do you see a flag?

7 A. I do.

8 MR. KENERSON: Seek to admit.

9 THE COURT: It will be admitted. And permission
10 to publish.

11 BY MR. KENERSON:

12 Q. Do you recognize any of the individuals on your screen?

13 A. I do.

14 Q. Can you point out who?

15 A. Kevin Tuck, Joseph Biggs, Paul Rae, Ethan Nordean,
16 Arthur Jackman, Nate Tuck, Eddie George, marching group.

17 Q. Thank you.

18 MR. KENERSON: Ms. Rohde, if we can play this
19 video from the beginning, please.

20 (Whereupon, segments of Government's Exhibit No.
21 449 were published in open court.)

22 BY MR. KENERSON:

23 Q. What did we hear said during that video?

24 A. "Freedom. Proud of your boy."

25 Q. Did Mr. Rehl take any photos as he left Capitol grounds?

1 A. He did.

2 MR. KENERSON: Can we have Exhibit 401JJ?

3 I've been wrong before, but I think this one is
4 admitted.

5 BY MR. KENERSON:

6 Q. Do you recognize this photo?

7 A. I do.

8 Q. Where was this recovered from?

9 A. Rehl's device.

10 Q. And does the metadata indicate what time it was taken?

11 A. It does. January 6th, 2021, at 4:06:17 p.m.

12 Q. And what is in the -- what is captured by this
13 photograph?

14 A. It's the scene as he's leaving.

15 Q. Around this time, was Mr. Tarrio still sending messages
16 about what's been going on at the Capitol?

17 A. He was.

18 MR. KENERSON: Could we have 500-85, please.

19 This I believe has been provisionally admitted.

20 Would seek permission to publish.

21 THE COURT: All right. It will be admitted. And
22 permission to publish.

23 (Whereupon, Government's Exhibit No. 500-85 was
24 entered into evidence.)

25

1 BY MR. KENERSON:

2 Q. What's the date of this chat, Agent Miller?

3 A. January 6th, 2021.

4 Q. Which chat?

5 A. Skull and Bones, which is the elders chat.

6 Q. Is that the same chat where we had previously heard or
7 seen Tarrío say, "Make no mistake; we did this"?

8 A. Yes.

9 Q. Can you --

10 MS. HERNANDEZ: Objection. Hearsay, your Honor,
11 as to Mr. Rehl.

12 THE COURT: Overruled. Overruled.

13 BY MR. KENERSON:

14 Q. Can you read the messages for us, Special Agent,
15 starting with the one at 4:05:57?

16 A. Chris Philips PB says, "So what now?"

17 At 4:06:37, Angel Valentine responds, "Um. So
18 from our end, it looks like Trump ain't going peacefully."

19 At 4:06:45, Tarrío responds, "They'll fear us
20 doing it again."

21 Angel asks, "So what about him and Pence?"

22 Angel then says, "Things are going to be real
23 interesting this next week."

24 Tarrío responds, "And we'll get blamed for it."

25 MR. KENERSON: If we could have, just for the

1 witness, 500-86.

2 I believe this has been provisionally admitted.

3 Would seek permission to publish.

4 THE COURT: It will be admitted. And permission
5 to publish.

6 (Whereupon, Government's Exhibit No. 500-86 was
7 entered into evidence.)

8 BY MR. KENERSON:

9 Q. What's the date of this chat?

10 A. January 6th --

11 MS. HERNANDEZ: Objection. Hearsay, relevance,
12 your Honor.

13 THE COURT: Overruled.

14 BY MR. KENERSON:

15 Q. The date of this chat, please.

16 A. January 6th, 2021.

17 Q. Which chat?

18 A. Skull and Bones, elders chat.

19 Q. Can you read the messages -- well, what did Chris
20 Philips PB ask at 4:09:07?

21 A. "So what do we do now?"

22 Q. Can you read what Enrique Tarrío posted at 4:14:22?

23 A. "Do it again."

24 MR. KENERSON: Can we have 600-63, please.

25 I believe this has been provisionally admitted.

1 Seek permission to be publish.

2 THE COURT: It shall be admitted. And permission
3 to publish.

4 (Whereupon, Government's Exhibit No. 600-63 was
5 entered into evidence.)

6 BY MR. KENERSON:

7 Q. What's the date of this?

8 A. January 6th, 2021.

9 Q. And which account?

10 A. Parler, Tarrio's.

11 MS. HERNANDEZ: Same objection, your Honor.

12 THE COURT: Overruled.

13 BY MR. KENERSON:

14 Q. What's the photo that Tarrio posted at 4:40:56?

15 A. The House of Representatives.

16 Q. And what is going on in that photograph?

17 A. They're hiding.

18 Q. Can you read what Mr. Tarrio posted below that at
19 4:44:43.

20 A. "When the people fear the government, there is tyranny.
21 When the government fears the people, there is liberty."

22 MR. KENERSON: Ms. Rohde, can we have Exhibit 183,
23 please.

24 I believe this was provisionally admitted this
25 morning. And would seek permission to publish.

1 THE COURT: It will be admitted and permission to
2 publish.

3 (Whereupon, Government's Exhibit No. 183 was
4 entered into evidence.)

5 BY MR. KENERSON:

6 Q. Agent Miller, are we looking at CCTV again?

7 A. We are.

8 Q. About what time?

9 A. 4:07 p.m.

10 Q. Can you describe where this video is taking place?

11 A. Sure. This is Constitution Avenue. Earlier, the Proud
12 Boys were at the food trucks, and the food trucks are going
13 to be over here.

14 Q. Which direction are we facing on Constitution?

15 A. We're facing towards the Capitol.

16 MR. KENERSON: And if we could fast-forward this
17 to about 25 seconds, Ms. Rohde, and then play.

18 (Whereupon, segments of Government's Exhibit No.
19 183 were published in open court.)

20 BY MR. KENERSON:

21 Q. What type of vehicles do we see driving up Constitution
22 right now?

23 A. Law enforcement.

24 Q. Do you recognize the person who just walked on the
25 screen?

1 A. I do.

2 Q. Who is that?

3 A. She was -- she entered the Capitol with Biggs and she
4 was with Nordean.

5 Q. Do you recognize any of the other individuals?

6 A. I do. Paul Rae, the other female that was with them,
7 Eddie George and Ethan Nordean.

8 Q. What does Ethan Nordean have on him?

9 A. He has a POW flag draped around his shoulders like a
10 cape.

11 Q. While they're walking up, are you familiar with the
12 portion of Constitution Avenue where this video camera is?

13 A. Yes.

14 Q. What is kind of behind and to the left of this camera,
15 if you know?

16 A. The courthouse.

17 Q. The courthouse we're in right now?

18 A. Correct.

19 MS. HERNANDEZ: Objection, your Honor.

20 THE COURT: Sustained.

21 MR. KENERSON: May we be heard?

22 MS. HERNANDEZ: And move to strike.

23 MR. KENERSON: May we be heard?

24 THE COURT: Yes.

25 (Whereupon, the following proceedings were had at

1 sidebar outside the presence of the jury:)

2 THE COURT: Mr. Kenerson?

3 MR. KENERSON: The next exhibit, which is the last
4 exhibit, is a photo of Mr. Nordean with that flag draped
5 over his shoulders in front of the courthouse.

6 THE COURT: Well, fair enough. I mean, just
7 setting up that last exhibit.

8 Is there going to be an objection to that?

9 MS. HERNANDEZ: Yes, your Honor. It's not
10 relevant that the courthouse is the building. I mean, I'm
11 not sure exactly what the point is of the courthouse, unless
12 Mr. Nordean is somehow making some reference to it. Again,
13 this is after all the Defendants have left. These are -- I
14 think it's unduly prejudicial and it's barely relevant.

15 THE COURT: Mr. Smith, do you have any objection
16 to that photo? Whatever photo we're about -- the next
17 photo? Since -- we may as well do all this now.

18 Mr. Smith doesn't have the phone.

19 Mr. Smith, can you hear me?

20 MR. SMITH: Is there an objection to the video on
21 the screen?

22 MS. HERNANDEZ: With reference to the courthouse.

23 THE COURT: We're building towards, apparently,
24 the next photograph of your client outside the courthouse.

25 MR. SMITH: Oh, your Honor. If the photograph is

1 a close-up photograph of the POW flag and the American flag,
2 we have no objection to that. If it's a different one that
3 visibly shows the courthouse, as a courthouse, and that's
4 going to be elicited, we would object to that. If it's
5 just --

6 MR. KENERSON: It's the flag. Mr. Smith is
7 correct about the photograph. I don't know whether counsel
8 appreciated it was the courthouse or not when we sent it to
9 them, but it is. The agent has gone and found the spot on
10 the courthouse where it is. I think it's relevant if that
11 was the courthouse. One, it's very close to the Capitol
12 where he is deciding to take this photograph, which the
13 Court will see soon. It involves Mr. Nordean standing in
14 front of a window making the Proud Boys gesture with the POW
15 flag on his back.

16 MR. SMITH: Your Honor, to be clear, we have no
17 objection to the picture. But eliciting factually it's
18 outside the courthouse doesn't have any bearing on anything.

19 MS. HERNANDEZ: Right.

20 MR. KENERSON: I don't think that that's correct.
21 One, it's close to the Capitol. Two, there's a lot of
22 buildings in Washington, D.C., and Mr. Nordean chose that
23 one. I think that's relevant.

24 MR. SMITH: Your Honor --

25 THE COURT: Mr. Kenerson, I'm going to exclude

1 that. I'm going to exclude it because I think it comes too
2 close to suggesting some sort of threat to this building
3 that the jurors are in right now. So I'm just going to ask
4 you to move past all this.

5 I don't think it makes sense to go back and strike
6 what you've elicited. Everyone knows the courthouse is near
7 the Capitol. I get it. So I don't think we have to go back
8 and strike what you've already done. But I'm going to
9 exclude -- let me put it this way: I'm going to exclude the
10 photograph. It doesn't add much. And I think there's a 403
11 problem with it.

12 MR. KENERSON: I would vociferously ask that -- I
13 cannot elicit from the agent that this is the courthouse.
14 But the fact that he is posing in the way he is with that
15 flag I think is extremely relevant.

16 THE COURT: Well, I haven't seen the photograph.

17 But Mr. Pattis.

18 We can't hear you.

19 MR. PATTIS: I would object on 403 grounds, on the
20 grounds that it's going to look like open defiance of this
21 building and the process within it. And that is unduly
22 prejudicial.

23 THE COURT: Well, I guess you're suggesting
24 that -- is it recognizable that it's the courthouse behind
25 him?

1 MR. KENERSON: If someone knows the façade of the
2 courthouse, well, maybe. Can we bring it up for the Court,
3 maybe? That may help.

4 THE COURT: Yes. Let's just go ahead and do it
5 now.

6 Ms. Harris, for me only. For the parties only.

7 (Displayed.)

8 THE COURT: Yes.

9 MS. HERNANDEZ: Your Honor, if he wants to say
10 it's close to the Capitol, that's one thing. But the
11 mention of the courthouse is really not relevant.

12 MR. SMITH: Your Honor, the Government just showed
13 a picture that was identified as Nordean with that flag. So
14 this is really adding nothing except that he's standing in
15 front of the courthouse.

16 THE COURT: Yes. Mr. Kenerson, you've got him
17 with the flag walking down the street. I'm not -- I'm going
18 to exclude the photo. I think -- well, for all the
19 reasons -- I'm going to exclude it because it is too close
20 to suggesting to these jurors that somehow he's threatening
21 to the building or to them in some way, where we are
22 sitting. So I'm going to exclude it on 403 grounds.

23 MR. KENERSON: If we can --

24 MR. SMITH: Very well.

25 MR. KENERSON: If I may be heard briefly on this.

1 THE COURT: Sure.

2 MR. KENERSON: We have got him certainly walking
3 up Constitution Avenue with the flag.

4 I think it's relevant and I think extremely
5 relevant and highly probative of Mr. Nordean's intent
6 regarding previous planning to do with the group Mr. Nordean
7 is involved in.

8 And, two, that they're going to argue his intent
9 was solely to protest, that once he left the building, he
10 took the flag that he stole and he started making the Proud
11 Boys gesture in front of building. We don't have him doing
12 that with the -- in what we saw.

13 Number two, I don't know if -- you know, we get to
14 prove identity. This is a much clearer view that it is
15 Mr. Nordean than was the other one. This shows the back of
16 his cap very clearly, which he has been wearing all day
17 long.

18 So respectfully, I understand the Court's ruling
19 on the courthouse. There are no identifying markings about
20 the courthouse in this photograph.

21 THE COURT: Mr. Kenerson, it doesn't have any --
22 how does it show planning -- I mean, whatever was happening
23 that day, this is totally consistent with planning or not
24 planning. I don't understand how this moves the needle on
25 planning.

1 MR. KENERSON: It moves the needle on whether
2 Mr. Nordean, within minutes after leaving the building,
3 thought this was something worth celebrating as a member of
4 the Proud Boys as opposed to just a member of the public.

5 MR. SMITH: Your --

6 THE COURT: I understand. But you have pictures
7 of him all over the Capitol grounds.

8 MR. SMITH: Your Honor, the Court has ruled. We
9 would ask the Government to accept the Court's ruling.

10 THE COURT: Mr. Smith -- Mr. Smith, please.

11 Lord knows I've given -- I've heard a lot of
12 defense lawyers in this case, Lord knows.

13 MR. KENERSON: We also have him in possession of
14 the American flag taken by Biggs. We've had him close to --
15 he's close to it in the other ones. But this has him in
16 possession of it.

17 THE COURT: It's out on 403. You're going to move
18 past it.

19 (Whereupon, the following proceedings were had in
20 open court:)

21 MR. KENERSON: Can we go back to 183, please.
22 Roll back just about ten seconds. Can we play.

23 (Whereupon, segments of Government's Exhibit No.
24 183 were published in open court.)
25

1 BY MR. KENERSON:

2 Q. Is this group walking on the sidewalk or in the street?

3 A. In the street.

4 Q. What's happening to their right?

5 A. I'm sorry. What was your question?

6 Q. What is happening with this line of vehicles to their
7 right? What type of vehicles?

8 A. Oh. They're law enforcement vehicles.

9 Q. Thank you.

10 MR. KENERSON: Nothing further.

11 THE COURT: Mr. Smith, you may proceed with
12 cross-examination.

13 CROSS-EXAMINATION

14 BY MR. SMITH:

15 Q. Good afternoon, Agent Miller.

16 A. Good afternoon.

17 Q. I'm Nick Smith. I'm going to ask you some questions for
18 Ethan Nordean.

19 A. Okay.

20 Q. Your role in this investigation is as a case agent here.
21 Correct?

22 A. Correct.

23 Q. And a case agent is a kind of -- would you say the
24 primary agent on an investigation?

25 A. Initially. But because this is so large, there's six of

1 us.

2 Q. And would you -- thank you for that. That's helpful.

3 Within the six of you, would you say that
4 you're -- would you characterize yourself as a lead case
5 agent?

6 A. Yes.

7 Q. Along with Special Agent Nicolas Hanak?

8 A. Sure.

9 Q. Okay. And so -- you have been involved in this
10 investigation from its onset?

11 A. Yes.

12 Q. Okay. And so you've familiarized yourself with the case
13 file in this matter?

14 A. I have.

15 Q. Okay. And you've testified that you've reviewed
16 information that was collected from the Defendants' devices?

17 A. Yes.

18 Q. Okay. Agent, one of your obligations as a case agent in
19 this matter is to provide the prosecutors in this case with
20 written statements that you've made about -- that relate to
21 the subject matter of your testimony. Is that right?

22 A. It is.

23 Q. Okay. And you understand that that's a legal
24 obligation?

25 A. I do.

1 Q. There's a law that imposes that duty. Correct?

2 A. Yes.

3 Q. Okay. And did the prosecutors in this case ask you to
4 collect any of your written statements you might have made
5 that relate to the subject matter of your testimony?

6 A. They did.

7 Q. Okay. And when was that?

8 MR. KENERSON: Objection. Relevance, scope.

9 MR. SMITH: Your Honor, I have to build a
10 foundation. There's relevance.

11 THE COURT: Overruled.

12 THE WITNESS: A few months before I testified.

13 BY MR. SMITH:

14 Q. Okay. And did you comply with their request?

15 A. I did. And I would continually provide things as well.

16 Q. Okay. Thank you.

17 And so did some of those statements of yours
18 include messages in something called the Lync application?

19 A. Yes.

20 Q. What is the Lync -- what is Lync?

21 A. So it's similar to Skype. You can basically instant
22 message somebody through our system.

23 Q. And when you say "our system," is it kind of a way for
24 FBI agents to communicate in a manner that's similar to
25 Skype?

1 A. Yes.

2 Q. Okay. And some of the statements that you produced
3 relating to the subject matter of your testimony were from
4 the Lync application. Correct?

5 A. Yes.

6 Q. Okay. And -- now, you said you complied with the
7 Government's request to produce the Lync statements relating
8 to the subject matter of your testimony. Correct?

9 A. I did.

10 Q. Did you withhold any statements that relate to the
11 subject matter of your testimony that you made in the Lync
12 messaging system?

13 A. No.

14 Q. So you provided every statement that you made in Lync
15 that is related to the subject matter of your testimony?

16 A. Yes. I believe so.

17 Q. You didn't withhold Lync messages about whether a
18 conspiracy exists in this case?

19 A. Not that I'm aware of.

20 Q. You didn't withhold Lync messages about whether Aaron of
21 the Bloody East was not involved in the planning chats?

22 A. Not that I'm aware of.

23 Q. And when you say not that you're aware of, I'm referring
24 to only your messages in Lync. Okay?

25 A. Yes.

1 Q. Okay. And did you withhold Lync messages about whether
2 inaccurate CHS-related information should be disclosed to
3 the defense?

4 A. No.

5 Q. Okay. Did you withhold -- have you ever gained access
6 to the contents of attorney-client communications involving
7 defense trial strategy in this case?

8 A. Not that I can think of. No.

9 Q. So another agent didn't tell you he had gained access to
10 attorney-client communications about a Defendant in this
11 case?

12 A. Not that I can think of, no.

13 MR. SMITH: Your Honor, at this point, I'm
14 bringing up impeachment evidence. It's going to be marked
15 Nordean Exhibit 2. And first, when I bring it up, I'm going
16 to ask the agent to stipulate that these are her statements.

17 Your Honor, may I publish? This was produced in
18 discovery.

19 MR. KENERSON: I'd ask -- well, first of all,
20 there's a number of messages on there. I don't know who
21 he's asking to publish to.

22 MR. SMITH: So, your Honor, this is a document
23 that was produced in discovery to the defense. I'm going to
24 first ask the witness to verify that it's her statements and
25 that she compiled the information, and we'd go from there.

1 THE COURT: All right. So just to the witness?

2 MR. SMITH: No, your Honor. This is -- this was
3 produced in discovery. It's Nordean Exhibit No. 2. I'm
4 impeaching the witness, so I have to be able to show the
5 jury the --

6 MR. KENERSON: Can we go to the phones, please?

7 THE COURT: Yes, we can.

8 (Whereupon, the following proceedings were had at
9 sidebar outside the presence of the jury:)

10 MR. KENERSON: I don't have a phone.

11 THE COURT: Mr. Kenerson?

12 MR. KENERSON: I don't know where we have any
13 objection to any of these messages in particular. He might
14 want to put it in front of the jury, but I doubt all -- I
15 mean, I can't even tell how many are on the screen right
16 now. It's at --

17 MR. SMITH: Your Honor, I'm going to --

18 THE COURT: Mr. Smith, will you let the other
19 person finish? We're never going to get through this trial.

20 MR. SMITH: Thank you, your Honor.

21 MR. KENERSON: It's at least a dozen messages,
22 probably two dozen messages. Maybe one of them is relevant
23 to impeachment of the agent; maybe not. I don't think he
24 gets to play all of them in front of the jury until the
25 Court has made a determination that at least one of them is

1 relevant, and that one is --

2 THE COURT: I think he is right.

3 MR. SMITH: Your Honor, that's why -- sometimes
4 the Court would rule based on one side. So I wanted to get
5 a word in. I'm not interrupting him.

6 Your Honor, first, I'm going to ask the witness to
7 acknowledge she compiled this exhibit. So I have to show
8 that this is hers. I start isolating things before the
9 relevant question is asked. But I will get to that. That's
10 the second question. I just need her to acknowledge this,
11 first.

12 THE COURT: The jury doesn't have to see it. So
13 you can put it in front of her.

14 MR. SMITH: Sure, your Honor. Okay. But, your
15 Honor, these statements are so small that it's not even
16 visible. I'm just asking her to -- I need to show the jury
17 how we arrive at the statement I was referring to.

18 THE COURT: I don't even know if you're going to
19 go any further. You can put it in front of the witness.
20 That's it.

21 MR. SMITH: Thank you, your Honor. Thank you.

22 (Whereupon, the following proceedings were had in
23 open court:)

24 BY MR. SMITH:

25 Q. Agent Miller, can you see the spreadsheet that says, To

1 produce, Nicole Miller Lync messages, on the screen?

2 A. I can.

3 Q. Do those look like your Lync messages?

4 A. They do.

5 MR. SMITH: Your Honor, permission to publish?

6 MR. KENERSON: Objection.

7 THE COURT: Permission denied.

8 BY MR. SMITH:

9 Q. Okay. So -- I guess we'll go through them specifically.

10 So -- well, first, Ms. Miller, are there hidden
11 rows in this spreadsheet?

12 A. Not that I'm aware of.

13 Q. You created it, right?

14 A. There shouldn't be hidden rows, no.

15 Q. Okay. So while I'm -- while you're observing, I'm going
16 to click the "clear" function here, which makes invisible
17 rows appear. So when I click "clear," do you see that there
18 are now about 8,000 rows here?

19 A. Yes.

20 Q. Okay. So it appears that someone hid rows in that
21 spreadsheet. Right?

22 A. I haven't seen it like this before, though.

23 Q. Okay. So I can just ask you specific questions about
24 whether specific chats are yours.

25 So I'll go to one that I was referring to with

1 monitoring defense communications. I'm going to draw a
2 yellow line next to a series of communications -- we won't
3 read them yet -- between you and an individual named T. Wang
4 at FBI.

5 Do you know an agent by the name of T. Wang?

6 A. I do. Out of Philly.

7 Q. He works on this investigation. Correct?

8 A. He does.

9 Q. Okay.

10 MR. SMITH: Your Honor, permission to publish the
11 impeachment evidence.

12 MR. KENERSON: That particular message, no
13 objection. Everything else, objection.

14 THE COURT: All right. So you can publish the one
15 message you're talking about, sir.

16 MR. SMITH: Okay. I will draw lines around the
17 other messages.

18 Permission to publish, your Honor? The other
19 charts are covered for now, although some of them are
20 relevant, but we can get to those later.

21 MR. KENERSON: I disagree that all the other
22 messages are covered.

23 THE COURT: Yes.

24 MR. SMITH: Your Honor -- okay. I -- your Honor,
25 these statements are also responsive to the questions I had

1 asked the witness, but I will cover these first and then we
2 can begin --

3 MR. KENERSON: Can we also be heard briefly?

4 MR. SMITH: Your Honor, I've now covered the
5 content of the messages. Can we please proceed on
6 impeachment?

7 THE COURT: I'm going to -- let me hear you at
8 sidebar.

9 (Whereupon, the following proceedings were had at
10 sidebar outside the presence of the jury:)

11 THE COURT: It's your choice to try to -- you
12 don't want to give the Government sort of a heads-up of how
13 you're going to do this? Number one. And you try to do it
14 the way you're doing it?

15 I mean, I don't have sympathy for you if you
16 haven't figured out a technological way to do this in a way
17 that complies with the Rules of Evidence. And the
18 Government has no way of even figuring out how to formulate
19 an objection.

20 So --

21 MR. SMITH: Your Honor, if you can see the screen,
22 I've covered every content. Those statements will be coming
23 out later, because they're responsive. They're responsive
24 impeachment. But I've covered them, your Honor. I'm only
25 asking about the first question here, your Honor.

1 THE COURT: So it's a --

2 MR. SMITH: The question was: Have you ever
3 gained access to attorney-client information in this case?

4 This is an exchange between the witness and
5 another agent about their reading emails between lawyers and
6 clients.

7 May I proceed, your Honor?

8 MR. KENERSON: Can I --

9 THE COURT: I don't even -- I guess I can't read
10 it the way you have it. I don't know what is a statement of
11 this witness versus someone else.

12 MR. SMITH: So, your Honor, on the -- does your
13 Honor see the section of conversation that's not drawn over
14 with yellow?

15 THE COURT: Yes.

16 MR. SMITH: Now, can your Honor see a column that
17 says T. Wang at FBI?

18 THE COURT: Well, it has other things.

19 MR. SMITH: It has a date, your Honor. I can
20 point your Honor to where the 6509 is. If you see an email
21 from T. Wang to Nicole Miller, "Found an email thread with
22 Rehl and his attorney. The attorney raised some interesting
23 points."

24 Then if your Honor goes down to 6512, "I need to
25 find other emails, but this email definitely indicates that

1 they want to go to trial. But don't freak out, Jason." So
2 this isn't -- your Honor, this is an email that they're
3 reading between the Defendant and his lawyer when he's in
4 jail.

5 I asked the witness whether she had ever become
6 privy to the content of attorney-client communications in
7 this case. That's a text to her.

8 There are also missing messages, your Honor. May
9 I proceed on this impeachment?

10 THE COURT: Mr. Kenerson?

11 MR. KENERSON: So while -- there's no indication
12 that she read this email, number one.

13 Number two, I think Mr. Smith just said that this
14 was an email while Mr. Rehl was incarcerated. It's -- all
15 of those emails are monitored. If it is an email that was
16 sent over the normal BOP system, that's monitored. Everyone
17 knows that's monitored. It's not privileged.

18 MR. SMITH: Your Honor, that's not the law whether
19 they're privileged communications. Your Honor, the witness
20 can answer these questions about whether she remembered. If
21 the fact there's no proof she saw it means it can't come
22 in -- that's the Government's entire case with Telegram
23 messages, your Honor. So, your Honor, Mr. Kenerson said
24 there's no proof that she saw this. It was received by her.

25 MR. KENERSON: No. I don't mean the message.

1 Excuse me. I do not mean the message. I mean the actual
2 substantive email to which the sender is referring.

3 MR. SMITH: The question is where she's received
4 content, your Honor, not the email.

5 Your Honor, may I proceed?

6 THE COURT: No, Mr. Smith. You'll proceed when I
7 let you proceed. All right?

8 I wish that this could be smoother. I really do.

9 Ms. Hernández, why do you have your hand up?

10 MS. HERNANDEZ: Because the messages refer to
11 Mr. Rehl. So before they -- before we really step into
12 it --

13 MR. SMITH: There's no content about the
14 communications, your Honor, right now.

15 THE COURT: Mr. Kenerson?

16 MR. KENERSON: Mr. Smith just conceded there's no
17 content about the communications. Thus, this does not show
18 she received content.

19 THE COURT: No, no, no. What Mr. Smith is -- my
20 guess is that that wasn't the question. The question was:
21 Have you had any communications about -- I believe about --
22 I don't think that was the --

23 MR. KENERSON: I don't think that was the
24 question. You can check.

25 MR. SMITH: Your Honor, the question was whether

1 she had received information that her agents gained access
2 to the content of communications between attorneys and their
3 clients in this case.

4 THE COURT: Mr. Kenerson, why isn't, then, he
5 allowed to proceed in that way if that's the question? I
6 believe the question was something along those lines.

7 MR. KENERSON: I believe the only one that's
8 relevant is the one that has the green square around it, not
9 the rest of it.

10 MR. SMITH: We need content to explain what
11 they're talking about, your Honor. I need the messages to
12 explain -- to show that -- if I want to show that text, then
13 Mr. Kenerson will say there's no proof she's received it or
14 what they're talking about.

15 Your Honor, this is --

16 THE COURT: Okay. Okay. So these are -- I
17 think -- look, if the only objection is along the lines
18 you're saying, Mr. Kenerson, I think I'm going to overrule
19 the objection. I mean, he asked a question. Again, it's
20 hard for me to quite understand this. But the "Nope" and "I
21 need to find other emails," that is this other agent to her.
22 Correct? It looks like they're going back and forth about
23 something.

24 MR. SMITH: Yes, your Honor. And there are other
25 messages as well that show that she received this. But I

1 need to be able to proceed because, otherwise, I'll never be
2 able to get to the first question and then build a
3 foundation.

4 THE COURT: I understand.

5 Mr. Kenerson.

6 MS. HERNANDEZ: I'm sorry.

7 THE COURT: Yes. I do have to hear you because of
8 your client. I understand.

9 MS. HERNANDEZ: I just -- I have no objection to
10 Mr. Smith going forward.

11 Is there some way to clarify that it's different
12 counsel or prior counsel or something?

13 MR. SMITH: I will, your Honor. I will clarify
14 that.

15 THE COURT: All right. Very well. You may
16 proceed.

17 MR. SMITH: Thank you, your Honor.

18 (Whereupon, the following proceedings were had in
19 open court:)

20 MR. SMITH: Permission to publish Nordean Exhibit
21 2.

22 THE COURT: Permission is granted in the form it's
23 in.

24 THE COURT REPORTER: For the record, is that
25 exhibit admitted?

1 THE COURT: I don't believe it's been admitted.

2 MR. SMITH: It's being published under

3 Rule 613(b).

4 BY MR. SMITH:

5 Q. So, Ms. Miller -- Agent Miller; excuse me -- I've --

6 this is messy, and I apologize, but I'm going to draw a

7 yellow area next to a snatch of conversation. You've had a

8 little bit of time to review it now.

9 It appears that there is conversation in Lync
10 between you and an agent named T. Wang. Correct?

11 A. Correct.

12 Q. And this is dated October 21st, 2021. Right?

13 A. It is.

14 Q. Now, it says -- the first message from T. Wang says,
15 "Found an email thread with Rehl."

16 Rehl, is that referring to Zach Rehl?

17 A. I would assume. Yes.

18 Q. Okay. And this message from T. Wang is to an e-mail
19 account that's named NMiller2@fbi.sgov.gov. Right?

20 A. It is.

21 Q. Is that your email account?

22 A. It is.

23 Q. Okay. So going back to the first statement, it says,

24 "Found an email thread with Rehl and his attorney, Moseley.

25 The attorney raised some interesting points."

1 Right?

2 A. Yes.

3 Q. Then, later on, a couple of rows down, T. Wang says, "I
4 need to find other emails. But this one email definitely
5 indicates that they want to go to trial. But don't freak
6 out, Jason and Luke -- don't freak out, Jason and Luke,
7 yet."

8 Right?

9 A. Yes.

10 Q. So Mr. Wang appears to be messaging you about emails
11 he's reading between Defendant Rehl and his attorney.

12 Right?

13 A. It appears so.

14 Q. So you understand that communications between defense
15 counsel and their lawyers to seek legal advice are
16 attorney-client-privileged communications. Correct?

17 MR. KENERSON: Objection. Relevance of her
18 understanding.

19 THE COURT: Sustained.

20 MR. SMITH: Your Honor, this is -- we have to make
21 an offer of proof because, if the Government knowingly
22 reviews attorney-client communications, it's --

23 MR. KENERSON: Can we not do speaking objections,
24 please?

25 THE COURT: Yes, Mr. Smith. Let me hear you.

1 (Whereupon, the following proceedings were had at
2 sidebar outside the presence of the jury:)

3 MR. SMITH: Your Honor, I can cite the D.C.
4 Circuit and Supreme Court case law. If the standard is
5 whether the Government knowingly intrudes in attorney-client
6 communications, it's a Sixth Amendment violation. So we
7 have to be able to ask the Government questions about
8 whether they knew these were attorney-client communications.
9 That's the standard of law. If we can't ask a question
10 about it, then we're barred from making an offer of proof.

11 THE COURT: But these are -- are the parties in
12 agreement that these communications are privileged?

13 MR. SMITH: Your Honor, the fact that the
14 attorney-client communication is on a jail line does not
15 mean it's not privileged. That's how most lawyers --
16 defense lawyers speak to their counsel [sic]. That's
17 basic -- that's why the Government, when it issues subpoenas
18 to jails, they carve out communication between counsel and
19 their -- counsel and the Defendant.

20 So, your Honor, this is on its face a *prima facie*
21 indication of an attorney-client communication. We're just
22 trying to elicit from the witness that she understands that
23 it's -- that attorney-client communication cannot be
24 intruded on by the Government.

25 THE COURT: And so --

1 MS. HERNANDEZ: I believe there's a due process
2 violation, once the client has an attorney, for the
3 Government to listen in. So it's not just Sixth Amendment;
4 it's due process.

5 MR. SMITH: Your Honor, I can cite the case law
6 for you. I pulled it up because I thought this might become
7 an issue immediately.

8 THE COURT: Here's what I'm going to do. Okay?
9 We have Mr. Smith -- we have more than -- you're going to be
10 using a lot of these messages from the agent to cross her.
11 Correct? You intend to do that?

12 MR. SMITH: Yes, your Honor.

13 THE COURT: Okay. So --

14 MR. SMITH: There's something we need to close the
15 loop on here, because the standard is -- there's D.C.
16 Circuit and Supreme Court case law saying if there's an
17 intentional intrusion into attorney-client communication,
18 there's a due process and Sixth Amendment violation. So if
19 we are barred --

20 THE COURT: I understand.

21 Mr. Pattis.

22 MR. PATTIS: I'm expecting this Court may think
23 this is a good time to send the jury home, but we think it
24 should be done in their presence. The foundation has been
25 laid. The obligations are clear. I think this goes to the

1 integrity of the investigation, and we have a right to
2 pursue this in the jury's presence.

3 THE COURT: Well, I understand.

4 Yes. If I agree you can pursue, you can pursue.
5 I'm not saying I don't. But we've all of a sudden hit
6 ground -- what seems to me is going to be a whole load of
7 contentious things. I want to make sure I'm making the
8 right decision.

9 We're 30 minutes out from when we were going to
10 close the day on --

11 MR. SMITH: Your Honor, I can go to the next
12 question and come back to the next one.

13 THE COURT: What is your next question going to
14 be?

15 MR. SMITH: It's not about that. It's another
16 question about this conversation, your Honor, fact-based,
17 not legal.

18 THE COURT: All right. We'll get as far as we
19 can. But I think I'd like to spend some time hearing from
20 all you on this outside the presence of the jury.

21 MR. SMITH: Okay. Thank you, your Honor.

22 (Whereupon, the following proceedings were had in
23 open court:)

24 BY MR. SMITH:

25 Q. Agent Miller, we'll get back to the question about the

1 attorney-client privilege.

2 But I'm just going to ask you one other question.
3 The last statement I read -- or message I read said,
4 "I need to find other emails, but this one email definitely
5 indicates that they want to go to trial. But don't freak
6 out, Jason and Luke, yet."

7 Now, "Jason," you understand to be referring to
8 the prosecutor in this case, Jason McCullough. Correct?

9 MR. KENERSON: Objection. Relevance.

10 MR. SMITH: This is the same issue, but it's
11 factual.

12 THE COURT: Right. Here's what we're going to do:

13 Ladies and gentlemen, it's 4:27. I wanted to go
14 another 30 minutes today, but we're going to press pause, as
15 we sometimes do when an objection hits. And so we're going
16 to release you for the day. I'm going to talk to the
17 lawyers about some of the things and we're going to pick up
18 tomorrow at 9:00.

19 (Whereupon, the jury exited the courtroom at 4:27
20 p.m. and the following proceedings were had:)

21 THE COURT: Agent, you may step down.

22 MS. HERNANDEZ: Sorry. Before the witness is
23 excused, your Honor, will you please alert her not to speak
24 to any prosecutor or any other agent?

25 THE COURT: Of course. That's the usual rule.

1 I'm sure the agent knows.

2 (Witness excused.)

3 THE COURT: Everyone may be seated.

4 MR. SMITH: Your Honor, was the jury excused 30
5 minutes early so we can argue about this one point? Or --

6 THE COURT: Well, it's not just this one point. I
7 think -- I mean, it seems to me like we're about to -- first
8 of all, yes, I'm going to hear you on this one point.

9 But it sounds like there's -- let me put it this
10 way: If you're going to be going into these messages, the
11 prosecutors can't talk to the witness. But it seems to me,
12 if you want to make tomorrow a tolerable day, spending some
13 portion of our time today talking about what sorts of things
14 you plan to do so that the Government can articulate a
15 position and I can figure out what the answer is makes
16 sense.

17 MR. SMITH: So, your Honor, we're going to cite
18 the Court to a case called *Weatherford against Bursey*. The
19 cite is 429 U.S. 545.

20 THE COURT: This is on the -- on the point we left
21 off on?

22 MR. SMITH: On the point we left off on.

23 And the rule here is that a defendant's Sixth
24 Amendment rights are violated when, quote, "the Government
25 gained access to the substance of the attorney-client

1 conversations and thereby created a realistic possibility of
2 injury to the Defendant or benefit to the State," end quote.
3 That's *Weatherford*.

4 THE COURT: Okay.

5 MR. SMITH: Then -- there's one more cite.

6 THE COURT: Okay.

7 MR. SMITH: So, your Honor, in the D.C. Circuit,
8 I'm citing to *Briggs* -- B-R-I-G-G-S -- *versus Goodwin* --
9 G-O-O-D-W-I-N. That's 698 F.2d 486, D.C. Circuit, 1983.
10 And the rule there is there's a presumption that the
11 information conveyed is -- there's a presumption that the
12 information collected by the Government on the
13 attorney-client communication is conveyed to the prosecution
14 team.

15 Then, your Honor, under *Weatherford* and the
16 *Goodwin* case I just cited, there are four factors that are
17 relevant to whether an intrusion into the attorney-client
18 privilege offends the Constitution. The first is whether
19 evidence to be used at trial was obtained directly or
20 indirectly by the Government intrusion; the second is
21 whether the intrusion was intentional; the third is whether
22 the prosecution received otherwise confidential information
23 about trial preparation or defense strategy as a result of
24 the intrusion; and the fourth is whether the privileged
25 information was used or will be used to the detriment of the

1 Defendants.

2 THE COURT: Okay.

3 MR. SMITH: And so, your Honor, what I was trying
4 to elicit -- we have communications that, on their face,
5 show intrusion of Mr. Rehl's attorney-client communications.
6 And we need to know whether it was intentional. And you
7 could certainly infer that from those messages.

8 But if we can't ask the question, we don't know.

9 THE COURT: Here's, I guess, my question: What's
10 the import of demonstrating a Sixth Amendment -- let's
11 assume all the inferences in your favor. What's the import
12 in demonstrating a Sixth Amendment violation?

13 MR. SMITH: Your Honor, if a Defendant's Sixth
14 Amendment rights have been violated, that means there's
15 error in the trial.

16 So this is -- we believe that this is structural
17 error. Structural error occurs when the attorney-client
18 relationship is interfered with.

19 One case for that principle is *González-Lopez*.
20 It's a Supreme Court case. I don't have the cite handy.
21 But, your Honor, it's relevant because we have to be able to
22 examine whether a Sixth Amendment violation has occurred.
23 It's always relevant if a defendant's rights are violated.
24 So we have *prima facie* evidence of that.

25 Then, your Honor, there's -- I asked the witness,

1 before we broke, about whether she had withheld certain
2 communications.

3 The spreadsheet that we've been delivered shows
4 that she's withheld communications about her statements
5 concerning whether there's a conspiracy in this case.

6 And so --

7 THE COURT: Don't you have a scope issue there?

8 MR. SMITH: No, your Honor, because, under Section
9 3500(b) it provides that, after a witness for the Government
10 has testified, the defense may make a request of the
11 Government for any statement that relates to the -- that
12 relates to the subject matter of the witness's testimony.
13 That's a statutory right a defendant has, so it's sort of
14 similar to a Sixth Amendment right.

15 THE COURT: Right.

16 MR. SMITH: So we -- once we've identified the
17 statements that are not produced that relate to the subject
18 of her testimony --

19 THE COURT: Well, that's the question. The
20 Government might make a production that is beyond their
21 obligation. Right?

22 MS. HERNANDEZ: No.

23 MR. SMITH: It's not beyond the obligation, your
24 Honor, because it relates to -- if they do relate to the
25 subject matter of the testimony, Section 3500 requires the

1 production --

2 THE COURT: Right.

3 MR. SMITH: -- unless the Government elects not to
4 produce.

5 THE COURT: Right. I understand that.

6 My point is, they may turn over a whole bunch of
7 stuff to you that is -- some of which is pertinent to her
8 testimony, some of which is not.

9 MR. SMITH: We're not looking for anything -- just
10 to be clear, we're not looking for anything not pertinent to
11 her testimony. We're going to identify exact, precise
12 conversations she's had that unequivocally relate to the
13 subject matter of her testimony. And I'll give the Court
14 some examples.

15 She's testified about Aaron of the Bloody East's
16 chats in the New MOSD. She has --

17 THE COURT: They relate to the chats --

18 MR. SMITH: They're --

19 THE COURT: -- or about the chats?

20 MR. SMITH: They're about the chats. That's -- I
21 would say that's squarely -- and there's an individual named
22 T -- an agent named T. Wang saying to her, I don't think --
23 not -- I mean, this isn't a verbatim quote; I don't have it
24 right in front of me -- but I don't think Aaron of the
25 Bloody East is involved in planning, he says to her.

1 So then there are missing chats from Miller back
2 to T. Wang in these conversations. The reason we know
3 they're missing, your Honor --

4 THE COURT: From who to --

5 MR. SMITH: So there are two agents involved in
6 several of these conversations. There's one named T -- his
7 first initial is T, and then Wang, W-A-N-G. The witness
8 testified that he's an agent who was involved in this
9 investigation.

10 This spreadsheet is communications between
11 Mr. Wang and Ms. Miller about the subject of this
12 investigation.

13 We know there are missing *Jencks* here under
14 Section 3500(b) and (d) because we can see Mr. Wang
15 responding in these spreadsheets to Ms. Miller, but we don't
16 have Ms. Miller's texts that triggered that response, if
17 your Honor is following me.

18 So here's how we got there. The Government gave
19 us a spreadsheet of Ms. Miller's *Jencks* from Lync, and it's
20 about 25 or 26 rows, approximately.

21 Then we discovered that there are secret rows in
22 the spreadsheet. So there's a button you can hit to make
23 certain rows secret. When you unclick that, it made about a
24 thousand more rows appear.

25 When you review some of those rows, you can see

1 that there are responsive -- there are *Jencks* statements
2 that Ms. Miller has made that were not in the 26-row
3 production.

4 So one of the categories was Aaron of the Bloody
5 East in chats. Another one is conversation about whether
6 the Government has made a well-pleaded conspiracy charge in
7 this case. I would say that's related to --

8 THE COURT: Well, this is -- we've been down this
9 road with the other agent. And I'm not -- I mean, this
10 agent testified as to -- I mean, we've been around this
11 particular thing before. Right?

12 I'm not -- she didn't testify there was or was not
13 a conspiracy. And she testified as to, you know, these
14 various media.

15 So I'm not -- the fact that she had conversations
16 with someone, another agent, who says, Well, what's the
17 conspiracy here one way or the other? I mean, that seems
18 pretty clearly outside the scope of her testimony.

19 MR. SMITH: So, your Honor, I guess if they were
20 just talking in the abstract like that, that might be true.
21 But when they're getting down into the facts, to say that's
22 not even -- so the standard isn't whether it's identical to
23 or the subject of her testimony; it's related to. And -- so
24 that's the *Jencks* standard.

25 And we could cite --

1 THE COURT: Right.

2 MR. SMITH: Related. So for us to say, you know,
3 her conversations about whether the facts satisfy a
4 conspiracy standard is not related to the subject matter of
5 her testimony would seem --

6 THE COURT: I would say it's beyond the scope of
7 her direct, though. That's a different thing.

8 MR. SMITH: Well, so, your Honor, this is about
9 identifying *Jencks* we're entitled to under Section 3500(b).
10 The *Jencks* -- 3500(b) vests a right in a defendant to
11 request of the Government a statement related -- from the
12 witness related to the subject matter of their testimony
13 after they testify.

14 Then the Government has two options. They can
15 produce the statement or they can withhold the statement.

16 If they withhold the statement and fail to produce
17 it, the testimony is struck. Section 3500(d) says the Court
18 shall strike the testimony of the witness.

19 THE COURT: Right. But if it's beyond the scope
20 of her direct, none of that clicks in.

21 MR. SMITH: So, your Honor, *Jencks* is not about
22 the scope of direct. *Jencks* is a discovery tool that vests
23 you with a right to -- so --

24 THE COURT: I understand.

25 MR. SMITH: We have to be able to ask -- once

1 we've identified that these are statements --

2 THE COURT: Can I just say, you're validating my
3 decision to send the jury home at 4:30.

4 Go ahead.

5 MR. SMITH: Your Honor, so we have to be -- so I
6 hear the point about the scope, your Honor. But we have to
7 also be able to ask the witness whether statements exist,
8 because we have a right under 3500(b) to get them if they
9 exist. So if we can't ask her whether statements exist, how
10 do we make a request for the statement?

11 THE COURT: So you want to ask about *Jencks*
12 statements that you believe you're entitled to; and if the
13 *Jencks* statements, no matter -- your position is the *Jencks*
14 statements, if they were not produced, no matter whether
15 they are within the scope of her direct testimony, the
16 witness's testimony must still be struck?

17 MR. SMITH: Your Honor, I believe, unless I'm
18 mistaken -- maybe Mr. Pattis or Ms. Hernández or any defense
19 counsel can comment on this, but 3500 is not about the scope
20 of testimony. It's about a right you have --

21 THE COURT: Right. I'm just -- so that's your
22 position as articulated?

23 MR. SMITH: Yes. We think scope is a separate
24 question. We think if this is a 3500 statement and it
25 exists and the Government chooses not -- elects not to

1 produce it, that's -- her testimony has to be struck.

2 Now, your Honor, there's one --

3 THE COURT: Have you gone back to the -- since you
4 realized that there were things you were missing, did you
5 then -- I mean, you say the Government has a choice. Have
6 you gone to the Government to say, Well, it looks like we're
7 missing some things here?

8 MR. SMITH: Your Honor, we were talking earlier
9 about how it might have been difficult, or might not, to go
10 through every single hyperlink in the exhibit. But, your
11 Honor, this kind of thing was very detailed. The way at
12 which we arrived at their hidden rows was not obvious on its
13 face.

14 THE COURT: Is that -- is this a no?

15 MR. SMITH: Your Honor, we are going to the
16 source, straight to the horse's mouth.

17 THE COURT: So it's a no.

18 MR. SMITH: I mean, your Honor, we're asking --

19 THE COURT: I'm not saying you're obligated. I'm
20 just asking the question.

21 MR. SMITH: So your Honor, the answer is no,
22 because we're asking the person who created the spreadsheet
23 whether there are statements.

24 THE COURT: But you said the Government had a
25 choice. They can do A or B.

1 MR. SMITH: Once -- okay. But first -- the first
2 step is -- is, like, a preliminary question, whether
3 something exists. Right? Does the statement exist?

4 Once she says the statement exists, then we make a
5 motion for the statement.

6 THE COURT: But you knew -- I mean, you just said,
7 We clicked on this; we could see that we only have half of a
8 conversation.

9 So --

10 MR. SMITH: Your Honor, I feel like sometimes if I
11 don't have enough proof, I would be faulted for not asking
12 her the question; and then if I try to ask the question,
13 it's inappropriate.

14 So if I -- you know, if I were just to just rest
15 on the spreadsheet, your Honor might say, Well, you know,
16 that's not enough proof there's actually a statement there
17 that you can see from 3500. But then if I ask her, it's,
18 That's an inappropriate question.

19 THE COURT: No, no. 3500 -- this is a little bit
20 of -- 3500, as you have said, is a discovery tool. And
21 so again, I just think the natural thing to do, if you
22 wanted the discovery, right, is to go to the -- this has
23 nothing to do with what you can ask the witness or not.

24 MR. SMITH: Okay.

25 THE COURT: My point is, if you wanted the

1 discovery, you could have easily -- I'm trying to get at
2 what you're entitled to and what you want, which, if you
3 wanted the extra messages, you could have just gone to the
4 Government and said, Give us the messages.

5 MR. SMITH: Your Honor, we discovered this
6 extremely recently. I can put it that way. And if the
7 person who knows whether there are statements is on the
8 stand, it seems fitting to ask them whether they've made a
9 statement.

10 And I guess I just don't see anything appropriate
11 [sic] about it. And if we can't -- it's like a Sixth
12 Amendment issue. If we can't ask her whether there are
13 statements, then we can't make a request.

14 Your Honor could say -- well, suppose I just took
15 this spreadsheet to the Government, and I'm making inference
16 about missing statements. They might say, Look, you haven't
17 shown there's a statement there.

18 So then if I can't --

19 THE COURT: I'm not -- I haven't said you can't
20 ask her if those are her statements.

21 All right. Why don't you tee up -- so you've teed
22 up for me your theory here about how you want to use -- what
23 else do you want to tee up for me --

24 MR. SMITH: So one issue is 3500. We can set --

25 THE COURT: Before I give the Government --

1 MR. SMITH: -- that aside. The other is
2 impeachment, your Honor.

3 So I asked whether she had -- this is separate and
4 apart from what we're entitled to. This is straight
5 impeachment on veracity. So I asked her whether she had
6 ever withheld -- she said she had disclosed to the
7 Government every Lync message related to the subject of her
8 testimony. So the impeachment are messages that relate to
9 the subject matter of her testimony that were not produced
10 to the prosecutors, to our knowledge.

11 So that's just -- I mean, that's -- and so that's
12 where we plan to go next on those questions.

13 THE COURT: In other words, here's a Lync message
14 that you that is the subject of -- is related to the subject
15 of your testimony. And -- see, the "related to the" --
16 okay. And --

17 MR. SMITH: She can say it's not related.

18 THE COURT: What?

19 MR. SMITH: She could respond: That's not
20 related; I didn't -- I'm the one who made this determination
21 at the beginning; I don't think Aaron of the Bloody East --
22 my messages about Aaron of the Bloody East chats are related
23 to my testimony.

24 THE COURT: Of course, you know, the tricky part
25 is, then, you have the substance of all of this before the

1 jury, and if she says -- and if I were to rule, no,
2 actually, it's not -- I mean, it's not related to testimony,
3 then we're kind of in a place where all this is in front of
4 the jury and -- let's just say some portion of it, I would
5 say, wasn't related, there's no way to kind of unring that
6 bell. Isn't that fair?

7 MR. SMITH: That's true, your Honor. But I think
8 that's probably true for any kind of impeachment with
9 extrinsic evidence. If a witness is confronted with
10 something that one person believes is contradictory and the
11 other doesn't, the witness may respond, "I don't think in my
12 own mind that's contradictory."

13 That's always true. But if that possibility
14 eliminated the defense's ability to impeach, then we
15 wouldn't be able to ever use extrinsic --

16 THE COURT: I'm not saying it's eliminating your
17 ability to impeach.

18 All right. Let me -- I'm going to give you -- if
19 there's anything else you want to set up for me, I want to
20 give the Government a chance to get a word in edgewise.

21 MR. SMITH: It's impeachment, your Honor. Sixth
22 Amendment and Section 3500.

23 Thank you, your Honor.

24 THE COURT: All right. Mr. Kenerson.

25 MR. KENERSON: I don't even know where to start.

1 So one, just where the Court left off on, you
2 know, whether someone agrees whether something is within the
3 subject matter of the testimony or not, I would point the
4 Court to -- you know, Mr. Smith says, Well, I mean, that's
5 just the only way to do it. The Court said, you can't
6 unring the bell. Rule 103(d) says that the Court must, to
7 the extent practicable, conduct a jury trial so that
8 inadmissible evidence is not suggested to the jury by any
9 means.

10 I think that's what we are doing by doing this
11 outside the presence of the jury. One.

12 Two: The determination as to whether something is
13 related to the witness's testimony is a determination
14 ultimately for the Court, not for the witness.

15 So I don't think it's -- I don't think it's
16 relevant what the witness's opinion of "may or may not be
17 relevant" is.

18 Three: I don't think that what Mr. Smith intends
19 to do, even assuming, arguendo, that there are missing
20 messages, which again, to take the Court's point, whenever
21 they found out about this, if they thought there were
22 missing messages, they could have asked us. They chose not
23 to.

24 But even assuming --

25 THE COURT: But it may have been very recently.

1 There's no reason to think it -- let me put it this way:
2 You've all been working pretty hard. It may well have been
3 recently.

4 MR. KENERSON: It may well have been.

5 But unless it was after 2:00 today, there was at
6 least a lunch break. So -- putting that aside, even
7 assuming that there are missing messages, the way that
8 *Jencks* is produced is that the FBI provides a whole lot of
9 material to us. We decide what we think is related to the
10 subject matter of the witness's testimony using a broader
11 definition than we think will pass muster. We decide what
12 to produce.

13 So I don't think it's proper to insinuate that the
14 agent did something wrong if there are indeed missing
15 messages, which again, we're not conceding. We'd ask that
16 we be pointed to specifically whatever it is that they think
17 they're missing.

18 We can go back to the original source documents,
19 see if those messages are there, either produce them if we
20 think that they should have been produced or give them to
21 the Court *ex parte*, if the Court wants them, if we think
22 not, or, if there are no messages, make a representation
23 that there are no messages.

24 THE COURT: I mean -- all right. It's not -- I'm
25 going to give Mr. Smith another word. But, I mean, I do

1 think you make a good point that it's not the witness's -- I
2 mean, it's a legal matter for me to determine. And it's not
3 even something that the witness herself determines in the
4 first place. She gives you all the material. You all
5 decide to turn it over.

6 So to say, Well, you know, we never got X, I'm not
7 sure how much that can be attributed to the witness.

8 I'm going to hear from -- don't worry.

9 Mr. Kenerson, what about on the Sixth Amendment
10 matter?

11 MR. KENERSON: If I can just make one more point
12 on 3500.

13 THE COURT: Sure.

14 MR. KENERSON: There's been some insinuation that
15 there is going to be -- if she answers -- if the Court
16 allows questioning along what Mr. Smith has suggested, and
17 the witness answers the question in a certain way, that
18 there's then going to be a motion to strike her testimony.
19 We are saying right now that if they think that there is
20 material that wasn't produced, we will go back and check and
21 see if that material exists and produce it to them.

22 So in terms of a production issue, I don't think
23 that we should be in any way, shape or form on the sense of,
24 there was a demand; the Government didn't meet it;
25 therefore, her testimony should be struck.

1 We provided this material back in November. I
2 have no reason to doubt that they only learned of it
3 recently. But we are only now getting the request. And we
4 will comply with whatever request is made. And if there is
5 additional disclosable material, we'll disclose it.

6 THE COURT: Why isn't -- at least on the 3500
7 issue, why isn't -- well, okay. All right. We'll get back
8 to that in a second.

9 What about the Sixth Amendment issue?

10 MR. KENERSON: So I will confess, I've read those
11 cases, but it has been quite some time. My inclination was
12 the same as the Court's in terms of, even assuming some sort
13 of a violation, what is the relevance in front of the jury
14 as opposed to a legal matter to argue in front of the Court?
15 That's one.

16 But, number two, I think one of the questions that
17 the Court asked was whether the parties are in agreement
18 that this material is privileged.

19 And I think, as I stated at the bench conference,
20 certainly I am not -- the Government is not going to agree
21 to that right here, because there are ways for persons to
22 have contact with their attorneys while incarcerated in a
23 way that is not monitored.

24 And, generally speaking, accounts that are
25 monitored, the privilege is waived.

1 Often the Government, even if they see such a
2 thing, chooses not to go into it, but that does not mean
3 that the privilege was not waived by choosing to communicate
4 with an attorney over an account one knows to be monitored.

5 So I think we would not concede, sitting here,
6 without at least more research, that the material at issue
7 was, in fact, privileged.

8 With respect to some of the other methods of
9 impeachment that Mr. Smith has brought up about whether
10 there were statements about what Mr. Wolkind's role may or
11 may not have been, I agree with the Court that that's
12 outside the subject matter of her testimony. But the
13 proffer was that the statements were not even her
14 statements; they were the statements of this other agent.

15 So I'm not sure it's proper impeachment in any
16 event, even if it were within the subject matter of her
17 testimony.

18 MR. SMITH: Your --

19 THE COURT: Give me one moment.

20 MR. KENERSON: And there was a filter protocol in
21 place. The Government has -- had authorized -- or had
22 alerted its agents to flag anything that might be privileged
23 and send it to filter. And that procedure was followed many
24 times in this case.

25 THE COURT: All right. Let me hear you in

1 response, Mr. Smith.

2 My inclination -- let me just say, my inclination
3 is that, on the *Jencks* stuff, I don't know why this isn't --

4 MR. SMITH: Your Honor --

5 THE COURT: -- this isn't -- this shouldn't have
6 been either the subject of, after the parties had an
7 opportunity to discuss what's missing, that -- both of these
8 things seem to me to be -- could have been the subject of a
9 motion that I'd take up outside the presence of the jury.

10 So -- and that's at least the *Jencks* issue. But
11 I'll hear you on that.

12 MR. SMITH: Thank you, your Honor.

13 The first point Mr. Kenerson made was that we're
14 suggesting inadmissible testimony.

15 That's -- that's -- that's not what the purpose of
16 impeachment is. Impeachment is not about admissible
17 testimony.

18 Second, your Honor, if there are missing
19 messages -- so the purpose of establishing -- the purpose of
20 using -- one purpose of using these messages is to impeach
21 her testimony. She testified she had not given all of these
22 statements concerning specific fact issues. Aaron of the
23 Bloody East, the conspiracy question I asked her, and
24 CHS-related information, that is impeachment. It doesn't go
25 to -- it's not asking her to say whether --

1 THE COURT: Why is the CHS impeachment?

2 MR. SMITH: She testifies she did not -- so, your
3 Honor, some of the other messages in here include --

4 THE COURT: You're saying it's impeaching her only
5 in the sense that she said, "I turned over everything," and
6 this wasn't turned over?

7 MR. SMITH: So she testified she has a legal duty,
8 your Honor, to turn this over. She said she complied in
9 three areas. If she -- Mr. Kenerson is raising his hand,
10 but Mr. Kenerson just made six points, so I just need a
11 little bit of time to make -- okay.

12 So if the witness has a legal duty and she
13 testifies about it, and it relates to her work on the case,
14 and she gives false information, we have to be able to
15 impeach her with extrinsic evidence.

16 So it's not just about, can we file a motion for
17 3500 material? It's impeachment, your Honor. She made --
18 she said, I have a legal duty. It includes giving certain
19 information.

20 And then she said, I deny withholding information
21 about facts X, Y and Z.

22 The spreadsheet shows --

23 THE COURT: And the Government is saying, Well,
24 actually, we're the ones who turned over whatever we turned
25 over.

1 MR. SMITH: So she testified -- the way it works
2 is she collected her own Lync messages. That's what she
3 said. And then she gives them to the Government. The
4 spreadsheet that she gave to the Government was then
5 produced to the defense.

6 You can see, from the way the spreadsheet is
7 crafted, that there are missing messages. They did not go
8 to the Government.

9 So this is -- we're not asking the witness a
10 question about whether -- what -- her position on a legal
11 issue: Is this 3500 material? The question is: Did you
12 withhold information from the prosecutors? That was the
13 question asked to her. And the spreadsheet certainly raises
14 a very strong inference that she did.

15 Now, she might say, No. Those are hidden columns
16 in the spreadsheet, but I actually gave those messages to
17 the Government.

18 That would be confronting the witness with
19 impeaching evidence, and she defuses it, or whatever you
20 want to say about it. But we have to ask the question
21 because she denied the fact that she ever withheld factual
22 statements about those three issues. This spreadsheet shows
23 she does.

24 So then, your Honor, on the 3500 point -- so
25 that's just impeachment. We didn't hear anything from

1 Mr. Kenerson about why that's not proper impeachment. This
2 has nothing to do with a legal opinion, your Honor, about
3 3500.

4 THE COURT: No. We did hear something. You just
5 disagree with it, but --

6 MR. SMITH: Well -- so, your Honor, on the 3500
7 point, we're not asking the witness to say, This is 3500
8 material. We're asking her to say whether she gave certain
9 messages to the prosecutors.

10 If she didn't give certain messages to the
11 prosecutors, and she says they exist, that's a fact; that's
12 not a legal conclusion.

13 Then, your Honor, Mr. Kenerson said, Well, they're
14 going to move -- the defense will move to strike the
15 witness's testimony as soon as they hear that she didn't
16 give those messages to the prosecutors.

17 No. That's a fact that's now in evidence, that
18 there are these messages that exist.

19 The defense is then entitled to make a motion
20 under 3500 for the material. We can't move to strike at
21 that point. Then 3500(d) says the Government can either
22 produce those statements if they relate to the subject
23 matter of the testimony or elect not to.

24 If they elect not to, then the Court shall strike
25 the testimony of the witness.

1 So we're not saying, as soon as she says something
2 on the stand, that means her testimony must be struck. That
3 is not our position.

4 And then, your Honor, if we can't ask her whether
5 they exist, then we can't even reach the first step under
6 3500(b). She's the one who created the spreadsheet. She
7 sent the messages. We can ask her whether she sent the
8 messages.

9 So, your Honor, we're not trying to trap her into
10 a statement that would then immediately strike her
11 testimony.

12 THE COURT: I understand that.

13 But you are trying to -- and I understand -- look,
14 my point is this: You know, we've all tried to make this
15 trial, as best we can, move quickly. But the place we are
16 going down here is not a way in which this will move
17 quickly.

18 So -- I mean, that's fine. That's fine.

19 MR. SMITH: Your Honor, there is another reason
20 that we can't actually do it through a motion: Because her
21 testimony has started, she is now not able to speak to the
22 Government. The Government can't go back to her and ask
23 her, Do you still have these statements in Lync?

24 And we can represent to the Court that we have
25 just discovered this information within the period of time

1 when, if she wasn't testifying already, almost immediately
2 before that.

3 So if we can't -- so then -- if we can't ask her
4 whether these statements exist, we can't invoke our 3500
5 rights. The Government can't speak to her.

6 Then, your Honor, on the Sixth Amendment point
7 that Mr. Kenerson made, we're not trying to -- again, we're
8 not trying to raise a Sixth Amendment legal argument in
9 front of the jury. What we're trying to do is impeach her.
10 She said that she had not received -- had communications
11 with agents about the content of legal communications from a
12 defendant.

13 This impeaches her. And that's what just
14 occurred. That's not litigating a Sixth Amendment issue
15 with the jury.

16 THE COURT: But of course, all that can be done
17 without the content of the messages. You know, Look at this
18 message. If her testimony is, Oh, I didn't withhold X, it's
19 about my -- and -- look at this; isn't this message about X?

20 MR. SMITH: But, your Honor, in the *Weatherford*
21 standard that we just read for the Sixth Amendment
22 violation, we have to show intentionality.

23 THE COURT: That's --

24 MR. SMITH: And there's usually a fact hearing
25 with the Government when they're determining whether there's

1 an improper intrusion into the defense camp. So there's no
2 difference here between a fact hearing and what we're doing
3 with this witness. We're asking her.

4 THE COURT: Well, one is in front of a jury and
5 one is not. Right?

6 MR. SMITH: We just discovered the information.

7 THE COURT: I know that. But that doesn't make it
8 proper.

9 Mr. Pattis?

10 MR. PATTIS: I view this largely, Judge, as a
11 Sixth Amendment issue.

12 The Government is the master of its destiny here.
13 And it chose to put this witness on the stand. It either
14 knew or should have known about the hidden columns.

15 And so here we have a witness on the stand.
16 Mr. Smith laid a very careful and general foundation, and he
17 has a good-faith basis to believe that she -- that she's
18 wrong.

19 And he's seeking to confront her, within the
20 meaning of the confrontation clause, with his -- with his
21 evidence about why he believes she's wrong.

22 So that's one Sixth Amendment prong that we think
23 is absolute and doesn't yield to any *Jencks*-related
24 concerns.

25 This is not a civil case where we had access to

1 robust discovery or motions to compel or depositions or
2 anything of that sort.

3 Even if we hadn't just discovered this material, I
4 think we would have strategically been within our rights to
5 withhold it, especially in a case of this sort where the
6 Government has made so much of the pregnant gaps in the
7 electronic communications they've been able to discover
8 against our clients.

9 An additional Sixth Amendment factor is the right
10 to present a robust defense, including chicanery, perhaps,
11 whether intentional or reckless, on the part of the
12 Government in pursuing a prosecution for venal motives.

13 And, you know, we've had arguments about First
14 Amendment issues and whether this case is coming close to
15 criminalizing dissent.

16 I don't know what went on on the Government's side
17 with respect to these things and whether the items are
18 privileged or not. So I don't think a *Jencks* standard
19 should govern this. We've not waived a right to confront a
20 witness that the Government chose to put on. I think *Jencks*
21 is more applicable when people are evaluating what witnesses
22 to put on.

23 And so had the Government not called her, and we
24 discovered this, you know, last night, let's say, we could
25 have said, Produce it so we can decide whether to call her.

1 But they chose to put her up. And they knew or
2 should have known that she had these problems. And now they
3 have to eat them. And we are entitled to feast on that to
4 the benefit of our clients. And I see you wincing, and I
5 know the metaphor is a little bit vulgar --

6 THE COURT: I was smiling, not wincing.

7 MR. PATTIS: I mean, I know the metaphor is bold,
8 but I remind you what's at stake here. The Government
9 selected these men to prosecute them, to hold them
10 incommunicado and, in some cases, in solitary confinement
11 for the better part of a year. And if we've come here to
12 fight with blood on our knuckles, are we to be blamed? Look
13 at the stakes here.

14 And we didn't --

15 THE COURT: No --

16 MR. PATTIS: -- choose this witness.

17 THE COURT: -- no. That's why I'm saying I'd like
18 to -- I would have liked to have things to -- I like to tee
19 up things to go -- your crosses, your directs, whatever, to
20 go as smoothly and efficiently as we can.

21 But am I -- do you see me berating you for --

22 MR. PATTIS: No. But the suggestion -- the
23 suggestion was that we could have done it a different way.
24 We could have -- we could have not had our homes raided and
25 our family lives disrupted and being held in lieu of bond,

1 incommunicado, without adequate communication with our
2 lawyers.

3 Lots of things could have happened in this world
4 that didn't. But we're right here right now, and this
5 witness is on the stand; and she's got to own up to what her
6 employer did or didn't do, or what she did or didn't do.
7 And there's no gainsaying that.

8 THE COURT: Here's what we're going to do. We're
9 going to -- it's 5:00. And I want -- what I want is
10 Ms. Harris -- I want to free up Ms. Harris to be able to
11 call the witness -- the jurors and tell them to come in an
12 hour later, if she can reach them, so we don't have to
13 burden more of their time with our discussions.

14 I'll let the parties -- let's put it this way. I
15 don't know. I think the best thing is to let you all go,
16 either -- whether that's for war camps or peace camps, I
17 don't know. But maybe there's a discussion to be had that
18 can cut through some of this. Or maybe you all just want to
19 sort of sharpen up your arguments, and we'll show up
20 tomorrow and I'll just decide.

21 Mr. Roots?

22 MR. ROOTS: Your Honor, there's been -- just with
23 what was said in that brief exchange, this is not just a
24 *Jencks* violation; it's a *Brady* violation. And it's a -- it
25 requires the Court to have no trial. We need to have a full

1 hearing tomorrow with Ms. Miller on the stand to -- we need
2 to know the scope of the FBI monitoring our communications
3 with our clients.

4 This -- this --

5 THE COURT: All right. Understand your point.
6 Understand your point. Understand your point.

7 MR. ROOTS: This trial has to stop until we get to
8 the bottom of that.

9 THE COURT: I understand your point.

10 Mr. -- I'm going to hear from Mr. Jauregui.

11 MR. JAUREGUI: Thank you, Judge.

12 And, Judge, since the Government is going to have
13 tonight, I just wanted to inform your Honor that we had
14 these Lync messages spreadsheets for the computer forensic
15 expert Cain, for Camiliere and for Dubrowski.

16 If your Honor can order the Government to find out
17 whether there were also hidden messages in these other
18 spreadsheets that were provided -- it's the same type of
19 spreadsheet, same type of Lync messages. The difference is
20 in the manner that they were produced. And the manner that
21 the files and the folder was produced for Agent Miller is
22 different than the way it was produced for the other --

23 THE COURT: Mr. Jauregui --

24 MR. JAUREGUI: -- witnesses.

25 THE COURT: -- that -- the issue you're raising is

1 classically discussed between the parties and not discussed
2 with me now.

3 Ms. Hernández?

4 MS. HERNANDEZ: Since apparently it's my client's
5 attorney privileged communications, whether they were, or
6 whether Mr. Moseley messed up and talked on nonsecure
7 channels, it is my understanding of the law that the
8 Government, if they know it's an attorney, has to stop
9 immediately.

10 And if they have those communications -- and some
11 of these -- one of the text messages appears to say
12 something like, he has some interesting points -- talking
13 about the conversation between Mr. Rehl and Mr. Moseley, the
14 former attorney -- and it appears that they want to go to
15 trial, and don't freak out, Jason and Luke, yet.

16 So we're talking about trial strategy, trial
17 tactics, whatever is going on. I don't know if there are
18 filter teams, whatever the heck is going on, number one,
19 beyond Rule 35, beyond the witness credibility.

20 I believe the Court should order the Government
21 immediately to have someone independent of this prosecution
22 team search their files to determine if they have any
23 attorney conversations with -- that involve my client and
24 turn those over. Or I can move to dismiss right now.

25 THE COURT: So, again, I think given this is a new

1 issue -- well, I guess I don't know that. But I want to
2 give both sides -- at least most of the people in this
3 room -- this is an issue that -- and I assume, it sounds
4 like, for you, Ms. Hernández -- I think it makes sense for
5 us to sort of retreat to our corners and figure out our
6 positions before I start ordering A or B.

7 You may be right. I'm not saying you're not.

8 Mr. Metcalf?

9 MR. METCALF: I'll be very quick, your Honor.
10 Just to rehash the importance of the Sixth Amendment and
11 what's at stake here --

12 THE COURT: Or --

13 MR. METCALF: -- for your Honor to look at *Briggs*
14 *v. Goodwin*, specifically at Pages 494 to 495. I'm just
15 going to give your Honor just two or three cases, because I
16 just briefed this issue.

17 THE COURT: The first one Mr. Smith already gave
18 me.

19 MR. METCALF: I'm asking you to look at specific
20 points in *Briggs v.* --

21 THE COURT: I'm going to -- trust me, I'm going to
22 read the case.

23 MR. METCALF: Okay. So then, your Honor, I ask
24 you to take a look at *United States v. Levy*, which is 577
25 F.2d 200, specifically at Page 208.

1 Then there is *U.S. v. Caldwell*, which is, I
2 believe, an appellate case out of the D.C. district, 92 U.S.
3 appellate division D.C. at 357.

4 There also is *Coplon*, C-O-P-L-O-N. That's 89 U.S.
5 App. D.C., specifically at Page 114.

6 And this -- all these go into how, when there is
7 ultimately an intrusion at all on the Government's side, it
8 invalidates the trial in its entirety, and mere possession
9 of this information -- mere possession -- of a prosecutor
10 having confidential information about defense strategy or
11 defense -- a defense's position is sufficient in and of
12 itself to determine --

13 THE COURT: All right.

14 MR. METCALF: -- that it's detrimental to --

15 THE COURT: Mr. Metcalf, you've given me the
16 cases. I will read the cases, I swear.

17 Mr. Kenerson?

18 MR. KENERSON: Just very briefly on the 3500
19 issue:

20 I think the Court has the authority to run its
21 courtroom in an efficient manner. It would be efficient, as
22 we said before, to, if there is a reasonable belief on the
23 defense side that there are missing messages in the *Jencks*
24 production, for the Court to order them, to point us to them
25 to see if we have them in the U.S. Attorney's Office's

1 possession, without even talking to the witness, and, if
2 they are relevant, to produce them or, if we don't have
3 them, to make that representation.

4 I would ask that the Court order the defense to
5 notify us of any it believes are missing.

6 MR. SMITH: Your Honor, the response is, it's the
7 witness's messages. The Government cannot communicate
8 with --

9 THE COURT: They said they weren't going to. I
10 mean, no one listens to anyone.

11 MR. SMITH: Your Honor, I am listening. The
12 question is, how do you -- is the Government saying that
13 her -- Ms. Miller's communications are not in her
14 possession? Is that what the suggestion is?

15 THE COURT: I think the suggestion is they might
16 have ways of obtaining -- she may -- there are all sorts of
17 ways that they could possibly do this in theory.

18 The point is, they've already said they're not
19 going to talk to her. They know they can't.

20 But the point is, does it -- are you willing to --
21 why doesn't it make sense for you to point out the missing
22 messages to them?

23 MR. SMITH: Your Honor, let's say there's a way
24 for the FBI to retrieve someone's personal communications,
25 through this communications -- without their consent. Let's

1 say there were such a way.

2 They would then be going into her system and
3 picking out information. Is the Government representing
4 she's not apprised of that? That's the subject of her
5 cross-examination.

6 THE COURT: Mr. Smith -- Mr. Smith, what's the
7 problem with you pointing out to the Government what the
8 missing messages appear to be?

9 MR. SMITH: Because, your Honor, already the
10 Government -- the Court has ordered the defense to disclose
11 its cross-examination questions to the Government with
12 respect to other --

13 THE COURT: No, I haven't. No, I haven't. To be
14 very clear --

15 MR. SMITH: Your Honor --

16 THE COURT: -- Mr. Smith, I ordered you to file
17 something *ex parte* and under seal.

18 MR. SMITH: Your Honor, I'm referring to when the
19 Court ordered the defense to provide all the prior
20 inconsistent statements they would use in advance to
21 cross-examine a witness.

22 THE COURT: Yes; once the witness was on the stand
23 and the Government couldn't talk to them.

24 MR. SMITH: What Mr. Kenerson is now asking for is
25 the Government -- is the defense to tell Mr. Kenerson,

1 before cross-examination resumes tomorrow, what questions
2 the defense is going to ask her about with her messages.

3 THE COURT: No.

4 MR. SMITH: That is effectively what providing the
5 messages to the Government means. We're just trying to
6 impeach the witness. That's the issue here.

7 MR. PATTIS: And it seems to me, Judge, just to
8 put one point on what Mr. Smith is saying, that's the
9 functional equivalent of requiring the Government to give us
10 a courtesy call 24 hours before they do a search warrant.

11 You know, we're in their house now, and we're
12 entitled to rummage around and find what they've got lying
13 around.

14 THE COURT: No. It's not the same.

15 So I'm going to ask -- here's what we're going to
16 do. Do the parties want to put anything -- apart from what
17 I'm going to order about any missing *Jencks*, do the parties
18 want to put something in writing on these topics? Or do you
19 think the time is best spent showing up and arguing it to me
20 tomorrow on -- whether talking about Sixth Amendment,
21 *Jencks*, whatever?

22 What's the Government's sense of what would be
23 more efficient?

24 I don't want to make either side do something that
25 they think would be inefficient and would take away from the

1 other time you're going to spend preparing.

2 MR. KENERSON: I think it's hard to say before we
3 get back. I mean, my inclination is that would be more
4 efficient if we were doing this tomorrow morning, to show up
5 and argue.

6 However, just speaking for the Government -- I
7 can't speak for the defense, obviously -- depending on when
8 we reread these cases and what we find, we may feel it
9 productive to file something. I know that's not very
10 helpful.

11 THE COURT: Fair enough.

12 Does any Defendant want to be heard on that
13 question?

14 MR. SMITH: Your Honor, I think we would probably
15 just file a very short notice of what our legal arguments
16 are and what -- just to clarify what it is we're arguing.

17 THE COURT: Okay.

18 MR. SMITH: And it would be maybe one or two
19 pages, not a brief.

20 THE COURT: Fine.

21 So I'll just say this: If either side wants to
22 file something on this, something short -- I'm not ordering
23 you to do it, but if you find it helpful and think it makes
24 sense, file that by midnight tonight. Something short.
25 Number one.

1 Number two: I am going to order, Mr. Smith, if
2 there are -- I'm going to order you to point the Government
3 to the messages that you think are missing so that they
4 can -- at a minimum, so that they can show up and be
5 prepared tomorrow to discuss them and also take whatever
6 steps they feel they can take to try to obtain them.
7 Obviously, again, they can't talk to the witness. We all
8 get that. But I think that's appropriate.

9 So I'll --

10 MR. SMITH: I'll identify them in the briefing,
11 your Honor, if that's okay.

12 THE COURT: Well, how are you going to identify
13 them in the briefing?

14 MR. SMITH: Because I can just copy/paste the
15 relevant messages. That identifies it extremely
16 specifically for them.

17 THE COURT: That doesn't allow them to be prepared
18 tomorrow morning. By -- I'm going to ask you to do that by
19 8:00. And then you can file whatever you want to by
20 midnight. By 8:00, I want the Government to have that
21 information.

22 And then we'll all show up here tomorrow at 10:00
23 and see where we go.

24 Ms. Hernández? 10:00. Because -- I'm sorry. No.
25 9:00 for you. 10:00 for the jurors. Sorry. Sorry,

1 Mr. Pattis.

2 MS. HERNANDEZ: Wait, wait, wait, wait. Your
3 Honor, is the Court -- I -- there is -- there are messages
4 about intercepting conversations between Mr. Moseley and
5 Mr. Rehl. And the Government should know that because
6 they're the ones who produced the spreadsheet.

7 So --

8 THE COURT: Right. On your request --

9 MS. HERNANDEZ: -- I would ask the Court to order
10 the Government to do a search, just like you're asking
11 Mr. Smith to identify, to do a search and find out, is there
12 a taint team? Do they have a bucket of these privileged
13 communications? I think I'm entitled to have those before
14 moving forward.

15 THE COURT: I don't think there's anything exact
16 that I can order -- let me put it this way: Yes. I think
17 the Government should be prepared tomorrow to discuss what
18 the situation is regarding these messages. Absolutely.

19 MS. HERNANDEZ: You're asking Mr. Smith to
20 identify.

21 THE COURT: Right.

22 MS. HERNANDEZ: Why can't you ask the Government
23 to identify what they have?

24 THE COURT: I don't know what you mean by
25 "identify what they have."

1 MS. HERNANDEZ: There is a message that says, We
2 have intercepted communications between Mr. Rehl and
3 Mr. Moseley and they -- you know, they don't want to go to
4 trial or -- I'm sorry -- they want to go to trial. There
5 are some interesting points.

6 THE COURT: Well, it's not an analogous situation,
7 because you don't want them to provide it to you because, if
8 the Government has it, they -- you don't want these
9 prosecutors to have it at all.

10 MS. HERNANDEZ: No. I want them to contact
11 Attorney General Garland right now and get a taint team in
12 there and find out whether they have attorney-client
13 privileged communications, because I cannot go forward to
14 trial if the Government has been sitting on attorney-client
15 privileged communications.

16 Even if Mr. Moseley messed up and made them
17 available -- you know, even if he talked on unsecured
18 devices, the Government, my understanding of the law, still
19 has an obligation at that point immediately to say -- it's
20 just like when they're -- when they have a wiretap, if they
21 intercept a communication between an attorney and a client,
22 their ordinary practice is to stop and not listen in. So I
23 think -- I think there needs to be confirmation of what they
24 have, how much they have.

25 THE COURT: Ms. Hernández, I'm ordering them to be

1 prepared to discuss exactly what you are asking for
2 tomorrow.

3 MS. HERNANDEZ: That's not fair to me because
4 they're going to -- I don't know what they have, and so how
5 am I going to be prepared to respond?

6 THE COURT: Right. They're going to be
7 scrambling.

8 MS. HERNANDEZ: There are five of them --

9 THE COURT: They're going to be scrambling. So
10 that's what we're going to do.

11 MS. HERNANDEZ: There are five of them, and a
12 whole Department of Justice. There's one of me. The Court
13 has just ordered Mr. Smith to identify specifically. I
14 don't know --

15 THE COURT: Identify things he already has in
16 front of him.

17 MS. HERNANDEZ: I don't understand why you can't
18 order the Government to have one of the multiple thousands
19 of attorneys they have to -- to go find out.

20 THE COURT: Ms. Hernández, I've ruled. The
21 Government has to be prepared to discuss the status of your
22 client's attorney-client communications tomorrow. They'd be
23 nuts if they weren't prepared.

24 MS. HERNANDEZ: I plan to file a motion to dismiss
25 tonight, then.

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THE COURT: Very well.

We'll see everyone at 9:00 tomorrow morning.

(Proceedings concluded.)

CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby
certify that the foregoing constitutes a true and accurate
transcript of my stenographic notes, and is a full, true,
and complete transcript of the proceedings produced to the
best of my ability.

Dated this 8th day of March, 2023.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the
District of Columbia
333 Constitution Avenue, Northwest
Washington, D.C. 20001
(202) 354-3269

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