IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	)	
	)	
Plaintiff,	)	Criminal Action
	)	No. 21-cr-175
vs.	)	
	)	JURY TRIAL
Ethan Nordean,	)	Day 28 - Afternoon
Joseph R. Biggs,	)	
Zachary Rehl,	)	Washington, DC
Enrique Tarrio,	)	February 8, 2023
Dominic J. Pezzola,	)	Time: 2:04 p.m.
	)	
Defendants.	)	

TRANSCRIPT OF JURY TRIAL
HELD BEFORE
THE HONORABLE JUDGE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

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THE COURTROOM DEPUTY: We're back on the record in criminal matter 21-175, United States of American versus Ethan Nordean, et al.

THE COURT: Counsel, you can resume your cross examination.

MR. KENERSON: While the witness is coming in, can we go to the phones briefly?

THE COURT: We can.

(Bench discussion:)

MR. JAUREGUI: Judge, I discussed this issue with the government over lunch, and I wanted to ask what she extracted. And I also want to ask if she reviewed the extraction from my client's phone and if she found text messages between my client, if she reviewed my client's phone and the extraction. And did she find Telegram messages between Shane Lamond and my client.

I'm not going to get into the content of those messages. Just asking her, Did you find those messages? Now, I think that I can actually even introduce these messages through her preliminarily, because she did the extraction on my client's phone, to be tied up later in the case. And then we could argue about that at some later point, but I think I can -- I have a good faith basis to ask her those questions.

THE COURT: Mr. Kenerson, what's your response? And

would she be available to be called in the defense case, if I were to admit such evidence, which would mean I could simply push this to that time?

MR. KENERSON: I do think, certainly, if she is the witness through whom the defense needs to authenticate those to get them in, we would make her available in the defense case. We would note, obviously, a hearsay objection to the contents of those. We would also note, as I told Mr. Jauregui, both a scope and a foundation, both for her, what her knowledge is as to whether the person they say is Shane Lamond is, in fact, Shane Lamond.

As well as she has not, so far as I know, compared the Cellebrite extraction that Mr. Jauregui is going to put to her to the originals, as she did with the government exhibits. And, also, this is something that, certainly, we would have wanted to weigh in on ahead of time, that Mr. Jauregui could have brought to everyone's attention prior to lunch right now. So I don't think he has to do it now.

THE COURT: Mr. Jauregui, go ahead.

MR. JAUREGUI: Judge, if I ask her the question, Are there messages between Shane Lamond and my client, she says, No, that's the end of it.

THE COURT: The whole question of Mr. Lamond and whether he's going to -- whether these items are going to be admissible is entirely to be determined. So, I don't think

it's appropriate to ask the question for that reason. So, I would move -- move beyond all this. I would sustain an objection as to foundation and scope.

But, again, this witness isn't going anywhere. If I rule all that admissible, of course, you'll be able to put it in in your case one way or another.

MR. JAUREGUI: Thank you.

Judge, please note any objection.

THE COURT: It is noted for the record. Very well.

(Open court:)

JENNIFER "KATE" CAIN,

CROSS-EXAMINATION (Cont.)

BY MR. JAUREGUI:

Q. Good afternoon, Ms. Cain.

A. Good afternoon.

Q. I think we were talking about Telegram, right, before?

A. Yes.

Q. Okay. Now I would like to show you a short little demonstration that I did on my phone with my -- the very talented Ms. Katinsky over there. I have Telegram on my phone. I'm going to just show you a video, and I would like you to just take a look at it. Okay?

MR. JAUREGUI: This is titled Demonstrative Aid 1A; is that all right?

THE COURTROOM DEPUTY: 1A?

MR. JAUREGUI: Sure.

BY MR. JAUREGUI:

Q. You know what kind of phone this is?

Is that a hint?

A. Oh, it's an Android.

Q. Yeah.

THE COURT: Counsel, has this demonstrative been shown to the government?

MR. JAUREGUI: It has, Judge. During lunch, I showed them.

THE COURT: Very well.

MR. JAUREGUI: Let me just get to the Telegram app here.

If we could publish, please, Ms. Harris.

THE COURTROOM DEPUTY: Permission to publish?

THE COURT: Permission to publish is granted.

BY MR. JAUREGUI:

Q. Does that look like the Telegram app to you?

A. It does.

Q. Great. I'm going to show you a short little video.

If the jury could please pay attention and look at it.

(Video played.)

Did you see that video?

A. I did.

Q. You said earlier that you didn't know whether messages

could be edited after the fact. Now you know they can, correct?

A. In this current version, yes. I do not know if that was available in January 2021.

Q. Okay. Wouldn't it have been your specific job, as a computer forensic expert of the FBI, to find out if, back then, when the crime was allegedly committed, whether that option was available?

A. Well, as you can see from the video you just showed me, when a video -- when a message is edited, it actually changes the message itself and says "edited" at a specific time --

Q. Right.

A. -- instead of "sent" on a specific time. So, there would be indicators in the database if something had been edited after the fact. There would be a timestamp associated with that.

Q. On the phone, not on Cellebrite, correct?

A. Not on Cellebrite. In the database, in the extraction itself. That's something that we look at in the extraction itself.

Q. Thank you for your honesty.

Isn't it true that on Cellebrite, there's no pulls data, correct?

A. There's no what? I'm sorry.

Q. Pulls data. The pulls.

A. There's no pulls data?
Q. Right. When you pull a message. You don't know what pulling a message is?
A. I don't know what the context of that means, no.
Q. Okay. And there's no edit history on Cellebrite, correct?
A. I did not see -- in the January 2021 versions of Telegram, I did not see an edited column in the database, no.
Q. Okay. And, actually, there's no muting history, either, on Cellebrite, correct?
A. There is. You can mute history.
Q. On Cellebrite?
A. I'm sorry. Notifications, you can mute them, yes.
Q. Okay. But can you please listen to my question carefully.

Is there mute history on Cellebrite? Yes or no?

A. No, it doesn't show if the chat has been muted.
Q. Thank you.

And even more importantly, there's no admin logs on Cellebrite; isn't it?

A. Admin what?
Q. Admin logs?
A. Admin locks?
Q. Logs. Logs. L-o-g-s. Administrative logs.
A. Logs?
Q. Yes, on Cellebrite.
A. I don't believe Telegram has administrative logs.

Q. You don't believe or you don't know?
A. I've never seen an administrative log for Telegram.
Q. Isn't it true that sometimes the times in Cellebrite are inaccurate?
A. For Telegram specifically?
Q. Yes.
A. No, I have never seen an inaccurate time tamp.
Q. Isn't it true that you can get added to chats without your consent?
A. You can be added to a chat, yes.
Q. And that explains all the spam that I get on Telegram, right? People just add me though their groups; is that the cause?
A. The public groups, if you've interacted in some way, then you can be automatically added to some.
Q. Thank you.

Can you tell on Cellebrite whether or not a message has been forwarded?
A. I don't believe on the earlier versions you could.
Q. Okay. And, actually, you can't even tell whether a user is a chatbot or not on Cellebrite, correct?
A. Whether a user is a chatbot?
Q. Yes.
A. No.
Q. And, actually, some of the messages that the government has

in their exhibits were actually chatbots. Did you know that?
A. Not that I recall.
Q. Do you know what Group Guardian is?
A. Group Guardian?
Q. Yeah.
A. Is that a -- is that a specific Telegram group?
THE COURT: Counsel, please, just for the court reporter's sake, again, counsel and the witness, each wait until the other is done speaking.
MR. JAUREGUI: My apologies, Judge.
BY MR. JAUREGUI:
Q. Have you heard of a chatbot whose name is Group Guardian?
A. No, I have not.
Q. Now, Tarrio created the Ministry of Self-Defense on December 31st, 2020, correct?
A. I don't recall the exact date of the group creation.
Q. So then you don't know when it became a super group, either, correct?
A. I believe I took notes regarding that, or conversed with my case agent regarding those things, but I don't have them committed to memory, no.
Q. Does the government have the notes? Do you know?
A. Potentially.
MR. JAUREGUI: Eric, do you have the notes?
(Off-the-record discussion between counsel.)

MR. JAUREGUI: May I have a minute, Judge, please, for a paper?

THE COURT: Yes, sir. Yes.

MR. JAUREGUI: May I approach, Your Honor?

THE COURT: You may, sir -- well, you may.

MR. JAUREGUI: Thanks.

BY MR. JAUREGUI:

Q. I'm showing you what's been shown to you before. Hopefully this will refresh your recollection as to when Tarrio created the MOSD.

Did he create it on December 31st, 2020?

A. I'm sorry. This one doesn't have the date the chat was created.

Q. Okay. And do you know when it became a super group? I guess not, right?

A. I don't recall from memory, no.

Q. Okay. And do you know when the group IDs were changed?

A. When the super group conversion happened is when --

Q. And when that conversion happens, there's two different IDs, right?

A. Yes.

Q. Now, let's talk about the Boots on the Ground chat. You did review that with the government, correct?

A. I did.

Q. And that was important because the government wasn't sure

whether or not Enrique was actually in that group, correct?

MR. KENERSON: Objection to characterization of why it's important.

MR. JAUREGUI: Well, I'll take the blame.

BY MR. JAUREGUI:

Q. It's important for me to find out when Enrique was in that Boots on the Ground. And you looked into that, correct?

A. I did research it.

Q. Okay. And the reason that was important is because there's actually no messages or any interaction by Enrique in that group Boots on the Ground, correct?

A. He does not contribute any messages, no.

Q. And, actually, there's not even a system message that he joined the group, correct?

A. No. Because he would have been added at the group creation, which does not create a system message.

Q. Thank you.

And we don't even know if he had even seen that group, correct?

A. I do not know if he saw it.

Q. Thank you for your honesty, Agent.

Now, Ms. Cain, did you create any exhibits whatsoever in this case?

A. No. I reviewed the exhibits.

Q. Okay. And the exhibits were manufactured by who?

A. Our investigative team put them together.
Q. And the government people at this table here?
A. They are -- the case agent and his team. You would have to ask him for the participants.
Q. Got it. So Agent Hanec is the one that created the exhibits in this case.
A. He was my contact that I spoke to about this. Again, I don't know who created each individual exhibit, no.
Q. Got it. And whatever exhibit Agent Hanec created was based on your data?

MR. KENERSON: Objection. Characterizes.

THE COURT: Sustained.

BY MR. JAUREGUI:
Q. Okay. The exhibits created by the prosecution team was based on your data?
A. It was based on the Cellebrite reports for those devices.
Q. Okay. I saw you make a big differentiation there. I asked you about the data, and you said: No, it was based on Cellebrite reports.

So what you're telling the jury is, just to be clear, the exhibits were manufactured, created, based on Cellebrite reports; is that correct?
A. That is correct.
Q. Did you preview these exhibits with that elaborate peer-review process you have at the FBI?

A. I did not.
Q. Any future mistakes on these exhibits, who's fault are they?
MR. KENERSON: Objection.
THE COURT: Sustained.
BY MR. JAUREGUI:
Q. If there's mistakes on the exhibit, they're not your fault, are they?
MR. KENERSON: Objection.
THE COURT: Sustained.
MR. JAUREGUI: And I have no more questions. Thank you, Ms. Cain.
THE COURT: All right. Counsel for Mr. Pezzola.
MR. ROOTS: Thank you.

CROSS-EXAMINATION

BY MR. ROOTS:
Q. Special Agent Cain, my name is Roger Roots. I represent Mr. Dominic Pezzola, along with my co-counsel, Mr. Steven Metcalf. My colleagues have mostly asked most of the questions that I wanted to ask, so I will just briefly touch on some of these.

Ms. Hernandez, representing Mr. Rehl, asked you: Isn't it true that millions of people use Telegram?

It's actual 500 million users worldwide, correct?
A. I don't know the exact number.

Q. That would be more than the total number of people in the United States.
A. I'm not sure.
Q. And hundreds of millions more use other encrypted apps, such as Signal, correct?
A. Signal is a widely used application, yes.
Q. And Signal would be described as a competitor of Telegram?
A. Potentially. They perform, generally, the same chat functions.
Q. WhatsApp is another encrypted app used by millions?
A. Yes.
Q. So, I believe Mr. Smith asked you a question: There's nothing criminal about using an encrypted communication, correct?
A. No.
Q. I'll go even further. If so many hundreds of millions of people use those, there's nothing shady about it, is there?
A. I don't presume to know why people use them. I just know that they are widely used, yes.
Q. And you use them yourself?
A. I do.
Q. So if witnesses were to come into this room and sit on the witness stand and say, These defendants have used encrypted communications, that wouldn't mean anything remotely unusual about them, would it?

MR. KENERSON: Objection. Argumentative.

THE COURT: Overruled.

BY MR. ROOTS:

Q. Along the same lines, how private do you think these apps are? If someone is in a club or a group that is controversial, or a club that has enemies, if he's aware that in that chat group there are dozens of strangers that he's never met, he wouldn't necessarily think he's protected with a lot of secrecy and privacy, would he?

A. I don't presume to know how people use their devices or what they would think about the privacy.

Q. Now, you testified that you are a FBI digital forensics expert?

A. My title is senior digital forensic examiner.

Q. How many of those are in the FBI?

A. I think there's roughly 400.

Q. 400 senior digital forensic examiners?

A. I believe about 100 of us are senior level.

Q. And I'm trying to understand. Do you all work in about the same place?

A. Well, we have 56 field division offices, so we are dispersed throughout those offices.

Q. So, I heard you mention maybe Tampa and maybe Knoxville or somewhere, Nashville. Do you work in those buildings -- the FBI buildings in those communities?

A. I did. I worked in the Tampa division until last January, and the last year I've worked in the Knoxville division.
Q. And how many other digital forensics FBI examiners are there in your office?
A. I have three in my current Knoxville office, and we had six in Tampa.
Q. Do you know anything about the D.C. FBI office division?
A. I work with their examiners. I've never visited their location.
Q. Do you know how many there are?
A. I do not.
Q. So, I believe you just said there are 400 FBI digital forensic, would you say, not senior, but agents?
A. No. It's a combination of agents and professional staff.
Q. And are they all doing what you were doing, or are they doing different things?
A. We all follow the same standard operating procedure.
Q. Did you -- did you go through the FBI training, Quantico, all the basic training, and that kind of thing?
A. We have our own digital forensic training, and so that is the training that I attended.
Q. You mentioned a programming team. Does the FBI program software?
A. Sure. Yes.
Q. The FBI creates actual software?

A. Yes.
Q. You mentioned developing a tool. The FBI developed actual tools for examining things?
A. Yes.
Q. How many people in the FBI are designing software?
A. I couldn't say. I'm not sure what the number is.
Q. Now, would you call what you do surveillance?
MR. KENERSON: Objection.
THE COURT: Overruled.
A. I would not.
BY MR. ROOTS:
Q. What's the distinction between what you do and surveillance? What's the distinction?
A. I look at devices in the past tense, essentially.
Q. Okay.
A. They must be seized upon consent or search warrant and have some type of legal authority, and the moment that that -- they come into our possession, the device activity ceases. So, I am not looking at any kind of live, interactive data. All the data I look at is historical.
Q. Okay. So you do your digital forensics of devices in the past tense, after -- after occurrences have already happened?
A. I do.
Q. And the FBI obviously has surveillance people that examine communications in realtime, correct?

A. I cannot speak to that.
Q. Couple of my colleagues asked you some questions about the fact that you can be put into a chat group uninvited, correct?
A. Someone can add you to a chat group without your permission.
Q. Without your permission. Without your even -- against your will?
A. No. You would accept the invitation to join the chat group.
Q. Okay. At least two of my colleagues asked about chatbots. I believe you said those are artificial intelligence entities on these chats that post comments?
A. To the best of my knowledge.
Q. So, if you were in a club that has enemies, you were involuntarily put in a chat with strangers, how comfortable would you be thinking that you're going to plot to overthrow the government in such a group?
MR. KENERSON: Objection. Speculation. Foundation. 403.
THE COURT: Sustained.
BY MR. ROOTS:
Q. Let's ask a different question, maybe from a different angle. Suppose an organization that wanted to harm the Proud Boys, such as the federal government, wanted to harm the Proud Boys, could they create a chat group, put chatbots in the chat

group, put, perhaps, plants, individuals that are put there with the sole purpose of harming others in the chat group, and then try to concoct a case based on such things?

MR. KENERSON: Objection. Speculation. Relevance. Foundation. 403. Argumentative.

THE COURT: Sustained.

MR. ROOTS: Thank you so much. No further questions.

THE COURT: All right. Any redirect from the government?

MR. KENERSON: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. KENERSON:

Q. Examiner Cain, Mr. Jauregui asked you some questions about an edit function, correct?

A. Yes.

Q. Have you ever seen any evidence that -- of editing going on back in 2021?

A. I did not. The database did not contain any indicators that editing was possible back then.

Q. You were asked a number of questions, as well, about whether these -- the phones at issue that you've testified about were extracted using the latest version of Cellebrite. Do you remember those questions?

A. I do.

Q. Could you tell us about how many releases of Cellebrite

have happened between January 2021 and today?
A. Do you refer to Cellebrite extracting or Cellebrite processing? Because they have different tools.
Q. Processing.
A. At least 20 different versions have come out in the last two years.
Q. And is it -- would it be standard operating procedure for the FBI to reimage -- or reprocess, excuse me, a phone every single time there's a new update to Cellebrite?
A. No, it wouldn't.
Q. Mr. Jauregui also asked you a question about what might happen if someone improperly extracted a phone and then you were looking at it. Do you remember those questions?
A. I do.
Q. Did you see any evidence of improper extraction in any of the phones in this case?
A. I did not.
Q. You were also asked a question about end-to-end encryption, and I think you said that Telegram was not end-to-end encrypted. Did I understand that correct?
A. It is not end-to-end encrypted by default. Groups can never be end to end --
MR. PATTIS: Objection, Your Honor. This is a narrative, no question.
THE COURT: Overruled.

A. Groups can never be end-to-end encrypted; however, direct messages between two users, private conversations, they have the ability to turn into secret chats, and those chats can be end-to-end encrypted.

Q. And can you just explain what the difference is between end-to-end encryption and the type of default encryption that Telegram uses?

A. End-to-end encryption --

MS. HERNANDEZ: Objection, Your Honor.

(Bench discussion:)

MS. HERNANDEZ: Your Honor, my concern is we're going into an area that wasn't explored in direct, and I don't want to end up with situation where -- asking to recross the end-to-end encryption we're talking about. I know there were questions about encryption, but end to end is a different animal.

THE COURT: I recall questions about end to end, but I could be wrong.

Mr. Kenerson, what is your --

MR. KENERSON: There were questions about end to end on cross, and I would think she's entitled to explore that difference because Mr. Jauregui, I think, left the impression that there might be some difference between them that's meaningful, and I would like to explain that.

MR. JAUREGUI: Judge, I did ask a question about end

to end.

MS. HERNANDEZ: I hadn't, so I my missed that.

THE COURT: Very well.

(Open court:)

THE COURT: Objection is overruled.

BY MR. KENERSON:

Q. Can you explain the difference between end-to-end encryption and the type of encryption that Telegram generally uses?

A. Sure. End-to-end encryption is from the first device, it is encrypted immediately after it is written. It passes through the Telegram servers, also encrypted, and then is delivered to the recipient, also in an encrypted state. It is encrypted the entire time and can only be decrypted by the two end users on the either side of that using the encryption key.

The type of default encryption that Cellebrite uses is a client-to-end-user encryption, which means that from the -- when the message is created, it is encrypted until it is received on the Telegram servers. And it is -- when it is at rest on the Telegram servers, it is in a decrypted state.

Their servers are distributed across hundreds of countries all over the world so that a piece of your data lives on each one of those 200 servers, so it's not all together. So for all intents and purposes, it might as well be encrypted because it's been split up.

And then it leaves Telegram servers in an encrypted state to its final destination, where it will be decrypted on the end user's device.

Q. Thank you, Examiner Cain.

I think you were also asked whether you had taken some courses put out by Cellebrite itself. Do you remember those questions?

A. I do.

Q. Can you remind us how many hours per year of training you must complete to keep your certification?

A. We do about 100 hours of advanced forensic training.

Q. And that's per year?

A. Per year, yes.

Q. I believe Ms. Hernandez asked you some questions about orphan files and what data is available and what you can tell based on certain properties associated with those files. Do you remember that?

A. Yes.

Q. And I think that you had said to her that there is EXIF data associated with images and videos and that can help you learn things about those files, correct?

A. That is correct.

Q. What is the difference between images and video and audio files in terms of what data is available to you?

A. Well, as I kind of mentioned before, the EXIF data was

established for photographers, originally, to use so that they could memorialize their camera settings in digital photos. Audio files are not inherently a photographer's use, so EXIF data is not attached to an audio file. So, that's why it's only available in video and images.

Q. And I think you also, with Ms. Hernandez, looked at a spreadsheet that you had created with some information about who was in what groups to refresh your memory. Do you remember that?

A. I do.

Q. It's sitting in front of you right now. I think it's Rehl Exhibit 40?

A. It is.

MR. ROOTS: Your Honor, at this point, I move this into evidence under Rule 612(b).

MS. HERNANDEZ: I don't -- we only used it to refresh her recollection, Your Honor. I'm not sure why it comes in and how it's relevant.

THE COURT: Well --

MS. HERNANDEZ: That document was marked up by me, too.

THE COURT: Let's -- let's just take this up -- let's take this up between witnesses, whether that will be admitted.

BY MR. KENERSON:

Q. Let me ask you, if private groups -- private Telegram

groups, I think you had some conversations with Mr. Jauregui about maybe being automatically added to a public channel; is that right?

A. I believe so, yes.

Q. What's the difference in terms of automatic addition to a public channel versus automatic addition to a private group?

MR. JAUREGUI: Objection. Vague. We don't know what version of Telegram we're talking about.

THE COURT: All right. Counsel can account for that in a rephrased question.

BY MR. KENERSON:

Q. In January -- or, not January, but in and around the time period we're talking about here, 2021 or so, was there a difference between the ability to be added to a private group versus automatically added to a channel?

A. Yes. Channels are public facing. A channel has a creator and -- or, an administrator, and when they post, it's not an interactive conversation. It's a one-way communication where the person that hosts the channel just posts video -- just posts comments or media, and people essentially just follow it. They don't interact in a group setting with it.

So if you're automatically added to a channel, it's just like following a channel. Just like following someone on Twitter, per se.

Q. And when you had that example with Mr. Jauregui about being

added to a channel as a result of maybe somehow interacting with it, were you talking about public channels or private groups?

A. With those, that would be a public channel -- and all channels are public by default -- or a public group.

Q. Okay. And can you remind us the process of how someone can get invited to a private group?

A. You must be invited to a private group. So, someone sends you an invitation to join. You accept that invitation to join the group.

Q. And within a group, who can send those invitations to join?

A. The administrator can always send those invitation, and then they can set a setting either allowing or disallowing the other users of that group to also be able to send invitations out.

Q. So people who are in a private group, if I understood you correctly, must be either invited by an administrator or someone the administrator has designated?

A. Yes.

Q. Now, you had a lot of conversations with Mr. Smith and a couple of the other defense counsel about whether Cellebrite parses all data associated with Telegram messages. Do you remember those conversations?

A. Yes.

Q. Now, you've had a chance to review, I think, those zip

files that we discussed labeled Government 500 through Government's Exhibit 550?

A. I did.

Q. And based on your understanding of Cellebrite as it existed at the time of these extractions, do you have any concern about the accuracy of those reports, in terms of accurately reporting the messages and the timestamps and the senders and things like that?

MR. PATTIS: I think that's compound, the items versus reports. So, objection.

THE COURT: I'll sustained as to compound.

BY MR. KENERSON:

Q. So for the exhibits that you reviewed labeled 500 through 550, based on your knowledge of Cellebrite as it existed at the time of the extractions, do you have any concern about the accuracy of that data?

A. No. The data was accurate.

Q. And any concern that Cellebrite would not capture messages, for example?

A. No.

Q. Any concern that Cellebrite would not capture the sender?

A. No.

Q. Any concern that Cellebrite would not capture timestamp?

A. No.

Q. Let me ask you, for more clarification, question on the

issue of who can join private groups.

In a super group, does the administrator have the ability to create a link?

A. They do.

Q. And what would be the functionality of that link?

A. When the administrator creates a link, then, I believe, anyone in that group can send the link out to add people. So, once that link is created, that functionality becomes available.

Q. Okay. So, in a super group, if the administrator creates a link, other group members can invite people by that link?

A. They can.

Q. Okay. Thank you.

MR. KENERSON: I do not have any other questions. Thank you, Your Honor.

THE COURT: All right. Can I have just counsel pick up the telephone for a moment.

(Bench discussion:)

THE COURT: All right. Just before we have the witness leave the stand, Mr. Kenerson, let me just ask Ms. Hernandez, do you -- the document that has been used to refresh her recollection, I guess I want to know whether -- I think technically, under the rule, I had always been of the view that the -- generally, the writing used to refresh recollection did not come in.

However, as I think has come up in other context in this case, the adverse party -- if an adverse party uses it, the adverse party, under 612, can -- can introduce into evidence a portion that relates to the witness's testimony. I'm not sure if the sponsoring -- the sponsoring party, the non-adverse party can do that.

On the other hand, if it's -- if you all have seen this, you all have had her use it to refresh her recollection, you all may not object, if you don't want to.

So let me just ask, Ms. Hernandez, do you object to the document coming into evidence?

MS. HERNANDEZ: Your Honor, this is a document generated by the government, and I used it similarly to the way the government used the metadata documents. I mean, it just lists the different groups, it lists everybody else. I don't know how the other defendants feel about introducing it, one; and, two, I only asked about Mr. Rehl's participation.

And that particular document, I believe, has my notes on it, or at least my highlights on it, because I think I had highlighted Mr. Rehl. I don't know what other information is on there. It is the government's -- the government generated the document, so to the extent Your Honor is talking about adverse party, I don't know whether that even fits this definition.

THE COURT: The witness is the government's witness,

so, I think technically, under the rules, I don't know that they have the right to admit the document. However, if all the defendants think that what's on there is accurate and no one objects, I will admit it.

But, I want to know whether you maintain your objection or whether the government might have to either address this as a legal matter or ask certain questions that could, for example, have the document admitted in some other -- for some other reason. For example, if she were to just testify that everything in there is accurate and she helped put it together as a demonstrative, or something like that.

I haven't seen the document, so I don't know. But, while the witness is on the stand, I think we could clean this up. The question is just whether you do object to the government's request to admit it. Whether any defendant does.

MS. HERNANDEZ: Your Honor, maybe, could we -- I think we would stipulate that if everybody is okay with it, it could come in, but let the other defendants see it later on, so they -- whether they have any objections or not.

THE COURT: All right. I mean, how about this: Mr. -- so, we'll -- just, again, if the government wants to ask any questions of the witness while she's here that might lay the foundation for it to come in some other way. I want to give them the opportunity to do that, rather than have to have the witness come back.

MS. HERNANDEZ: What I'm suggesting is if nobody objects, I don't think anybody would say you have to bring the witness back just to admit it. I mean, I think we would all agree, if nobody objects, it would just come in.

MR. JAUREGUI: For Tarrio, we object, Judge. I don't even know what that document is, to be honest with you. I haven't had a look at it.

THE COURT: I thought you used it to fresh her recollection, if I recall.

MR. JAUREGUI: I did. But I don't -- I didn't look at it.

MS. HERNANDEZ: It doesn't have the information you needed, so you couldn't use it.

THE COURT: Mr. Kenerson, how do you want to proceed?

MR. KENERSON: Your Honor, I think we got to have an adequate basis to admit it, but I would take the Court's invitation to ask a couple of foundational questions so we can have a legal argument later, depending on what her answers are.

THE COURT: Let's do that. All right.

(Open court:)

BY MR. KENERSON:

Q. Examiner Cain, just a couple more questions.

That document that you have in front of you, I think that Ms. Hernandez showed you --

A. Yes.

Q. -- can you tell us what this is?
A. This is a chart I created of the Government Exhibits 500 through 544, it appears. It's a variety of Telegram group chats. In it I've put the name of the exhibit, the kind of colloquial name that we were calling it internally, because there's a couple with very similar names. The actual Telegram chat name as given -- as assigned to the group. And then the Android and IOS group number and super group number, if applicable, and then a list of the five subjects and whether or not they were members or administrators in each of these groups.
Q. Now, with the exception, I think, of, you said, some of it was, what? We have colloquially referred to the chats as -- what's the source of the data for that spreadsheet?
A. The Telegram databases.
Q. The -- the extractions?
A. From these extractions, yes.
Q. Thank you.
MR. KENERSON: I don't think I have anything further.
THE COURT: All right.
Sorry one more.
BY MR. KENERSON:
Q. For the data that came from those databases, does the data in your chart fairly and accurately describe what was in the databases?

A. It does.

MR. KENERSON: Thank you.

THE COURT: All right. Very well.

(Bench discussion:)

MR. PATTIS: Can it be circulated briefly between counsel? I didn't look at it when it was shown to her. I want to look at it.

THE COURT: I'm not admitting it now.

MR. PATTIS: Okay. You did say that. I apologize.

THE COURT: Very well.

(Open court:)

THE COURT: Ma'am, you can step down. Thank you very much for your testimony.

Government may call its next witness.

MR. MULROE: Your Honor, the United States calls Peter Dubrowski.

THE COURTROOM DEPUTY: Will you please raise your right hand.

PETER DUBROWSKI,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE COURT: Counsel, to begin, you may want to retrieve -- there's an item at the -- with the witness right now.

MR. McCULLOUGH: Permission to approach, Your Honor?

THE COURT: Yes, sir. Granted.

MR. MULROE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MULROE:

Q. And good afternoon, sir.

A. Good afternoon.

Q. Please start by introducing yourself to the jury and spelling your last name for the court reporter.

A. My name is Peter Dubrowski, D-U-B-R-O-W-S-K-I.

Q. And, sir, where do you work?

A. I'm a special agent at the FBI.

Q. How long have you been a special agent with the FBI?

A. Three years.

Q. And apart --

THE COURT: Sorry. Counsel, I -- I mean, I have to do this multiple times a day. Let me just suggest notes.

You may proceed, Counsel.

BY MR. MULROE:

Q. Agent, aside from being an FBI agent, would you give us just a short summary of your professional and educational background?

A. Sure. I got my bachelor's in journalism from the Missouri School of Journalism, then I went to law school at NYU. After graduating law school, I spent a year at a large Wall Street law firm, then I clerked for a federal judge on the Southern

District of New York, which is the federal court in Manhattan.

After that, I spent several years practicing as a criminal defense attorney in a small criminal shop in New York City before joining the Bureau.

Q. Any military experience?

A. Yes. In 2017, I joined the U.S. Army Reserve as a judge advocate, an Army lawyer. I continue to serve to this day. I'm attached to a brigade in New York, where I practice mostly criminal justice and administrative law matters. I hold the rank of captain.

Q. Focusing on your work as an FBI special agent, is there a particular type of case that you focus on?

A. I'm a counterintelligence agent.

Q. And your work in that realm, does that include the investigation of criminal conspiracies?

A. It does.

Q. Do you have experience reviewing communications among members of criminal conspiracies?

A. I do.

Q. Now, agent, broadly speaking, and in general, why is it helpful to review communications between members of conspiracies?

A. Communications are important in conspiracy investigations for several reasons. First and foremost, it gives a sense of relationships, who's talking to who, if there's a hierarchy in

an organization, and how people on different levels of that hierarchy relate to each other.

Second, the object of the conspiracy. So, as these individuals are talking with one another, are they discussing an objective -- a potentially criminal objective when I'm investigating.

And, third, related to the second, really, is the manner in which they intend to go about achieving that goal, accomplishing that objective.

Q. Now, in your experience, when a group shares a criminal objective, do they tend to discuss that very openly and explicitly among themselves?

MS. HERNANDEZ: Objection. Leading.

MR. SMITH: Calling for testimony on a legal opinion.

THE COURT: Sustained to leading.

BY MR. MULROE:

Q. Agent, in your experience, what level of care do people use when they discuss shared objectives that may be criminal in nature?

MR. PATTIS: Objection. May we be heard, please?

(Bench discussion:)

MR. PATTIS: He's asserting -- the government's questions are asserting a fact that needs to be proven, that there was a conspiracy. I think that he is able to testify about what he observed, what his -- what data he relied upon,

his role as an investigator, but he can't be permitted to adopt the government's conclusions about the case in the form of the questions or in his testimony.

This is going well beyond even a summary agent. He's offering, in effect, his opinions that these guys were conspirators, and that's what we're here to contest.

THE COURT: He was asked a general proposition about whether people who communicate in conspiracies tend to do so openly or privately.

MR. PATTIS: No. He was asking about more than that. He was asking about criminal conspiracy, is communication among members in a conspiracy -- why it's helpful. We deny that there was a criminal conspiracy.

MR. SMITH: Nordean joins the objection.

THE COURT: All right.

MS. HERNANDEZ: Your Honor, he's being asked to give a legal opinion on an issue -- on the ultimate issues in this case.

THE COURT: No. No. He's allowed to say that -- I mean, is it really an opinion that criminal conspirators, if there were criminal conspirators, that in general, criminal conspirators tend to hide the conspiracy? Is that what you're telling me?

MR. PATTIS: Judge, he's being permitted to offer opinion testimony. He can ask about the nature of the

communications these men had, but he cannot reach conclusions about it. Otherwise, why have a trial?

THE COURT: He's not reached --

MR. PATTIS: He is.

THE COURT: No. No. No. Mr. Pattis, listen to what I'm telling you. He wasn't asked that. He was asked about -- you're saying you would object to the question if -- do members of criminal conspiracies typically discuss their conduct openly or in private?

What is --

MR. PATTIS: What is the relevance of that? He is here as a fact witness about what he observed. He's a percipient witness, and we are going down the same rabbit hole we went with the first special agent who testified in this case. It's being offered as an opinion. And I'm sorry to be abrasive with you, and I apologize for my tone, but I suggest the Court is the one, perhaps, not recalling what he said accurately, and I would encourage you to look at the transcript. I sat on the objection for what would be preliminary, but this is the fourth or fifth question adopting that narrative, that's the issue we're here to contest.

THE COURT: Mr. Mulroe -- hold on one second.

Why don't I just ask: Mr. Mulroe, what's the pending question? I can tell you right now, the question was: In your experience, when a group shares a criminal objective, do they

tend to discuss that openly and explicitly amongst themselves?

That's the question.

MR. PATTIS: And my objection to that, who cares what his opinion is about groups in a criminal conspiracy? What did he observe here.

THE COURT: He was going to get to that. He's setting the table for that.

MR. PATTIS: He's well beyond setting the table. This is the fourth or fifth or sixth course in a meal that's too rich for the defendants. Well beyond what is preliminary.

MS. HERNANDEZ: And, Your Honor, he's asking a hypothetical. This is a fact witness, not an expert witness. He should not be asking hypotheticals.

THE COURT: Mr. Mulroe, how many questions -- tell me where we are headed in this in general.

MR. MULROE: Your Honor, I think this is the second and final course of this meal. Question that Your Honor read is the original question. There was a leading question sustained. But it's the same question.

MR. PATTIS: Your Honor, there was also a presumption-of-guilt theme in Mr. Mulroe's questioning; when the conspirators communicate and when the -- he was presuming guilt.

THE COURT: No. No. No. He's asking a general question. A general question.

MR. SMITH: Your Honor, we respectfully disagree. There were these questions about the presumption of the people speaking in this way are conspirators. Your Honor, it was not -- everyone at the table was thinking the exact same thing.

THE COURT: I don't think it's a conspiracy among you all.

MR. PATTIS: Well, it could be. You haven't seen our text messages.

I also point out the following: That there is additional prejudicial impact here; he's a former lawyer, former law clerk to a federal judge --

THE COURT: All right. All right. All right. Here's what we're going to do: We're just about at the time for our afternoon break. We're going to take a quick ten minutes and come back and continue.

MR. PATTIS: Yes, sir.

THE COURT: All right.

(Open court:)

THE COURT: Ladies and gentlemen, we're going to take a few minutes for our afternoon ten-minute break for the court reporter. We'll do that and see you back here in about ten minutes.

(Whereupon the jurors leave the courtroom.)

THE COURT: And, special agent, you may step down, just for a moment.

And you all may be seated. So, just while we can use this, we are going to take our break for the court reporter. I'm not -- just --

Madam Court Reporter, I haven't forgotten you.

Why don't we just have -- why don't I just hear from Mr. Mulroe about -- look, I don't think it's improper -- the circuit has drawn a line about improper opinion testimony from agents. I don't think we're crossing that line with this agent saying: Based on my training and experience, people who engage in criminal conspiracies don't -- they often conceal their communications. And as a lead-in to what we're about to discuss.

MR. PATTIS: The form of that question crosses the line, because everything he says is going to then be to support that predicate. And I didn't object the first time the question came up because I thought it was preliminary, to orient him, but I -- I noticed it repeatedly, and then just decided enough was enough.

Because he cannot be permitted to come in and say, the characteristics of the conspirator are X, Y, and Z, based on my skill, training, and experience. And, oh, by the way, these fellows all meet those conclusions.

You know, our position is there was protected speech. The Court has given a curative instruction. The jury will decide what it has to decide, but it's the jury's role, not

this witness's, to tell us what happened here.

THE COURT: Sure.

Mr. Roots, go ahead.

MR. ROOTS: Yeah. Pezzola joins all of these points. What they're trying to do here is get around the Rules of Evidence and suggest that the absence of evidence of guilt is guilt. And so they're putting an FBI special agent on the stand and asking him as his opening, well, isn't it true that guilty conspirators don't create evidence of that; isn't that true?

That's what they're trying to do, is create a fake case out of nothing. Where the evidence doesn't support guilt, they're trying to get this witness to say, oh, yeah, well, this is a case where there doesn't need to be evidence.

THE COURT: Mr. Mulroe, why don't you just preview for me, are there other topics before we take our break? Tell me other things, just so we can do this all at once. You know, so this is a point -- putting aside the question of whether the question was -- you rephrased the question so it wasn't leading. Putting aside issues of leading questions.

You know, he is offering a kind of, I would say, opinion based on his training and experience. And, I would say, it goes pretty much -- pretty close to common sense that people planning a crime don't do so openly, and they may conceal their communications.

Are there any other -- what -- is it a long list of things that you would categorize as in this bucket that we should all just talk about now so you don't have to be interrupted as we go forward?

MR. MULROE: I think not, Your Honor. Mr. Pattis described it as, you know, repeating over and over again. I think that was the second question of that type.

MR. PATTIS: No.

MR. MULROE: The first was: Why is it relevant? The second is what --

THE COURT: I know. It was a little -- I understand, so --

MR. MULROE: From there, we are going to transition to the particulars of this case and what he reviewed and what the sources of those things were. But, I think we are entitled to orient the jury a bit, especially because I foresee that much of the cross and much of the defense theory in this case so far is: There's no plan to storm the Capitol in these chats.

And, so --

THE COURT: So, the reason I, again, went to the break is I just wanted to try to collect all this at once, to see if there was anything else.

Look, you can, in a non-leading way, ask him a question that gets at an answer being, yes, typically, in my

training and experience, people don't openly talk about conspiracies, if that's what you were getting at. I don't think that's -- I think that's not objectionable.

MR. PATTIS: I don't mean to argue about how many angels can dance on the head of a pin. My notes reflect the following --

THE COURT: Mr. Pattis, just take a deep breath.

MR. PATTIS: My recollection was the question was about his familiarity with investigations of criminal conspiracies. It then went to communications among members of communication -- of conspiracies. It then went to investigations of the importance of this in a conspiracy investigation to talk about the nature of the relationships, the hierarchy, who talks to whom. Then, there was the manner in which conspirators sought to accomplish their objective.

So, that's four, and I think there was a fifth, but my notes are unclear.

So, I objected at that point because I thought one question was appropriate to orient the jurors, but it began to feel like a setup so that these categories could be used as the overarching chapter headings for the direction examination. I could imagine the following:

Sir, you mentioned earlier in your testimony that it was important in conspiracy investigation to get a sense of the relationship between peoples. Did you examine these people?

Yes.

And what did you see?

Bingo. Bing. Bing. Bing. Bing.

And, thus, the presumption of innocence disappears with nonprobative evidence.

I understand that they're entitled to try to prove their case, but we're entitled to defend it, and I just don't think this guy gets to give his opinion about what happened. And questions cloaked in the form of opinion testimony are prejudicial.

MS. HERNANDEZ: Your Honor --

MR. SMITH: And, you know, he used the word conspiracy. This is what a conspiracy -- he says when I see these factors an agent, me, the former clerk for a federal judge, this is conspiracy. Now I'll move into those factors.

This is just calling for a legal conclusion from an FBI agent about whether a conspiracy is alleged here.

THE COURT: Ms. Hernandez, your view, and then we'll take our ten-minute break.

MS. HERNANDEZ: Your Honor, and the notion that there's -- they conceal their communications after we've had this witness talk about Telegram and encryption and all of that, it just -- I agree. I objected, too. He is a fact witness. He's here to introduce documents. He's not here to give an opinion. And all this background about having been a

lawyer just adds another layer of prejudice to his testimony.

THE COURT: All right. I don't think we're across the line -- an impermissible line. Maybe there was an objection to leading that might have been sustained to one of your early questions, but, if he's, again, orienting the jury in a way that, frankly, is not -- I mean, you're all right. You're going to have the opportunity to put on evidence about how -- why would people planning such a crime have hired a filmmaker to walk around with them all day?

I get it. But, I know you say that's -- as we were talking about before -- to some degree, just like what we talked about before, that's a non sequitur of the question of whether this is proper under the Rules of Evidence. I just don't think we're anywhere near an improper legal conclusion or anything like that.

MS. HERNANDEZ: In *Moore*, the D.C. Circuit says the government has a way to orient the jury: That's the opening statement. It is not through these FBI agents being super duper FBI agents. I'm a prior law clerk. I'm a prior lawyer. I'm a clean-cut FBI agent.

We're crossing the line, Your Honor. We don't need it in this case, please.

THE COURT: Ten minutes. Ten minutes.

(Recess.)

THE COURT: We're back on the record in criminal

matter 21-175, United States of America versus Ethan Nordean, et al.

THE COURT: All right. I guess before we bring the witness back in, again, the last -- where we left off, the last question, again, I'm going to --

Mr. Mulroe, why don't you just preview to me what -- rather than me go find it, where is your questioning leaving off?

MR. MULROE: I think the question as rephrased was: In your experience, agent, what level of care do members of conspiracies generally use when they discuss the objectives of the group?

THE COURT: The objectives of the conspiracy. Okay.

MR. SMITH: So, "members of a conspiracy" is a legal conclusion. Whether people belong to a conspiracy is not the job of an FBI agent to determine. That's a jury's determination.

THE COURT: Yeah, when he's investigating conspiracies.

MR. SMITH: That he's investigating criminal conspiracies are the subject of the investigation, not are the people in the conspiracy. I think Mr. Mulroe is continuously sort of characterizing it as those guilty people that we're talking about, the subjects of the investigation.

THE COURT: The objection is overruled.

MS. HERNANDEZ: When he's testifying -- and, really,

whatever he thinks is not relevant to his testimony, Your Honor.

THE COURT: The objection is overruled. That he's not calling these people conspirators. Okay? He's not. That's not the question.

MS. HERNANDEZ: My objection is to the relevance of his opinion. It's irrelevant to us. It might be relevant when he's doing the investigation. When he's testifying before the Court, his opinion of what conspirators, criminal or otherwise, do or why they do it is not relevant because it doesn't make it any more likely or less likely that -- any issue of fact in this case. His opinion is not relevant.

THE COURT: Mr. Pattis?

MR. PATTIS: I know you've ruled, sir, but briefly.

I would withdraw my objection, if the form of the question was: In investigating a conspiracy, what factors are important to you?

That begs the question of whether this is a conspiracy. The government is free to do what it will. You've ruled against me, so I hear you and I'll shut up.

THE COURT: Mr. Pattis, I don't want you to shut up unless I order you to shut up.

Look, I don't see any -- I'll go back and look and see --

Mr. Mulroe, members of the -- what level of care do

members of a conspiracy generally use?

I don't know that that's functionally different than the way you asked the question.

MR. PATTIS: Because you've invited me to speak --

THE COURT: I am.

MR. PATTIS: -- and to taunt Mr. McCullough, I think it matters a great deal. I mean, the jury knows and they've been instructed that these folks have been charged with conspiracy. They know what the investigation is about.

But, to say that when -- you know, that it's important in conspiracy cases to do X, Y, and Z, he's told us he's got experience investigating criminal conspiracies. I don't think the government has asked, nor can it, whether those have led to convictions -- we certainly won't ask -- but he's asserting that that is a conspiracy rather than taking steps to produce evidence that may or may not support the case.

And speaking not for my colleagues, but as I hear them, I think that we all have that as an objection here. And, so, we're not suggesting that this witness should be asked: Oh, you came in. And did you notice anything interesting about this case?

He's looking at things that are important in an investigation of this sort, but for him to reach the conclusion that in conspiracies people do X, Y, and Z, and then: Look at what I found here, X, Y, and Z, is to let this man

constructively draw the term out and say: Therefore, these people are conspirators.

THE COURT: I just don't think it's that functionally different to say -- to phrase it as you did. I mean, you know: What do you look for --

MR. PATTIS: In which case, there would no harm in the government agreeing to the proposal.

THE COURT: Well, as I said, the can -- I'm not going to micromanage their case any more than you've asked me to do already and I've done.

Let's bring in the jury.

So, I mean, I think that form of the question would be fine. Mr. Pattis, maybe the government wants to avoid the objection by rephrasing it along the lines you indicated, but I think, functionally, it's the same thing.

MR. MULROE: To be clear, Your Honor --

MS. HERNANDEZ: Can I object to Mr. Pattis' form of the question?

MR. PATTIS: No surprise there. Can we argue it for, oh, half an hour or so, Judge?

THE COURT: So, Mr. Mulroe, the witness is in the room. Do you need to address --

MR. MULROE: I want to be clear, the objection is overruled?

THE COURT: Yes.

MR. MULROE: Thank you.

MS. HERNANDEZ: Your Honor, we've made a lot of objections to the documents that he's going to be introducing. Those are preserved. We don't need to get up and make them.

THE COURT: Any document -- let's put it this way: I'm going to indicate in an oral ruling, whenever we can squeeze it in, sort of the objections that have been made and address them. So, I think that's right. Let's just -- I'll just put on the record right now that that's the case, that I'm going to be ruling on objections that have been made to various exhibits that are going to come in through this witness.

Obviously, any objections that have been made to date are preserved.

MS. HERNANDEZ: Thank you.

(Whereupon the jurors enter the courtroom.)

THE COURT: Everyone may be seated.

And, Mr. Mulroe, you may proceed.

MR. MULROE: Thank you, Your Honor.

BY MR. MULROE:

Q. Agent Dubrowski, before the break we were talking about your experience investigating conspiracies generally.

A. Yes.

Q. Do you happen to remember the last question before we left off?

A. I could use a reminder.

Q. So, in your experience, what level of care do members of conspiracies generally use when they are discussing their shared objectives?

A. It depends on the medium. If the individuals are by themselves, in private, and don't think they're being recorded, they might take less effort. But, certainly --

MS. HERNANDEZ: Objection.

THE COURT: Overruled.

A. But, certainly, members of a criminal conspiracy may take steps to hide the nature of their activities from the public.

MR. SMITH: Objection.

THE COURT: Overruled.

BY MR. MULROE:

Q. Why don't you start over, agent.

A. It depends on the medium. If people are in private and --

MR. SMITH: Objection. Calling for a legal conclusion.

THE COURT: Overruled.

BY MR. MULROE:

Q. If people are in private?

A. And they think that they likely aren't being overheard, they might be explicit in discussing what they're doing. But, it is certainly the case that people may take efforts to hide what they're doing from the public if they're engaged in a criminal conspiracy.

Q. And, agent, I'm going to invite you, if you want, to move the microphone. The base is movable. So, if you can get that nice and close to your face to make sure the court reporter can hear what you're saying.

Now, I want to move to the investigation of the attack on the Capitol on January 6, 2021. Have you taken part in that investigation?

A. I have.

Q. When did you first become involved?

A. I joined this team in April of 2022.

Q. So sometime after the event itself?

A. Yes.

Q. And has there been a particular aspect of the investigation that your testimony here is going to focus on?

A. Yes. I became sort of responsible for reviewing and analyzing the defendants' and others' private communications.

Q. How was it that the FBI came into possession of these private communications?

A. The FBI gets information from a bunch of different sources, but, in this case, through search warrants for individual devises, which were then extracted and used to pull the chats.

Q. So, devices, including cell phones?

A. Yes.

Q. Let me just ask you about some specifics.

Was there a cell phone searched that belonged to Ethan

Nordean?

A. Yes.

Q. Was there a cell phone searched that belonged to Joseph Biggs?

A. No.

Q. Was there a cell phone searched that belonged to Zachary Rehl?

A. Yes.

Q. Was there a cell phone searched that belonged to Dominic Pezzola?

A. No.

Q. Was there a phone searched that belonged to Enrique Tarrio?

A. Yes.

Q. Do you know when it was that that phone of Tarrio's was seized by the FBI or by law enforcement?

A. I do not, not off the top of my head.

Q. And what about phones belonging to other members of the Proud Boys? Did you examine communications taken off other phones as well?

A. Yes, I did.

Q. Agent, in your review of the data from these phones, was there a particular means of communication that was especially important to these defendants related to the events you were investigating?

A. Yes.

MS. HERNANDEZ: Objection as to what was especially important to the defendants.

THE COURT: Sustained as to the form of the question.

BY MR. MULROE:

Q. Was there a means of communication that they used especially frequently when they discussed the events in question?

A. Yes. Telegram.

Q. Did the FBI manage to extract Telegram communications from those phones that we mentioned?

A. Yes.

Q. Did the FBI get any Telegram data by any other means, like by subpoena or search warrant?

A. Not that I'm aware of, no.

Q. Do you happen to know why that is?

A. Telegram is a foreign-owned company, and as a company isn't particularly cooperative with U.S. law enforcement.

MS. HERNANDEZ: Objection, Your Honor.

THE COURT: Overruled.

BY MR. MULROE:

Q. You can answer.

A. Telegram is a foreign company, and isn't particularly cooperative with U.S. law enforcement when we serve them with subpoenas or search warrants.

Q. FBI did manage to get data from the devices that belonged to the defendants and others, though?

A. Yes.
Q. Apart from Telegram, were there other means of communication that you examined?
A. Yes.
Q. What do those include?
A. So, other encrypted apps, such as Signal, iMessage, standard text messages, FaceTime, Zoom, other video chat platforms, as well as phone calls.
Q. Give us a sense, if you would, of the volume of communications that you reviewed. Are you able to estimate about how many separate message threads and chat groups you reviewed in the course of the investigation?
A. Threads and groups across all devices, several hundred.
Q. What about individual messages?
A. Again, across all of the devices in this case, slightly over half a million individual messages.
Q. Out of those slightly more than half a million individual messages, did you find all of those to be relevant to what you were investigating?
A. No.
Q. Tell us about that.
A. So, when we're reviewing an extraction of a phone, it's the full device, right? So as you start looking through the phone, you'll find all sorts of messages and artifacts that have nothing to do with the investigation -- grocery shopping,

talking about schedules, things like that -- so, those all kind of get put to one side, and then you start working through the messages that do appear to be relevant to the investigation.

MR. SMITH: Objection. Calling for a legal conclusion.

THE COURT: Overruled.

BY MR. MULROE:

Q. Agent, are you aware of a distinction between public messages and private messages?

A. I am.

Q. Was there one category or the other that you primarily focused on?

A. I primarily focused on private communications.

Q. Were you, nonetheless, aware of certain public communications that were also taking place at the relevant timeframe by the defendants?

A. Yes.

Q. And were those a primary focus of yours during the investigation?

A. They were not.

Q. Were there still times when you sought intersections between what the conspirators -- or, by what the defendants were discussing privately and what they were posting publicly that --

MR. SMITH: Objection to "conspirators," Your Honor.

MR. PATTIS: Biggs joins.

MR. MULROE: I can rephrase, Your Honor.

THE COURT: Yeah, please rephrase.

BY MR. MULROE:

Q. The people you were investigating, agent, were there times when their public communications helped to shed light on their private communications such that there was intersection between them?

MR. SMITH: Objection. Calling for speculation, defendant's mental state.

THE COURT: Overruled.

BY MR. MULROE:

Q. You can answer.

A. Yes.

Q. Now, among the communications that you reviewed, are you familiar with the set that has been formatted for use in court and marked with exhibit numbers?

A. I am.

Q. And did you review a set of those exhibits in preparation for your testimony?

A. I did.

Q. Agent, I'm going to read you a list of exhibit numbers and ask you whether you reviewed all of those and whether all of them fairly and accurately reflect the communications in question to the best of your knowledge. And I'm going to

apologize in advance. This is a lengthy list, but I'm going to read it in order of exhibit number. And each of these is a number of the exhibit series, then a hyphen and then the particular number.

So, beginning with 500-2, 500-3, 500-5, -6, -8, -15, -34, -40, -66, -69, -72, -74, -79, -81. Again, all in the 500 series.

Then 501-1, 501-2, -3, -4, -5, -6, -7, -8, -9, -12, -13, -14, -15, -16, -17, -20, -21, -23, -24, -25, -31, -39, -40, -41, -45, -49, -50, -53, -56, -57, -60, -62. Again, all in the 501 series.

In the 503 series, 503-1, -3, -5, -10, -11, -13, -17, -18, -19, -23, -25, -26. All in the 503 series.

Then, in the 505 series, 505-1, -3, -6, -11, -12, -16, -17, -18, -20, -21. All in the 505 series.

In the 507 series, 507-1, -3, -7, -10, -11, -12, -13, -16. All in 507.

508-1. Then, 509-1, -2, -3, -4, -5, -6, -11, -15, -16, -19, -21, -23, -24. That was all in the 509 series.

510-1, -4, -6, -8, -9, -10, -11, -17, -19, -23, -26. All in the 510 series.

512-1, -2 -- I'm sorry. 512-1, -3, -4, -5.

514 series, 514-1, -2.

MS. HERNANDEZ: Your Honor, this is a leading question, I believe.

MR. JAUREGUI: Yes, Judge. Judge, it's also compounded.

THE COURT: Ms. Hernandez, your objection is overruled in this instance.

MR. MULROE: Should I start over, Your Honor?

THE COURT: Pardon me?

MS. HERNANDEZ: Your Honor, maybe the agent can recall all these numbers that have just been read to him.

MR. MULROE: 514-1, -2, -3, -4, -6, -7, -9, -10, -12, -17, -20, -21, -22, -33, -34, -35, -36, -37, -39, -47, -62, -63, -64 --

MR. PATTIS: Please slow down.

MR. MULROE: -64, -65, -66, -67, -68, -69, -70, -71, and -72. All in the 514 series.

And 515-3, 517-1, and -3, 518-1, 519-1, 520-1, 521-1, 522-1, -2. 523-1. 525-1, -5, -7.

526-2. 528-1, -1A. 530-1, -2, -3. 531-1.

534-1. 537-16, -19, -23, -27.

538-15, -18, -22. 530-3 --

MR. PATTIS: 530?

MR. MULROE: 530-3, 543-1, 545-1, 546-2, 547-3, 548-1, -2, -8.

BY MR. MULROE:

Q. Now, agent, did you say that you had reviewed a whole bunch of exhibits before coming to court today?

A. Yes.
Q. Did that list of numbers appear to correspond with all the ones you reviewed?
A. Yes.
Q. And tell us, again, are these fair and accurate depictions of the communications that they memorialize?
A. To the best of my understanding.
MR. MULROE: Your Honor, at this time, and pursuant to the Court's ruling of yesterday, we would not yet seek to admit Exhibits 514-62 through 72. All in the 514 series.
MS. HERNANDEZ: Objection, Your Honor. Aspect of it.
THE COURT: Well, just -- we don't even --
Complete your sentence, Mr. Mulroe.
MR. MULROE: So with the exception of 514-62 through -72, we would move to admit all those exhibits.
THE COURT: All right. Let me just hear counsel at sidebar.
(Bench discussion:)
THE COURT: Here's what I propose to do, is that, obviously, I've issued a series of rulings regarding these documents. And, I guess, for starters, all the objections that have been made on the record to all these documents are preserved, number one.
Number two, to the extent any of you -- any one of defence counsel, as one of these is brought up, thinks for some

reason this does not conform to my ruling, for whatever reason, then you're free to object. You should object.

But, subject to all of that, it seems to me I should just conditionally admit the documents so we can move through them. But, obviously, if any defense lawyer sees something that you think doesn't conform to what I've ruled, then you may object and we'll take it down and take it up at sidebar.

Mr. Pattis? Mr. Pattis, you had your hand up.

MR. PATTIS: Yes. Point of clarification for Mr. Mulroe. I stopped him in his recitation. We have 530-1, -2, -3. And then after 530, he went back to 538 and did -1. I wondered whether it was out of sequence numerically. That was a misreading?

MR. MULROE: Let me check, Your Honor.

THE COURT: All right.

MR. PATTIS: 538.

MR. MULROE: I suspect it's just an error in my list, Your Honor.

THE COURT: Meaning, it just -- they're out of sequence, not that you misread it?

MR. MULROE: Correct. 530-1 -- I'm sorry. 530-3, I think I had listed twice.

THE COURT: All right. Okay.

So, Ms. Hernandez?

MS. HERNANDEZ: Your Honor, my objection was to

Mr. Mulroe -- well, in addition to the leading nature, because: Does the witness recall those?

But my second objection was to the -- Mr. Mulroe's statement that pursuant to the Court's ruling, we're not going to introduce this. It sounds like the Court is keeping information out from the jury, and that should not be presented to the jury.

THE COURT: That is true. Very well. But, of course, you all want me to do that. But, I understand the point. I understand your -- I understand. I understand.

MS. HERNANDEZ: Your Honor, this is sort of a spectacle. I'm not sure what we just witnessed. I don't think anybody in this courtroom has ever seen this.

THE COURT: Ms. Hernandez, he read a list of exhibits that they've moved into evidence. That's the way this works. It was a very long list. So, my -- you all heard how I would like to proceed in the interest of time.

Is there any objection to that?

MR. SMITH: Yes, Your Honor. We object on the ground we have to be able to object on the basis of cumulative presentation of evidence. We just heard hundreds of pieces of evidence recited. A lot of it is duplicative.

THE COURT: Mr. Smith, I'll just state for the record, that objection is reserved. If at any time you feel you need to raise that objection, you may do so, and I will

take it up.

So, my suggestion is, I conditionally admit the documents that, I think, conform to my rulings. And we will go forward. Again, if -- I'm going to be watching this, too. But if any defense counsel thinks for whatever reason, you know, we're -- that there's been an inadvertent situation where the government hadn't conformed to those rulings, of course I'll hear your objection.

All right. So, we'll proceed in that way.

(Open court:)

THE COURT: Those documents will be conditionally admitted, the documents Mr. -- were the subject of that very long question.

You may proceed, sir.

BY MR. MULROE:

Q. Agent, that long list of exhibits that I read, do those go up until any kind of stopping point in terms of date and time?

A. Yes. 11:59:59 on January 5th, 2021.

Q. And is it your understanding that you're going to be testifying again, at a later time, about communications on January 6th and afterward?

A. It is.

Q. Agent, I would like to take you to the fall of 2020, before January 6, before the election. Were there any Telegram chat groups in existence at that time that would become relevant to

your investigation?
A. Yes.
Q. Tell us about those.
A. There were two. The first was Official President's Chat and the second was a chat called Skull and Bones.
Q. Describe for us, if you would, what is the Official President's Chat?
A. Official President's Chat was a chat for chapter presidents of Proud Boys's chapters.
Q. And relative to other Telegram groups you looked at in this case, was the Official President's Chat a large or a medium or a small group?
A. It was a large chat.
Q. Do you have a ballpark, about how many people were in it?
A. There were something in the area of mid-60s, I think. I'm not certain on the exact number.
Q. And what type of discussion took place in the Official President's Chat?
A. A wide-ranging discussion. Chapter business. Club business. Politics. Family lives. It ran the scope.
Q. Was the other one you mentioned called Skull and Bones?
A. Yes.
Q. What was the Skull and Bones chat?
A. Skull and Bones was a chat for the Proud Boys's elders. It was much smaller.

Q. And based on your review of the Telegram and other communications, what are the Proud Boys's elders?
A. Based on my review of the communications, they were senior leaders of the organization who had certain roles to play in conducting nationwide Proud Boys' business.
Q. Focusing on the 2020 presidential campaign, remind us, who were the major party candidates for that campaign?
A. At the time, President Donald Trump and Joseph Biden.
Q. And bringing you specifically to the evening of September 29th, was there anything significant to the election happening on that date?
A. Yes. There was a presidential debate.
Q. Was the debate, itself, a topic of discussion in the Proud Boys' group chats that you reviewed?
A. It was.
MR. MULROE: If we could have the screen for the jury. I'm going to publish 514-1.
THE COURTROOM DEPUTY: Are you doing it from the lectern or from the table?
MR. MULROE: Oh, I'm sorry. Yeah, I should have said. From the lectern.
THE COURTROOM DEPUTY: Okay.
BY MR. MULROE:
Q. Can you see the screen, agent?
A. Yes, I can.

Q. Is this one of the Telegram exhibits that you reviewed?
A. Yes.
Q. So given that this is the first one we're seeing, could you just orient us to the structure of how the exhibit --
MR. SMITH: Objection. This is evidence of political commentary, not a criminal conspiracy.
THE COURT: I'm sorry. I'm sorry. There will be no speaking objections, as I have instructed counsel. The objection is overruled.
BY MR. MULROE:
Q. Orient us, if you would, agent, to how the exhibit is laid out.
A. Sure. So, at the top you have the name of the chat. So, in this case, Official President's Chat. To the right is the date of this specific message. These bubbles on the top are bubbles for each of the defendants in this case who were present in the chat. So, in this case, Enrique Tarrio, Ethan Nordean, and Zachary Rehl.
Because the Official President's Chat is large, there is a "plus others," just to indicate that it's not just the three of them in this chat.
Q. And to pause you right there, on other exhibits where the chat groups are smaller, do we have more precise numbers in that bubble?
A. If the chat is a smaller chat, we've endeavored to put the

exact number of additional people who are in that bubble.
Q. All right. Go on.
A. Then, in the actual chart, Time, Name, Message, is -- for Time, it is the timestamp of the message. That timestamp is Eastern Time. Name, this is the Telegram user who sent the message. Underneath that series of numbers is the Telegram ID associated with that specific user. And then the Message is the content of that chat.
Q. And we see two messages up on the screen on 514-1 here?
A. Yes.
Q. Now, this is not the entire extent of the whole President's Chat, is it?
A. No, not at all.
Q. So in terms of the setup of the exhibit, have we omitted certain messages that come before the first message?
A. Yes.
Q. Have we omitted the messages that come after the last message?
A. Yes.
Q. The way these exhibits are set up, are there any messages omitted in between?
A. No. This is a complete chat in between.
Q. So does that go for all of the exhibits we're going to be seeing, that they're always a complete string?
MS. HERNANDEZ: Objection as to leading. Can we stop

the leading, please?

THE COURT: All right. Sustained as to leading.

BY MR. MULROE:

Q. Agent, are there or are there not ever messages omitted in the middle of chat strings?

A. There are not.

Q. So, with that orientation to the format, tell us, who are we hearing from here in the Official President's Chat on 514-1?

A. This is a user named Johnny Blackbeard, who is John Stewart.

Q. And what are the messages he sends on September 29th?

A. He says: This debate is a bloodbath. Cringe as fuck.

Q. Was there something that happens during that debate that was --

MS. HERNANDEZ: Objection. Leading.

THE COURT: You may complete the question, at least, before an objection is heard.

BY MR. MULROE:

Q. Agent, was there or was there not something that happens during the debate that led to a reaction among members of the chat?

MR. SMITH: Objection. Relevance.

THE COURT: Overruled.

A. There was.

BY MR. MULROE:

Q. What was that?
A. President Trump mentioned the Proud Boys in the debate.
MR. MULROE: If we could have the screen just for the witness, please.
BY MR. MULROE:
Q. Agent, I'm going to show you just a few moments of an exhibit marked 1101 -- Government Exhibit 1101, then I'll pause it and ask you whether you recognize it.
A. Um-hum.
(Video played.)
Q. And that is without sound. But based on what you see on the screen, do you recognize what's depicted in 1101?
A. I do.
Q. What is this?
A. This is the presidential debate between Donald Trump and --
MR. SMITH: Objection. This is not a political trial.
THE COURT: Sir, I don't know how many times I have to instruct you that there are no speaking objections. If you have a relevance objection, you may state it.
MR. SMITH: Your Honor, relevance and 403.
THE COURT: I'm not going to instruct you again.
The objection is overruled.
MR. PATTIS: Are we offering the entire debate? I wouldn't object on that grounds. I would like to see it.

MR. MULROE: This is the form of the exhibit that has been produced to the defense. It is a clip of the debate.

MR. PATTIS: Reserving the right to show the rest of the debate or call the debate participants, we will not object.

THE COURT: Do you have an objection, sir?

MR. PATTIS: Yes. The complete debate should be shown so the remark can be placed in context.

THE COURT: All right. It's overruled.

MR. MULROE: Move to admit 1101.

THE COURT: The exhibit will be admitted.

MR. MULROE: And may we publish?

THE COURT: You may.

MS. HERNANDEZ: Sorry, Your Honor. What Exhibit number is this one?

THE COURT: Mr. Mulroe indicated it's 1101.

MS. HERNANDEZ: Thank you, Your Honor.

MR. MULROE: Going to test the sound first.

(Video playing.)

MS. HERNANDEZ: Objection, Your Honor. Move to strike the exhibit.

THE COURT: Overruled.

MR. PATTIS: Make reservation on a motion, Judge.

MS. HERNANDEZ: Your Honor, may we be heard? I'm sorry.

(Bench discussion:)

MS. HERNANDEZ: Your Honor, I didn't recall the whole reference to what the premise is, both from the then-vice president and now-president of the United States, and even from the moderator. That -- it's just highly prejudicial, unduly prejudicial, and, really, minimally relevant.

MR. SMITH: Nordean moves for a mistrial.

THE COURT: Oh, my God. Listen to me. You all knew this was -- I cannot -- I cannot conceive of how you're telling me that you didn't -- I mean, we've been talking about this whole issue, the obvious chats on the -- the obvious exhibits that you all have objected to or not objected to concerning this debate. You've had notice that this exhibit was in play.

So, if you want to talk to me about some sort of -- first of all, the motion for a mistrial is denied.

If you want to talk to me about some kind of instruction, I'm happy to hear it. But, we're going to continue. We're going to -- the exhibit is going to be admitted, and we're going to continue with the trial.

MS. HERNANDEZ: Your Honor, just for the record, the only thing that I understood was coming in was for the president said, Stand by and stand down, or whatever those words were. That's what the government played during their opening statement. This whole notion where Mr. Wallace refers to, you know, white supremacists and then the current-President Biden mentions white supremacists, it's just completely

unnecessarily and unduly prejudicial.

THE COURT: Did you not have a copy of this exhibit?

MR. SMITH: Your Honor, we don't know exactly what seconds the government is going to play in every exhibit. There are hundreds of exhibits. Some of them last 1 hour and 30 minutes. Some of them last ten seconds. We don't know what the government is going to play for Your Honor. The government represented it was going to play one comment: Stand back and stand by.

You just heard a conversation about white supremacy, Donald Trump. A mistrial is appropriate. This is not a political trial, this --

THE COURT: Mr. Smith, stop talking.

MR. PATTIS: Your Honor, how would I --

THE COURT: Just quickly, quickly, Mr. Jauregui.

MR. JAUREGUI: Thank you, Judge.

Judge, the clip that we've seen before made no mention of white supremacists. Wallace was not talking about white supremacists. That's not the clip I remember. I'm going to go back and check, but the clip I had before made no mention of white supremacists.

And I'm going to hand it off to Mr. Pattis.

THE COURT: Mr. Pattis?

MR. PATTIS: I simply join Mr. Smith's motion, sir.

THE COURT: Okay, I think the motion for a mistrial

is denied, number one.

Number two, I believe that -- we'll go back and check, but I believe a large portion of that was what was played in opening, but Mr. Mulroe can correct me if I'm wrong.

MR. MULROE: Your Honor, I think the opening clip might have been a bit shorter. I will represent that this is the only version of this exhibit we have ever produced to the defense. They've had it. They've had an opportunity to review it. It was part of our production.

THE COURT: All right. And it's not -- I mean, I take Mr. Smith's point, that there's been a lot of discovery in the case. This was not a long clip. So, I'll take up whatever -- if you all think -- and, frankly, again, the question ended up -- let me put it this -- well, we can talk about the particulars.

But, let's just proceed. And if there's anything curative that defense wants to do, I'll certainly hear about it when we don't have the jury here.

Yes, Mr. Pattis?

MR. PATTIS: Would the Court consider something like, perhaps, using the curative instruction you gave earlier with respect to distasteful speech?

THE COURT: I don't -- we'll take it up later. We'll take it up later.

(Open court:)

THE COURT: Objection is overruled.

You may proceed, Mr. Mulroe.

BY MR. MULROE:

Q. Agent, after this occurred in the debate, what did you see in the chats?

A. Immediate reaction, jubilation.

Q. I'm going to show you 514-2.

MR. MULROE: And if we could unpublish the screen for just a moment, Ms. Harris.

THE COURTROOM DEPUTY: It's unpublished.

MR. MULROE: All right. If we could publish, again, 514-2.

BY MR. MULROE:

Q. Are we in the same chat here?

A. We are.

Q. And what type of messages do we see starting at 10:10 p.m.?

A. So starting at 1010 p.m., a user named Ty Webb says: Proud Boys, in all caps.

Immediately followed by Metalcow, who says: Shout out.

Greg North Sound Prez says: Who was it?

And then user named Nebraska Red says: Trump told Proud Boys to stand down and stand by.

To which Johnny Blckbeard, who is, again, John Stewart, says: Yoohura, you beautiful bastards.

Q. Was there any engagement by any these defendants on this topic?

A. There was.

MS. HERNANDEZ: Objection. Leading.

THE COURT: Overruled.

BY MR. MULROE:

Q. You can answer.

A. There was.

Q. Showing you 514-3. Are we in the same chat here?

A. Yes.

Q. This just a couple minutes later?

A. This is an immediate continuation, yes.

Q. And scrolling down a bit, to message at 10:12:59, who do we hear from there?

A. That is user Enrique Florida PB, who is Enrique Tarrio, who says: Guys, stand by.

Q. Agent, I want to direct you to -- scrolling back up a little bit, we have a message from George Ghoul Gang Nada at 10:12:24 p.m., with no content in it.

Would you explain to the jury what's happening there?

A. Sure. So if there's an empty message here, it means that the message in the extraction that this was based off of was also empty. There was no content in the message.

Q. Have you or have you not personally reviewed the extractions that are the source of these messages?

A. Pardon me. Could you say that again?
Q. Have you or have you not personally reviewed the extractions that are the source of these messages?
A. I have.
Q. Are those the extractions that Examiner Kate Cain was kind of responsible for checking?
A. Yes.
Q. Apart from Tarrio saying: Guys, stand by, did any of the other defendants --

MR. SMITH: Objection. Sidebar.

(Bench discussion:)

MR. SMITH: Your Honor, pretrial the Court ruled that it would not require the government to hunt and peck for inflammatory, irrelevant commentary that would enrage the jury. We are putting on the record that we have notified every single place in the government's exhibits where there's an inappropriate, inflammatory comment that does not aid any of the -- that does not have any relevance in this case.

We'd asked the Court to redact those statements. It would be a matter of 30 seconds. We could do it for the government. And' we're putting it on the record right now that it says that on the jury screen and it has no relevance in this case whatsoever.

THE COURT: Mr. Smith -- Mr. Smith, I've already indicated -- I've already indicated that all your objections

are preserved, and that's -- and, so -- and, so, if you interrupt one more time with an objection that has already been preserved, I'm going to have to see what measures can be taken. Because I already indicated that that objection was preserved, number one.

Number two, with regard to this document, the government has not even -- did not even elicit it or talk about it. They moved past it.

And number three, with regard to the specific indications, yes, it's up on the screen while we're dealing with your objection that had already been preserved, correct.

And number two -- and number three, with regard to the things that you did point out, I do think it is -- the jury has -- as I indicated, not even during the trial, but pretrial, that the jury has the right to understand how these defendants and individuals talk between each other, and that the use of certain phrases is indicia of how close they are to each other, and that is relevant evidence of a conspiracy, the fact that their relationship is such that they can use certain terms with each other.

So, I've already ruled on this objection. I've gone out of my way to say your objection is already preserved. And, I mean, I don't know what to tell you, but I'm not going to take your invitation to go to sidebar anymore if you're going to bring up things that have already been preserved. I'm

sorry.

Ms. Hernandez, I'll hear from you.

MS. HERNANDEZ: Your Honor, I just wanted to -- since we're at sidebar, I want to inquire, is the government -- is the Court going to allow the government to go and allow the agent to read all these exhibits, or is --

THE COURT: Yes, I am.

MS. HERNANDEZ: -- the exhibit themselves the best evidence --

THE COURT: It is the best evidence, but they get to put on their case.

MS. HERNANDEZ: Okay. And with respect to the ruling that the Court just made, I just wanted to point out that the statement that was made by someone named Heath Hair, that I don't believe has been identified as a coconspirator.

THE COURT: I'm sure that's correct. So in this case, the jury -- beside the point, the jury would never have -- this is -- you all making more ado of this than the jury will. So I'm going to overrule the objection, as I have multiple times before.

Mr. Mulroe, you may proceed.

(Open court:)

BY MR. MULROE:

Q. Agent, other than Enrique Tarrio saying: Guys, stand by, did any of the other of these defendants join in this

conversation about the remark at the debate?
A. Yes.
Q. Going to 514-6.
Are we still in the President's Chat here?
A. We are.
Q. And looking at the message at the bottom of the screen, who is the center of that message?
A. The user Captain Trump, who is Zachary Rehl.
Q. What does Zachary Rehl say to the President's Chat here?
A. He says: Looking at the news, we are clearly brought into the presidential conversation. We have no platform, but will be part of the conversation. Let's hope daddy Trump plays it right.
Q. Was there any discussion in the chat about how to interpret the "Stand back and stand by" comment?
A. There was.
Q. Showing you 514-4.
Who do we hear from here?
A. This is user Nebraska Red, who says: So what the fuck did "stand back and stand by" mean exactly?
Q. And then 514-7.
Who do we hear from here?
A. This is Johnny Blackbeard, John Stewart, who says: I read it as stand by. Don't engage immediately, but be ready to go.
Q. Was that followed by any comment by George Ghoul Gang Nada?

A. It was. He said: I see @NobleLead -- which is Defendant Enrique Tarrio -- visiting the White House soon.
Q. Outside of the President's Chat, was there any discussion of the stand back, stand by comment in any of the other chat groups you reviewed?
A. Yes. In elders.
Q. So, going to Exhibit 500-2.
Did you just call this the elders chat?
A. Yes, I did. The name of the chat is Skull and Bones, but it is the chat for the Proud Boys' elders.
Q. And looking at the date and time, how does this compare to the President's Chat messages we just saw?
A. It's on the same day, approximately the same time.
Q. What do we see discussed --
MS. HERNANDEZ: Objection, Your Honor. And I would -- I would ask for a limiting instruction on this particular chat.
THE COURT: Your objection is overruled.
MS. HERNANDEZ: I would ask for a limiting instruction, Your Honor.
THE COURT: We've discussed that already, and it will be taken up in due time.
BY MR. MULROE:
Q. Agent, walk us through what the elders have to say about stand back, stand by.

A. It begins at 10:21:18. User Chris Cannon Pb says: We are bigger than Jesus.

To which Enrique Florida Pb, Enrique Tarrio, says: Kings.

There's a sort of continued conversation after that.

Q. And as the conversation continues, does any member of the chat say anything noteworthy regarding the leadership dynamic within the Proud Boys?

A. Yes.

MS. HERNANDEZ: Leading, Your Honor.

THE COURT: Sustained as to leading.

BY MR. MULROE:

Q. Does or does not a member of the chat say anything noteworthy regarding the leadership dynamic of the Proud Boys?

A. Someone does, yes.

Q. Scrolling down to the message beginning at 10:37:51 from user Phap. What does Phap say?

A. Phap says: BTW -- and that's slang for by the way -- I nominate @NobleLead -- who's Enrique Tarrio -- for '20 to '21 chairman. I have seen Enrique grow into the position and support his further growth and development.

Q. And let me take this opportunity to ask you, agent, @NobleLead, you said that that's Enrique Tarrio?

A. Yes.

Q. Did we also see the username Enrique Florida Pb, that you

told us with associated with Tarrio?
A. Yes.
Q. Explain that.
A. My understanding is that's the difference between a name saved in someone's phone and the Telegram user handle. So, NobleLead was Enrique Tarrio's Telegram handle. Enrique Florida Pb was how he was saved in the device that this extraction came from.
Q. And so is it or is it not the case that depending whose phone these come from, it might list one name or the other?
A. That is the case, yes.
Q. And are they or are they not both Enrique Tarrio?
A. They are both Enrique Tarrio.
Q. Other than Tarrio and Rehl, do any other of these defendants react to the mention of the Proud Boys at the presidential debate?
A. They do.
Q. Showing you 515-3.

Now, what chat is this?

A. This is a chat call OG Pickleback Crew.
Q. And tell us a bit about the OG Pickleback Crew.

MS. HERNANDEZ: Your Honor, same objection as to Mr. Rehl.

THE COURT: Can I see counsel at sidebar?

(Bench discussion:)

THE COURT: Ms. Hernandez, now it's the same issue with you. Have I not made clear, as many ways as I can, that your objections are preserved?

MS. HERNANDEZ: Your Honor, but I think it's important that -- a limiting instruction is supposed to be given at the time that the objectionable evidence comes in. So, I think it behooves the government to indicate that some of the defendants are not in these particular chats.

Also, I don't want to continue to object on leading, but the government continues to lead, and then points to a particular page after it leads. I mean, Mr. Mulroe might as well have been testifying.

THE COURT: I've sustained your objections along those lines.

As for the limiting instruction, we've talked about this, and I -- first of all, the issue of your client not being in the chat is absolutely clear to the jury based on the testimony that has been elicited already. They can look up and see that he's not there.

So -- but, I don't disagree with you that a limiting instruction might be appropriate, but you all have had notice about this. I will give a limiting instruction on this, but I'm not going to do it when this is a half-baked idea that no one has language for me, in the middle of the testimony.

MS. HERNANDEZ: Can the government be asked to at

least state that not all the defendants are in some of these chats?

THE COURT: They've already elicited that testimony from this witness. All right. The objection is overruled.

(Open court:)

BY MR. MULROE:

Q. Agent, you were just about to tell us about the OG Pickleback Crew chat.

A. Yes. This is a chat that was identified during the review of Telegram chats. It's not a Proud Boys exclusive chat, there are non-Proud Boys in it, but it contains Enrique Tarrio, Ethan Nordean, and Joe Biggs.

Q. And just to erase any confusion, is that indicated by the photos at the top of the page?

A. Yes.

Q. So is Zachary Rehl a member of this chat?

A. He is not.

Q. All right. We see messages -- do we or do we not see messages from a username Planet?

A. We do.

Q. Is that one of the defendants?

A. No.

Q. What does Planet say?

A. Planet says -- again; this is at 10:23: Stand back and stand by. Needs to be shirts @NobleLead for the PBs. Condemn

the PBs. Hahaha, Joe Biden. And Trump's response.

Q. As the discussion continues, do we hear from any of the defendants?

A. Yes. From Joe Biggs.

Q. What does he say?

A. He says: I'm so happy.

Q. Any other defendants?

A. Yes. Ethan Nordean immediately follows and says: He said our name. In all caps with exclamation points.

Q. And are there any further messages or are there not as we continue down the chain?

A. There are.

Q. What do we see?

A. Starting at 10 -- I'm sorry, at 10:57:02 p.m., Joe Biggs says: My phone hasn't stopped reading -- ringing. Apologies.

Q. And, agent, I think you've suggested this, but just to be explicit, who is the person with username Joe Biggs?

A. That is Joe Biggs -- Defendant Joe Biggs.

Q. Who is the person with the username Rufio Panman?

A. The username Rufio Panman is Ethan Nordean.

Q. And I apologize if I missed that, but is OG Pickleback Crew kind of an unofficial Proud Boys chat, the way the Presidents and Skull and Bones are or --

A. It is not --

Q. -- a little different?

A. -- it is not.
Q. More of a social aspect to it?
A. Yes.
Q. Now, staying in the timeframe after the debate but before the election, did politics remain or did it not remain a topic of discussion for the defendants in the private chats that you reviewed?
A. It remained a topic of discussion.
Q. Did you or did you not find any messages showing any of the defendants' attitudes toward the political process?
A. We did.
Q. Showing you 500-15.
So, which chat are we in here?
A. This is Skull and Bones, the elders' chat.
Q. And looking at the date, how does this chat string relate to the date of the election?
A. This is October 4th, 2020, so about a month before the election.
Q. Agent, would you orient us to the context? Where are we picking things up in this exhibit here?
A. So we're picking up this conversation in the middle of a discussion about another Proud Boys -- another Telegram chat called Proud Boys Uncensored.
Q. And what appears to be the problem relating to Proud Boys Uncensored?

A. Proud Boys Uncensored was a Telegram chat that is known for a particularly vitriolic and aggressive messaging, it was a subject of regular conversation in the elders chat.

Q. What suggestion does Enrique Tarrio propose to address this issue?

A. He says that, 3:30:20 p.m.: There's many solutions to this problem. Once thing I've always used to my advantage is plausible deniability. There's a solution that's amicable. We can just say we don't know who runs the PB uncensored channel, and that any other communications that come from any other channel but ours is not our position.

Q. Does any member of this chat group propose a different approach?

A. Yes. Ethan Nordean.

Q. Scrolling down to the message from Rufio Panman at 3:33:56 p.m., would you read that to us?

A. Sure. He says: Why don't we just fash the fuck out so we don't have to worry about these problems anymore; live free or die hard.

Q. Do you know what that word "fash" means?

A. It's short for fascism.

Q. Scrolling down some more, is there another message from Rufio Panman at 3:37:49 p.m.?

A. Yes.

Q. Read us that message.

A. "Politics ain't working for nobody, optics game doesn't work, the left os -- which I'll read as "is" -- destroying our culture and mind fucking our children, our rights are being stripped away, we are censored and banned off every platform, unable to complete on an equal business playing field, our cities are burning down, it's time to fuckin' rage, not play tea time with RINOs."

Q. Do you understand the meaning of that term RINOs?

A. Yes.

Q. What that mean?

A. RINOs is common slang for --

MS. HERNANDEZ: Objection.

THE COURT: You can answer.

A. RINO is common slang for Republican In Name Only.

Q. R-I-N-O?

A. Yes.

Q. What does he say after that?

A. "That's my two cents."

Q. Can I take you to the date of the presidential election, agent? Do you know the date of the 2020 election?

A. November 3rd.

Q. Was there indication in the chats you reviewed whether or not the defendants were following the election.

A. There was.

Q. Moving to 514-9 which chat are we back in here?

A. This is the Official President's Chat.
Q. Tell us the date and time.
A. This is November 4th, 2020, at 12:31:48 a.m. So just after midnight.
Q. Just after midnight following Election Day?
A. Yes.
Q. What does Zachary Rehl say here?
A. He says, Biden is about to concede. Stand back and stand by.
Q. Agent, did Biden in fact concede after this?
A. He does not.
Q. All right. Are you familiar with the public reporting about the election results as they were being reported on election night and the days that followed?
MS. HERNANDEZ: Leading, Your Honor.
THE COURT: Overruled.
A. I am.
BY MR. MULROE:
Q. And so summarize for us, what was being reported as the votes came in after the election?
A. On election night many of the first votes to be counted were election day votes that are more Republican leaning, and then overnight more Democratic leaning votes began to be tallied.
Q. And did the chats you reviewed indicate any reaction by any

of the members of the chats to that reporting?
A. Yes.
Q. Summarize it for us.
A. People immediately began focusing on the concept of a stolen election.
Q. So 514-10, who is the sender of this message?
A. This is John Stewart.
Q. What is the date and time?
A. This is November 4th, 2020 at 8:37 a.m.
Q. So next morning?
A. Yes.
Q. What does Stewart say?
A. "The question now is what happens next. They are going to steal this election."
Q. Was there or was there not any discussion in the chats about how they should respond to a perceived stolen election?
A. There was.
Q. Showing you 514 --
MR. SMITH: Objection to "they." Vague. How did "they" respond.
THE COURT: Sustained.
BY MR. MULROE:
Q. Any indication in the chats about how the defendants who were in these chats, and other members of these chats, believed they should --

MR. SMITH: Objection. Compound.

THE COURT: Sustained.

BY MR. MULROE:

Q. Any indication in the chats about how the members of the chats thought they should respond to the stolen election?

MR. SMITH: Objection. Vague.

THE COURT: Overruled.

A. Yes.

BY MR. MULROE:

Q. Would you summarize for us?

A. There was discussion about how to immediately respond to the election, immediately following this.

Q. So, I'm showing you 514-12. Now, what is the date of this exchange?

A. This is November 6th, 2020.

Q. And which chat are we in?

A. This is Official President's Chat.

Q. What time of day, roughly?

A. Roughly 11 o'clock in the morning.

Q. And walk us through the conversation.

A. At 10:57 a.m. a user named Joseph Quake says, "Okay, genius. What's your plan to stop this from unfolding?" A couple messages later, at 11:04:50, John Stewart says: If you live in one of the swing states in which efforts are underway to steal the election from President Trump, do your part by

calling your state legislature to demand that it selects a slate of Trump loyal electors. And then there's a couple links, the first one to an apparent news article and the second to an apparent legislature look-up for the state of Pennsylvania.

At 11:08 Enrique Tarrio says, Not sit on Telegram. In those swing states get to the election offices. No colors, but bring people.

Q. Was there or was there not any discussion of this topic in Skull and Bones elders chat?

A. There was.

Q. Showing you 500-34, date of this slide, please?

A. This is November 7th, 2020.

Q. What time of day?

A. 11:43 a.m. is when it begins.

Q. Give us, if you would, the first two messages in this chain.

A. User named Angel Valentine says, Just heard Biden won. Damn. So which Tarrio responds: Dark times if it isn't reversed. And if it's reversed, civil war.

Q. Agent, we've been talking about group chats. If I say the phrase, "side chats," would that mean anything to you?

A. Yes.

Q. Tell us what we mean by side chats.

A. It would mean other chats that weren't these group

conversations. So one-on-one chats between individuals, other non-Proud Boys chats, things like that.

Q. Did you or did you not examine any side chats during this timeframe?

A. I did.

Q. And did you or did you not locate any similar types of conversation in those?

A. I did.

Q. Showing you 530-1, who are the participants here?

A. These are Enrique Tarrio and Jeremy Bertino.

Q. So Jeremy Bertino, is he a person we have seen so far in these chats?

A. No.

Q. What is the date of this text conversation between Tarrio and Bertino?

A. This is November 7th, 2020.

Q. Walk us through the messages, please.

A. So the messages begin at 12:36 p.m. Jeremy Bertino texts: Bro. WTF -- what the fuck -- happened?

Tarrio replies with a question mark.

Bertino then says: They called it. Now we have to mobilize. Should we roll out to the state houses?

Tarrio replies: Yes. I'll be available after Sunday.

Q. Moving to the next exhibit, 530-2, same chat string?

A. Yes.
Q. What's the date?
A. This is November 8th, 2020.
Q. Walk us through the messages between Tarrio and Bertino starting at 10:08:23 a.m.
A. At 10:08:23 Bertino says: By the way, were -- which I read as we're -- going to Raleigh this afternoon.

Tarrio replies: Make sure...no colors.

Bertino replies: Why not? Those wheels are already in motion.

And Tarrio replies: The campaign asked us to not wear colors to these events.

Bertino says: Okay.

Tarrio then continues and says: Keep identifying colors to a minimum.

A few minutes later Jeremy Bertino sends a picture of himself wearing what appears to be a black hoodie. It has two gold laurels over the chest, along with a bearded skull.
Q. How does he caption that photo?
A. "Minimum enough. LOL."

Tarrio then replies: LOL you're pushing it.

To which Jeremy Bertino replies with two laughing, cry emojis and says: Where is that envelope? I'm trying to push it.

A few minutes later he sends a picture of another

shirt that says, "Kill a commie for mommy" in large red lettering with a picture of the statue of liberty superimposed over an American flag.

Q. Agent, I want to take you next to the middle of November. Are you aware of whether there was a publicly announced rally in Washington, D.C. during that timeframe?

A. There was. On November 14th.

Q. And based on the way it was promoted, do you have an understanding of what the purpose of that rally was?

A. It was a pro Donald Trump, anti -- it was a Stop the Steal event.

Q. Did you see any discussion of the November rally in the chats before the rally happened?

A. Yes.

Q. Showing you 514-17, what is the date of this slide?

A. So this is November 8th, 2020.

Q. How far before the date of the rally was that?

A. About a week.

Q. And which chat are we in here?

A. We in Official President's Chat.

Q. What is the message that we see?

A. This is a message at 6:57 p.m. from Tarrio who says: Anyone else coming with us to D.C.? Need some heads. Join here only if you're 100 percent sure you're going. And then below that there is a link to a different Telegram chat.

Q. Apart from the group chats, did you also review the side chats during this timeframe?
A. Yes.
Q. Was there or was there not any discussion in advance of the rally in the side chats?
A. There was.
Q. Showing you 530-3, what's the date?
A. This is November 9th, 2020.
Q. And who are the participants?
A. These are the text messages between Enrique Tarrio and Jeremy Bertino.
Q. What does Bertino send to Tarrio at 5:31:34 p.m.?
A. He says: Well, I'm sure on Saturday things are going to get crazy, so we'll have a chance to get on video, us smashing people.
Q. Based on the date of the chat, what would Saturday have been?
A. Saturday was the rally in D.C.
Q. November 14th?
A. Yes.
Q. Moving to after the rally. Was there any indication in the chats after the rally about how any defendant thought things had gone for the Proud Boys at the rally?
A. There was.
Q. Showing you 545-1, what text thread are we in here?

A. This is a text thread between Zachary Rehl and an individual saved in his phone as mom.
Q. What's the date of this?
A. November 14th, 2020.
Q. And what's the time of the first message?
A. 10:10:10 p.m.
Q. So I had said after the rally, but this is actually the evening of the rally?
A. It is the evening of, yes.
Q. Tell us, what are the messages that Zachary Rehl sends to the contact saved as mom in his phone?
A. It says PB is in the streets of D.C. now absolutely beating the shit out of antifa and BLM. You got to get on Parler. I've been sharing videos all night. Man, I wish I was there, Aghhh, exclamation point, exclamation point, LOL.
Q. Does mom respond?
A. Mom responds a minute and a half later, saying: Awesome, with a kissing, winking emoji.
Q. And then what does Zachary Rehl say next?
A. "Sometimes I'm so proud that I'm president of such an awesome organization in one of the largest cities in the country, LOL."
Q. Based on your review of the chats, did you see any expression of things the members of the chats did not like about the November rally?

A. Yes.
Q. 514-20, are we back in the group chat here?
A. Yes, we're back in Official President's Chat.
Q. And what's the date?
A. This is November 16th, 2020.
Q. How far after the rally?
A. A couple days.
Q. Orient us to the context of the discussion where we're picking it up.
A. This is in the middle of a discussion about perceived leadership lapses at the rally.
MS. HERNANDEZ: Objection as to the background.
THE COURT: Overruled. If the witness can testify based on -- overruled.
BY MR. MULROE:
Q. And in terms of background, to be clear, agent, just the preceding messages in the chat, not anything else after those chats.
A. Yes.
Q. All right. Go on.
A. This is part of an ongoing discussion in this chat about perceived leadership failings on the 14th in D.C.
Q. Who is the first person in the chat that we hear from?
A. Johnny Blackbeard, John Stewart.
Q. What does he say?

A. He says: That is certainly a part of it. I want to address the root cause so it doesn't occur again. Once that split happened, quote, leaders, end quote, cropped up all over making horrible decisions that could have gotten someone killed.

He then continues and says: One such leader decided it would be a good idea to take the ten or fewer that were with him and try to, quote, sneak up, unquote on 100 or more antifa.

Tarrio then replies with a cringe, hissing face emoji. Stewart then says: I'm quiet about the autism and even defend it, but when shit like that happens I sit up.

Shortly thereafter Brien James continues the conversation.

Q. Do we hear anything more from Tarrio at the end?

A. He says: Call me in ten.

Q. Now, we obviously have been seeing messages on a screen, correct, agent?

A. Yes.

Q. When there are phone calls, generally speaking, do we have recordings or other records of the contents of phone calls?

A. Generally speaking, no.

Q. Based on your review of the chats, did any of these defendants disavow any of the violence that occurred at the November rally?

MS. HERNANDEZ: Objection to testimony based on his

review of chats that are not in evidence, Your Honor.

MR. PATTIS: Also calling for a legal conclusion. Objection.

THE COURT: Overruled.

BY MR. MULROE:

Q. You can answer.

A. No.

Q. Showing you 525-1. What type of chat are we in here?

A. These are text messages between Enrique Tarrio and Joe Biggs.

Q. What is the date and how does it relate to the date of the November rally?

A. November 16th, 2020. So a couple days after that rally.

Q. Walk us through the messages, beginning with the one from Joe Biggs at 11:32:02 p.m.

A. Biggs says: I'm ready to war.

Tarrio replies: We warred Saturday.

Then Biggs replies: That's a sparring. War hasn't happened yet. I'll let you know when war starts.

Tarrio replies a few moments later and says: I'll be at your house when it does. I can't throw a rock, but I can shoot.

To which Biggs replies: I got thousands of rounds and guns.

Q. Agent, based, again, on your review of the chats, did you

see any evidence of what was fueling this desire for war?
A. Yes.
Q. Showing you 500-40, which chat are we in?
A. We're in Skull and Bones, the elders chat.
Q. What is the date here?
A. This is November 20th, 2020.
Q. Still within about a week of the November rally?
A. Yes.
Q. What's the first message?
A. This is a message from user Chris Cannon PB, who says: I'm one hundred percent with you. There wasn't much of a reason to rally before, other than punching commies. But now there's a real reason. We are months away from gulags. It's now or never. We fight or get locked up.
Q. Agent, what are "gulags"?
A. Gulags are Soviet prisons for political prisoners.
MS. HERNANDEZ: Objection, Your Honor.
THE COURT: Overruled.
BY MR. MULROE:
Q. Would you tell us again?
A. They were Soviet prisons, largely for political prisoners.
Q. Does anyone respond after the message from Chris Cannon?
A. Yes. Rufio Panman, Ethan Nordean. He says: Perfectly said, my brotha.
Q. As we scroll down, what do you see?

A. An empty message from Ethan Nordean, followed by LOL and then a series of empty messages between Chris Cannon PB and Rufio Panman, Ethan Nordean. Then at 4:38:40, Chris Cannon PB writes: Yeah, the guy that sent me the screenshots of that chick talking about the FBI asked me, quote, Why would they come for us, close quote?

I told him, quote, because we don't investigate crimes, they investigate threats. And we are their biggest threat, close quote.

Chris Phillips Proud Boy then replies, LMFAO, right? To which Ethan Nordean says: 100 percent.

Q. I want to now move out of November into December. Was there another publicly announced rally in Washington, D.C. during that timeframe?

A. Yes. On December 12th.

Q. Was there a publicly advertised purpose of the December 12th rally?

A. It was another pro Donald Trump, anti-stolen election rally.

Q. And do the chats reveal any preparation by the defendants for this December rally?

A. They do.

Q. Go to 548-1. Is this -- what chat do we have here?

A. So this is a new chat called East Coast Rally Command.

Q. What is the date that we see that begin?

A. This is November 17th, 2020.
Q. And I don't know whether we've seen a system message yet. But what is the text of the system message at 2:51:52 p.m.?
A. So the text of the system mess is: NobleLead, Enrique Tarrio, created the group DC Planning.
Q. And we see East Coast Rally Command at the top, we see DC Planning in the first message. Is it your understanding whether or not the names of the chat groups sometimes change over time?
A. You can change names of chat groups. They do change over time.
Q. What dos Enrique Tarrio sending to this group at 2:53:56 p.m.?
A. He says this: Chat will be used for all rallies in the East Coast.
Q. What's the next message?
A. "Aaron of the Bloody East, who was an individual named Aaron Wolkind replies: Got it.

And then NobleLead, Tarrio, says: We need to get as organized as possible.

Q. And Aaron of the Bloody East, is he somebody who we are going to hear from again as your testimony continues?
A. Yes.
Q. Directing you to the top, we see face bubbles at the top. So among the defendants in this case, were any of them members

of the East Coast Rally Command chat?
A. Among the defendants, Enrique Tarrio and Zachary Rehl were a part of this chat.
Q. And beyond the two of them, were there -- how many others?
A. Eight others.
Q. So Aaron of the Bloody East and some others?
A. Yes.
Q. Moving next to 548-2 are we in the same chat here?
A. We are.
Q. What's the date of this string?
A. So this is on December 8th, 2020.
Q. What do we have from Enrique Tarrio on December 8th, 2020?
A. So at 4:44:40 p.m. he posts a lengthy message concerning the December 12th rally.
Q. Taking it in parts, what is the first part of the lengthy message from Tarrio?
A. "Word is law by the following members," and then there's a series of names.
Q. And walk us through the names, agent, and tell us, for each one, whether that's a person we've discussed or seen messages from so far?
A. Okay. Noble, NobleLead. Tarrio. Rufio, Rufio Panman. Ethan Nordean. Kyle is an individual we have not discussed. Blackbeard is John Stewart. Zach, Zachary Rehl. Mantis is someone we haven't discuss. Aaron is Aaron Wolkind, who we've

discussed. Biggs is Joe Biggs. Beard is short for Noblebeard, which Jeremy Bertino. And Yut is short for someone we haven't discussed either.

Q. What's Yut's real name?

A. Charles Donohoe, he goes by the name Yut-Yut Cowabunga on Telegram.

Q. I'll ask you the same question I asked about Aaron. Is Donohoe, or Yut Yut somebody that we're going to from some more as we go on?

A. Yes.

Q. Move to the next part of the Tarrio's message to the group, what do we have after the list of leaders?

A. After the list of leaders there is a sort of itinerary for the weekend. It begins at Friday at 10:30 p.m. with a security brief. The location is going to come later. "No colors" is in all caps.

On Saturday there is a 10 a.m. start time at Hotel Harringtons, all colors. At that point Tarrio notes: Rufio -- so Nordean -- will be assuming control at this point, at 11:30 a.m., Freedom Plaza. There's a discussion of joining the crowd there and then of marching out of Freedom Plaza at 12:30 to 12:40.

After that, the itinerary tells members to disburse and go to your hotel rooms -- rest, eat, shower, and regroup yourself. Do not go out on the streets at this time. Don't

try to be a fucking hero.

At 6:30 p.m. the itinerary says: Meet at Freedom Plaza for night march. Try to recruit patriots to join as we enjoy a march through the streets of D.C.

Q. Does Tarrio give any more specifics about what is going to happen at the night march?

A. No.

Q. What's the next part of the lengthy message?

A. A series of rules that individual Proud Boys are expected to abide by during the march.

Q. Let me ask you to just highlight a few of them for us. What's rule No. 1?

A. "Absolutely no colors anywhere in D.C. unless it's Saturday. This will be strictly enforced. If you are seen in colors on Friday night you will be in a heap of shit."

Q. What's rule No. 3?

A. "Do not patrol the streets. Always follow the itinerary. We keep each other safe when were" -- which I read as we're -- "in a big group."

Q. What's rule No. 4?

A. "Always in self-defense."

Q. Rule No. 5?

A. "Do not talk to the media. Send any media inquiries to Noble or Rufio. Not a single fucking interview without our authorization."

Q. So who were the two people that media inquires were supposed to be sent to?
A. Tarrio and Nordean.
Q. Rule No. 7, please.
A. "These rules too much for you, stay the fuck home."
Q. And scrolling to the bottom of this exhibit, agent, in this lengthy message that Enrique Tarrio sends in advance of the December rally, did we see any explicit discussion of violence?
A. No.
Q. Was there any indication elsewhere in the chats about whether or not violence was expected at the December rally?
A. There was.
Q. Going to 548-8, which chat are we in?
A. We're still in the East Coast Rally Command.
Q. The date?
A. December 10th, 2020.
Q. Walk us through the messages beginning at 10:28:27 p.m. from El Jefe?
A. El Jefe begins: I mean, I have a guy who's trying to find every single bit of wiggle room when it comes to weaponry.

Zach Rehl relies: There was a whole thing with guns and Idaho/Montana though.

El Jefe says: Basically he's just like looking at flagpoles or mag lights and S -- three stars, three asterisks -- like that.

John Stewart says: Has he ever faced antifa in a fight before? We don't need weapons, like at all.

To which Rehl says: LMAO.

And Stewart continues: It's a nice force multiplier, but it's unnecessary.

Q. Now, agent, in the longer message from Tarrio we saw there was a phrase that you read to us, "always in self-defense." As you reviewed all the chats in this timeframe, were all of those chats consistent with the idea --

MS. HERNANDEZ: Objection, Your Honor. Leading.

MR. PATTIS: And argumentative. Calls for a conclusion.

THE COURT: You may complete the question and then I'll see if I sustain an objection.

BY MR. MULROE:

Q. Agent, as you reviewed other chats in this timeframe, were they or were they not all consistent with the idea that the Proud Boys going to the December rally would only use force reactively?

MR. SMITH: Objection. Compound.

MR. MULROE: Your Honor, pursuant to the decorum order, I ask that I be permitted to finish the question.

THE COURT: You shall be permitted to finish the question.

BY MR. MULROE:

Q. Agent, I'll start over. Tarrio said: Always in self-defense.

A. Yes.

Q. Based on your review of all the chats in this timeframe, were they consistent with the idea that the Proud Boys going to the December rally would only use force reactively and never proactively?

MR. JAUREGUI: Objection, Judge. If we can come to the phones, please.

MS. HERNANDEZ: Leading.

(Bench discussion:)

THE COURT: Go ahead.

MR. JAUREGUI: Judge, what the government is doing is trying to attribute all these chats, all these different people, people that are not trolls, that are not co-conspirators, directly to my client. It's improper. It's an improper question and it's leading, compound, irrelevant, anything else I can think of.

THE COURT: Throwing it all against wall, I get it.

Mr. -- let me just ask this question of Mr. Mulroe: What is -- what is the answer going to be and what exhibits does this relate to?

MR. MULROE: Your Honor, the answer will be no, and it is to tee up the very next exhibit, which is the same one that's next in the exhibits that we provided to the defense.

It's a side chat involving Zachary Rehl where he talks about a plan to take over a plaza in D.C.

THE COURT: How is that really -- I mean, look, the question was about whether force would be used. You know, as -- I suppose that is force.

MR. PATTIS: I'm --

MR. MULROE: Your Honor. The word I was looking for was raid, raid BLM plaza.

THE COURT: He does say that. Mr. Pattis, what's your response? I see your hand up.

MR. PATTIS: Yes, sir. The response, briefly, is that the jury could draw conclusions, because force is an element here. I don't guess, I know the Court has ruled this admissible for that purpose. But I think the use for which the evidence is to be put is for the jury. And I would -- I would object to the form of the question as leading and calling for a conclusion that is invading the province of the jury. And I think a proper question might be: Were there other emails related to this event? And then let the jury draw the conclusion whether a raid is the use of force.

THE COURT: Ms. Hernandez?

MS. HERNANDEZ: Your Honor, this whole -- the way the government has been cross-examining -- I'm sorry, direct examination is leading, throughout, continuously, and then it points to a particular document. Also, "raid" can have many

meanings, but the preliminary question gives it a meaning that it means only one thing, and that's force. And, three, Your Honor -- and, again, my client did not use any force in December when he was here. And then the third thing, Your Honor, is -- I forgot what the third thing was. Sorry.

I mean, this is -- it's just -- it's very difficult to sit here -- oh, oh, based on all your review of all the messages or whatever that question, implies that he's looking at a lot of stuff that may or may not come in. So, that goes to that whole summary witness issue.

THE COURT: Right. So just to circle back on that point, Miss Hernandez, the reason I didn't sustain your objection there is because there's nothing improper about -- the problem is when opinion testimony is based on things not before the jury. The problem is not, well, factual things about you've reviewed these other messages. The messages have been produced. They are not in evidence, but they have been produced and you are free to say, Look at this message. This says something contradictory.

But the point is that case stands for the proposition that opinion testimony cannot be based on evidence not before the jury, but not -- he can testify, Oh, yes I've seen -- and summarize what he's seen in other -- in other parts of these chats, if it sets up the chats that are in evidence, that's fine.

MS. HERNANDEZ: So, Your Honor, I don't believe -- he's not just testifying to facts, he's testifying to opinion. Because the question is -- if the Court will just allow me, the question is being set up: Have you viewed -- is there any other, you know, support for or against force. That's his opinion, that's not a fact question. And it's -- he keeps -- he continues to be asked, Based on everything you've reviewed. We don't know what -- based on the chats you've reviewed, some of the chats are excludable. Some of the chats -- I'm sorry, some of the chats involve chats that my client is not involved in.

So, the combination of the broadness of the question -- in my opinion, what he is being asked is to give an opinion, because the question implies not did you find anything, but what is your opinion of the content of those chats that may or may not come in.

THE COURT: All right. Here's what I'm going to go. It's 5 o'clock and, so, I'm going to release the jury and we can talk about a few of these. I also want to give you a heads-up, at least the contours of my ruling on the thing we talked about before.

So, let me excuse the jury, we'll have a little bit of a chat and we'll be ready to begin at 9 o'clock tomorrow and pick up right where we left off.

MS. HERNANDEZ: Thank you, Your Honor.

THE COURT: All right.

(Open court:)

THE COURT: Ladies and gentlemen, we'll stop for the day. You should be prepared to begin right at 9 o'clock tomorrow morning. So we'll see you first thing tomorrow morning.

(Whereupon the jurors leave the courtroom.)

THE COURT: You may step down. And you all may be seated.

All right. Couple of matters. So, to put a bow on this last point, I don't think we're near opinion -- I indicated, first of all, that the witness can, without running afoul of the precedent you've indicated, you've referenced before, Ms. Hernandez, testify as to the -- it's only when opinion testimony based on -- that case is only about when a potentially -- when opinion testimony is based on things that are not in evidence, that is a problem.

For him to say, Well, I reviewed some of the other chats and in fact they -- yes, there was a discussion about topic X and now we're -- we walk into the specific statements at issue. There's nothing improper about that. And that's why I didn't sustain that objection, just to make that clear.

On the question on where we left off, I -- look, it is a characterization to some degree, but I hardly think it's in the -- you know, to say is there anything that suggested to

you that there was, you know, force was in play beyond self-defense, I just think it's a characterization that's true, but on the other hand, you all are going to be able to cross-examine him and say is that really force and all the rest. I don't think we're talking about improper opinion.

So, we can -- we'll pick up at 9 o'clock tomorrow. You can have the witness on the stand and we'll get rolling.

On the issue we left off on, earlier, I just want to say, the following: I think -- so, I do think this issue really is about -- I take the objections of the defendants -- I think are reasonable when we talk about the outer bounds of relevance and 403 on this type of exhibit. And I think, you know, part of what the government wants to do is to put these things, these additional exhibits in, you know, to -- as they've said, to let the jury -- to give more context and let the jury look at all these data points and decide for themselves what this term means.

Part of my thinking right now, frankly, is that I think there are five examples of Minecraft being used in the exhibit that I've already admitted. So, I mean, that is a bunch of context already from which the jury can decide one way or the other.

I think the three that I'm -- I'll just -- I'll just tell you all this: The three that I think -- there are a couple of different -- I thought I would have the names right

here, and of course I don't. I think there are -- I think, to me, there are -- most of what the government has proposed, then, because of, I think, the question of who is really the speaker and the fact that it's not these defendants, number one, and the fact that I think there already is a bunch of context for the jury to be able to decide this issue. The only three that I think are in play and that I'm considering some subset of these to be admit, just so you all know, are: Three that involve -- well, two that involve defendants in this case, and one that involves at least a -- a individual -- Charles Donohoe.

So, the two that involve defendants are 514-64 which involves Mr. Nordean -- here it is. There's one that involves directly Mr. Rehl, which is 514-69, and then there is another one that pertains to Mr. Donohoe. So those three I'm weighing whether I think I can let those come in for the limited purpose we've talked about. The two that the defendants -- the one with regard to -- I'll just say this: The one with regard to Mr. Donohoe, actual has -- this is the one where he says "hypothetical" at one point afterward.

So I actually think that one has some value in terms of sort of explaining what that term might mean. Maybe more so than the others. And the other two, for the two defendants, are -- I mean the one that related to Mr. Rehl, it doesn't have -- I think the prejudicial value regarding his is quite

low. He says something like, We need to fight these guys or fight this or something, but it doesn't really suggest necessarily a physical fight.

I mean, part of this is I'm running up against, kind of, how I've drawn the line in terms of -- or, that line on cross-examination of one of the witnesses was kind of blown open a little bit. But, you know, I've been drawing the line about intent and violence to make sure that it was related to election-related things. I know you all have not liked where I've even drawn that line. So, I'm -- I'm loath to let in -- obviously, part of what these exhibits are is linking the word "Minecraft" to conduct the government thinks is illicit or violent.

And so, I do think I've got to weigh, really, how much, really, additional background they really give the jury to interpret that term, with the prejudicial effect, even when we're talking about things directly related to the defendants. We're not talking about, you know, exhibits that have to do with other individuals, whether that's really a -- whether that's really something that meets 403 in terms of what they're being offered for.

So I think those three are in play. I think the others, because they pertain to other people, because they often include sort of very -- a lot of discussion of violence and violence untethered to at least -- sort of hard to tell,

but violence that's not clearly tethered to anything, that's where I am on that. I'm weighing whether those -- whether those three I indicated might come in; the others will not. But that's -- but I do think part of my thinking is, again, there are a number of uses of this phrase, five of them, I believe, in exhibits I've already admitted. And, so, maybe that provides the jury enough -- I'm not sure how much marginal context these other examples really provide before running into a 403 issue on violence and other things.

So that's where I am on that.

MS. HERNANDEZ: Your Honor, the Rehl one refers to COVID, and I believe you've already made a ruling in this case that the COVID references are out.

THE COURT: No. No, I've ruled in a particular document referencing that for the reason it was being offered was out. Now this would be offered for something different, and so that's what I've got to weigh.

MS. HERNANDEZ: Your Honor, I will submit a limiting instruction to the Court. You'll have it tonight -- or some point today or first thing in the morning. I -- I made a lot of objections about Mr. Mulroe's leading nature of his cross-examination -- of his direct examination. I believe it's been leading throughout. And the way -- not only does he lead in the question and then he points to a particular exhibit and then -- the whole process. I'm happy to write to -- you know,

instead of taking the Court's time now, I'm happy -- I'm not happy, but I'll write something to tee it up for the Court. It's just I believe it's completely improper, the way it's been going. But I'll write something.

THE COURT: I wouldn't spend -- I mean, of all the things you could spend your time doing, writing something about leading questions doesn't seem -- doesn't strike me as a super great use of your time.

MS. HERNANDEZ: It's not just the leading, it's the entirety of his examination, is he leads, he asks for opinion, he includes everything you've read. It's the combination of all these items that I believe make it improper.

THE COURT: Use your time as you see fit.

MS. HERNANDEZ: Obviously I don't have any time, my life is -- I don't have a life.

THE COURT: Mr. -- generally speaking, there's been -- it's been very factual, what has come out of this witness's mouth, I'll just say that. And he's perfectly -- he's perfectly permitted to testify factually to other -- about other pieces of these chats, just to provide the context, that have been produced to the defense, that just don't have to -- that just don't happen to be trial exhibits.

Yes, Mr. Pattis?

MR. PATTIS: Just to alert the Court, given the broad nature of this witness's testimony, I know the courts are

generally loath to permit cross-examination on individual witness's political views and so forth, but we intend to go at them, hammer and tongs. I think it's bias. It's clearly relevant within the Sixth Amendment purpose. And given the dramatic reading he's making of these exhibits, I think we have the right to explore this. If the government thinks otherwise, I'm just giving them notice.

THE COURT: Just to be clear, his personal opinions?

MR. PATTIS: Oh, yeah, his personal political opinions and views.

THE COURT: I can't imagine allowing that, but --

MR. PATTIS: I can't imagine you not doing so, consistent with the Sixth Amendment and the law of this case, where presidential debate has been put on, evidence of white supremacy, and so on and so forth. This witness, like any witness, comes to court and we have a robust right to cross-examine him on his bias, and that's never collateral.

I alert the Court to it because I know there will be opposition to it. And, obviously, I live with your ruling, but this is a hill we choose to die on.

THE COURT: All right. You should anticipate me not allowing that cross-examination.

Anything -- Mr. Mulroe?

MR. MULROE: Just on the Minecraft issue, greatly appreciate Your Honor previewing some of your reasoning on

that. I have just one point and then one question.

THE COURT: Um-hum.

MR. MULROE: Ask Your Honor to consider this evening as you think about it, that there are a handful of examples of Mindcraft in the exhibits that we are already sponsoring.

THE COURT: Five.

MR. MULROE: They're very spread out, and I think the difficulty for the government in presenting the evidence in an understandable way is that the jury won't have the benefit of all five of those examples until the very last one.

THE COURT: I'm sorry, can I have everyone at counsel table, please, pass notes instead of speaking.

Yes, Mr. Mulroe?

MR. MULROE: They won't be able to see all of the examples until the last one. Even then they're not going to be able to see them all together in a way that kind of helps them understand the points. So I would ask Your Honor to consider that.

THE COURT: I'll consider that, but I'll quote Ms. Hernandez and say -- she was quoting one of the cases, That just may be what closing argument is for. But, I hear you. I hear you.

MR. MULROE: Thank you, Your Honor. The question is -- I think it was pretty clear, two out of the three exhibits you reference -- I only ask, in terms of the ones that

involve the specific defendants, I know the one with Zachary Rehl, I can think of two that have Nordean in it, one of which he's laughing in response to the term, the other he's using it himself. So we can wait until tomorrow to find out.

THE COURT: The one I think is -- considering was the laughing one.

MR. MULROE: Thank you.

THE COURT: Just to be clear. The other one I can't recall. I can't recall the details. But to me, again, it felt like it didn't make 403. Long story short. All right. We'll see you all at 9 o'clock.

* * *

CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 9th day of February, 2023.

/s/_____

Janice E. Dickman, CRR, RMR
Official court reporter
Room 6523
333 Constitution Avenue NW
Washington, D.C. 20001

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