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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

2

MIAMI DIVISION

3

CASE 04-60001-CR-COOKE

4

THE UNITED STATES OF AMERICA,

5

Plaintiff,

6

vs.

MIAMI, FLORIDA

7

JULY 12, 2007

THURSDAY - 9:00 A.M.

8

ADHAM AMIN HASSOUN,

KIFAH WAEL JAYYOUSI,

9

JOSE PADILLA,

a/k/a "Ibrahim,"

10

a/k/a "Abu Abdullah the Puerto Rican",

a/k/a "Abu Abdullah Al Mujahir",

11

Defendants.

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13

TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
BEFORE THE HONORABLE MARCIA G. COOKE,

14

UNITED STATES DISTRICT JUDGE

15

DAY 40

16

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17

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0005

1 MORNING SESSION

2 COURTROOM DEPUTY: All rise. Court is back in  
3 session.

4 THE COURT: We have two motions before we start with  
5 the jury, defendant Jayyousi's request that the Court take  
6 judicial notice of a material fact and defendant Hassoun's  
7 motion for production of FBI reports related to the criminal  
8 investigation.

9 Mr. Swor, I will start with yours.

10 MR. SWOR: First, Your Honor, I want to advise the

11 Court that something came up this morning with Ms. Pell and I,  
12 and I wanted you to know that there is absolutely no  
13 disagreement about it, so there is no reason for the Court to  
14 take any time about it.

15 With regard to the motion for judicial notice, I filed  
16 my pleadings, I am sure the Court has read them. You don't  
17 need to hear me repeat them again. I don't know if the  
18 government has filed an answer.

19 THE COURT: I have one question, though I may have  
20 more, but I will start with one. Once you have a dispute about  
21 the fact, isn't it kind of difficult for the Court to take  
22 judicial notice of it?

23 MR. SWOR: I don't know that the government has  
24 disputed it. I think the Court can find that it's beyond  
25 dispute. If the Court finds that it's beyond dispute, then the

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1 Court can take judicial notice.

2 THE COURT: Mr. Killinger, are you going to argue this  
3 for the government?

4 MR. KILLINGER: I am, Judge. I wasn't here at the end  
5 of Tuesday's session when you ordered it, but the message I got  
6 was that I needed a response filed by today.

7 THE COURT: I thought we needed to take this up before  
8 the jury started. Am I wrong?

9 MR. KILLINGER: It already is, or will be literally  
10 within the next 45 minutes.

11 THE COURT: Next break, then.

12 MR. KILLINGER: It's a very brief response. If you

13 want to wait, we'll -- read the response.

14 THE COURT: I'll read the response first. Mr. Swartz,  
15 it is your motion for FBI reports related to the criminal  
16 investigation?

17 MR. KILLINGER: Judge, again, my understanding was --

18 THE COURT: You don't have a response for that one  
19 either?

20 MR. KILLINGER: No, it's done and -- that one probably  
21 won't be filed until after the lunch break today.

22 THE COURT: We will squeeze it in some time.

23 MS. BAKER: Your Honor, I would like to renew a  
24 request that may not have been made with adequate precision at  
25 the end of the day Tuesday. We did make a motion for a

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1 mistrial based upon references that Dr. Gunaratna made to 9/11.  
2 I have the transcript cites when he made all those references  
3 and can share them, of course, with Your Honor if you permit me  
4 to put them on the record.

5 In addition, though, we do request that the jury  
6 receive an instruction from you very much along the lines that  
7 you said on day one, which was April 16, 2007. At page 22,  
8 going on to page 24, you discussed the instruction you would  
9 give the jury to make sure that they understood that these  
10 defendants were not on trial for anything to do with 9/11.

11 We believe that after Dr. Gunaratna's  
12 cross-examination by Mr. Swor, and after his redirect, it is  
13 essential that the instruction that you, yourself, laid out at



14 these pages be given because 9/11 has now come into this  
15 courtroom in full flush.

16 THE COURT: I don't think it came in in full flush. I  
17 think there was a reference to it. It went straight to  
18 Dr. Gunaratna's -- what he felt were his credentials in this  
19 matter. He talked about how the U.S. responded or did not  
20 respond after 9/11 in terms of its intelligence capabilities.  
21 There was not any reference made specifically to these  
22 defendants, so I'm not going to say full flush.

23 MS. BAKER: I hear that you don't accept my words and  
24 I certainly --

25 THE COURT: I don't accept the characterization of

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1 full flush.

2 MS. BAKER: I'll withdraw that characterization, Your  
3 Honor. May I state on the record the pages of Dr. Gunaratna's  
4 testimony?

5 THE COURT: You may.

6 MR. SWOR: On 7/10, during Mr. Swor's  
7 cross-examination, at pages 86 to 88, he discussed his  
8 development of a proper counter terrorism facility with the New  
9 York City Police after 9/11. At pages 94 and 95, he discussed  
10 the proactivity of going after terrorist cells that he  
11 encouraged people to do. At 95 itself, he talked about the  
12 wall which precluded going after terrorists until after 9/11.

13 At 97, Your Honor, you did make a ruling at that time,  
14 this was during the lunch break. You stated that you did not  
15 view his testimony as having violated your prior rulings.

16 With all due respect, we take exception to that ruling of Your  
17 Honor's.

18 Then, after lunch, during his redirect, at pages 122,  
19 124, 132 and 136, there were objections, some by myself and  
20 some by Mr. Swor, because Dr. Gunaratna's testimony was beyond  
21 the scope of the indictment and was going into 9/11, and we  
22 think in very inflammatory ways.

23 He basically suggested in one of the ways that he had  
24 suggested in the morning, and really emphasized later, but in  
25 the morning, as Mr. Swartz had pointed out to you during the

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1 lunch break, he had talked about fishing in advance and then  
2 hunting afterward, hunting terrorists. Our case was developed  
3 afterwards. He was, therefore, calling attention to the United  
4 States Government, in hunting terrorists, put these men on  
5 trial. In his afternoon redirect, he picked up similar themes  
6 with respect to the government finally waking up after 9/11 and  
7 going after terrorists.

8 We call Your Honor's attention, as I said, to your own  
9 ruling on April 16, 19 -- 2007, which was the first day of the  
10 trial, in which you said you would advise the jurors that there  
11 are no allegations the defendants participated in the events of  
12 September 11th. Then you said you would remind them of the  
13 requirement that they put aside any emotions related to 9/11,  
14 and decide this case solely based on the evidence.

15 Those two instructions in particular we would ask you  
16 to give at this time.

17 MR. SWOR: Your Honor, I just have a brief comment.  
18 My concern is solely, or principally focused on a volunteered,  
19 unsolicited narrative by the witness during his redirect  
20 examination. Mr. Shipley asked him what I thought was a very  
21 carefully crafted question about his August, 2001 writing in  
22 the James Intelligence Review. The witness ran away with that  
23 and started talking about preparations and, to be honest, I  
24 don't remember the exact verbiage, but I do remember standing  
25 up and advising the Court that I was reserving a motion for

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1 mistrial.

2 The witness on his own, in a narrative, just  
3 effectively said, I told them all about this. Nobody listened  
4 to me. They weren't preparing. He was clearly talking about  
5 the attacks on September 11th. I think it was inappropriate.  
6 It was not solicited by the government.

7 As we heard from the witness, he is a very educated  
8 and experienced witness. I think it was very clear during his  
9 testimony that he was in control of everything he was saying  
10 and I think it was deliberate. I think it was intended to  
11 provoke fear among the jury. It was intended to take them away  
12 from the evidence.

13 Whether the Court grants a mistrial or whether the  
14 Court grants a special jury instruction, I think the Court  
15 ought to notice and recognize the impropriety of that  
16 particular response under all the circumstances, especially  
17 since it wasn't solicited by the government, and the damage it

18 could cause.

19 THE COURT: First of all, I think we addressed this  
20 the other day. I said I was not going to declare a mistrial.  
21 I thought the comments were maybe not what I would have hoped  
22 for, but not beyond the pale in the context in which they were  
23 given. All three attorneys, at that time, requested mistrials  
24 and I said no. I am continuing to say no. I've allowed you to  
25 continue to make your record, but we are moving on.

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1 MR. CARUSO: Your Honor, I just need to briefly  
2 complete the record because I -- I just need to mention two  
3 things that were not mentioned by co-defendants' lawyers,  
4 although I do, of course, adopt and join in their arguments.

5 I want to refer the Court's attention to page 162 of  
6 the transcript from our last day in court. This was a question  
7 asked by Mr. Shipley: Now, so we are clear, what was the  
8 relationship between the Blind Sheikh and Osama Bin Laden?  
9 Dr. Gunaratna goes on to give a very long description. The  
10 particularly troubling part of that description is when he  
11 says, "In terms of their mission, they were compatible. Both  
12 of these people advocated violence. They advocated violence  
13 even against the United States. Very openly Bin Laden called  
14 for violence against the United States."

15 As if that's not enough, Dr. Gunaratna continued,  
16 "Very openly Sheikh Omar Abdul Rahman called for violence  
17 against the United States." There was an objection, there was  
18 a reservation of a motion.

19 First of all, I don't believe Dr. Gunaratna's answer

20 was called for by Mr. Shipley's question. I think it was  
21 prejudicial. This case, as we all know, is charged as an  
22 indictment, a conspiracy to murder, maim or kidnap people in a  
23 foreign country. We have tried very carefully throughout the  
24 course of these proceedings to keep actions within the United  
25 States out of it.

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1 In this particular passage, Dr. Gunaratna in an  
2 unwarranted fashion, squarely put that these men were  
3 advocating acts of violence in the United States. This is  
4 particularly prejudicial to Mr. Padilla because we did not ask  
5 Dr. Gunaratna any questions on cross-examination. Therefore,  
6 we cannot be held to blame for answers he gave on his redirect  
7 examination by the government.

8 So we think this passage, in addition to the ones  
9 cited by Ms. Baker and Mr. Swor, calls for a mistrial, Your  
10 Honor.

11 THE COURT: Thank you very much, counsel. Your record  
12 has been made.

13 MS. BAKER: One more piece for the record. At page 22  
14 of the April 16th date, you stated in your words: Any idea  
15 through inference or otherwise that these defendants are  
16 connected to 9/11 is not available to the government in this  
17 case, quote, unquote. We thought you made a judicious and  
18 appropriate ruling. You said at that time that you would  
19 instruct the jury with respect to not taking 9/11 into account.

20 We just want to make it very clear that we are asking

21 at this time, we think it's appropriate because Dr. Gunaratna  
22 really talked about 9/11 repeatedly. We really urge you to  
23 take an opportunity whenever you have time to look at the  
24 transcript of that date, April 16th, and provide us with an  
25 instruction now, mid trial, that follows through on what Your  
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1 Honor indicated on that date.

2 THE COURT: Thank you.

3 MR. SHIPLEY: Thirty seconds to one minute, Your  
4 Honor. Just so the record is clear --

5 THE COURT: Thank you. Is the government prepared  
6 with its next witness?

7 MR. NATALE: Your Honor, there is a motion that I need  
8 to take up. I was just presented with a document which the  
9 government plans to have their expert witness opine on. That  
10 document, although it is in evidence, was not mentioned in his  
11 report.

12 THE COURT: Who is the witness and what's the report?

13 MR. NATALE: It is Mr. Gerald LaPorte, who is their  
14 ink expert. In his report, and I have a copy of it, there is  
15 no mention of the exhibit which he is now going to opine on. I  
16 think that it puts us at a distinct prejudice because we  
17 previously had done investigation on this for certain purposes  
18 and we relied on what they said he was going to talk about.  
19 It's not in here.

20 I have asked on a number of occasions were there --

21 THE COURT: What is he supposed to say today?

22 MR. NATALE: He is supposed to, from what I gather,

23 comment about another piece of paper, another document which is  
24 in Government's Exhibit 400. He is going to give an opinion.

25 I don't even know what the opinion is. Evidently, according to  
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1 the prosecution, they tell me this morning that they are going  
2 to show him this document and ask him to opine about that  
3 document.

4 THE COURT: What's the document?

5 MR. SHIPLEY: Judge, maybe I can clarify this. This  
6 is a document in evidence. It's one of the pages in the  
7 binder. It is, in fact, specifically referenced in the report.  
8 It is his exhibit, Mr. LaPorte uses the number K26, which  
9 corresponds to the Bate's number page in the binder AFGP 2002  
10 80333600193.

11 THE COURT: So the defense was aware that this witness  
12 had opined on this document?

13 MR. SHIPLEY: That this is one of the pages that he  
14 looked at, so that's clearly in the report. Of course, the  
15 report --

16 MR. NATALE: Your Honor, may I give you a copy of the  
17 report?

18 THE COURT: Show me the report, and then show me the  
19 Bates document that corresponds to it. If there's a Bates that  
20 corresponds to it, there's no issue.

21 MR. NATALE: Your Honor, here it is. He said that he  
22 looked at all of these documents, but in his conclusion, he  
23 didn't give any conclusion regarding that document. He only

24 gave a conclusion as to Q1 through 5. He did not give a  
25 conclusion as to this particular document. We have had no  
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1 notice of it.

2           There is no notice that says he is going to opine X on  
3 document K26. He says he is going to opine on documents Q1 to  
4 5, but he doesn't say that he is going to opine on document  
5 K26.

6           MR. SHIPLEY: Your Honor, under Rule 16, Rule 16  
7 requires a summary of expert testimony. The fact that we gave  
8 them actually the full report is more disclosure, not less. He  
9 specifically referenced this page in his disclosure, as you can  
10 see in the report. It's obvious to anyone taking a look at it.

11           All I was going to ask him about it is, this page,  
12 upon even the observation of anyone in that jury or anyone in  
13 this courtroom, is a page that has multiple inks on it. If I  
14 may approach, Your Honor?

15           THE COURT: Yes.

16           MR. SHIPLEY: This isn't even an expert opinion. A  
17 lay person can recognize there are two colors of ink writing on  
18 that page. That's all I am going to ask him about. It's not  
19 even an expert opinion. I could bring in Mr. Natale or  
20 Mr. Kavanaugh or anyone off the street to say, does that look  
21 like two different inks?

22           Aside from the fact the disclosure of this page was  
23 clear and an available topic that they should have looked at,  
24 because this is what --

25           THE COURT: How does this number correspond to what is



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1 in the report? I'm looking at the bottom of the page.

2 MR. SHIPLEY: Sure. May I approach, Your Honor?

3 THE COURT: Yes.

4 MR. SHIPLEY: He used a numbering system of K1 through  
5 K30. In his report he identifies K26 as the number I gave  
6 earlier, AFGP 2002 8003360010093. That's the Bate's number on  
7 the bottom of that page. He just, for his own purpose, used a  
8 different system.

9 MR. NATALE: Your Honor, Rule 16(f) talks about the  
10 reports and what we have a right to proceed.

11 THE COURT: What I am trying to figure out,  
12 Mr. Natale, is, what about this didn't let you know he was  
13 talking about this?

14 MR. NATALE: Because if we had known he was going to  
15 talk about that particular document, we could have had our  
16 expert do an analysis of the inks on that and would be able to  
17 show that there were different inks in this case. This is a  
18 very big, important point.

19 In fact, we have had an expert do an evaluation on  
20 this, not on this form, but on other forms, do a duplicate of  
21 what the government did. So, now they are wanting to bring  
22 in -- if they wanted to argue, since it's in evidence, if they  
23 want to argue --

24 THE COURT: What he is going to say, if I am  
25 understanding this, is, folks, these are two different colors.

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1 That's not a technological thing.

2 MR. NATALE: I understand that. But, Your Honor, we  
3 would have been able to have done our technological report on  
4 it to --

5 THE COURT: To say what, they are the same?

6 MR. NATALE: No, but to say that maybe they are  
7 different in some other way than the other inks that are  
8 involved in this case. We gave strict notice as to what people  
9 were going to ask. If it's so obvious, the government can say,  
10 look through the blue binder and you can see that for some  
11 other reason -- now, I don't know why it's probative that there  
12 are two different inks on this page, why that's even probative  
13 or relevant in this case.

14 THE COURT: On this one, once again, Mr. Natale, we  
15 have to agree to disagree. I believe the government has  
16 complied.

17 Mr. Shipley, is that your first witness?

18 MS. PELL: No, Your Honor.

19 THE COURT: Can we get a witness?

20 MS. PELL: Yes, Your Honor, she is right outside.

21 MR. CARUSO: We were here at 9:00, Your Honor. We  
22 were waiting for the government.

23 THE COURT: Witness, please. Jury, please.

24 [The jury enters the courtroom].

25 THE COURT: Good morning, ladies and gentlemen.

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1 Please be seated.

2 COURTROOM DEPUTY: Do you swear or affirm the

3 testimony you are about to give is the truth, the whole truth  
4 and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE COURT: Please state your full name, and spell  
7 your last name.

8 THE WITNESS: Chris Louella Hoffman, H-o-f-f-m-a-n.

9 CHRIS HOFFMAN, GOVERNMENT'S WITNESS, SWORN

10 DIRECT EXAMINATION

11 BY MS. PELL:

12 Q. Good morning, Ms. Hoffman.

13 A. Good morning.

14 Q. Robin, who is sitting next to you, has to take down  
15 everything you say, so you may want to pull the microphone a  
16 little close to you so we make sure we can hear you.

17 A. Okay.

18 Q. Ms. Hoffman, what do you do for a living?

19 A. I work for the Department of Defense.

20 Q. What do you do at the Department of Defense?

21 A. I am a division chief in charge of the data and analysis  
22 programs division at the Defense Manpower Data Center.

23 Q. What is the data and analysis programs division at the  
24 Defense Manpower Data Center?

25 A. It is the division responsible for receiving personnel and

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1 training data from all of the military services and components  
2 to a centralized database to supply programs with that  
3 information.

4 Q. So, the organization you work for is essentially a  
5 component of the Department of Defense?

6 A. That's correct.

7 Q. What is its primary function for the Department of Defense?

8 A. Its primary function is to be a central database of all  
9 military and military affiliated individuals, including DOD  
10 civilians who work for the military or have worked for the  
11 military, and to provide benefit eligibility for health care  
12 and other benefits.

13 Q. In order to accomplish this mission for the Department of  
14 Defense, does your organization or component maintain any  
15 particular type of database?

16 A. We maintain a database on all personnel who have been in  
17 the Department of Defense since 1985.

18 Q. Does that database include both civilian, enlisted and  
19 officers in any service branch of the United States military?

20 A. Yes, it does.

21 Q. Now, does this database have a particular name?

22 A. The central database is called the Defense Enrollment and  
23 Eligibility Reporting System, or DEERS is the acronym for it.

24 Q. You previously testified that this DEERS database has been  
25 operational since 1985?

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1 A. Correct.

2 Q. How is it that your component collects materials to put  
3 materials in the database?

4 A. We receive daily updates from each of the service  
5 components to update that database.

6 Q. Do you update this database and maintain these records in  
7 your regular course of business?

8 A. Yes, we do.

9 Q. Do you use the database in your regular course of business  
10 to perform the duties that your component is required to  
11 perform?

12 A. Yes, we do.

13 Q. Can this database tell you if a particular individual has  
14 been employed by the Department of Defense, or a member of any  
15 member of the Armed Services since 1985?

16 A. Yes, it can.

17 Q. Now, as part of your duties as chief of the division, are  
18 you or your employees ever asked to determine if someone has  
19 ever served in any branch of the military in the United States?

20 A. Yes.

21 Q. And you have done that before?

22 A. Yes.

23 Q. Were you asked to determine if you could find a record of  
24 service for someone in connection with this case?

25 A. Yes, we were.

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1 Q. And what name were you asked to search?

2 A. Jose Padilla.

3 Q. Can you spell that for us?

4 A. J-O-S-E, P-A-D-I-L-L-A.

5 Q. Now, when you run a search for a name, do you just run a  
6 name, or do you often require additional information?

7 A. We require additional information.

8 Q. What type of information do you usually require or request?

9 A. Social Security number and date of birth.

10 Q. Now, in connection with the name Jose Padilla, did you have  
11 a Social Security number associated with that name that you  
12 used to run your search of Jose Padilla to determine if there  
13 were any prior military service?

14 A. Yes, we did.

15 Q. What was that Social Security number?

16 A. 330-66-3070.

17 Q. Now, did you also use a date of birth in conjunction with  
18 the Social Security number you just testified about and the  
19 name Jose Padilla to run through your database to determine if  
20 there were ever any prior military service?

21 A. Yes, we did.

22 Q. What was that date of birth?

23 A. October 18, 1970.

24 Q. When you ran the name Jose Padilla, with the Social  
25 Security number 330-66-3070, and the date of birth October 18,

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1 1970, what, if anything, did your search tell you?

2 A. That he had no prior military service or DOD civilian  
3 service.

4 MS. PELL: With the Court's permission, I am going to  
5 project a page from Government's Exhibit 408 in evidence.

6 THE COURT: Proceed, please, counsel.

7 BY MS. PELL:

8 Q. Ms. Hoffman, are you able to see this document from where  
9 you are sitting?

10 A. Yes.

11 Q. Do you see a Social Security number on this document?

12 A. Yes, it's in block 6.

13 Q. Can you read that Social Security number?

14 A. 330. I am having trouble with that next digit. 3070.

15 Q. Does that appear to be the same Social Security number that  
16 you used in your search?

17 A. Yes.

18 Q. Do you see a date of birth on this document?

19 A. Yes.

20 Q. What is that date of birth?

21 A. 10/18/70.

22 Q. Is that the date of birth that you used in your search?

23 A. Yes.

24 MS. PELL: With the Court's permission, I would like  
25 to project a page from Government's Exhibit 403TR that is in  
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1 evidence.

2 THE COURT: You may.

3 BY MS. PELL:

4 Q. Ms. Hoffman, I ask you to take a look at Government's  
5 Exhibit 403TR. Do you see a date of birth in the top portion  
6 of this exhibit?

7 A. Yes.

8 Q. What is that?

9 A. 10/18/1970.

10 Q. Is that the date of birth that you used when you ran your  
11 search?

12 A. Yes.

13 Q. Now, Ms. Hoffman, I direct your attention, please, to  
14 another page of Government's Exhibit 403TR, and direct your  
15 attention to the middle portion of the document. Do you see  
16 where it says "military level"?

17 A. Yes.

18 Q. Is there a question about whether this individual has ever  
19 worked in the military type environment before?

20 A. Yes.

21 Q. What is the answer given?

22 A. No.

23 MS. PELL: Your Honor, we have no further questions at  
24 this time.

25 THE COURT: Any questions of this witness from

0024

1 Mr. Hassoun?

2 MR. SWARTZ: No, Your Honor.

3 THE COURT: Any questions of this witness from

4 Mr. Jayyousi?

5 MR. LOUIS: Yes, Your Honor.

6 CROSS EXAMINATION

7 BY MR. LOUIS:

8 Q. Good morning, ma'am.

9 A. Good morning.

10 Q. Can you please tell the jury what a DD 214 is?



11 A. It's the separation document from military service.

12 Q. That would include the length of service?

13 A. Yes.

14 Q. The training, awards?

15 A. Yes.

16 Q. Honorable, dishonorable, that type of information?

17 A. Yes.

18 Q. Were you asked in this case to confirm that Kifah Wael

19 Jayyousi served in active duty from 1985 to 1988 in the United

20 States Navy?

21 MS. PELL: Objection.

22 THE COURT: Basis?

23 MS. PELL: Hearsay, relevance, beyond the scope.

24 THE COURT: Approach, please.

25 [Proceedings at sidebar follow]:

0025

1 THE COURT: Do you want me to have her stick around

2 and wait for their case?

3 MS. PELL: No, Your Honor. What Mr. Swor and I

4 discussed this morning, this was the issue, was whether they

5 were going to ask if she made a search to determine whether

6 Mr. Jayyousi was in the military. What I specifically told

7 Mr. Swor is that I would object to the proffering of this

8 information through her without laying a foundation. If he

9 asked her if she ever looked, she would say no.

10 What Mr. Louis did is proffer information that

11 Mr. Jayyousi did serve in the military, which we don't dispute,

12 but that's not proper through this witness when they don't ask  
13 her if she searched.

14 THE COURT: Rephrase, Dory. Just talk about whether  
15 or not she searched. Objection sustained as to form.

16 [Proceedings in open court follow]:

17 THE COURT: Objection sustained as to form. Rephrase,  
18 Mr. Louis.

19 BY MR. LOUIS:

20 Q. Let me go back. Can you please tell the jury what  
21 information would be on that form?

22 A. Beyond what you said, it would have the date of the actual  
23 separation and which service branch he served in.

24 Q. Whether it was active or inactive reserves as well?

25 A. Yes.

0026

1 Q. Were you asked to search to determine whether or not  
2 Dr. Kifah Wael Jayyousi ever served in the United States Navy?

3 A. No.

4 MR. LOUIS: Thank you. No further questions.

5 THE COURT: Counsel for Mr. Padilla, any questions?

6 MR. CARUSO: No thank you, Your Honor.

7 THE COURT: Any redirect?

8 MS. PELL: No, Your Honor.

9 THE COURT: Thank you very much, you are excused,  
10 ma'am.

11 MR. SHIPLEY: At this time, Your Honor, the United  
12 States calls Jerry LaPorte.

13 THE COURT: Mr. Shipley, how long do you anticipate

14 this witness would take on direct?

15 MR. SHIPLEY: I wouldn't think more than a half hour.

16 THE COURT: We are going to take a brief break. I  
17 understand through Ivan that you didn't have a chance to submit  
18 your lunch forms. To make sure they are ready for you, I am  
19 going to excuse you for five minutes to fill out those forms  
20 and we are going to come right back.

21 [The jury leaves the courtroom].

22 THE COURT: Mr. Shipley, I apologize. We promised the  
23 vendor that we would get the forms by 10:30.

24 MR. SHIPLEY: That's fine.

25 [A brief recess was taken].

0027

1 [The jury returns to the courtroom].

2 THE COURT: Mr. Shipley, call your next witness.

3 MR. SHIPLEY: Gerry LaPorte will be the United States'  
4 next witness.

5 COURT REPORTER: Do you swear or affirm the testimony  
6 you are about to give is the truth, the whole truth and nothing  
7 but the truth, so help you God?

8 THE WITNESS: I do.

9 THE COURT: Please state your full name for the  
10 record, sir, and spell your last name.

11 THE WITNESS: Gerald, G-E-R-A-L-D, LaPorte,  
12 L-A-P-O-R-T-E.

13 GERALD LAPORTE, GOVERNMENT'S WITNESS, SWORN

14 DIRECT EXAMINATION

15 BY MR. SHIPLEY:

16 Q. Good morning, Mr. LaPorte.

17 A. Good morning.

18 Q. Who do you work for?

19 A. I work for the United States Secret Service.

20 Q. Now, people know the Secret Service for protecting the  
21 President, but does it also do some other things?

22 A. Yes, we do.

23 Q. What division or group are you in in the Secret Service?

24 A. I am employed with the forensic services division.

25 Q. Can you tell the jury, what is forensic services?

0028

1 A. We provide services of a forensic nature, of course,  
2 whenever evidentiary materials are submitted and there is a  
3 request to conduct any kind of forensic examination.  
4 Typically, our division handles just about anything related to  
5 documents, paper related things, or other types of documents,  
6 like credit cards, travelers checks, identifications. We  
7 typically handle everything that does not include currency or  
8 Treasury obligations. We have another division that handles  
9 that.

10 Q. Forensic means what?

11 A. Forensic typically means, or implies that a request is made  
12 to conduct some sort of physical or chemical examination with  
13 relation to a piece of material that has been obtained from a  
14 crime.

15 Q. Now, what specifically do you do as part of the forensic  
16 services division?

17 A. I am a senior document analyst, and I have is sub specialty  
18 in chemistry.

19 Q. How long have you been employed by the Secret Service?

20 A. I have been employed for six years.

21 Q. Always as a document examiner?

22 A. Yes, sir.

23 Q. Do you do work just for the Secret Service or also for  
24 other law enforcement agencies?

25 A. We have some unique resources, so we, on a regular basis,  
0029

1 conduct examinations at the request of other law enforcement  
2 agencies.

3 Q. Does that include the FBI?

4 A. It does, yes.

5 Q. Now, is there a particular type of document analysis that  
6 you do?

7 A. Yeah, my specialty revolves around the examination of inks  
8 and papers.

9 Q. What kind of documents do you analyze?

10 A. I analyze a variety of documents, anything from kidnapping,  
11 threatening and extortion letters, counterfeit documents, such  
12 as drivers identifications, travelers checks, birth  
13 certificates, that sort of thing, financial agreements, the  
14 whole gamut of -- anything that you could imagine would be a  
15 document.

16 Q. What is the purpose of your analysis?

17 A. Typically, the purpose of my analysis is usually to try and

18 determine how the document was produced, where it may have  
19 originated from, and often times the authenticity of the  
20 document which, in most cases, relates to the date that it was  
21 produced. For someone, if someone alleges that a document was  
22 produced in 1999, it would be submitted to us to try and  
23 determine if it really was produced in 1999.

24 Q. Have you heard the term "questioned document"?

25 A. Yes, I have.

0030

1 Q. Is that a term that you are familiar with in your work?

2 A. Yes.

3 Q. What does that mean in the context of your work with the  
4 Secret Service?

5 A. First of all, that's a very common term that is used  
6 generically throughout our community. Typically, it just means  
7 a document that's submitted for examination where the submitter  
8 is trying to ascertain information about the document.

9 Q. Can you tell the jury a little bit about your background  
10 now? Did you attend college?

11 A. Yes, I did. I have a bachelor's of science degree, with a  
12 major in biology. I also have a bachelor's of commerce degree  
13 in business administration, both of those were from the  
14 University of Windsor in Windsor, Ontario, Canada. Then I  
15 attended graduate school at the University of Alabama,  
16 Birmingham, and I obtained a master's of science degree in  
17 forensic science from there.

18 Q. Have you had experience in your career with forensic

19 analysis?

20 A. Yes, I have.

21 Q. Can you tell the jury a little bit about that?

22 A. Yeah, I spent three and a half years as a forensic  
23 technician, autopsy assistant, working in a medical examiner's  
24 office. I then spent two years as a supervisor. My title  
25 there was forensic and clinical toxicology specialist, in a

0031

1 private laboratory just outside of Dallas, Texas. I then spent  
2 three and a half years as a forensic drug chemist, which is  
3 usually the individual that examines substances that are  
4 suspected to be controlled substances, like cocaine and  
5 marijuana. Then I've spent the past six years with the Secret  
6 Service.

7 Q. Your time with the Secret Service for the past six years,  
8 this has been doing document analysis?

9 A. That's correct.

10 Q. By the way, are you a handwriting analyst?

11 A. No, I am not. I do not do handwriting examinations.

12 Q. That is not an area of your expertise?

13 A. That's correct.

14 Q. What kind of specialized training or education have you  
15 received to become a document analyst?

16 A. In addition to my educational background, and to my  
17 previous work background, which was very chemistry related, I  
18 underwent a one year intensive training program with the Secret  
19 Service and successfully completed that.

20 Q. The chemistry background that you mentioned earlier, did  
21 that also -- is that something you use in your document  
22 analysis work?

23 A. Yes, that background carries over into my everyday work.

24 Q. Do you have any certifications or professional affiliations  
25 in your field?

0032

1 A. I am a member of the American Academy of Forensic Sciences.  
2 I am also a member of the Mid Atlantic Association of Forensic  
3 Scientists. I am a member of the American Society for Testing  
4 Materials. I'm a regular participant in the Scientific Working  
5 Group for Document Examiners.

6 Q. Have you received any honors or awards in your career?

7 A. Yes, I have. I received the Forensic Scientist of the Year  
8 award from the Mid Atlantic Association of Forensic Scientists  
9 in 2005.

10 Q. Have you been accepted as an expert witness before in the  
11 area of document analysis?

12 A. Yes, I have.

13 Q. Have you also testified before that as an expert with  
14 regard to other kinds of forensic analysis?

15 A. Yes, I have.

16 Q. Any of those in Federal Court?

17 A. Yes.

18 Q. Have you made any publications or given any lectures on the  
19 subject of document analysis?

20 A. Yes, I have published six or seven papers in peer reviewed  
21 journals, and then I have also conducted well over 50 training



22 seminars and lectures in ten different countries, typically to  
23 other law enforcement agencies to do specialized training, or  
24 to professional groups.

25 Q. Any guess as to how many documents you have analyzed over  
0033

1 the course of your career, just talking about Secret Service?

2 A. Thousands.

3 Q. In your job, do you ever do analysis of the kind of ink  
4 that appears on a document?

5 A. Yes, I do.

6 Q. How about the type of printing or machine-generated  
7 printing on a document?

8 A. Yes.

9 Q. Do you also do analysis of the indentations that are made  
10 from writing on a piece of paper?

11 A. Yes.

12 Q. Those are all part of the analysis that you conduct in your  
13 job?

14 A. That's correct.

15 MR. SHIPLEY: Your Honor, at this time the United  
16 States would offer Mr. LaPorte as an expert in the area of  
17 document analysis.

18 MR. NATALE: If I may voir dire briefly?

19 THE COURT: Briefly counsel.

20 VOIR DIRE EXAMINATION

21 BY MR. NATALE:

22 Q. Do you have this thing called a curriculum vitae, sort of

23 like a resume?

24 A. Yes, that's correct.

25 Q. Are you the same Gerald LaPorte who wrote an article called  
0034

1 The Evaluation of Matching Unknown writing Inks with the United  
2 States International Ink Library?

3 A. Yes, that's my article.

4 Q. That's you. You said you testified in other Federal Courts  
5 as an expert?

6 A. That's correct.

7 Q. Would that be in the case of United States versus Hector  
8 Rios on May 22nd, at approximately 9:30 a.m., in the year 2006?

9 A. I am not sure about that. Where was that trial?

10 Q. In Puerto Rico.

11 A. Yes, I did testify in Puerto Rico. I am not quite sure --  
12 there were several defendants in the case.

13 Q. Yes, about five or six.

14 A. Yes.

15 Q. You testified in that case?

16 A. Yes. Once again, I am not familiar with the defendants,  
17 but I did testify in Puerto Rico.

18 Q. Forget about the defendants. You testified in the case?

19 A. I assume so, yes.

20 Q. You put it on your CV, right?

21 A. Yes.

22 MR. NATALE: Thank you. No problem.

23 THE COURT: The witness is accepted. You may

24 continue, counsel.

25 BY MR. SHIPLEY:

0035

1 Q. Mr. LaPorte, did you examine any documents in this case?

2 A. Yes, I did.

3 MR. SHIPLEY: Your Honor, if I may approach?

4 THE COURT: You may.

5 BY MR. SHIPLEY:

6 Q. I am showing you what has been introduced into evidence as  
7 Government's Exhibit 400. You already have some gloves up  
8 there. I'd ask you to put them on. Take a look at that item  
9 and tell me whether you recognize it and its contents.

10 A. Yes, I do.

11 Q. Does that item contain some of the documents you analyzed  
12 in this case?

13 A. Yes, it does.

14 Q. Did you obtain that from the FBI?

15 A. I did.

16 Q. About when did you first receive that?

17 A. I believe it was on April 19, 2006.

18 Q. And were you asked to conduct an analysis of items in that  
19 binder?

20 A. Yes, I was.

21 Q. Was there one particular document that was the focus of  
22 your analysis?

23 A. Yes, there was.

24 Q. Is that the pages that were in the plastic sheaths as  
25 Government's Exhibits 403A through E?

0036

1 A. That's correct.

2 MR. SHIPLEY: If the members of the jury have the  
3 color copies of that exhibit, again, it's Government's Exhibits  
4 403A through E, if you want to pull that out. We're going to  
5 be talking about that.

6 MR. NATALE: Your Honor, may I have a color copy, too?

7 THE COURT: Which exhibit are you talking about?

8 MR. SHIPLEY: This is a color copy of 403A through E.  
9 I don't have an extra copy, Tony.

10 MR. NATALE: That's okay. I will look at it later.

11 MR. SHIPLEY: Does everyone have that?

12 BY MR. SHIPLEY:

13 Q. Mr. LaPorte, before we start --

14 MR. NATALE: John, I have it. Thank you.

15 BY MR. SHIPLEY:

16 Q. Before we start taking a look more closely at that page, I  
17 want you to just take a look at Government's Exhibit 403 as it  
18 appears in the binder. Now, does that consist of five pages?

19 A. That's correct.

20 Q. As you see them there in front of you, are they in exactly  
21 the same appearance as when you first got them?

22 A. No, they are not.

23 Q. How are they different as you see them today?

24 A. When I received them, 403A through 403E were not in the  
25 plastic sheet protectors and they were part of the binder.

0037

1 Then, 403A through 403E did not have -- these documents have  
2 purple staining on them. They did not have that as well. In  
3 addition, there are some hole punches through the ink. That,  
4 obviously, was not there as well at the time when I received  
5 it.

6 Q. The hole punches, was that as a result of your analysis?

7 A. My analysis, yeah, and someone --

8 MR. NATALE: There is an objection I would like to  
9 pose. May we come side bar?

10 [Proceedings at sidebar follow]:

11 MR. NATALE: Your Honor, we had an expert come and  
12 look at it and that's also the reason why some of the holes are  
13 there. I am concerned that he might say that because --

14 MR. SHIPLEY: All I was doing was clarifying.

15 THE COURT: He is saying that the expert just  
16 inadvertently may say --

17 MR. SHIPLEY: I just wanted to show that the holes  
18 were part of the analysis.

19 THE COURT: All right.

20 [Proceedings in open court follow]:

21 BY MR. SHIPLEY:

22 Q. Mr. LaPorte, the holes that you mentioned, those are part  
23 of the document analysis, correct?

24 A. That's correct.

25 Q. The plastic sheath and the discoloration, do you know what

0038

1 that was the result of?

2 A. The discoloration appears to be from a chemical processing,

3 typically a compound that they use or a chemical called  
4 ninhydrine that they use to enhance fingerprints. That's  
5 usually where -- that's what I would assume the purple staining  
6 is coming from. The sheet protectors, I would assume that the  
7 documents were placed in those sheet protectors afterwards for  
8 protection of the documents.

9 Q. Is it your understanding that was part of the fingerprint  
10 analysis?

11 A. Yes.

12 Q. Was that done after you got through with your analysis?

13 A. That's correct.

14 Q. Now, when you first saw Government's Exhibit 403, and all  
15 the other pages in the binder, did they have labels on the  
16 bottom of them?

17 A. Yes, they had white labels on them.

18 Q. Are those the white labels that appear on the color copies  
19 at the very bottom with the initial letters AFGP?

20 A. Yes.

21 Q. Do you see those same labels on those pages and other pages  
22 in the binder today?

23 A. Yes.

24 Q. Now, the pages that you worked with, did you actually put  
25 your initials on those white labels on the pages?

0039

1 A. Yes, I actually put a portion of my case number, the last  
2 five digits of my case number, and then an assigned number and  
3 my initials.

4 Q. Before coming to court, did you also visually examine all  
5 of the pages in that binder?

6 A. Yes.

7 Q. Now, what's the very first thing you did as part of your  
8 analysis?

9 A. The first thing that I do when I get documents is,  
10 obviously I just look at them visually. I try and determine if  
11 there may be any staining on the documents, that somebody  
12 applied a chemical, maybe, to alter something. I get an idea  
13 of how they are produced, if they are handwritten, if there's  
14 writing notations on them, possibly the different type of pens  
15 or writing instruments that may have been used. Just sort of  
16 an overall visual inspection.

17 Q. Even before you do that, do you take some photographs?

18 A. Yes, I take photographs. Usually the photographs come  
19 first. It's an immediate process. I take photographs and then  
20 I take photocopies to use as working copies for my notes.

21 Q. In your analysis, before we get into the substance of it,  
22 did you assign your own numbering system to the pages that you  
23 looked at?

24 A. Yes, I did.

25 Q. I know you have referred to them by your own numbering

0040

1 system and the Bates numbers on this document are a little  
2 different. I just want to make sure the record is clear on  
3 that.

4 The 403A through 403E, those first five pages, what

5 numbers or letters did you assign to those pages?

6 A. 403A through 403E have been assigned Q1 through Q5  
7 respectively.

8 Q. So, Government's Exhibit 403A, the first page of the form,  
9 is your Q1, correct?

10 A. Correct.

11 Q. That goes through the rest of the pages up to Government's  
12 Exhibit 403E is your Q5, correct?

13 A. That's correct.

14 Q. Did you also select some additional forms from that binder  
15 for analysis?

16 A. Yes, I did.

17 Q. Did you label those K1 through K30?

18 A. That's correct.

19 Q. Were those basically six sets of the five-page document?

20 A. Yes.

21 Q. I am just going to read this to you, for the sake of the  
22 record. Your K1 to 5, does that correspond to the labels AFGP  
23 2002 80336-00115 through 24?

24 A. Yes, that's correct.

25 Q. Your K6 through K10, does that correspond, and I will just  
0041

1 read the last two digits of those, 25 to 34?

2 A. Yes, sir.

3 Q. Your K11 through K15, that corresponds to the Bate's  
4 numbers that end in 35 through 44?

5 A. Yes.



6 Q. Your K16 through 20, does that correspond to the Bate's  
7 labels that end in 69 through 78?

8 A. Yes.

9 Q. Your K21 to K25, does that correspond to the Bate's labels  
10 ending in 81 through 90?

11 A. Yes, sir.

12 Q. Your K26 to K30, does that correspond to the pages ending  
13 in 93 through 102?

14 A. Yes, that's correct.

15 Q. How did you select those six forms of five pages each for  
16 your comparison analysis?

17 A. Basically, I just looked through the binder and  
18 representatively sampled or chose pages that were the same size  
19 as the questioned documents and sort of the same type of paper.

20 Q. Now, after you did the copying and the photographs, tell  
21 the jury again, what's the first thing you did as part of your  
22 actual analysis?

23 A. The first part of my actual analysis, like I previously  
24 explained, is just a visual examination, no microscope or  
25 anything, just with some light and just my eyes. Look over the

0042

1 document, look for anything extraordinary on the document.  
2 Sort of get an idea of how it was produced, the types of  
3 writing instruments that may have been used, that sort of  
4 thing.

5 Q. You did that for the five pages that are Government's  
6 Exhibit 403A through E?

7 A. Yes, that's correct.

8 Q. After you did the visual examination, did you also do a  
9 microscopic examination?

10 A. Yes, that's when I look at it under the microscope. Once  
11 again, sort of doing the same type of thing, I try and  
12 determine at that point how the documents were produced  
13 generally or how they were printed. There is a variety of  
14 methods that documents can be printed. It could be  
15 typewritten. It could be produced on a photocopier. It could  
16 be produced with an ink jet printer. They can be  
17 professionally printed, that sort of thing.

18 So I get an idea of how it was produced or how it was  
19 printed, and then I examine if there were any writing inks,  
20 which in this case there were. I microscopically examine those  
21 and a lot of times one can determine the type of ink that was  
22 produced.

23 Q. Did you observe any pre-printed text or non-handwritten  
24 text on Government's Exhibit 403A through E?

25 A. Yes.

0043

1 Q. Did you also observe what appeared to be handwriting on  
2 those pages as well?

3 A. Yes.

4 Q. I want to first talk about the printed text. Is that in  
5 Arabic?

6 A. Yes, it is.

7 Q. Did you attempt to compare the printed text on Government's  
8 Exhibit 403 to the six other forms that you examined, your K1

9 to K30?

10 A. Yes, I did.

11 Q. Did you reach any conclusions about the source of the  
12 printing on all of these pages?

13 A. Yes, I had determined that all of them were produced using  
14 an office machine system that utilizes toner. Toner,  
15 basically, is the type of material that is used in machines  
16 like photocopiers, laser printers, and some types of fax  
17 machines.

18 Q. Are you familiar with the term a "common source"?

19 A. Yes, I am.

20 Q. Were you able to determine whether those items came from a  
21 common source?

22 A. Yeah, I determined that Government's Exhibits 403A through  
23 403E had originated from a common source when compared to the  
24 items that I had designated K1 through K30.

25 Q. Those are other forms that appeared in that binder,

0044

1 Government's Exhibit 400?

2 A. Yes.

3 Q. How can you tell that? What is the basis for that  
4 conclusion that they came from a common source?

5 A. Like I had mentioned, these documents were produced using a  
6 toner type process. A lot of times when one makes a copy on a  
7 photocopy machine, there are markings on the photocopy machine  
8 that can get transferred over onto the document. For example,  
9 like a scratch on the glass or some dust, even like White Out  
10 or Liquid Paper, if someone leaves some of that on the glass,

11 then when you put the document on top and you make a photocopy,  
12 then all those defects will be transferred onto the final copy.

13 Q. Are you familiar with a term called "trash mark"?

14 A. That's the terminology, that's sort of the jargon, if you  
15 will, that we use in the field to describe those types of  
16 markings. What trash marks are, are basically physical defects  
17 that are transferred onto a document.

18 Q. Did you take any photographs or images that showed the  
19 trash marks that your analysis revealed?

20 A. Yes, I did.

21 Q. Did you put those together into an exhibit that we have for  
22 the jury today?

23 A. I did.

24 MR. SHIPLEY: Your Honor, at this time I offer  
25 Government's Exhibit 725.

0045

1 MR. NATALE: No objection.

2 THE COURT: You may proceed.

3 [Government Exhibit 725 received in evidence].

4 MR. SHIPLEY: If I may have the witness stand down.

5 THE COURT: You may step down. You need to use the  
6 hand-held mike.

7 MR. SHIPLEY: Can everybody see these markings in  
8 here?

9 ALL JURORS: Yes.

10 BY MR. SHIPLEY:

11 Q. That's what we are going to be talking about.

12 First of all, this is Government's Exhibit 725. What  
13 does this show?

14 A. Okay. What this depicts is, first of all, I took  
15 photographs of the top portions of these designated documents  
16 which I have labeled here in the left third portion of the  
17 page. You will notice I have Q1, which is Government's Exhibit  
18 403A. Then K1, K6, K11, K16, K21 and K26.

19 Q. Let me just stop you. Where you have Q1, is that  
20 Government's Exhibit 403A?

21 A. That's correct.

22 Q. What you have labeled K1, K6, K11, K16, K21 and K26, are  
23 those the first pages of other forms from that binder?

24 A. Yes, that's correct.

25 Q. Okay. You may continue.

0046

1 A. What I have denoted here, or why I took this photograph, is  
2 to depict that, as you can see in these areas, these are  
3 markings on this document. You can see the same types of  
4 markings. Once again, just to describe for the record, I guess  
5 it would be in the left portion or the left corner of each of  
6 the documents. You can see that the markings are similar on  
7 each document here. Even some of the portions in some of these  
8 other documents, sort of the swipe marks or the dirty area, if  
9 you will, are reproduced as well.

10 Q. Are those what you call trash marks?

11 A. Yes, that's correct.

12 Q. Does this support your conclusion that Government's Exhibit  
13 403A and the pages in it come from a common source as these

14 other documents you sampled?

15 A. Yes, at some time there was an original document that was  
16 used to create these documents. Once again, what that comes  
17 back to was that there was a common source at one point that  
18 was used to produce all of these documents.

19 Q. Thank you very much. You may stand down.

20 [Witness resumes the witness stand.]

21 BY MR. SHIPLEY:

22 Q. That was one phase of your analysis. Let me ask you about  
23 another phase regarding the ink that appears on Government's  
24 Exhibit 403A through E. Did you analyze the ink that appears  
25 in the handwritten portion of this document?

0047

1 A. Yes, I did.

2 Q. Can you tell the jury, how did you do that?

3 A. Once again, the first thing, just to sort of recap, I  
4 visually examined. I then look at it with a microscope.  
5 Thirdly, which we haven't discussed at this point, is that I  
6 examine the inks using an apparatus called the video  
7 spectrocomparator. What that is used for is, basically, to  
8 look at the inks under different types of lighting conditions.  
9 The apparatus that we use is made up of different filters and  
10 so forth.

11 Although a lot of times inks, when you look at inks,  
12 you may see five inks that are black. A lot of times the  
13 blacks are actually differently. They are made up of different  
14 dye components to actually have different hues. I don't know

15 if you have ever gone to a store like Home Depot and you get  
16 paint made and then they put all the different colors and so  
17 forth in there to develop a certain color. Inks are  
18 essentially the same way. There are a lot of different  
19 colorants used. Once again, when you go to the store, if just  
20 a little bit different color is added to your paint, it can  
21 change the color completely.

22 So, the apparatus that we use kind of helps us, in  
23 essence, to look at very subtle differences that you couldn't  
24 notice with the naked eye.

25 Q. Is it possible to observe whether different inks are used  
0048

1 simply using the naked eye?

2 A. Yes, absolutely.

3 Q. Now, in this case, you went a little further than that,  
4 correct?

5 A. Yes, it's one of many, or one of a gamut of tests that we  
6 use during the ink analysis.

7 Q. Did you actually perform a chemical analysis of the ink in  
8 this document?

9 A. Yes, I did.

10 Q. Can you tell the jury how you go about doing that?

11 A. Yes, the procedure that I used in this particular case is  
12 called thin layer chromatography. I will just use the acronym  
13 TLC. Basically, what chromatography is, from a chemical  
14 perspective it is a way to divide up the different components  
15 of the ink. Like I talked about when you go to Home Depot and  
16 they add these different colors to their paints, chromatography

17 will actually allow you, in many instances, to separate those  
18 different colorants.

19 Another common example is anything from a soft drink,  
20 like a Coke or something like that. Coke is actually made up  
21 of several different things, colorants, sugar, caffeine and so  
22 forth. What chromatography would allow you to do is actually  
23 to separate all of those different components and identify  
24 them.

25 Q. Based on your chemical analysis, did you draw any

0049

1 conclusion about the type of ink or inks used in the  
2 handwritten portion of the document?

3 A. Yes, I determined that at least two different writing inks  
4 were used to produce the written notations on Government's  
5 Exhibit 403A through 403D. There were no written notations on  
6 403E.

7 Q. Now, were you able to tell where each ink was used on this  
8 document?

9 A. Yes, I was.

10 Q. Let's look at the first page of the exhibit that the jury  
11 has in color copy, which is 403A for you. First of all, can  
12 you tell the jury the two types of ink or writing instrument  
13 that you found? What were they?

14 A. The two types of inks that were used, one of them was a  
15 ballpoint ink, which I am sure most people are familiar with,  
16 just your standard ballpoint pen or writing instrument. The  
17 other was a non-ballpoint ink. When I say non-ballpoint ink,



18 what that typically means is that can encompass different types  
19 of writing instruments, which may be gel writing pens, roller  
20 ball type pens, felt tip markers. The way we divide things up  
21 in the laboratory is, we categorize them as ballpoint and then  
22 basically everything else, if you will, which is non-ballpoint.

23 Q. First of all, the ballpoint ink, does that appear on the  
24 first page, which is Government's Exhibit 403A?

25 A. Yes, the ballpoint ink, you can actually see the physical  
0050

1 differences between the different writing inks. The ballpoint  
2 ink exists on lines 1 through 3, not including -- there is a  
3 check mark on the right one third portion, the first check mark  
4 in there, which is a light blue ink. That was not a ballpoint  
5 there.

6 Q. The writing that appears in the balance of the page, is  
7 that done with non-ballpoint ink?

8 A. That's correct.

9 Q. Government's Exhibits 403B, 403C, are those non-ballpoint  
10 ink also?

11 A. That's correct.

12 Q. Let's take a look at 403D, which is the fourth page of the  
13 color copy set. Is there any ballpoint or non-ballpoint ink on  
14 that page?

15 A. The check mark up on the top portion of 403D, you can see  
16 it's kind of a different color blue. That was done in  
17 non-ballpoint, and then the remaining written entries on the  
18 bottom portion of 403D was in ballpoint ink.

19 Q. Now, can you tell the jury again, where else does the  
20 ballpoint ink appear on this document?

21 A. It appears, I guess, down in the -- to physically describe  
22 it, there is a double line in the middle of the page or so.  
23 All the ink that was written under the double line.

24 Q. Does it also appear on Government's Exhibit 403A, which is  
25 the first page?

0051

1 A. Yes, it was determined that the ballpoint ink used on 403A  
2 and the ballpoint ink used on 403D in the bottom portion, they  
3 were determined to match each other.

4 Q. So we are clear, that's the writing up here at the top of  
5 Government's Exhibit 403A, and it's your conclusion that  
6 matched the ink used at the bottom of 403D?

7 A. That's correct.

8 Q. Take a look, while we're on 403D, if you'd look at the date  
9 that's written on the left-hand side at the bottom, does that  
10 appear to correspond to July 24, 2000?

11 A. That's what it appears to read, yes.

12 Q. Did you investigate at all whether the inks that appeared  
13 in this document were available on July 24, 2000?

14 A. Yes, I did.

15 Q. Can you tell the jury, how do you go about investigating  
16 that?

17 A. Well, the U.S. Secret Service actually maintains the  
18 largest collection of writing inks, or forensic collection of  
19 writing inks in the world. At the time of this analysis, we  
20 had 8500 inks in a reference collection, or a standard

21 collection, if you will.

22           How that works is, on an annual basis we petition all  
23 the different pen and ink manufacturers throughout the world.  
24 We ask them if they could supply us with any new formulations  
25 of ink that they produced in the past year. Then, once they

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1 send those to us, we chemically analyze them and put them into  
2 the database. The samples that we have in the database  
3 actually date back to the 1920s. We have a variety of writing  
4 inks from -- I mean, it's a global collection, if you will.  
5 It's a worldwide collection. We collect from all over the  
6 world, not just the United States. So, I used that as my  
7 standard collection.

8           From this point on, I do the chemical analysis of the  
9 inks. I will call them the questioned inks. I will use the  
10 short form, the Q inks. I do the chemical analysis of the Q  
11 inks and then I see if they match other inks in our collection.  
12 Based on if they do or they don't, then I can ascertain  
13 information further about those inks.

14           A lot of time what we use the collection for is, if  
15 someone produces something -- let's say they purport to create  
16 some sort of financial agreement. I will use a contract as a  
17 common example. Someone purports to have signed a contract in  
18 2003, but they really didn't, and then they go and sign it in  
19 2006. What we can do is we can find out if that ink was  
20 actually available in 2003, and sometimes we find that the ink  
21 was not available in 2003, so it couldn't have been signed in

22 2003. That's sort of the purpose of the collection.

23 Q. Is that the kind of investigation you did in this case?

24 A. Yes, that's exactly what I did.

25 Q. Let's talk first about the ballpoint ink that appears on

0053

1 403A and 403D. Were you able to determine whether that ink was  
2 available on July 24th of 2000?

3 A. Yes, that ballpoint ink was determined to match other inks  
4 in our collection produced by a number of -- at least two or  
5 three manufacturers. That ink was available before July of  
6 2000.

7 Q. Can you tell the jury a little bit more about that type of  
8 ink, where it was manufactured, how it was distributed?

9 A. One of the companies that we identified there was Bic,  
10 which obviously is an international producer of inks and they  
11 distribute their inks worldwide. There was a German company as  
12 well, which was Mittenwald Chemy, and another company that  
13 merged, eventually merged, they're one company now. But that  
14 ink as well which is produced in Germany. So, we determined  
15 that those inks also were available prior to 2000, as well.

16 Q. Based on your information and the library and your  
17 knowledge, would that ink have been available worldwide in July  
18 of 2000?

19 A. Yes, absolutely.

20 Q. Now, how about the non-ballpoint portion of Government's  
21 Exhibit 403, were you able to determine whether that ink was  
22 available in July, 2000?

23 A. Yes, I was.

24 Q. What was your conclusion?

25 A. My conclusion in that case was something that I should

0054

1 probably preface before I answer this. Another way that we  
2 collect samples is, we call them open market purchases. What  
3 we do is we buy pens from different retailers and we do it  
4 quite regularly. When people travel throughout the world, we  
5 have them purchase pens in different regions and so forth. We  
6 always bring those back, analyze those and put those into our  
7 the library. We sort of use that as a check and balance to  
8 make sure that we have as many inks as possible.

9           The non-ballpoint ink actually matched an ink that was  
10 purchased on the open market. Actually, one of the pens was  
11 brought back from Japan and the other one was brought back from  
12 Korea. That was back in the late '80s. So, that ink was  
13 obviously available prior to 2000.

14 Q. Would that ink have been available in the Asian market at  
15 that time?

16 A. Yes.

17 Q. So, based on your analysis of the ink in the handwritten  
18 portion of this document, do you have an opinion as to whether  
19 this document could indeed have been filled out on July 24,  
20 2000?

21 A. Yes, my opinion is that the written entries could have been  
22 completed on July 24, 2000, as it has been purported to be.

23 Q. So this is not an example that you gave the jury of a  
24 document that was purportedly signed in 2003, but was really

25 signed in 2006. This is not that kind of example?

0055

1 A. That's correct.

2 Q. Now, can you tell from your results exactly when ink was  
3 put to paper on this document?

4 A. No, we can't.

5 Q. Are you aware of any scientifically reliable way to make  
6 such a determination looking only at the ink for a document  
7 like this?

8 A. There is no scientifically reliable methodology that could  
9 be used to determine the age of the ink or to determine when  
10 exactly they were placed on that piece of paper.

11 Q. Can you tell from your results when the ballpoint portion  
12 was written relative to the non-ballpoint portion?

13 A. No, it would be impossible to tell which was done first.

14 Q. Are you aware of any scientifically reliable way to make  
15 that determination?

16 A. No.

17 Q. Can you tell from you ink analysis whether or not the  
18 document was written by more than one person?

19 A. No, I can't do that also.

20 Q. Any scientifically reliable way to determine that?

21 A. No, not based on the ink analysis.

22 Q. By the way, did you observe whether any other forms from  
23 the binder, including K1 through 30, had a page with more than  
24 one ink?

25 A. Yes, I visually went through some of the documents. I

0056

1 believe there is another document in there that was produced  
2 with two inks as well.

3 Q. Similar to, for example, Government's Exhibit 403A?

4 A. Yes.

5 MR. SHIPLEY: Your Honor, may I approach?

6 THE COURT: You may.

7 MR. SHIPLEY: Your Honor, for the record, I am  
8 removing a page that we previously put in plastic that is  
9 actually in the binder and it's already in evidence. That  
10 page, using the Bates label, is AFGP 2002 8003360010093. I am  
11 just going to give that its own exhibit label as Government's  
12 Exhibit 409, but it is already in evidence, Your Honor.

13 May I approach the witness?

14 THE COURT: You may.

15 BY MR. SHIPLEY:

16 Q. Do you recognize that page, Mr. LaPorte?

17 A. Yes, I do.

18 Q. The Bates label at the bottom, do your initials appear down  
19 there?

20 A. Yes, they do.

21 Q. Does that correspond to one of the pages that you reviewed  
22 in your analysis?

23 A. Yes, it corresponds to the page that I had designated as  
24 K26.

25 Q. Based purely on a visual examination of that document, can

0057

1 you reach any conclusion about whether there is more than one

2 ink on that page?

3 A. Yes, just visually inspecting, there are two different inks  
4 that were used to produce the written notations of this  
5 document.

6 Q. In the same fashion as Government's Exhibit 403A?

7 A. Yes.

8 MR. SHIPLEY: Your Honor, may I publish that to the  
9 jury? I can't really put that up on the ELMO.

10 THE COURT: You may.

11 BY MR. SHIPLEY:

12 Q. Are there other examples that you observed involving the  
13 use of more than one ink on a single page in that binder?

14 A. Yes, I believe there was one other document.

15 Q. Now, we talked about the printing and the common source of  
16 this document. We talked about the availability of the inks.  
17 Did you also perform any analysis regarding what are called  
18 indentations on Government's Exhibit 403?

19 A. Yes, I did.

20 Q. Can you tell the jury, what are indentations?

21 A. When you write on something and if there is a piece of  
22 paper under that, there will actually be indentations that get  
23 transferred onto the underlying document. I don't know if you  
24 remember when you were young and you'd take a document and  
25 you'd have indentations on it and take a pencil and just sort

0058

1 of go over it very lightly, and then you could bring out the  
2 indentations that way to see them.

3 Often times, sort of if you are looking at them the



4 right way with what we call oblique lighting or side lighting,  
5 so you light it from the side, then you can actually see  
6 indentations. That will indicate what was written on the page  
7 above it at one time.

8 Q. What causes an indentation to be made? If I have this  
9 right, if I am writing on this page of my notes and it would  
10 leave an indentation on the page below it, how would that  
11 happen?

12 A. It's sort of a combination. For example, if I write on  
13 here, what happens is the pressure that I apply with my pen  
14 will actually get transferred onto this next page. We have a  
15 procedure that we use to actually develop those indentations so  
16 that they are visible.

17 Q. Do indentations always occur, and are they always  
18 detectable?

19 A. Not necessarily. There are a lot of factors that may  
20 affect them. It could be the pressure, it could be the type of  
21 paper that you are writing on, it could be the angle of the  
22 pen, the type of pen. So there are a number of factors.

23 Q. What can those indentations tell us about where a page was  
24 relative to another piece of paper?

25 A. Essentially, as you could sort of visualize, it just tells  
0059

1 you -- not tells you, but gives an indication of the page that  
2 was on top of it, what was written on top of it.

3 Q. Can it tell us whether two pages were together at a  
4 particular of time?

5 A. Yes, that's essentially what it does. It tells you that  
6 those two pages were together.

7 Q. Did you analyze any pages of Government's Exhibit 403 for  
8 indentations?

9 A. Yes, I did.

10 Q. What techniques did you use to do that?

11 A. The first technique I used was, like I had mentioned, the  
12 oblique lighting or side lighting to visualize it. Then I used  
13 an apparatus called the electrostatic detection apparatus. I  
14 used that procedure to sort of enhance the indentations, if you  
15 will.

16 Q. Based on that, did you reach any conclusions about the  
17 presence of indentations on these pages?

18 A. Yes, I did.

19 Q. Specifically, let me ask you about the first page of  
20 Government's Exhibit 403, which is 403A. Did you find any  
21 impressions from the handwriting on page 403A on 403B, which is  
22 the second page of the exhibit?

23 A. Yes, I did.

24 Q. Can you tell the jury about what you found? Before you do  
25 that, let me be clear. In the color copy packet 403B is the

0060

1 next page with writing on it, which is the Bates label 005.

2 The copies that the jury has, Your Honor, has the backs of the  
3 document as well, so the second page in the color copy is  
4 simply the back of 403A.

5 Tell the jury now, what conclusions did you reach  
6 about impressions from 403A onto 403B?

7 A. I had determined that a portion of the written entries  
8 found on 403A were indented onto 403B. I could specifically  
9 make out the 10/18/70, and then, most of the written notations  
10 above the 10/18/70. I couldn't really make out any of the  
11 notations that were produced with the non-ballpoint ink. So,  
12 mostly the ballpoint ink notations is what I could decipher.

13 Q. So we are clear, you were able to determine indentations  
14 from the ballpoint ink portion of the document from  
15 Government's Exhibit 403A onto 403B?

16 A. That's correct.

17 Q. What does that tell us about whether these pages were  
18 together at the time they were written?

19 A. That would indicate that 403A was on top of 403B when the  
20 individual that wrote those notations, when they did that.

21 Q. Did you conduct a similar examination of other pages in  
22 this exhibit?

23 A. Yes, I did. I actually did that same examination for all  
24 the pages.

25 Q. If we look at page 403D, which has the signature block,

0061

1 could you determine whether any indentations from 403D appeared  
2 on page -- on 403E?

3 A. Yes, I determined that a portion of those, the entries  
4 written in the bottom portion of 403D, like the 2007-7-24, a  
5 portion of those entries were indented onto 403E.

6 Q. Again, this basically corresponds to the ballpoint writing?

7 A. That's correct.

8 Q. What does that conclusion tell us about the relationship  
9 between 403D and 403E at the time they were completed?

10 A. Once again, that would indicate that when someone filled  
11 out 403D, 403E was under it.

12 Q. That's your conclusion with regard to 403A and 403B also?

13 A. That's correct.

14 Q. That's the case even though there were two inks used on  
15 both of those pages?

16 A. Yes.

17 Q. So we are clear, your testimony is that the printed  
18 material on all of those pages came from a single common  
19 source?

20 A. Yes.

21 MR. SHIPLEY: That's all for right now, Your Honor,  
22 thank you.

23 THE COURT: Cross-examination, Mr. Hassoun's counsel?

24 MR. SWARTZ: No, Your Honor.

25 THE COURT: Cross-examination, Dr. Jayyousi's counsel?

0062

1 MR. LOUIS: No, Your Honor.

2 THE COURT: Counsel for Mr. Padilla?

3 MR. NATALE: Yes, thank you.

4 CROSS EXAMINATION

5 BY MR. NATALE:

6 Q. Good morning, Mr. LaPorte. Did I hear you correctly to say  
7 that, based on your analysis, that the date which appears on  
8 Government's Exhibit 403A through E, that that date of, I think  
9 it's July 24, 2000, that that date could -- you used the word

10 could have been written on that date, right?

11 A. Yes.

12 MR. SHIPLEY: Your Honor, just for clarification, I  
13 think he meant the inks.

14 MR. NATALE: The inks, yes.

15 BY MR. NATALE:

16 Q. So, that means that it could have been written before that  
17 date, right?

18 A. Correct.

19 Q. It could have been written after that date?

20 A. That's correct.

21 Q. If I understand it correctly, you don't want to leave this  
22 jury with the impression that your testing determined that the  
23 ink was actually placed there on the date that it said it was  
24 placed there?

25 A. No, absolutely I do not want to leave here with that

0063

1 impression.

2 Q. So it could have been placed on there at any time prior to  
3 when you actually looked at the documents, right?

4 A. Yes, in theory, yes. When I received it April 19th of  
5 2006.

6 Q. I am not saying that you would have played with it after  
7 that. Before April 19th, when you received it, the ink could  
8 have been placed on there any time from April 19th back, right?

9 A. That's correct. Just to clarify, we were determining  
10 that -- if the ink was available. If the ink was available

11 prior to 2000, it could still be available today as a matter of  
12 fact.

13 Q. Exactly. You couldn't differentiate between whether it was  
14 the Bic or the two German companies, could you?

15 A. That's correct.

16 Q. And sometimes the -- Bic sells their ink to other companies  
17 and then they send it out?

18 A. The ink industry is very complex. They sell to each other.  
19 The way the industry works, I am not an expert on the industry,  
20 but I know from my dealings that, basically, what it comes down  
21 to a lot of times is what is the most economical way to do  
22 this. Sometimes it may be economical for a company to buy ink  
23 from another company. So, yes, that happens all the time.

24 Q. Bic is one of the biggies, right?

25 A. It's a large company.

0064

1 Q. Now, you get information from the manufacturers to put in  
2 your library. They will say, here is an ink we're coming out  
3 with and here is a sample of it. That's one of the things you  
4 get, right?

5 A. That's correct.

6 Q. Then you do your testing and you basically have a chemical  
7 profile of that?

8 A. That's correct.

9 Q. Then, when you get these questioned documents with  
10 questioned inks on them, you do the same chemical analysis and  
11 you say, it looks about the same or it looks different?

12 A. That would be a simplified way of saying that, yes.

13 Q. In fact, we don't have to get into it, but when we're  
14 talking about thin layer chromatography, you are talking about  
15 the height and rate at which certain chemicals migrate up a  
16 piece of silica; is that correct?

17 A. That's correct.

18 Q. You get one piece of silica here where they went up so high  
19 and you get another piece, and then you compare to see if they  
20 went up to the same heights?

21 A. That's correct. But there is also the videospectro  
22 examination, too, looking at optical properties.

23 Q. That's the other one.

24 A. That's a portion of the exam as well.

25 Q. We are going to get to that one. What we're getting at is  
0065

1 that you have, if you will, for lack of a better term, a  
2 profile for your inks in different chemical and visual testing  
3 modes, right?

4 A. That's correct.

5 Q. Whatever testing mode you use, you compare it and you say,  
6 look, this is resonating, or this is looking exactly like this  
7 one, it looks like we've got a match?

8 A. Yes, but then also, too, once again to clarify, because I  
9 think it's only fair for the jurors to understand this, what we  
10 are doing is, we are comparing to 8500 other standards in our  
11 collection. So, the way we use that, is we use that profile,  
12 which is a good terminology -- I refer to it as the analytical

13 profile. I compare that with the other analytical profiles in  
14 the profile and basically was able to, in this case, eliminate  
15 8498 other inks with only two left. So, that's part of it.  
16 Also, the important part is that you have the collection to  
17 compare it to.

18 Q. You compare it to your collection and then you decide  
19 whether you have a match?

20 A. Right.

21 Q. In this case, did you determine when Bic first began to  
22 make commercially available the darker blue ink?

23 A. Based on --

24 Q. When your library received it?

25 A. Yes, we received it prior to 2000.

0066

1 Q. Was it in 2000, in July of 2000? Was it prior to July of  
2 2000, or was it in January or February of 2000?

3 A. Can I refer to my notes on the exact date?

4 Q. Yes.

5 A. In my notes, I have indicated that, based on an e-mail that  
6 I received from Bic, that it was at least 1999.

7 Q. 1999 that it came out?

8 A. Correct.

9 Q. So, either one of these two inks is the sort of inks that,  
10 I guess, some government agent or someone could have access to,  
11 right?

12 MR. SHIPLEY: Objection to form and speculation.

13 THE COURT: Overruled.

14 BY MR. NATALE:



15 Q. They could have access to these inks, right?

16 A. Anybody can have access to these inks.

17 Q. Absolutely. In fact, you told this jury that when people  
18 go to Asia and they go to different places, you told the jury  
19 that the agents will go out, buy some pens, bring them back so  
20 you can put them in the library?

21 A. I am not saying the agents. I do the same thing when I  
22 travel internationally. I just go to a local store, buy a  
23 whole bunch of pens and bring them back. So, it's a lot of  
24 people that travel throughout the world.

25 Q. Now, you did not compare the inks that you found in Q1

0067

1 through 5, either the dark blue or the light blue inks, you  
2 didn't compare those inks to any of the other inks that you  
3 found in the binder, did you?

4 A. No, I did not.

5 Q. Now, if I understand this correctly, there is a test that  
6 can be done to determine the time in which ink was placed on a

7 document, right?

8 A. No, there is no scientifically reliable test to determine  
9 exactly when an ink was put down on a piece of paper.

10 Q. Have you ever run a phenoxyethanol test?

11 A. Yes, it's called phenoxyethanol.

12 Q. Easy for you to say.

13 A. We can use the terminology PE if you would like, to keep it  
14 simple.

15 Q. Let's do PE. Now, PE is a test which you're able to sort

16 of measure the rate at which an ink dries, right?

17 A. It's a lot more complex than that, but, essentially, yes.

18 Certain inks have a component known as phenoxyethanol that is

19 present in them, and there have been studies to show that

20 phenoxyethanol basically evaporates at a predictable rate

21 somewhat. It really depends on the type of document that it's

22 on, the storage conditions of that document, the type of ink

23 that has been used and so forth.

24 Q. In fact, in other cases, haven't you performed that test

25 and testified about that test?

0068

1 A. I have never testified about using that particular -- like,

2 then I found a positive result. I have testified about the

3 procedure itself, yes.

4 Q. You have testified about the procedure, right?

5 A. Yes.

6 Q. In fact, you explained it to a jury where you said it's

7 like paint drying, right?

8 A. Correct, yes.

9 Q. You put it on, you touch it, and it's wet. Two days later,

10 you touch it and it may not come off on your hand, but you can

11 still smell it because it hasn't dried quite enough?

12 A. Yes.

13 Q. In fact, that's what you did when you explained to another

14 jury about this test, which is one way of determining how much

15 the ink could have dried?

16 A. The only time that we would use that test, there would have

17 to be certain circumstances around that document. First of  
18 all, we would use it to compare. Let me just provide an  
19 example for simplicity. Let's suppose that someone has a diary  
20 of entries and they are purported to have been done in 2001,  
21 2002, 2003, 2004. So we have written entries. It may be  
22 purported that they were done at different times, but if it is  
23 suspected that they did it all at once, then we can go back and  
24 analyze all four of those inks and then try and determine if  
25 those inks have significant differences to indicate that they

0069

1 were put down at a different time, or if they are all basically  
2 the same.

3           So, if you would like to go back to the paint example,  
4 it would be like putting down four -- paint at four different  
5 times and then sort of measuring the tackiness or how much it  
6 has dried for each of them. That requires the entries to be  
7 produced on the same document so that we would know that it was  
8 under the same storage conditions, that it was exposed to the  
9 same environmental factors and so forth. Even paper can have  
10 an effect. There are a lot of factors that have to --

11 Q. There are a lot of factors that you can consider. But, in  
12 fact, you even wrote an article about this, didn't you?

13 A. Yes, I published an article.

14 Q. And you testified to a jury as part of your expertise about  
15 this article you wrote and you told them the same thing that I  
16 am saying and you are saying here today, right?

17 A. That's correct.

18 Q. Now, if we look at Government's Exhibit 403A through E --

19 A. Yes.

20 Q. -- With the naked eye you can tell there are two different  
21 inks, right?

22 A. Correct.

23 Q. You did your tests on them, right?

24 A. That's correct.

25 Q. Now, on page one, or let's call it A, page A, and actually  
0070

1 on page four there are two different inks on those pages,  
2 right?

3 A. Correct.

4 Q. Two different inks on 403A and two different inks on 403D?

5 A. Correct.

6 Q. On the same page?

7 A. Yes.

8 Q. One of the criteria that you just told us about was that  
9 you want to have the ink on the same page, right?

10 A. That's correct.

11 Q. In order to say, this way we have got one ink here, we've  
12 got another ink, it's on the same page, to see if they could  
13 have been placed there at the same time or at different times;  
14 isn't that correct?

15 A. That's correct, but the key --

16 Q. Let me ask you this. You must have told these government  
17 lawyers that there was this other test you could do, right?

18 A. The key, though, is that phenoxyethanol is found only in

19 ballpoint inks and we have a non-ballpoint ink here, so there  
20 is no way that that analysis would have -- obviously I would  
21 have conducted that examination. I have published articles on  
22 it. I have written procedures for it. Obviously, I would have  
23 done that examination had I thought it would have been a  
24 pertinent thing for this type of examination. This doesn't  
25 qualify at all for that type of test.

0071

1 Q. Okay. Well, you are saying because the light blue ink is a  
2 non-ballpoint ink --

3 A. Correct.

4 Q. -- you can't compare the ballpoint ink to the non-ballpoint  
5 ink?

6 A. They are two completely different formulations.

7 Q. Perfect. But you could compare the ballpoint ink, which is  
8 the dark blue ink, right, to the known samples which you have  
9 in your library which you've already testified about, right?

10 A. No, I can't do that because, as I had explained, the inks  
11 have to be stored in the same condition. The inks that we have  
12 in our reference collection are stored on different types of  
13 paper, they are stored in a humidity and temperature control  
14 environment. They are stored in binders. So, you can't do the  
15 test and compare it to a standard. It's called relative  
16 comparison. You have to do it relative to the other inks on  
17 that particular document.

18 Q. So, then, you could have done it from the ballpoint ink  
19 that appeared on the front page to the ballpoint ink which is

20 on the signature page, right?

21 A. No, because, once again, as I explained, we like to have  
22 them on the same document. Now we have got inks that are on  
23 page one and inks that are on page four. If I had done that  
24 type of examination, I would be getting cross-examined about  
25 the validity of that testing because page four could have been

0072

1 stored in a different environment versus page one.

2 Q. Or they could have been written at different times by  
3 different people, right?

4 MR. SHIPLEY: Objection, speculation.

5 THE COURT: Overruled.

6 THE WITNESS: Well, of course. I can't tell you when  
7 these entries could have been created. I am a scientist, so I  
8 can't speculate on when the entries were put down.

9 BY MR. NATALE:

10 Q. And it would be wrong for anyone to speculate, or to want  
11 people to speculate that the date which purports to be on this  
12 document was, in fact, the actual date that all of the writing  
13 occurred?

14 MR. SHIPLEY: Objection to form. Is he asking about  
15 based on his ink analysis or in general, because the question  
16 is broader than that.

17 MR. NATALE: On his ink analysis.

18 THE COURT: Based on your ink analysis, sir.

19 THE WITNESS: Based on my ink analysis, I can't render  
20 a conclusion at all. There is nothing to indicate that this  
21 document was not created on the purported day, and there is

22 nothing I can say that it wasn't created on the purported date.  
23 There is certainly nothing consistent on this document to  
24 indicate to me that it was not created on its date.

25 BY MR. NATALE:

0073

1 Q. I understand that, which is something that I want to get  
2 at. Now, just so I am clear, let's say if -- let's pick some  
3 dates just so I am real clear on this. Let's say that back  
4 in -- let's say from the year 2000 to 2006, you were in  
5 Washington, D.C., you were never here in this courtroom during  
6 that entire time.

7 A. Okay.

8 Q. Let's assume that on that day, say that on December 20th,  
9 in 2001, I am in the courtroom with everyone else who is here  
10 except you, right, and I write on a piece of paper. I write  
11 data form, right?

12 A. Okay.

13 Q. I write July 24, 2000, and I write Ross Appleman on it,  
14 right?

15 A. Right.

16 Q. Now, they all saw me do this, right, everyone saw me do it,  
17 but you didn't, you are in Washington.

18 A. Right.

19 Q. Let's say hypothetically, on April 19, 2006 --

20 MR. NATALE: May I approach?

21 THE COURT: You may.

22 BY MR. NATALE:

23 Q. -- someone comes to you in your lab and they say, hey, look  
24 at this, and I want you to do the same test that you did in  
25 this case here, right?

0074

1 A. Correct.

2 Q. Let's assume that the ink used was in existence from 1997?

3 A. Okay.

4 Q. You would come in and you would tell this jury that you  
5 have no evidence to show that July 24, 2000, wasn't the correct  
6 date that the writing appeared?

7 MR. SHIPLEY: Objection, Your Honor, to form again.

8 We have to be clear whether we're talking about based --

9 MR. NATALE: Based on your ink analysis.

10 THE COURT: The objection is sustained.

11 BY MR. NATALE:

12 Q. Based on your ink analysis, the test that you did on this  
13 case, the ink analysis you did on this case, you would analyze  
14 it and compare it and you'd say, ladies and gentlemen, the ink  
15 that was used on here was in existence in 1999, therefore, this  
16 document could have been written on July 24, 2000, and I see no  
17 evidence that it wasn't written on that date?

18 A. It's also important to note that there were other  
19 examinations that I did like with regard to the trash mark  
20 examination. I am comparing those documents with other  
21 documents, so if you did that and you substituted that page in  
22 with a bunch of other documents, then I could say that there is  
23 an indication that that page was substituted in there as well.

24 Q. These forms were printed on a copy machine, right?



25 A. Correct.

0075

1 Q. They were printed in blank and then someone filled them  
2 out?

3 A. You'd have to do the same blank form as well.

4 Q. Let's say if I found a binder and I have all of this stuff,  
5 some are blank, some are filled in, right?

6 A. You would have to get the exact same pages, blank pages  
7 that were used to fill out the original form, too.

8 Q. There is a whole binder here of different stuff, right?

9 A. Yes.

10 Q. You don't know anything about where it came from?

11 A. No, I don't.

12 Q. Let's say it has the same mark on these others, but you get  
13 this. Based on your ink analysis, you would look in front of  
14 this jury and say, you know, this could have been written on  
15 July 24, 2000, correct?

16 A. Correct.

17 Q. And you would say, I, being you, have no evidence that it  
18 was written at any other time other than July 24, 2000, when in  
19 reality everyone in this courtroom, including the jury, would  
20 know, one, that it was written at a different time, at a  
21 different date, at a different location, and by the way, my  
22 name is Tony Natale, it's not Ross Appleman, that it was  
23 written by a different person?

24 MR. SHIPLEY: Objection, speculation. We are talking  
25 about Mr. Natale's hypothetical.

0076

1 MR. NATALE: Your Honor, this is a hypothetical.

2 THE COURT: The objection is overruled.

3 THE WITNESS: Can you rephrase the question? It was  
4 kind of long.

5 BY MR. NATALE:

6 Q. I will make it shorter for you. If you don't understand,  
7 tell me. We've gone through when this was really written, but  
8 you were in D. C., you don't that, right?

9 A. Yes.

10 Q. Based on your ink analysis, you come into court and some  
11 government lawyer says, well, could it have been written on  
12 July 24, 2000, and you say, yes, it could have. They say,  
13 well, did you, by your ink analysis, find anything that could  
14 say that it wasn't created on July 24, 2000, and you'd say, no,  
15 I found nothing to refute that. Isn't that what your testimony  
16 would be?

17 A. My testimony is that, yes, I can't render a conclusion as  
18 to when it was produced.

19 Q. Even though these people know what the whole truth really  
20 is, right?

21 A. That's a question?

22 Q. Yes.

23 A. Yes.

24 MR. NATALE: No further questions. Thank you very  
25 much.

0077

1 THE COURT: Redirect, Mr. Shipley.

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REDIRECT EXAMINATION

BY MR. SHIPLEY:

Q. Your testimony on cross concerned ink analysis, right?

A. That's correct.

Q. There are other tests, including some of which you performed on this document, that may establish when a document was created or whether it is genuine, correct?

A. That's correct.

Q. There might be facts completely unrelated to scientific analysis that establish whether a document is authentic in its date?

A. Yes, that's correct.

MR. NATALE: Your Honor, objection, beyond the scope of my cross-examination. I just asked about his ink analysis.

THE COURT: Overruled.

BY MR. SHIPLEY:

Q. Let's talk specifically, if you want, about the hypothetical that Mr. Natale gave. Other facts, independent of you scientific analysis, determined whether the document had the date on it that was correct?

A. Yes. Of course, what I was trying to do in this case is to show that, in trying to prove that this document was somehow inconsistent in nature with some of the other documents and its preparation, I could not find anything to show that this

document had the lookings of being not authentically produced or anything like that.

3 Q. You were not able to date the document more specifically

4 because you could not perform those kind of tests?

5 MR. NATALE: Objection, leading.

6 MR. SHIPLEY: I'll rephrase.

7 THE COURT: For the record, sustained.

8 BY MR. SHIPLEY:

9 Q. Do you remember Mr. Natale asking you about the tests or  
10 procedures that may, in some circumstances, allow you to date a  
11 document more precisely?

12 A. I have to reiterate, because I feel it's very important,  
13 obviously, I have published about this particular procedure  
14 that Mr. Natale has mentioned, the phenoxyethanol procedure. I  
15 would have been more than happy and very excited to do that in  
16 this type of case. I am a scientist and I want to do as much  
17 as I can from a scientific standpoint to try and prove or  
18 refute whatever the allegations are. I would have done that  
19 had I thought that would have been a meaningful analysis.

20 In addition, which we didn't really talk about, the  
21 document, as far as my understanding --

22 MR. NATALE: Your Honor, I would object to him  
23 testifying as to any knowledge as to the origin or process of  
24 the document.

25 THE COURT: Sustained.

0079

1 BY MR. SHIPLEY:

2 Q. Are you aware of any information related to -- we don't  
3 even need to go there.

4           You mentioned, in response to Mr. Natale's questions,  
5   that the common source analysis that you did may be relevant to  
6   determining when this document was created. Can you tell the  
7   jury again why that is so?

8   A. Right, if someone was, say, trying to substitute a document  
9   into a whole pile of documents like this, they would have to  
10  get the original form. It would have to have the same trash  
11  marks and so forth. Like I said, there are no inconsistencies  
12  here. This form didn't stand out on its own. There were other  
13  forms in this book that were filled out with different inks.

14           If I opened this book and this paper was bright white  
15  and everything else was not bright white, or everything was  
16  done all in the same type of inks, or the forms were filled out  
17  consistently, like all the different areas on the forms, if all  
18  the same areas were completed in the same way with the same  
19  pen, that would raise more suspicion to me. I do this day in  
20  and day out. 95 percent of my job is to authenticate  
21  documents.

22  Q. You have looked through the pages in that binder, correct?

23  A. Yes.

24  Q. Are there any blank pages in that binder?

25  A. Not that I recorded. I actually looked through every one

0080

1   of the pages.

2   Q. There are no blank pages?

3   A. No.

4           MR. SHIPLEY: Nothing further.

5 THE COURT: Thank you very much, sir, you are excused.

6 [The witness exits the courtroom].

7 THE COURT: Ladies and gentlemen, it is 11:30. We  
8 will take a brief break now. 15 minutes and we will be back.

9 [The jury leaves the courtroom].

10 [A brief recess was taken].

11 [The jury enters the courtroom].

12 THE COURT: Thank you, ladies and gentlemen. You may  
13 be seated.

14 Government, your next witness, please.

15 MS. PELL: The United States calls Special Agent Craig  
16 Donnachie.

17 COURTROOM DEPUTY: Do you swear or affirm the  
18 testimony you are about to give is the truth, the whole truth  
19 and nothing but the truth, so help you God?

20 THE WITNESS: I do.

21 CRAIG DONNACHIE, GOVERNMENT'S WITNESS, SWORN

22 DIRECT EXAMINATION

23 BY MS. PELL:

24 Q. Good morning, Special Agent Donnachie?

25 A. Good morning.

0081

1 Q. What do you do for a living?

2 A. I am a Special Agent with the FBI.

3 Q. How long have you been a Special Agent with the FBI?

4 A. Since 1997.

5 Q. Where are you currently working for the FBI?

6 A. I'm currently assigned to our FBI headquarters in  
7 Washington, D.C.

8 Q. What is your assignment in Washington, D.C. specifically?

9 A. I'm assigned as a supervisory Special Agent with out Office  
10 of International Operations.

11 Q. Prior to that, have you worked for the FBI in other cities?

12 A. Yes, I have.

13 Q. Were you working for the FBI in May of 2002?

14 A. Yes.

15 Q. Where were you working specifically?

16 A. With the FBI's New York office, our joint terrorism task  
17 force.

18 Q. Now, I would like to direct your attention to May 8th of  
19 2002. You testified that you were working in New York at that  
20 point in time?

21 A. Yes.

22 Q. On May 8, 2002, did you travel from New York to any other  
23 city?

24 A. I did.

25 Q. Where was that?

0082

1 A. To Chicago.

2 Q. Did you fly to a particular airport in Chicago?

3 A. I flew to the domestic arrival terminal in Chicago.

4 Q. Once arriving at the domestic terminal in Chicago, did you  
5 proceed to another location or another terminal in the airport?

6 A. Yes, we proceeded to the international arrivals terminal in  
7 Chicago's airport.

8 Q. You said "we." Did you travel with another agent?  
9 A. Yes, with Special Agent Russell Fincher of the FBI.  
10 Q. So you proceeded to the international terminal?  
11 A. Yes.  
12 Q. Did you go to a particular area in the international  
13 terminal?  
14 A. We met in the Customs area of that terminal.  
15 Q. Did there come a time when you were in the Customs area of  
16 the terminal that you proceeded to a conference room?  
17 A. Yes.  
18 Q. When you were in that conference room, did there come a  
19 time when you encountered an individual known to you as a Jose  
20 Padilla?  
21 A. Yes.  
22 Q. And would you be able to identify Jose Padilla?  
23 A. I can.  
24 Q. Could you look around the courtroom and let us know if you  
25 can identify him?

0083

1 MR. do CAMPO: Your Honor, we stipulate that  
2 Mr. Padilla is in the courtroom.

3 THE COURT: Having stipulated, the jury should know  
4 that the agent is identifying defendant Jose Padilla.

5 You may proceed.

6 BY MS. PELL:

7 Q. After you were in the conference room for some time, did  
8 there come a point in time where you took some personal



9 property that belonged to Mr. Padilla into custody?

10 A. Yes.

11 Q. When you took that personal property of Mr. Padilla into  
12 custody, what did you do with it that evening on May of 2002?

13 A. That evening, we secured it in the Chicago field office of  
14 the FBI that evening.

15 Q. Did you do anything in relation to that property of Jose  
16 Padilla's the next day?

17 A. Yes.

18 Q. What did you do?

19 A. We conducted a formal inventory of all the items that we  
20 had taken or collected from our time with him that evening, the  
21 day before in the airport.

22 Q. Were you specifically the agent that completed this  
23 inventory?

24 A. Yes, I was.

25 Q. Prior to coming to court today, have you had the

0084

1 opportunity to review that inventory?

2 A. I have.

3 Q. Have you also had an opportunity to review some materials?

4 A. Yes.

5 Q. Have you matched those materials and can you identify them  
6 as the personal property you took into custody of Jose  
7 Padilla's on May 8, 2002, and subsequently inventoried the next  
8 day?

9 A. I can.

10 MS. PELL: If I may I approach, Your Honor?

11 THE COURT: You may.

12 BY MS. PELL:

13 Q. Special Agent Donnachie, I am showing you what has been  
14 marked as Government's Composite Exhibit 901, and contained  
15 inside 901 there are four additional documents that are part of  
16 that composite exhibit, but they are broken out, for the  
17 record, as 901A, B, C and D. If you could take an opportunity  
18 to look at these documents and tell us generally whether you  
19 recognize them?

20 A. Sure. I do recognize these items.

21 Q. Do you recognize all the items in Government's Composite  
22 Exhibit 901, which includes 901A through C?

23 A. Yes.

24 Q. Did you examine those documents prior to coming to court  
25 today and compare them with your inventory?

0085

1 A. I did.

2 MS. PELL: We move Government's Exhibit 901 into  
3 evidence, to include all the contents, which also include 901A  
4 through D.

5 THE COURT: Any objection?

6 MR. SWARTZ: Your Honor, could we go side bar for a  
7 quick moment?

8 [Proceedings at sidebar follow]:

9 MR. SWARTZ: Judge, one of the items is the address  
10 book with the phone number of Mr. Hassoun's telephone. We  
11 would like to object to the introduction of that as part of

12 this packet because this agent is talking about his arrest in  
13 May of 2002. There are a lot of -- the context of this arrest  
14 is obviously because of the Dirty Bomber incident.

15 THE COURT: We are not going there.

16 MS. PELL: The government doesn't intend to go there.

17 MR. SWARTZ: The jury has heard that this agent  
18 traveled from New York to Chicago specifically to meet  
19 Mr. Padilla at the airport.

20 THE COURT: We also had another agent --

21 MS. PELL: Special Agent Fincher also --

22 THE COURT: Talked about the same --

23 MS. PELL: And he is going to be the next witness.

24 MR. SWARTZ: Not that I was happy, but I think --

25 THE COURT: I am assuming that you are going to

0086

1 identify the property that's inside the envelope.

2 MS. PELL: Yes, ma'am.

3 THE COURT: We already had a motion about the money.

4 That's been determined. The motion to suppress, except for the  
5 money, was denied.

6 MS. BAKER: Just for the record, Your Honor, there is  
7 no evidence that the phone number of Mr. Hassoun was in  
8 Padilla's possession during the time period of the indictment.  
9 The arrest of him is ten months after the indictment. We  
10 understand that he had Mr. Hassoun's phone number on May 2,  
11 2002. We understand that. There is no evidence that he had  
12 his phone number in his possession during the time period of  
13 the indictment, so this is outside the indictment.

14 THE COURT: How does he talk to him?

15 MS. BAKER: We don't dispute there is evidence that  
16 they communicated during the time of the indictment. Whenever  
17 those calls were, they were. This evidence, because it ties  
18 our client to Padilla in May of 2002, we think has a special  
19 prejudicial impact that Mr. Swartz has --

20 THE COURT: The defense objection is overruled. First  
21 of all, we have other evidence that during the period of the  
22 indictment, that defendant Padilla communicated with defendant  
23 Hassoun by telephone. And there is no and never has there been  
24 an issue if these two people knew each other during the period  
25 of the indictment. It's not as if somehow the jury is going to

0087

1 think it didn't happen or it was going to happen.

2 If nothing else, if you take the total innocent  
3 approach to this, they went to the same religious building at  
4 least three times a week. Your objection is noted and  
5 overruled for the record.

6 MS. PELL: Thank you, Your Honor.

7 [Proceedings in open court follow]:

8 THE COURT: Please proceed, counsel.

9 MS. PELL: Your Honor, again, the government would  
10 move Composite Exhibit 901, which also includes 901A, B, C, D,  
11 into evidence.

12 THE COURT: Received.

13 [Government Exhibit 901 received in evidence].

14 MR. do CAMPO: There is no objection.

15 THE COURT: Proceed, please. It is admitted.

16 MS. PELL: Thank you, Your Honor. If I may approach.

17 BY MS. PELL:

18 Q. Special Agent Donnachie, as soon as our projector comes on,  
19 I am going to project, with the Court's permission, a few of  
20 these documents for you.

21 I have pulled out the documents that you just examined  
22 that were in 901D. For the record, also contained in 901D was  
23 a previously admitted exhibit, which is Government's Exhibit  
24 410, a passport of Jose Padilla.

25 Did you receive from Jose Padilla and take all of

0088

1 these documents into custody on May 8, 2002?

2 A. I did.

3 Q. And we have several identification documents?

4 A. Yes.

5 Q. We have a passport, Social Security card?

6 A. Driver's licenses.

7 Q. Special Agent Donnachie, I am now going to project what has  
8 been labeled Government's Exhibit 901C. Do you recognize this  
9 note as a document you took into custody on May 8, 2002, from  
10 Jose Padilla?

11 A. Yes.

12 Q. Special Agent Donnachie, I am now going to project  
13 Government's Exhibit 901B. This is a multi-page document.  
14 Tell us if you recognize this as a document that you took into  
15 custody from Jose Padilla on May 8, 2002?

16 A. I do.

17 MS. PELL: Members of the jury, can you see all of  
18 this?

19 ALL JURORS: Yes.

20 BY MS. PELL:

21 Q. Now, Special Agent Donnachie, I am going to project  
22 Government's Exhibit 901A. Do you recognize 901A as a document  
23 that you took into custody from Jose Padilla on May 8th of  
24 2002?

25 A. I do.

0089

1 MS. PELL: Thank you, Your Honor. We have no further  
2 questions at this time.

3 THE COURT: Counsel for Mr. Hassoun, any questions?

4 MR. SWARTZ: No questions, Your Honor.

5 THE COURT: Counsel for Mr. Jayyousi, any questions?

6 MR. LOUIS: No questions, Your Honor.

7 THE COURT: Counsel for Mr. Padilla, any questions?

8 MR. do CAMPO: No questions, Your Honor.

9 THE COURT: Thank you very much, sir. You're excused.

10 [Witness exits the courtroom].

11 MS. PELL: Your Honor, we moved so quickly, we just  
12 need a moment to get the next witness.

13 THE COURT: All right.

14 MS. PELL: Your Honor, it will be just a moment. We  
15 have gone to get him. Your Honor, while we are waiting, if I  
16 may publish this to the jury?

17 THE COURT: You may.

18 MS. PELL: The United States calls Special Agent Russ  
19 Fincher.

20 COURTROOM DEPUTY: Do you swear or affirm the  
21 testimony you are about to give is the truth, the whole truth  
22 and nothing but the truth, so help you God?

23 THE WITNESS: I do.

24 THE COURT: Please state your full name and spell your  
25 last name for the record.

0090

1 THE WITNESS: Russell Robert Fincher, F-I-N-C-H-E-R.

2 RUSSELL FINCHER, GOVERNMENT'S WITNESS, SWORN

3 DIRECT EXAMINATION

4 BY MS. PELL:

5 Q. Welcome back, Special Agent Fincher.

6 A. Thank you.

7 Q. You testified once prior in this trial?

8 A. Yes.

9 Q. You gave your background to the jury, but if you could  
10 remind us what you do for a living?

11 A. I'm an FBI Special Agent supervisor in New York City. I  
12 supervise a counter terrorism squad.

13 Q. How long have you been an FBI agent?

14 A. Just over eight and a half years.

15 Q. Were you an FBI Agent in May of 2002?

16 A. Yes, I was.

17 Q. Where were you working in May, 2002?

18 A. I was assigned to a counter terrorism squad in New York

19 City.

20 Q. I would like to direct your attention to May 8th of 2002.

21 On May 8, 2002, did you fly from New York to Chicago?

22 A. Yes, I did.

23 Q. Were you alone or was another agent with you?

24 A. Special Agent Craig Donnachie was with me.

25 Q. When you arrived in Chicago on May 8, 2002, did you and

0091

1 Special Agent Donnachie proceed to any particular place at

2 Chicago O'Hare International Airport?

3 A. Yes, we went from the domestic terminal to the Customs area

4 of the international terminal.

5 Q. What was your purpose in going to Chicago that day?

6 A. To conduct an interview of Jose Padilla.

7 Q. Now, when you got to the Customs portion of the

8 international terminal, had you given any instructions to the

9 Customs officials?

10 A. Yes, we had.

11 Q. What were those?

12 A. We asked them to treat Mr. Padilla as they would any other

13 passenger clearing Customs.

14 Q. Now, did there come a time when you became aware that the

15 defendant Padilla had arrived on an international flight?

16 A. Yes.

17 Q. Upon arriving on an international flight, did you become

18 aware whether he proceeded through the Immigration area?

19 A. Yes, I did.



20 Q. Did you become aware whether he proceeded into the Customs  
21 area?

22 A. Yes, I did.

23 Q. When he proceeded into the Customs area, did there come a  
24 time where you met him in a different part of the Customs area?

25 A. Yes, I ended up meeting him in an interview room adjacent

0092

1 to the Customs area, a conference room.

2 Q. Was that conference room part of the Customs area?

3 A. Yes, ma'am.

4 Q. Now, were you alone in that conference room with Jose  
5 Padilla, or were there other agents present?

6 A. There were three other agents present in the room.

7 Q. Now, this conference room, can you just give us a general  
8 description of how it looked?

9 A. It was an executive conference room. It was a large  
10 square, it had a square conference table in the middle of the  
11 room, comfortable chairs, a well appointed conference room.

12 Q. Did you all sit around that table to conduct the interview?

13 A. Yes, we did.

14 Q. Now, when you interview an individual, do you have a  
15 general goal in mind?

16 A. Yes, in general.

17 Q. What is, generally, that goal?

18 A. The goal is to gather information that is verifiable, that  
19 results in the setting of investigative leads to further the  
20 investigation.

21 Q. What do you mean by an investigative lead?

22 A. To gather information that I can then ask maybe another  
23 field office to go and check an address or a phone number, or  
24 verify the information gained from the interviewee.

25 Q. Tell the ladies and gentlemen of the jury, are there

0093

1 techniques that you use to accomplish your goal of collecting  
2 verifiable information that you can generate leads from?

3 A. Yes, there is a general investigative strategy that I use  
4 in conducting interviews.

5 Q. Tell the ladies and gentlemen of the jury about that,  
6 please.

7 A. Investigative strategy basically breaks an interview up  
8 into two areas. In the first part of the interview you want to  
9 take the opportunity to learn about the interviewee that you  
10 are talking to, to build rapport, to learn about their  
11 background, to ask questions that they, in general, will have  
12 the answers to that are about their favorite topics, that are  
13 about themselves.

14 During that period of rapport building you are also  
15 doing something else; you are gauging their answers, the level  
16 of detail that they are providing the answers to you in.

17 Q. Is there a particular term for that that you use?

18 A. It's often referred to as norming, what's the normal  
19 response to a question that someone will have the answer to.

20 Q. What are you doing when you are norming?

21 A. I am paying attention to the level of detail, is the person  
22 able to remember, is the person able to provide detail to

23 questions. I am paying attention to their demeanor, the speed  
24 of their answers, the completeness of their answers during that  
25 period.

0094

1 Q. So, it is it fair to say, based on your testimony, that  
2 things like speed, detail and completeness are things that you  
3 listen for in the beginning part of this interview?

4 A. Yes, ma'am, that is correct.

5 Q. You talked about that there are, in your mind, two parts of  
6 an interview. What is the second part?

7 A. The second part of the interview, after you are confident  
8 that you have built rapport with the person that you are  
9 interviewing, the second part of your interview, you want to  
10 transition and move to questions of substance and ask questions  
11 about what you are really interested in, and you now compare  
12 their responses to those answers to what the norm was in the  
13 beginning of the interview.

14 Q. In comparing the responses, what types of things are you  
15 listening for?

16 A. I think the most important thing is the level of detail  
17 that somebody is giving at the beginning of the interview about  
18 things that they are comfortable discussing, and then the level  
19 of detail that they are giving about questions of substance  
20 later on in the interview.

21 Q. Why would such a difference matter in the first part and  
22 the second part?

23 A. If you are asking a question of substance later on in the  
24 interview and the answer is full and complete, the similar

25 level of detail as a biographical question, then you feel

0095

1 comfortable with the answer. If there is diminishing detail,  
2 then you are not comfortable about those answers and you are  
3 suspicious that the person is being evasive.

4 Q. Stepping away from this case for a moment, can you give the  
5 members of the jury sort of a real life example of what it is  
6 you have just been describing?

7 A. An example that I use with this squad and I've used in the  
8 past is an example of teenagers. My children are four years  
9 old and six months old, so I will use myself as the teenager in  
10 this example and say, if you were a teenager you may have  
11 experienced this, or if you have teenage children. They are  
12 going out on Friday night. I am going out on Friday night with  
13 my brothers and we are going to go to the movies with some  
14 friends, and we end up coming home really late. So who meets  
15 us at the door, hypothetically, of course, because I never did  
16 anything wrong as a teenager, and I am sure none of you did  
17 either.

18 So, my mother meets us at the door and she says, where  
19 have you been? Why? Because she's worried. We were at the  
20 movies. Where did you go? Loews Theater at the mall. In my  
21 town there's one theater, one mall, so she knew that. What  
22 movie did you see? Superman. When did the movie start? 8:00.  
23 Who drove? Me. Who was there? My brothers, Tom, Dick, Harry,  
24 Jane. What did you do afterwards?

25 Q. Let me stop you for a second. Those questions that you

0096

1 have just taken us through where your mother is interviewing,  
2 what is that an example of in the interview process that you  
3 described?

4 A. That would be an example of norming. Although she is not a  
5 trained FBI agent, we do that on a normal daily basis. Maybe  
6 we just don't realize it's an interview technique. She knew  
7 when the movie started. She knew who we went with. She knew  
8 where the theater was.

9 Q. Continuing with your mother's interview, talk about the  
10 next portion.

11 A. What did you do afterwards? We were out. Where did you  
12 go? Around. What were you doing? We were just hanging out.  
13 Who with? Well, we were just out with the guys. What were you  
14 doing? Cruising. Oh, so you were cruising. Who was driving?  
15 Eddy was driving.

16 Q. Now, what differences is your mother looking for in the  
17 first part and the second part?

18 A. Level of completeness. She is looking for the  
19 spontaneousness of our answers, are we being evasive, do we  
20 finally come through. Of course, she knows that we shouldn't  
21 be out cruising around and she knows we shouldn't be riding  
22 with Eddy.

23 Q. Hypothetically, what happened to you after this evening?

24 A. Hypothetically, we all got grounded, of course.

25 Q. Taking you back to May 8, 2002, you indicated that you

0097

1 conducted an interview of Jose Padilla?

2 A. Correct.

3 Q. Did you employ the techniques that you've just talked about  
4 and given us the example of in this interview?

5 A. Yes.

6 Q. In general terms, what were some of the things that you  
7 talked to Jose Padilla about?

8 A. In general, people and places.

9 Q. When you began the interview, did you ask him about places  
10 that he lived in the United States?

11 A. Yes.

12 Q. What did he tell you?

13 A. He told me that he was born in Brooklyn; that around age  
14 two his family moved back to Puerto Rico. Around age five, his  
15 family relocated, his mother -- his father had passed. His  
16 family relocated to Chicago.

17 Q. When he talked about his family relocating to Chicago, was  
18 he able to associate any particular addresses that he lived in  
19 Chicago?

20 A. He said that he lived on Fullerton Street and he gave the  
21 cross street of Albany. He said he lived on Francisco Street  
22 and he gave of the cross street of Northern.

23 Q. Did he tell you an additional place that he lived after  
24 Chicago?

25 A. Following Chicago, he went back to Puerto Rico for a brief  
0098

1 period and then returned to Chicago following that.

2 Q. When he returned to Chicago, did you ask him where he

3 lived?

4 A. Yes, and he told me he lived at the Fullerton address with  
5 his mother.

6 Q. Was he able to give you a phone number for his mother?

7 A. Yes, he did. He gave us a slip of paper which had his  
8 mother's address and phone number here in Florida.

9 Q. So he was able to give you a phone number and an address?

10 A. Yes.

11 Q. After talking about living in Chicago the second time at  
12 his mother's residence, did he talk about another place that he  
13 lived?

14 A. Yes, after Chicago, he moved to Florida, and he moved to  
15 Davie -- well, Sunrise, Florida. He provided us a driver's  
16 license with his address in Sunrise, Florida.

17 Q. Now, the questioning that you have just been talking about,  
18 where does that fit in your interview process? What was going  
19 on there?

20 A. That would have fit in the beginning rapport building area  
21 where we are discussing background and I am norming him.

22 Q. You indicated when you were testifying earlier that one of  
23 the goals you have for an interview is to gain verifiable  
24 information so that, if appropriate, you could in theory send  
25 out investigative leads?

0099

1 A. That is correct.

2 Q. In this early part of the interview where Jose Padilla is  
3 telling you places that he lived, addresses, et cetera, did you  
4 get the type of information that you could use to send out

5 investigative leads?

6 A. Yes.

7 Q. Why was that?

8 A. He gave me information that I could potentially verify,  
9 streets, cross streets, addresses, phone numbers, people's  
10 names.

11 Q. Now, when you were talking to Jose Padilla about the places  
12 he lived in the United States, was he able to give you a time  
13 frame for the various places that he has lived?

14 A. Yes, that time frame encompassed approximately from 1970 to  
15 1998.

16 Q. Okay. Now I would like to turn your attention to the time  
17 frame of 1998 to 2002. During the course of your interview,  
18 did you talk to him about places that he may have lived during  
19 that time frame?

20 A. Yes, I did.

21 Q. Let me ask you, in terms of the time frame of 1998 to 2002,  
22 where does that fit into your investigative plan?

23 A. That fits into the substantive part of what I am interested  
24 in.

25 Q. The substantive part?

0100

1 A. Yes.

2 Q. Okay. Did he tell you about some places that he lived  
3 overseas?

4 A. Yes, he did.



5 Q. Where was the first place he told you he lived overseas?

6 A. He told me he lived in Egypt.

7 Q. Did you ask him for an address that he lived in Egypt?

8 A. Yes, I did.

9 Q. What was his response?

10 A. He told me that he lived in Cairo, in an area called

11 Madinah Aruk, and that he had a roommate, that he had lived

12 with that roommate for a year and a half.

13 Q. Did he ever give you a specific address that he lived in

14 Egypt?

15 A. He did not.

16 Q. You said that he told you he had a roommate. Did you ask

17 for a name of that roommate?

18 A. Yes, I did.

19 Q. What was his response?

20 A. He gave me the name of Mohamed.

21 Q. Did you ask him for Mohamed's last name?

22 A. Yes, I did.

23 Q. What was his response?

24 A. He said he couldn't remember.

25 Q. During the course of your interview, did he ever mention

0101

1 the name Mohamed Youssef to you?

2 A. He did not.

3 Q. Now, did you ask Jose Padilla for a phone number associated

4 with this roommate, or this place that he lived in Egypt?

5 A. Yes, I did.

6 Q. What was his response?

7 A. He said he couldn't remember.

8 Q. Now, did Jose Padilla indicate whether or not he was

9 married in Egypt?

10 A. Yes, he indicated to me that he became married in Egypt.

11 Q. Did you ask for the name of his wife?

12 A. Yes, I did.

13 Q. What did he tell you?

14 A. He gave me the name Shaima Sayeed Ibrahim.

15 Q. Did you ask for a phone number where his wife could be

16 reached?

17 A. Yes, I did.

18 Q. What was his response?

19 A. He said he couldn't remember the number where his family

20 was living.

21 Q. Did he indicate that he had other family in Egypt?

22 A. Yes, he had two sons, an 18-month-old son and a

23 three-month-old son.

24 Q. Did he have a picture of his wife with him?

25 A. He did not.

0102

1 Q. How about of his children?

2 A. Yes, he did.

3 Q. Now, did there come a time in the interview where you asked

4 him if he had traveled anywhere else?

5 A. Yes.

6 Q. Following from Egypt, did he tell you about another place

7 he went in the Middle East?

8 A. Yes, he told me that he went to the Hajj in Saudi Arabia  
9 either in 1999 or 2000.

10 Q. Did you ask him if he met anybody at the Hajj?

11 A. Yes, I did.

12 Q. What was his response?

13 A. He said that he had met two individuals. He told me that  
14 one individual was from Saudi and one individual was from  
15 Pakistan.

16 Q. Did he give you any further information regarding the  
17 suggestions these individuals may have?

18 A. He told me that both of those individuals wanted him to  
19 relocate to their countries.

20 Q. Did you ask for the names of each of these individuals?

21 A. Yes, I did.

22 Q. What was his response?

23 A. He said he couldn't remember.

24 Q. He couldn't give you a first name?

25 A. He could not.

0103

1 Q. Did he give you a last name?

2 A. He did not.

3 Q. Did you ask him for a description of these individuals?

4 A. Yes, I did.

5 Q. What was his response?

6 A. He said he couldn't remember.

7 Q. Did you ask him for a phone number of either one of these

8 individuals?

9 A. Yes, I did.

10 Q. What was his response?

11 A. He said he couldn't remember.

12 Q. Did you ask him for any other type of information that  
13 might identify these individuals?

14 A. Yes, I did.

15 Q. What is his response?

16 A. He said he couldn't remember.

17 Q. Now, if you had wanted to send investigative leads over  
18 about who he might have met at the Hajj, would you have had an  
19 easy time doing that at this point in the interview?

20 A. No, ma'am.

21 Q. Why is that?

22 A. Because the level of detail regarding his answers in his  
23 travels to Saudi Arabia would not have allowed me to set  
24 investigative leads and to verify his story.

25 Q. Special Agent Fincher, did Jose Padilla ever indicate that

0104

1 he was in Pakistan?

2 A. Yes, he did.

3 Q. Did you ask him for information about anyone he may have  
4 met in Pakistan?

5 A. Yes, I did.

6 Q. What was his response?

7 A. He said he couldn't remember.

8 Q. Did you specifically ask him for any names of anyone he  
9 might have met in Pakistan?

10 A. Yes, I did.

11 Q. What was his response?

12 A. He said he couldn't remember.

13 Q. Did you ask him for any sort of identifying information for  
14 people he may have met in Pakistan?

15 A. Yes, I did.

16 Q. What was his response?

17 A. He said he couldn't remember.

18 Q. Now, other than Egypt and Pakistan, did you talk to him  
19 about anywhere else he may have traveled?

20 A. Yes.

21 Q. What was his response?

22 A. He told me that he had transited through Switzerland.

23 Q. So, at this point we have Switzerland, we have Egypt?

24 A. Yes.

25 Q. We have Pakistan?

0105

1 A. Yes.

2 Q. And we have Saudi Arabia?

3 A. That's correct.

4 Q. Did he ever indicate that he traveled to Yemen?

5 A. He did not.

6 Q. Did you specifically ask him whether he had traveled to  
7 Afghanistan?

8 A. Yes, I did.

9 Q. What was his response?

10 A. No.

11 Q. Now, in the course of speaking with Jose Padilla about his  
12 travels in the 1998, 2002 time frame, how many names did you  
13 learn about?

14 A. I learned the name Mohamed, but not a last name. I learned  
15 the name of his wife and his children. I believe that's it.

16 Q. How about addresses; did you learn any specific addresses?

17 A. I did not.

18 Q. Based on what he told you about where he traveled in that  
19 time frame, did you have a basis to send out good investigative  
20 leads at that point in time?

21 A. It would have been difficult to set out good investigative  
22 leads based on the level of detail of his answers.

23 Q. Why is that?

24 A. Because I didn't have the names of people, places, phone  
25 numbers, addresses to verify his story.

0106

1 Q. Based on the norming you did in the beginning part of the  
2 interview versus the second substantive part of the interview,  
3 did you make any observations about how he was relaying  
4 information to you?

5 MR. CARUSO: Objection, irrelevant.

6 THE COURT: Overruled.

7 BY MS. PELL:

8 Q. You may answer.

9 A. I felt that, based on the norming of him in the first part  
10 of the interview, he had the ability to recall and remember  
11 detail over a long period of time, explicit detail, including  
12 the cross streets of where he had lived while he was a youth in

13 school. So I felt he had the capacity to remember, the ability  
14 to remember that fine detail. The absence of that detail  
15 regarding questions of substance led me to believe that  
16 Mr. Padilla was being evasive with his answers regarding his  
17 travels overseas.

18 MS. PELL: May I have one moment, Your Honor?

19 THE COURT: You may.

20 MS. PELL: Your Honor, we pass the witness at this  
21 time.

22 THE COURT: Thank you. Questions from Mr. Hassoun?

23 MR. SWARTZ: No questions, Your Honor.

24 THE COURT: Questions from Dr. Jayyousi?

25 MR. LOUIS: No questions.

0107

1 THE COURT: Questions from Mr. Padilla?

2 MR. CARUSO: Yes, Your Honor. Thank you.

3 CROSS EXAMINATION

4 BY MR. CARUSO:

5 Q. Agent Fincher, this interview occurred on May 8, 2002?

6 A. Yes, sir.

7 Q. So that's some time ago?

8 A. Yes, sir.

9 Q. A little over five years at this point?

10 A. That's correct.

11 Q. Now, you told us that, at first, you went to the domestic  
12 section of Chicago's O'Hare airport; is that right?

13 A. That's where I flew into from New York, sir.

14 Q. So you went from that section to the international arrival  
15 section; is that right?

16 A. That's correct.

17 Q. Because you understood Jose was going to be arriving in  
18 that section of the O'Hare Airport?

19 A. That's correct.

20 Q. You understood that he was going to be arriving on a flight  
21 from Switzerland?

22 A. Yes, sir.

23 Q. That was a direct flight from Switzerland to Chicago?

24 A. Yes, sir, I believe that's the case.

25 Q. Do you understand that flight to be about eight, eight and  
0108

1 a half hours long?

2 A. That sounds about right, sir.

3 Q. At some point -- you did not see Jose as he disembarked the  
4 plane, correct?

5 A. That is correct.

6 Q. You only encountered him later on?

7 A. That's correct.

8 Q. You understood his plane to have landed at about 2:00 that  
9 afternoon?

10 A. I believe it was around 1:00 that afternoon, Chicago time,  
11 sir.

12 Q. Your interview with Jose commenced a couple hours later,  
13 about 3:00?

14 A. Yes, sir, I think that's correct.



15 Q. I think you told us that the interview occurred in a  
16 conference room within the Customs area of Chicago's airport?

17 A. That's correct.

18 Q. Now, is this a secure area of the airport?

19 A. It's the Customs area of the airport. I am not sure what  
20 you mean by secure.

21 Q. Let me put it this way, are there passengers roaming around  
22 that area of the airport?

23 A. I don't believe so, sir, no.

24 Q. Could a passenger have accidentally walked into the room  
25 where you were conducting the interview?

0109

1 A. It's possible.

2 Q. How long were you in that area before the interview began?

3 A. Not very long at all. I was in the main terminal area  
4 where there were passengers, and then I was escorted to the  
5 room and commenced an interview.

6 Q. Who escorted you to the conference room?

7 A. Customs.

8 Q. That's where you met Jose to conduct the interview?

9 A. Yes, sir.

10 Q. Now, there were four FBI agents in the room while the  
11 interview was being conducted?

12 A. That's correct.

13 Q. You were the one who was asking questions?

14 A. In the beginning, it was Mr. Donnachie and I, but most of  
15 the questions were from me.

16 Q. And there were two other FBI agents sitting around the  
17 conference table just being present?

18 A. That is correct.

19 Q. Now, as part of the norming process, as you testified  
20 earlier, you asked him some general questions about himself,  
21 correct?

22 A. Yes, sir.

23 Q. You asked him why he was traveling to Chicago; is that  
24 right?

25 A. That's correct.

0110

1 Q. He told you he was there to visit his son, Joshua?

2 A. That's correct.

3 Q. And then he was later to go to Florida to visit his mother,  
4 right?

5 A. That's correct.

6 Q. I think it was at that point where he provided you with a  
7 slip of paper with his mother's address and phone numbers?

8 A. Yes.

9 Q. He did not know those phone numbers off the top of his  
10 head, correct?

11 A. He did not.

12 Q. Or the address?

13 A. He did not.

14 Q. When you asked, he pulled out a slip of paper that had her  
15 name on it, right?

16 A. That's correct.

17 Q. Her address, right?

18 A. That's correct.

19 Q. And two of her phone numbers?

20 A. Yes.

21 Q. One of the phone numbers had a 954 area code, right?

22 A. Yes.

23 Q. And one of the phone numbers had an 800 area code?

24 A. That's correct.

25 Q. With an extension number?

0111

1 A. Yes, sir.

2 Q. The note on that piece of paper said, ask for Estella

3 Lebron?

4 A. That's correct.

5 Q. You knew that Estella Lebron was his mother's name?

6 A. That's correct, and he provided his mother's name to me as  
7 well.

8 Q. He provided mother's name to you before he showed you the  
9 slip of paper, correct?

10 A. Yes, sir.

11 Q. So that slip of paper confirmed what he had told you  
12 earlier?

13 A. That's correct.

14 Q. Now, he also told you the name of the mother of Joshua,  
15 correct?

16 A. Yes, sir.

17 Q. He told you her name was Marisol Rivera?

18 A. That's correct.

19 Q. He told you that he believed she lived in Chicago, but did  
20 not know her address, right?

21 A. That's correct.

22 Q. But you had her name?

23 A. Yes, he gave me her name.

24 Q. Okay. Now, he was able to give you information about the  
25 areas in which he had grown up, correct?

0112

1 A. Yes, sir.

2 Q. In Chicago?

3 A. In Chicago.

4 Q. In Puerto Rico?

5 A. Just the country of Puerto Rico. He didn't give me  
6 specifics about Puerto Rico.

7 Q. And in Florida?

8 A. Yes, sir.

9 Q. Now, in Florida, with regard to his address, he couldn't  
10 give that to you off the top of his head either, correct?

11 A. No, sir, he could not, but he provided me a driver's  
12 license which had that information on it.

13 Q. You asked him for his address in Florida, did you not?

14 A. Yes, sir, I did.

15 Q. And that's when he pulled out his driver's license and  
16 showed you his license and said, that's the address where I was  
17 living?

18 A. That's correct.

19 Q. But he had not known that off the top of his head?

20 A. Not off the top of his head, but he made it available to

21 us.

22 Q. Okay. Now, at this point I want to talk to you -- we  
23 talked about this earlier in the trial and I will be briefer  
24 this time. Your interview with Mr. Padilla was not recorded,  
25 correct?

0113

1 MS. PELL: Your Honor, we are going to object to asked  
2 and answered. It was covered in the earlier part of the trial.  
3 We would also like to be heard side bar on this issue.

4 [Proceedings at sidebar follow]:

5 MS. PELL: Judge, the Court will recall the first time  
6 Agent Fincher testified --

7 THE COURT: I am laughing because, I know I probably  
8 shouldn't say this, but I know he testified, but I have no  
9 present memory of what he said.

10 MS. PELL: He did refer to this.

11 MR. CARUSO: I did 'cause I am trying to be fair. I  
12 also said I was going to be briefer than I was before. I do  
13 want to orient the witness and the jury to the scene in the  
14 interview room. I am not going to go into the level of detail  
15 I did before. I do need to establish a few basic facts.  
16 That's all.

17 MS. PELL: This is my objection. Perhaps he is  
18 establishing different facts. When I went back through the  
19 record, no one ever asked him why he did not tape record, or  
20 why he didn't even ask a supervisor about tape recording. If  
21 he is going to answer that question, which on redirect, where

22 Mr. Caruso is going, he is going to say because, you know, I  
23 had information that Mr. Padilla may have been coming to the  
24 United States to conduct a terrorist attack.

25 THE COURT: That should have been forewarned way  
0114

1 before now, Ms. Pell. I can't even imagine that it would --

2 MS. PELL: It was forewarned because we had  
3 suppression testimony on this. That testimony bears out why he  
4 was going there and that his goal was to gain cooperation.  
5 Putting a tape recorder --

6 THE COURT: Let me ask this question. I think it is  
7 appropriate. Let me make sure that we get, unless I am  
8 incorrect, Mr. Caruso, no areas that you don't want to go if  
9 the question is simply put, you didn't tape record your  
10 interview with Mr. Padilla.

11 MR. CARUSO: That was all I was going to ask, Your  
12 Honor. That doesn't open the door.

13 THE COURT: I don't think it opens the door to  
14 anything else.

15 MS. PELL: If that is the only question that is asked,  
16 Your Honor.

17 THE COURT: No audio recording and no video recording,  
18 do we have that?

19 MR. CARUSO: That's all.

20 [Proceedings in open court follow]:

21 THE COURT: Proceed, please, Mr. Caruso. The  
22 objection is overruled.

23 BY MR. CARUSO:

24 Q. Agent Fincher, you did not audio record your interview with  
25 Jose that day, correct?

0115

1 A. I did not.

2 Q. Neither did you video record your interview with Jose that  
3 day, right?

4 A. I did not.

5 Q. Now, Jose did tell you the name of the man that he lived  
6 with in Egypt, correct?

7 A. He told me his first name, Mohamed.

8 Q. He told you his name was Mohamed, right?

9 A. That's correct.

10 Q. And he told you the section of Cairo in which he lived,  
11 right?

12 A. Yes.

13 Q. He was not able to provide you with an address however?

14 A. He was not.

15 Q. We're talking about a street address, right?

16 A. A street address, a cross street, to a place that he lived  
17 for a year and a half.

18 Q. To be fair, Jose told you that he arrived in Egypt in  
19 September of 1998, correct?

20 A. Okay.

21 Q. That's right, he told you that?

22 A. Yes, in '98.

23 Q. He lived there in 1998, 1999 and 2000, correct, based on  
24 what he told you?

25 A. Yes.

0116

1 Q. That was almost two years before the interview you  
2 conducted with him on May 8, 2002, correct?

3 A. Correct. If I follow your chronology, correct.

4 Q. Is that chronology correct?

5 A. I believe so, yes, sir.

6 Q. So we are on the same page. And again, this interview was  
7 conducted after Jose had just gotten off a very long flight  
8 from Switzerland, right?

9 A. Correct.

10 Q. He was able to tell you that he was married while he was in  
11 Egypt, correct?

12 A. Yes.

13 Q. He told you his wife's name?

14 A. Yes.

15 Q. He told you that he had two sons, correct?

16 A. Yes.

17 Q. He told you that one son was 18 months old, correct?

18 A. Yes.

19 Q. And one son was three months old, right?

20 A. Correct.

21 Q. He told you their names as well, right?

22 A. Yes, he did.

23 Q. I think you testified earlier about Jose's trip to the  
24 Hajj, right?

25 A. Yes, sir.

0117



1 Q. Jose told you that he traveled to the Hajj during Ramadan  
2 in 1999 or 2000, correct?

3 A. Correct. He couldn't remember which year, but '99 or 2000.

4 Q. It could have been an overlapping time, correct?

5 A. Could have been. He gave me the answer '99 or 2000.

6 Q. He told you that he had met two men at the Hajj, correct?

7 A. That's correct.

8 Q. One was from Pakistan, right?

9 A. Correct.

10 Q. One was from Saudi Arabia?

11 A. Correct.

12 Q. He told you that each of those men had encouraged him to  
13 move to their countries, correct?

14 A. Correct.

15 Q. He told you that, as an American Muslim, he was well  
16 received at the Hajj?

17 A. That's correct.

18 Q. That's how he explained he had come into contact with these  
19 two men, right?

20 A. He explained to me that he was well received at the Hajj.  
21 I don't know if the context of that conversation was with these  
22 two individuals. He told me he was well received because he  
23 was an American at the Hajj, and he told me about these two  
24 people that he had met.

25 Q. He told you, on the one hand he was well received, and on  
0118  
1 the other hand, that he met these two gentlemen?

2 A. Yes.

3 Q. Jose told you that he was not happy in Egypt, correct?

4 A. At one point he was not happy in Egypt because of some  
5 difficulties.

6 Q. Difficulties adjusting to the culture and the language and  
7 so forth?

8 A. That is correct.

9 Q. He was interested in moving to Pakistan, correct?

10 A. He didn't tell me that he was interested in moving to any  
11 particular location. He told me that they had encouraged him  
12 to go there. He was interested in continuing his education.

13 Q. He told you he was studying while he was in Egypt, right?

14 A. Yes.

15 Q. He told you that he had applied to a university while he  
16 was there?

17 A. Yes.

18 Q. He told you he could not get into that university, right?

19 A. Yes.

20 Q. Because the university required an Egyptian diploma?

21 A. Yes.

22 Q. So he had to go to a private study course, right?

23 A. He went to a study course at the university for foreign  
24 students.

25 Q. There was a private study course for foreign students that  
0119  
1 was affiliated with the university?

2 A. I believe that's the case.

3 Q. He attended that?

4 A. I believe so.

5 Q. But because of the difficulties that he had with the  
6 language and adjusting to the culture of Egypt, he told you he  
7 was not happy there?

8 A. That's correct.

9 Q. He told you that this man that he had met at the Hajj had  
10 encouraged him to move to Pakistan, right?

11 A. That's correct.

12 Q. To further his study?

13 A. Correct.

14 Q. Jose related to you that there were schools in Pakistan  
15 that could further his Islamic study, correct?

16 A. That provided him with a more intensive Islamic study.

17 Q. And again, with regard to Jose's trip to the Hajj, even if  
18 we use the date of 2000, that's about two years before your  
19 interview with him on May 8, 2002, correct?

20 A. Correct.

21 Q. Jose told you that the purpose of his study at the  
22 university was to further his goal of becoming Imam? Did he  
23 tell you that?

24 MS. PELL: I am going to object to hearsay at this  
25 point. Can I be heard at side bar?

0120

1 [Proceedings at sidebar follow]:

2 MS. PELL: Judge, at this point in time the government  
3 believes that Mr. Caruso is going beyond the scope of direct  
4 examination and bringing out subject-matter areas that the

5 government did not go into. The government is not a party  
6 opponent in the case law --

7 THE COURT: So your objection is that this is a  
8 hearsay statement?

9 MS. PELL: Yes.

10 MR. CARUSO: They did ask questions regarding --

11 THE COURT: It's a statement of hearsay, an out of  
12 court statement offered --

13 MR. CARUSO: They put in a portion of the statements  
14 and I'm allowed to put in others to put the ones they put in in  
15 context.

16 THE COURT: Ms. Pell?

17 MS. PELL: Your Honor, if the argument is rule of  
18 completeness, the rule of completeness does not allow him to  
19 introduce a portion of the statement that is neither  
20 explanatory nor relevant to the portions introduced by the  
21 government. The government specifically tailored its questions  
22 to places he lived and people he met. We did not go into why  
23 he traveled, what his purpose was for being there. This is a  
24 hearsay statement.

25 THE COURT: But you examined the agent, you used these

0121

1 questions about establishing norms and whether or not he was  
2 being truthful and was he trying to conceal anything by the  
3 fact that he didn't know Mohamed's last name and some of the  
4 places. So, in essence, what Mr. Caruso is doing is saying he  
5 had a full and open conversation. He talked about a lot of

6 things.

7 MR. SHIPLEY: Your Honor, it goes directly to why we  
8 argued for admission of the statements about the money.  
9 Mr. Caruso wants to put in statements beyond direct examination  
10 to create a different impression to the jury. That puts  
11 squarely back the opportunity to respond under the same theory  
12 and then to go into the statements about the money. That's why  
13 we argued it was important to us. Regardless of whether the  
14 actual money comes in, those statements show absolutely he was  
15 being evasive.

16 Mr. Caruso made this argument and he is the one that  
17 just put this on the table. His argument about the rule of  
18 completeness goes both ways.

19 MR. CARUSO: They directly asked him about a man he  
20 met at the Hajj in Pakistan. I am trying to complete that and  
21 nothing more, Your Honor.

22 THE COURT: This is the concern. We have deliberately  
23 kept out the issue regarding the money and the issues  
24 surrounding the money. If the issue is evasiveness and the  
25 government wants to counter that he was being evasive, here is

0122

1 the evidence. Here is a thing that he didn't tell you about.  
2 He didn't tell you about the approximately \$10,000 he had in  
3 his pocket.

4 MR. CARUSO: I had discussions with Ms. Pell this  
5 morning trying to get out what they believed was going to open  
6 the door and this wasn't brought up.

7 MS. PELL: I told him that I didn't know because my

8 direct was so narrow.

9 THE COURT: I think the crack is there.

10 MR. CARUSO: So the door has not been opened.

11 THE COURT: Yet.

12 [Proceedings in open court follow]:

13 THE COURT: Objection sustained.

14 MR. CARUSO: Thank you, Agent.

15 THE COURT: Redirect, Ms. Pell?

16 MS. PELL: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY MS. PELL:

19 Q. Special Agent Fincher, Mr. Caruso -- do you recall that  
20 Mr. Caruso just asked you questions about Mr. Padilla's  
21 production of the name and the phone number and address for his  
22 mother?

23 A. Yes.

24 Q. And he said, well, he didn't actually remember them. He  
25 gave them to you on a slip of paper?

0123

1 A. That's correct.

2 Q. During the time that you were talking to him about that  
3 matter, how would you describe his demeanor, his speech?

4 A. Are you talking about the early part of the interview?

5 Q. Yes.

6 A. His answers are complete. His demeanor is relaxed. He is  
7 offering answers. In the case that Mr. Caruso presented, the  
8 illustration he presented, I asked him about his address in

9 Florida. He couldn't remember, so he produced a document, a  
10 driver's license that had that information. I asked him about  
11 his mother's address and telephone number. He couldn't recall,  
12 but produced a piece of paper that had that information on it.  
13 So, I felt that he was being forthcoming and complete and  
14 providing detailed answers.

15 Q. What you just described, is that the same or different than  
16 the second part of the interview?

17 A. It's different from the second half of the interview. A  
18 time period that is more recent he was unable to recall the  
19 circumstances, where he recalled the street and cross street  
20 where he lived, I would say, just before the 7th grade. But,  
21 yet, he couldn't recall the street and the cross street or the  
22 last name of the roommate that he lived with for a year and a  
23 half.

24 He also didn't produce any items that had that  
25 information on them, that had phone numbers on them or had

0124

1 names on them. So, the level of completeness, the level of  
2 detail, the speech was different. Instead of giving narrative  
3 complete answers, it was short, halting answers. If I was to  
4 compare the beginning of the interview on a continuum to where  
5 we ended up in the interview, there was a diminishing level of  
6 detail and completeness of answers.

7 Q. Do you recall when Mr. Caruso was questioning you and  
8 stated, well, he told you his wife's name, correct?

9 A. Correct.

10 Q. And he told you the names of his children, correct?

11 A. Correct.

12 Q. Did you ask him for a phone number where he could reach his  
13 wife and his children?

14 A. Yes, I did.

15 Q. How did he respond?

16 A. He said he didn't have a phone number. He couldn't  
17 remember.

18 MS. PELL: If I may have a moment, Your Honor.

19 A few more brief questions.

20 BY MS. PELL:

21 Q. Special Agent Fincher, you indicated that Mr. Padilla  
22 produced a piece of paper to you to show you his mother's  
23 address and phone number?

24 A. Yes.

25 Q. When you were questioning him about other individuals that  
0125

1 he may have met overseas, did he ever offer any paper or other  
2 documents to point out that information?

3 A. No, he did not.

4 Q. Now, was he able to give you the names and ages of his  
5 sons?

6 A. Yes.

7 Q. What were those?

8 A. Hussein was 18 months old at the time of this interview and  
9 Hassan was three months old at the time of this interview.

10 MS. PELL: Thank you, Your Honor. No further  
11 questions.



12 THE COURT: Thank you very much, sir, you are excused.

13 [The witness was excused].

14 THE COURT: Ladies and gentlemen, it's ten minutes of  
15 1:00. We will adjourn for lunch and return at 2:00.

16 MR. SHIPLEY: Judge, before we do that, can we talk  
17 about a scheduling matter side bar?

18 [Proceedings at sidebar follow]:

19 MR. SHIPLEY: Judge, Mr. Killinger can chime in, but  
20 things are going much quicker than expected this morning. I  
21 don't know that we have our next witness, which would be the  
22 last one lined up. We may need to recall another witness. We  
23 suggest that we let the jury go for the day.

24 THE COURT: Their lunch is here.

25 MR. SHIPLEY: We have the motions we need to go back

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1 to this afternoon, and we need some time to finalize the jury  
2 instructions anyway.

3 THE COURT: You have no more witnesses?

4 MR. KILLINGER: No, I really didn't expect us to go  
5 this fast today.

6 THE COURT: I will tell them the government has  
7 exhausted their witnesses. I will just tell them that the van  
8 will be ready in 45 minutes to an hour.

9 [Proceedings in open court follow]:

10 THE COURT: Ladies and gentlemen, your lunch has  
11 arrived. However, our next witness for today has not arrived  
12 and it does not look like they would be able to get here before  
13 the Court convenes. Your lunch is ready. I am going to make

14 arrangements for your transportation. They should be here in  
15 45 minutes. After that, you are free to go for the day.

16 Remember, no discussing the case or letting anyone  
17 discuss it with you. No reading about the case. I will see  
18 you all back in court tomorrow morning at 9:30. Have a good  
19 afternoon.

20 [The jury leaves the courtroom at 12:51 p.m.]

21 THE COURT: Counsel, why don't we adjourn until 2:15.  
22 That will let you have your lunches. Make sure we have the  
23 filings that we need for the two matters. Come back and finish  
24 those after lunch and find out what the status is among  
25 everyone for jury instructions.

0127

1 MR. do CAMPO: Your Honor, for the sake of possibly  
2 having tomorrow off, we still have the jury here, we will  
3 stipulate to the translation. My understanding is,  
4 Ms. Kandalaft is going to say she translated it from Arabic to  
5 English. I think it would save everybody a lot of trouble.

6 MR. KILLINGER: She is going to do a little bit more  
7 than that, Judge.

8 MR. do CAMPO: What's that?

9 THE COURT: You all can work that out among  
10 yourselves.

11 Mr. do Campo, if the government finishes tomorrow, we  
12 are going to have Monday off anyway.

13 MR. do CAMPO: I tried, Judge.

14 THE COURT: I know everybody is kind of reaching that

15 level of emotional and mental exhaustion that is hard to  
16 describe to those people who haven't been sitting in a trial  
17 for three months.

18 Mr. Killinger?

19 MR. KILLINGER: Judge, I believe one of the responses  
20 was filed and I don't know what happened to the other one. I  
21 will be prepared at 2:15 to argue it. I don't think there will  
22 be a response. That's the motion for open file discovery from  
23 the government.

24 THE COURT: I wouldn't quite call it that,  
25 Mr. Killinger.

0128

1 MS. BAKER: Could we request a heads up before 2:15?

2 THE COURT: That's the motion for production of FBI  
3 reports related to the for criminal investigation.

4 Let's talk about some other ground rules. No, I will  
5 wait on that one. We will just do that, go to jury  
6 instructions. We will finish up tomorrow morning, hopefully,  
7 with the government, and maintain our schedule that we talked  
8 about the other day.

9 MR. CARUSO: What are we doing at 2:15?

10 THE COURT: The two motions, FBI report related to  
11 criminal investigation, docket entry 1101, and docket entry  
12 1091.

13 MR. CARUSO: Okay. But we are not doing the jury  
14 instructions.

15 THE COURT: No, but everybody is supposed to have  
16 their jury instructions filed by today.

17 MR. SHIPLEY: I spoke to Mr. Caruso, Your Honor, and  
18 he wanted a little time after court to coordinate with the  
19 defense team. Does 5:00 make sense, Michael?

20 MR. CARUSO: Yes.

21 MR. LOUIS: There is confusion over it, Your Honor,  
22 and I apologize. I need to clarify.

23 THE COURT: Your theory of defense, which is normally  
24 included in your defense jury instructions, should still be  
25 included in your defense jury instruction. We had some

0129

1 discussions. We went back and forth a little bit and I kind of  
2 went back and forth and I said, with the jury instructions.

3 MS. BAKER: Your Honor, at this point we are including  
4 what we think will cover everything.

5 THE COURT: I have said before and I said in chambers  
6 that you will be allowed to amend your defense before we give  
7 the final jury instructions to the jury and before we have  
8 closing arguments. I said that last week.

9 MR. FRAZIER: Your Honor, one final thing. If we  
10 could set aside a few minutes this afternoon for the government  
11 and the Court and the defense to go through the exhibit list.

12 THE COURT: I said that earlier in the week,  
13 Mr. Frazier. Mr. Shipley said he was going to sit and have  
14 some time with Robin. We thought tomorrow, if you guys  
15 finished early, but if you want to do it this afternoon, I  
16 don't have a problem.

17 MR. NATALE: If we could do that tomorrow, Your Honor.

18 THE COURT: Mr. Frazier, they would rather finish the  
19 jury instructions today, get those circulated among themselves,  
20 since they are trying to do joint ones, and then do the  
21 exhibits tomorrow.

22 MR. FRAZIER: We just don't want to close out our case  
23 in chief --

24 THE COURT: I won't let you rest in front of the jury  
25 until that matter has been resolved.

0130

1 MR. SWARTZ: We can do this later, Your Honor. I  
2 would like to make a motion to sever. I may have made this  
3 motion once before, I would like to renew it, regarding the  
4 statements that came out in the direct examination of Agent  
5 Fincher. Ms. Pell went on to ask some questions about whether  
6 the information Agent Fincher obtained through this interview  
7 could be used to further an investigation in foreign countries,  
8 addresses, names, things to that effect. This is in May of  
9 2002.

10 The investigation of this case we know did not begin  
11 until May of 2002, but we know it happened after the arrest of  
12 Mr. Padilla when the investigation of Mr. Hassoun began. The  
13 implication that is given here is that somehow there is  
14 information that they would have wanted to use to pursue  
15 someone in a foreign country. We know what that information  
16 was about and that was about the reason for arresting -- first  
17 detaining and then arresting on the material complaint  
18 Mr. Padilla, which ultimately became an enemy combatant issue.

19 THE COURT: Did I miss something in this testimony

20 today?

21 MS. PELL: I don't think so.

22 MR. SWARTZ: The follow-up question that Ms. Pell  
23 asked, which was the norming, there was the norming and then  
24 there was the other information. And based on that, it was  
25 scanty information, no addresses, no names, could you have used

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1 that to go somewhere in Egypt, or whatever country, to find  
2 people, to interview people, to pursue an investigation.

3 THE COURT: I took the questions meaning as follows:  
4 Was the information such, was it complete as such that you  
5 could have done something with it, not as to a specific  
6 investigation, but to indicate that despite the very complete  
7 information he gave on other things, he gave very incomplete  
8 information here.

9 MR. SWARTZ: I remember -- I didn't go back and look  
10 at it, but I remember him trying to make the point that he did  
11 not have enough information with what he was given to go  
12 overseas or whatever to one of these countries and locate  
13 anybody. I don't know why she went to that point. I don't  
14 know what the point of that was, but it came out.

15 It gives the jury the impression that they were  
16 somehow looking for information that they could have used from  
17 this interview to find people, interview people, locate people,  
18 do something with that information.

19 THE COURT: And? Why is that grounds for severance?

20 MR. SWARTZ: Because that was for the purpose -- if

21 that, in fact, was what he was talking about, I am sure he  
22 meant that, it had to do with the reason why they detained him,  
23 which had nothing to do with this case. That was the Dirty  
24 Bomber investigation. That's why they traveled to Chicago to  
25 meet him. They had information that he was traveling. That

0132

1 information had nothing to do with the FISA investigation.  
2 That had to do with the independent investigation of  
3 Mr. Padilla which led to him being detained.

4 THE COURT: Okay.

5 MR. SWARTZ: The answer he gave that I didn't have  
6 enough information to go anywhere and talk to people based on  
7 what Mr. Padilla told me was for pursuing the people -- his  
8 investigation was about why Padilla -- what Padilla was doing,  
9 what Mr. Padilla was traveling to Chicago for. He is asking  
10 questions about people that he meets, not just 1998, 1999  
11 period, 2000, the period of this indictment, but more recently  
12 in 2002.

13 In 2002, after the period of this indictment, from  
14 November to May of -- November 1 to May of 2002, six months  
15 there, he is asking questions about that period as well, who  
16 his associations are, where he lived.

17 THE COURT: How does that affect Mr. Hassoun?

18 MR. SWARTZ: Because it's a completely different  
19 investigation. It's a completely different case.

20 THE COURT: But that doesn't show prejudice.

21 MR. SWARTZ: It does as to Mr. Hassoun because

22 Mr. Padilla is being detained and interviewed and interrogated  
23 for something that has nothing to do with this case.

24 THE COURT: For which this jury has been told has  
25 nothing to do with this case and they should disregard.

0133

1 MR. SWARTZ: Unfortunately, Your Honor, the more that  
2 they are told about this, the harder it is for them to  
3 separate.

4 THE COURT: The motion for severance is denied.

5 MR. SWARTZ: I ask for a instruction that the  
6 interrogation of Mr. Padilla at that point in time is not  
7 related to Mr. Hassoun.

8 THE COURT: I think that is one of those pink  
9 elephants, Mr. Swartz. I don't think that it created a  
10 situation that prejudices Mr. Hassoun to the point that the  
11 jury needs to be further instructed on this issue.

12 I will see you all back at 2:15.

13 [There was a recess for the noon hour].

14 AFTERNOON SESSION

15 THE COURT: On behalf of Mr. Jayyousi, you said your  
16 motion will be short and sweet.

17 MR. SWOR: Your Honor, maybe the shortest way would be  
18 for Mr. Killinger to get up and say that there was or was not a  
19 criminal investigation and moot out both motions, and obligate  
20 the government to turn over all the evidence.

21 THE COURT: That's not what you asked for, though.

22 MR. SWOR: Mechanically I'm trying to save everybody  
23 time. Having said that, the way I read their motion, they are



24 basically saying I'm right. They just don't think that what  
25 I'm requesting is the right way to do it.

0134

1 THE COURT: What would it accomplish? What  
2 evidentiarily wise, which is not a word, do you gain?

3 MR. SWOR: What do I gain?

4 THE COURT: Yes.

5 MR. SWOR: I gain foreclosure of that issue that they  
6 keep injecting in that we didn't do this sooner. They are  
7 trying to make an excuse in front of the jury that they didn't  
8 do it sooner because they couldn't do it sooner. That is not  
9 true. Even if it was fact, it's not law. All I have asked for  
10 the Court to say is there was no legal impediment and that's  
11 that. Their argument is that it was policy --

12 THE COURT: Even if it were not policy, the sovereign  
13 does what the sovereign does when he or she wants.

14 MR. SWOR: But the sovereign is over there in the jury  
15 box.

16 THE COURT: No, the sovereign determines when someone  
17 is charged, within the statute of limitations period and the  
18 appropriate grand jury proceedings, et cetera. If they want to  
19 bring it to the jury on Monday instead of Friday, or in May  
20 instead of December --

21 MR. SWOR: That's a different issue. First of all, I  
22 discuss agree with the use of the word "sovereign." They may  
23 be the executive, they are not the sovereign.

24 Secondly, this is not the executive's decision, the

25 charge that is being called into question. It is an excuse for  
0135

1 not acting that they put in front of the jury that is  
2 misleading.

3 THE COURT: Let me hear from Mr. Killinger.

4 MR. KILLINGER: Judge, I don't have a whole lot to  
5 say. I think I spelled it out pretty succinctly in my memo.  
6 What Mr. Swor is asking for is an instruction and for the Court  
7 to take judicial of a fact that is already in the record  
8 evidentiary wise. I actually quoted it verbatim.

9 Agent Hukill simply testified that there was within  
10 the FBI, prior to or up until immediately after 9/11,  
11 rightfully or wrongfully -- and if it's an excuse, then fine,  
12 they can argue that this is just an excuse by the government.  
13 I can't stop them from making that argument.

14 The fact remains that there was a policy within the  
15 FBI that, for the most part -- and that's what the record says.  
16 Kent Hukill never came in here and testified that, no,  
17 absolutely not, there was no criminal intelligence information  
18 ever shared with any criminal investigator before 9/11. He  
19 says, very accurately, that it was not done very often and it  
20 was a difficult process when it was done.

21 I think the 9/11 Commission report shows that. I  
22 think the Gerard memo of '95 shows that. So, that's the state  
23 of the evidence in here. If you go back to the transcript  
24 again, when Agent Hukill mentioned the word the Patriot Act,  
25 which gets into the legal analysis, which he was not competent

0136

1 to testify, Mr. Swor objected and Your Honor rightfully cut him  
2 off and sustained the objection. You said, we are only talking  
3 about the policy within the FBI that affected his investigation  
4 within the Miami office and when he was given information in  
5 this investigation. That's what he was testifying to.

6 There is no basis for the Court to instruct the jury  
7 on a legal issue that is not in the case, never has been in the  
8 case, and wasn't testified to by the witness.

9 To the extent that it then goes from adjudicated facts  
10 into legislative facts which -- my position is that that's  
11 where this whole policy realm comes in. As I pointed out, the  
12 Foreign Intelligence Surveillance Act was passed in 1978. For  
13 many years there was no written policy. Then, when there was a  
14 written policy, we now know, as of 2002, because it took the  
15 first ever appeal to the Foreign Intelligence Court of Review  
16 for that Court to finally, in 2002, from 1978, to say that this  
17 whole thing about the wall, we recognize it existed, but it  
18 never should have existed.

19 That's all well and good, but everything that was  
20 going on up until that point within the FBI I believe falls  
21 into the category of legislative facts which are not to be  
22 judicially noticed. Obviously there was considerable dispute  
23 about what the statute allowed, what it didn't allow, when it  
24 allowed it, and everything else, as all the 9/11 Commission has  
25 set forth. That's the government's position on this.

0137

1 I don't know what the dispute is. The evidence is in.

2 Hukill's testimony is here. It's crystal clear. He is not  
3 saying it never happened or it couldn't legally ever happen.  
4 He is just saying that, for the most part, not even generally,  
5 it was the rare exception as opposed to an everyday thing. I  
6 think that's true.

7 THE COURT: Mr. Swor?

8 MR. SWOR: The fact is the government says that I can  
9 argue that it's just an excuse, but without something in front  
10 of the jury, how do I argue that it's --

11 THE COURT: I think you have the record from what  
12 Agent Hukill said or didn't say.

13 MR. SWOR: When Mr. Gunaratna testified and he talked  
14 about the wall, he threw that out just for volunteered stuff.

15 THE COURT: I do not think that this is the type of  
16 fact of which the Court should take judicial notice. I think  
17 that there is obviously a question of fact, to a degree, as to  
18 how, when, if, should have, could have a wall existed between  
19 these various entities in terms of these types of  
20 investigation. So docket entry 1091 is denied.

21 Now, on the docket entry 1101, Mr. Swartz, I have to  
22 say I am not sure I understand what you are asking for.

23 MR. SWARTZ: I feel like it's the motion that can't  
24 quite get started here. If I could just pick up from what  
25 Mr. Swor mentioned, because he really makes a point here that

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1 is crucial in all of this, in this motion as well, which is the  
2 agent -- Agent Hukill made that statement and then it was  
3 echoed by the expert. So it has been really given a lot of,

4 should we say attempt to give a lot of credibility to the  
5 government's case.

6           And that is, the government, meaning the FBI, had this  
7 wall which prevented the intelligence side from sharing with  
8 the criminal side. That has been presented because they  
9 anticipate, and they are correct, that there will be an  
10 argument, which is, during the time when this wiretap began, as  
11 early as '94, '95, and through 2000, if this conspiracy  
12 existed, why didn't someone in the FBI or in the government  
13 take some action? If they saw it as a conspiracy, it was a  
14 violation of the law which existed then, which is a conspiracy  
15 to commit a murder in a foreign country, why wasn't an action  
16 taken then? But it wasn't until post 9/11. That's why this  
17 whole fact has come out, which is, well, since the Patriot Act  
18 that wall was taken down, but before, the wall existed and  
19 that's why our hands were tied.

20           What I am trying to address is, there is no question  
21 about one thing, the wall or this barrier began with the  
22 Attorney General's memo of July, 1995, and then was filtered  
23 down to become a policy of the FBI. That is the wall that we  
24 are all talking about. I am looking before this wall existed  
25 when there was no prohibition. During that period, what the

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1 agents testified to did not exist during that time, pre 1995,  
2 so their testimony, to some extent, was inaccurate.

3           Prior to the wall there was no barrier between  
4 intelligence and criminal, and that period is when Mr. Hassoun

5 was under investigation, Mr. Jayyousi's wiretap existed,  
6 Mr. Hassoun had been talking to Mr. Jayyousi on that wiretap,  
7 Mr. Hassoun had been followed and photographed. And we see in  
8 the FBI reports that were given to us the Neutrality Act was  
9 one of the subjects of the investigation. That's a criminal  
10 offense.

11 What I'm suggesting is, we are entitled to any  
12 information of a criminal investigation that overlapped or was  
13 in conjunction with the intelligence investigation, at least to  
14 disprove. Now, I don't know how we would use it, but this  
15 contradicts the fact that the government has presented that  
16 this wall prevented the intelligence side from talking to the  
17 criminal side.

18 I hope that clears up or helps. It doesn't look like  
19 it has done much. But if this testimony -- now we have heard  
20 it from two different witnesses.

21 THE COURT: Let's say that I accept your factual  
22 scenario that at some point in time, or contemporaneous with  
23 the intelligence investigation there is some other criminal  
24 investigation going on of your client. Let's say I were to  
25 accept that for the sake of argument. What does that mean to

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1 you and what do you think it means that you are entitled to, I  
2 think is the question.

3 MR. SWARTZ: First, what it means is that the  
4 government is wrong.

5 THE COURT: Wrong about?

6 MR. SWARTZ: About the fact that there couldn't be a

7 criminal investigation simultaneous with or --

8 THE COURT: Or could that support the fact that there  
9 is a wall because the right hand really doesn't know what the  
10 left hand is doing?

11 MR. SWARTZ: If there is a criminal investigation and  
12 they are using the intelligence investigation for their  
13 criminal investigation or sharing --

14 THE COURT: But, if I understand you, that's not what  
15 we have. We have a separate criminal investigation going on.

16 MR. SWARTZ: You mean this particular case?

17 THE COURT: Yes.

18 MR. SWARTZ: I'm going back to the pre 1995, or the  
19 pre wall period, which does exist. There is a period of time  
20 in this case that is pre wall. My theory is that, based on  
21 what I'm seeing, is that there was an intelligence  
22 investigation which shared their evidence with the criminal  
23 investigation; or to put it differently, the intelligence and  
24 the criminal investigation were both done at the same time,  
25 parallel and both know about each other.

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1 The Neutrality Act investigation, which I believe was  
2 the criminal investigation, was following these guys to see  
3 what they were doing with regard to arms to Bosnia, funding to  
4 Bosnia, which I believe was a Neutrality Act violation, getting  
5 involved in that war.

6 Why would they be following a group of Muslim men who  
7 were target practicing, and then we find out in the FBI report

8 which has as a title Neutrality Act, and then the whole results  
9 of the fingerprint examination of things that were taken from  
10 the shooting range. It seems to me like it's pretty obvious  
11 that that is what is going on.

12 THE COURT: Why are you entitled to it?

13 MR. SWARTZ: Because it rebuts what the government is  
14 trying to present to the jury. The government is so concerned  
15 about getting accurate information to the jury, yet, in this  
16 case they have, with two witnesses, misled the jury about the  
17 fact that in this case there was no ability for the  
18 intelligence to share with the criminal, when in fact there  
19 were times in this case -- and it's important because it's in  
20 the beginning of the case when they were sharing information,  
21 that this information was being shared, and this is contrary to  
22 what the government has said in its witnesses.

23 Agent Hukill wasn't around in 1995, so he doesn't know  
24 what they were doing in San Diego in 1995, before there was a  
25 wall. He has no idea. He is just aware of what is going on at

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1 the point he gets into it. But he is not aware of what is  
2 happening then. We are entitled to show, at least as Brady  
3 material, because it rebuts what these witnesses have said.

4 It shows that they did a criminal investigation at the  
5 same time they were collecting this intelligence. The criminal  
6 investigation led nowhere. They were free, at one point, to  
7 share it, and they knew enough at that point to believe that  
8 there was a conspiracy to commit the kind of crimes that they  
9 are charged with here.



10           If they had that information back then and they could  
11 have shared it and nothing resulted in the way of a criminal  
12 prosecution, we are entitled to present that to the jury. We  
13 are entitled to let the jury know that there was a point of  
14 time in the beginning of this case when the intelligence side  
15 could have presented it to the criminal side. The criminal  
16 side could have taken it and said, yeah, we think this is  
17 something that we need to present to the grand jury, but it  
18 wasn't done.

19           The government is using this wall to hide behind  
20 this -- as a shield from our argument, which is, ladies and  
21 gentlemen, these facts that you are looking at, if they were so  
22 clearly evident of a conspiracy and could have been taken to  
23 prosecution back then, but they waited until not just three or  
24 four years, but five years, six years, after the wire is shut  
25 down to some extent, and then we have no -- suddenly we have a

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1 prosecution that goes back to things that happened in '94,  
2 before the wall even existed.

3           I think these are very valid arguments and I think  
4 this rebuts a very damaging point that the government has tried  
5 to present to the jury. In order for the jury to -- the jurors  
6 are thinking, you know, if this is such terrible stuff, if  
7 these are such dangerous people, if this is about terrorism,  
8 why -- and if you are following them and listening to them all  
9 these years, what gives? What took so long? I think it's a  
10 perfectly valid point. The government has anticipated that and

11 that's why they have this agent and this expert make these  
12 points.

13 THE COURT: Mr. Louis, do you have something you  
14 wanted to add?

15 MR. LOUIS: Yes, ma'am. Your Honor, we would adopt  
16 Mr. Swartz's motion. I would also like to point out a couple  
17 of facts that relate to Dr. Jayyousi. I found it interesting  
18 that Mr. Killinger, during the previous argument with Mr. Swor,  
19 and it may have been that he just misspoke, pointed out that  
20 there was no criminal investigation in the Miami office. I  
21 felt his language was very particular to the Miami office.

22 I think it is relevant that the San Diego office was  
23 the one that was investigating Mr. Zaky, as well as L.A., which  
24 were not mentioned. In addition to those investigations of  
25 Mr. Zaky, there was also the '93 investigation of Sheikh Omar  
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1 Abdel Rahman, which we know Dr. Jayyousi was recorded in, at  
2 least from the L.A. end of it and the San Diego end of it, and  
3 we also know that people were prosecuted as a result of  
4 recorded telephone calls out of New York.

5 THE COURT: So you want everything having to do with  
6 the Abdel Rahman investigation of '93?

7 MR. LOUIS: No, Judge. My path on this is a little  
8 different in that it's not about gathering the information, but  
9 there was something presented to the jury which was not  
10 presented in general terms of, generally speaking, we didn't  
11 share this information in terrorism cases because we were doing

12 intelligence investigations. The way it was presented to the  
13 jury was as an explanation, as Mr. Swartz went over and I am  
14 not going to go through it again, as an explanation for the  
15 delay in this case. Obviously, the government felt that it was  
16 relevant enough for this case to bring it up during their  
17 direct.

18 THE COURT: What Mr. Swartz is asking me to do is to  
19 give him something. I'm still not quite sure what that  
20 something is. I don't know, even if you had it, if it exists  
21 and you had it, why is it beneficial to your client, A; or, B,  
22 why is it prejudicial to your client not to have it.

23 MR. LOUIS: I can answer that. I can't speak for  
24 Mr. Swartz, but I can speak for Dr. Jayyousi. From our  
25 perspective, it is a result oriented request. There has been

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1 something presented to the jury that is untrue, in our opinion,  
2 and that is, in this case in particular as to Dr. Jayyousi,  
3 there was no information shared with the criminal investigation  
4 unit of the FBI, the people looking into crimes. Whether it  
5 was through the Rahman case that was being investigated -- we  
6 know Dr. Jayyousi was approached to be a witness in the case.  
7 They knew about him in the criminal cases.

8 It has been presented to the jury in a way that has  
9 tried to suggest to them that, look, we knew about what  
10 Dr. Jayyousi was doing in '93, '94, '95, '96, all the way until  
11 January of '98, when AWR was shut down, and we didn't do  
12 anything about it because our hands were tied. We couldn't do  
13 anything about it because it was an intelligence investigation

14 and the information wasn't being shared with the criminal  
15 investigators.

16 Now, if that is untrue, Your Honor, which these  
17 reports would show, if that is a fact that is untrue, it should  
18 not have been presented to the jury and that needs to be  
19 corrected, whether it's through an instruction from the Court  
20 or through evidence that could be presented by the defense. It  
21 is something that is misleading.

22 The government obviously felt that it was relevant for  
23 a reason, because they know that if the FBI criminal  
24 investigators knew these men were involved in a conspiracy to  
25 murder, maim or kidnap people wherever they are in this world,  
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1 and the FBI criminal investigators didn't do something about  
2 it, it says a lot about the government's proofs in this case.

3 MR. NATALE: Your Honor, on behalf of Mr. Padilla,  
4 what we would like to ask is that the Court prohibit the  
5 government from arguing to the jury that they had a legal  
6 impediment to engaging in a criminal investigation, or that  
7 they had a legal impediment which prevented them from having  
8 the FISA information, or any information that they had, going  
9 between one branch of the FBI and the other.

10 That is what we would be asking on behalf of  
11 Mr. Padilla, just a simple motion in limine that our relief  
12 would be that they not be allowed to argue to the jury that,  
13 look, legally we couldn't do anything at that time, because  
14 that is patently false. If they are prohibited from arguing

15 that legally they were prohibited from doing it, that would, I  
16 think, solve the problem.

17 Then if they want to say, well, for whatever reason,  
18 for some reason we didn't go into it, that's different than  
19 them saying legally their hands were bound, because we know  
20 they weren't. During the time frame, I believe, there was over  
21 90 some cases --

22 MR. KILLINGER: Judge, we agree with that. Let's get  
23 out of here.

24 THE COURT: You agree with the motion in limine?

25 MR. KILLINGER: Yes, Your Honor. What have I just  
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1 been arguing here? Isn't that what the record reflects? I  
2 would never stand before this jury and say --

3 THE COURT: It just seems so sane for a moment that I  
4 guess I --

5 MR. KILLINGER: I would never stand up in front of  
6 this jury and this Court and argue that there was a legal  
7 prohibition and a legal barrier. I am conceding there wasn't.

8 MR. NATALE: He and I agree.

9 MR. KILLINGER: That's not going to happen.

10 MR. SWARTZ: I am happy they agree. I just want to  
11 make sure that it doesn't tie our hands from arguing that  
12 because there is no legal impediment, and it shouldn't, then we  
13 can still argue that they could have taken this information --

14 THE COURT: I am not going to take it that far. I  
15 think we may be getting toward pigs get fat, hogs go to  
16 slaughter.

17 MR. SWARTZ: I don't think it is being too greedy.

18 THE COURT: I think what I think Mr. Killinger is  
19 willing to, and I don't want to use the word concede, but at  
20 least willing to state, or not state, or argue to this jury  
21 that there was, one, no -- that there was some impediment that  
22 prevented the government from moving forward; two, that the  
23 only investigation, potential investigation going on in this  
24 case would have been the intelligence side stuff.

25 If I give you what, what do you get? You want every

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1 possible -- for him to search the Neutrality Act files and to  
2 see if your client's name is mentioned?

3 MR. SWARTZ: I will back away from any of that stuff.  
4 I just want to be able to argue what we could argue all along.  
5 This has nothing to do with the motion that I am filing, just  
6 with regard to the government making their, I guess,  
7 understanding that they are not going to say there was a legal  
8 impediment.

9 THE COURT: He just said he is not going to say it.

10 MR. SWARTZ: With that, we can still argue that, given  
11 the facts of this wiretap, given the content of this wiretap,  
12 if there was something that was obviously criminal, a  
13 conspiracy to kill, murder, maim, whatever, that it could have  
14 been done back then. That's all I am saying. Nothing is  
15 stopping us from saying that. I just want to make sure that we  
16 are not foreclosed in any way from saying that. I think that  
17 would have been our argument all along.

18 MR. KILLINGER: By the same token, the government  
19 should not be stopped -- I agree there was no legal impediment,  
20 but the fact still remains, and the testimony is in the record  
21 that there was a climate within the FBI that, although it was  
22 done on maybe a case-by-case basis and in rare instances, the  
23 overriding policy was, and that's what the 9/11 Commission has  
24 found as a matter of fact, is that the information was not  
25 freely shared the way it should have been.

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1 I am not for a minute saying that I can't get up and  
2 argue, if I chose to do so, and I don't know that I am going  
3 to, that if you want to blame the government, blame the  
4 government, but that's just the way it was, ladies and  
5 gentlemen. This information was not freely shared during this  
6 period of time. Not that it could legally be, because that  
7 would be wrong, but that it wasn't for the most part.

8 MR. SWARTZ: Two points; number one, I would say that  
9 it should not be policy, but the practice, because I believe  
10 that is in fact what happened. But more importantly, that may  
11 have been the case, what Mr. Killinger just talked about,  
12 beginning in July of '95, not before.

13 MR. KILLINGER: I disagree with that, Judge,

14 THE COURT: I do, too. I don't think that's what the  
15 testimony has borne out.

16 MR. SWARTZ: No, the testimony hasn't said that, but  
17 the 9/11 Commission clearly said that.

18 THE COURT: We are not going to talk about 9/11.

19 Remember we had this whole argument about the --

20 MR. SWARTZ: Yes, but I'm just saying that if he is  
21 talking about the policy and the practice, or whatever you call  
22 it, the fact is before July there was no policy that prohibited  
23 the sharing between intelligence and criminal.

24 MR. KILLINGER: I want to know what the basis of that  
25 statement is.

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1 MR. SWARTZ: Go look at the 9/11 Commission. I don't  
2 know why we are even debating that. That's what it says.

3 THE COURT: We are debating it, Mr. Swartz, because  
4 you brought it up, if we want to be technical.

5 Mr. Killinger has already said that he is willing, on  
6 behalf of the government, to fall on the sword on this. We  
7 didn't do it. We could have done it. This is what our case is  
8 now. You want to argue, ladies and gentlemen, they didn't do  
9 it, they could have done it, and now this is where they are.  
10 Please tell me what the point is. I feel like I am on some  
11 kind of bizarre judicial treadmill here.

12 MR. SWARTZ: If the government concedes that -- if the  
13 understanding is the government is not going to argue the law  
14 was that they could not do it.

15 THE COURT: He just said he won't, and I will hold him  
16 to it.

17 MR. SWARTZ: Then we can live with that.

18 MR. LOUIS: Our client, Judge, Dr. Jayyousi, is in a  
19 different position here factually, and that is that we know  
20 that there were criminal investigators that was privy to



21 Dr. Jayyousi's actions back then.

22 THE COURT: What do you want me to do, Mr. Louis?

23 That's what I cannot seem to -- maybe my mind is just closing  
24 over this afternoon and I am not hearing what you are trying to  
25 tell me, but I don't get what you want me to do.

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1 MR. LOUIS: May I have a moment to speak to co-counsel

2 THE COURT: Yes.

3 MR. KILLINGER: Judge, I am not sure what I am  
4 responding to.

5 MR. NATALE: I can help you. You are waiting to hear  
6 what they have to say when they come back. You are doing  
7 great. Everyone here thinks that.

8 MR. LOUIS: Factually, the correct thing that can be  
9 presented to the jury is that whatever the general policies  
10 were that the government chooses, if they want, to present to  
11 the jury and argue, they didn't apply to Dr. Jayyousi because  
12 in fact the criminal investigative unit of the FBI at least  
13 knew about some of his actions, which would allow us to argue  
14 to the jury that the criminal investigators at the FBI knew  
15 about his actions and chose to do nothing about it until --

16 THE COURT: We don't have any evidence of that.

17 MR. LOUIS: Actually, we do, Judge.

18 THE COURT: We have it from the witness stand?

19 MR. LOUIS: No, Your Honor, and that's the problem.  
20 The evidence that's been presented from the witness stand is  
21 contrary to the facts as they actually exist.

22 THE COURT: The evidence from the witness stand has  
23 been that it was practice, if not policy, that these things  
24 should not be shared. Mr. Killinger has said that he is  
25 willing to say that.

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1 MR. LOUIS: The problem is, Judge, is that we know as  
2 a result of the Rahman investigation --

3 THE COURT: Let's say we say that is a fact. Now  
4 what, Mr. Louis?

5 MR. LOUIS: If we say that is a fact, we need go no  
6 further because the government will not be able to argue to the  
7 jury something which is false.

8 THE COURT: You want me to tell you that it is a  
9 judicial noticed fact? I am trying to figure out. So it  
10 happened. Now what?

11 MR. LOUIS: I believe that the government and  
12 Dr. Jayyousi's counsel could get together and craft an  
13 agreement that would cover Dr. Jayyousi's position on this.

14 THE COURT: To do what? I don't see how you get from  
15 there to there. What happens? Evidentiarily, this word I've  
16 just made up, how does that happen?

17 MR. LOUIS: There is one of two ways it happens.  
18 Either they have to turn something over which will allow us to  
19 present evidence to the jury, whether it may be a criminal  
20 investigator that was involved in Dr. Jayyousi's investigation  
21 who was aware of him back then --

22 THE COURT: You want to have a witness come in and say

23 Dr. Jayyousi was under investigation?

24 MR. LOUIS: I would prefer not to. I think that they  
25 can agree to facts that are true, that are true.

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1 THE COURT: You want to enter into a stipulation that  
2 your client was under criminal investigation in 19 something or  
3 other?

4 MR. LOUIS: No. I do not want to run into closing  
5 arguments, Your Honor, where the government -- this is the  
6 relief I will ask for at this time. I will ask you to withhold  
7 ruling on this motion particularly to Dr. Jayyousi at this  
8 point.

9 THE COURT: I'm just afraid if I revisit this, I'm  
10 back on -- right now I feel like those hamsters. They are  
11 running in that little thing and you feel sorry for them  
12 because they are working as hard as they can, but they never  
13 leave the cage.

14 MR. LOUIS: I know, Judge, but we are all working here  
15 to do justice.

16 THE COURT: I recognize that, Mr. Louis, and I don't  
17 want to disparage your position. I know that everyone in this  
18 case is working hard for their position. Talk it over with  
19 your colleagues. Maybe there is something I'm not seeing here.  
20 I do have the agreement so far about what the government is not  
21 going to argue, what Mr. Padilla's counsel and Mr. Hassoun's,  
22 they will argue. Come back to me. Maybe there is common  
23 ground here that I'm not seeing. Right now, I feel a little  
24 bit in judicial quicksand.

25                   Tomorrow morning, 9:30.

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1                   MS. BAKER: Your Honor, I have a scheduling question.

2 I think at one point, perhaps the day before yesterday, you  
3 said we were going to argue Rule 29 on Monday and then --

4                   THE COURT: I said Tuesday. What everybody asked for  
5 was a little time over the weekend to spend with the record.  
6 What I said was defense would be able -- because, remember, you  
7 said you had not envisioned putting anything to paper. I said  
8 I wasn't expecting the Supreme Court briefs to --

9                   MS. BAKER: Is that mandated?

10                  THE COURT: I said no the last time you asked me,  
11 Ms. Baker. If you want to do it to the government by 9:00 a.m.  
12 on Monday, the government is going to have something to me  
13 responding the same way by 5:00 on Monday night. You don't  
14 have to. You can take a Pina Colada, sit by the pool. You  
15 don't have to.

16                  MS. BAKER: When you had originally set the schedule  
17 two days ago, you had said certain things would happen on  
18 Monday.

19                  THE COURT: If the government rests tomorrow, there  
20 will be no court on Monday.

21                  MS. BAKER: I understand. You had said a few days ago  
22 that Monday morning, I think, was the deadline for our exhibits  
23 and our witness list and Rule 29. Now that you have changed  
24 Rule 29 to Tuesday, I don't know where we stand with respect to  
25 the rest of what you said.

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1 THE COURT: All of my other things remain the same.

2 MR. SHIPLEY: That was Monday morning for the defense  
3 exhibit list and witness list?

4 THE COURT: Yes.

5 MS. BAKER: Thank you, Your Honor. I'm sorry.

6 THE COURT: That's okay. Mr. Killinger, do you thing  
7 you are finishing tomorrow? You have one witness, two  
8 witnesses?

9 MR. KILLINGER: We will be done tomorrow early.

10 [Court recessed.]

11 C E R T I F I C A T E

12 I hereby certify that the foregoing is an accurate  
13 transcription of proceedings in the above-entitled matter.

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DATE FILED

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