UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	Criminal Action No. 21-00175
Plaintiff,	
vs.	
ETHAN NORDEAN, JOSEPH R. BIGGS, ZACHARY REHL, ENRIQUE TARRIO and DOMINIC J. PEZZOLA,	Washington, D.C. February 8, 2023 9:21 a.m.
Defendants.	
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TRANSCRIPT OF JURY TRIAL - DAY 28
MORNING SESSION
BEFORE THE HONORABLE TIMOTHY J. KELLY,
UNITED STATES DISTRICT JUDGE

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I N D E X

	Direct	Cross	Red.
WITNESSES FOR THE GOVERNMENT:			
Jennifer "Kate" Cain	7802	7856 7857 7892	

EXHIBITS RECEIVED IN EVIDENCE	PAGE
Government's Exhibit No. 1137	7804
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THE COURTROOM DEPUTY: This is Criminal Matter 21-175, the United States of America versus Defendant 1, Ethan Nordean; Defendant 2, Joseph R. Biggs; Defendant 3, Zachary Rehl; Defendant 5, Enrique Tarrio; and Defendant 6, Dominic J. Pezzola.

Present for the Government are Jason McCullough, Erik Kenerson, Conor Mulroe and Nadia Moore; present for Defendant 1 is Nicholas Smith; present for Defendant 2 are John Hull and Norman Pattis; present for Defendant 3 is Carmen Hernandez; present for Defendant 5 are Nayib Hassan and Sabino Jauregui; present for Defendant 6 are Steven Metcalf and Roger Roots.

Also present are Defendant 1, Mr. Nordean; Defendant 2, Mr. Biggs; Defendant 3, Mr. Rehl; Defendant 5, Mr. Tarrio; and Defendant 6, Mr. Pezzola.

THE COURT: Good morning to everyone.

Part of the reason I took the bench later than I would have liked to today was I know, Ms. Hernández, there were a series of the Government having -- there were a series of filings related to this issue of an agent testifying to a particular term. And, Ms. Hernández, I know you filed something -- or emailed something very early in the morning.

So I wanted to try to get as much up to speed on all of that as I could.

I think, for the moment, my suggestion is we just plow ahead with this witness. Even if we move to the next witness that the Government just -- I don't know how quickly we'll move through this witness, but that we put off the discussion of that until perhaps after lunch, or at another break, just so we can get going with this witness.

Obviously, there's a lot of testimony that the next witness will provide that the parties already know the contours of. And if we get that far, even -- the Government could just defer that issue until we've had a chance to pause and discuss it.

I know I'll benefit a little bit from reading the cases a little more closely Ms. Hernández cited, look at the -- and have an opportunity to look at what the Government has proffered it would base the testimony on and go from there.

Anything -- Mr. Pattis?

MR. PATTIS: One request. And then to put something on your radar.

I don't know if the Court has given thought to management of jury expectations. My recollection is that when we selected, the expectation was we'd finish probably by the end of February, and that seems increasingly unlikely.

That's an issue for the Court and the jury.

From the defense perspective, has the Court decided what the protocol will be for presentation of the defense? Are we going to be expected to present in order of the indictment and so forth, as we've cross-examined? And the reason I ask is we're managing people's time and whatnot at this point.

THE COURT: Right. No, that's fair.

So let me think about -- I mean, I think that strikes me as an efficient way to do it, and do it in order and -- do it in that order.

MR. PATTIS: The issue might become, for some of the witnesses, we've given them target dates months ago that are no longer realistic. And we're going to be bumping up against scheduling issues. And, you know, a subpoena is a subpoena. I get it. But I don't want to deal with unnecessary motions to quash.

THE COURT: Putting that on my radar is fair. And so let me think about it. Hopefully, I will raise it, let's say, in the next day or two to talk about it.

On that score, let me just ask the Government -- I mean, part of the answer to that question is how much -- at the rate we're going, when the Government thinks it would wrap up its case. All the caveats apply that -- you know, there have been times when, all of a sudden, we'd skip faster than we thought previously. So, you know, you're

doing -- this is an estimate. I get it.

MR. McCULLOUGH: With all embedded caveats, we had indicated to the defense that we expect another three to three and a half weeks as of last Friday. And we'll -- I think we'll see kind of where we are at the end of this week and determine where we are.

As we've said, I think we're somewhat hostage to kind of the length of cross-examination. So we're -- it will be interesting for us to see how that kind of plays out over the next few days.

THE COURT: At least as of then, you know, roughly end of the month?

MR. McCULLOUGH: Yes. That's correct, your Honor.

THE COURT: Okay. So, Mr. Pattis, you have that at least to help guide you. And then the other question I'll take up in terms of trial management of the defense case.

MR. McCULLOUGH: And just to be clear, your Honor, we send that estimate to the defense every Friday at their request. And so they received that exact representation by email last week.

THE COURT: Okay.

MS. HERNANDEZ: Your Honor, in terms of --

THE COURT: Anything else further before we bring in the jury and the witness?

MS. HERNANDEZ: Just in terms of trial management, we're trying to -- I know we're all working very diligently. It cannot be that we're exchanging exhibits after midnight and having to file things. The Government -- I know that we're all working -- I'm not putting blame on anyone, but it's just not workable.

I can only wake up at 3:00 in the morning twice a week before I drop dead. It just -- we have to figure out something to -- I'm speaking, I think, for all defense counsel, probably for all the prosecutors, and particularly for -- probably for Ms. Rohde, who I'm sure is having to do some of this work.

THE COURT: Well, on this specific issue, the reason I think, you know, I expressed skepticism about a particular piece of testimony, and then the Government is attempting to respond to that. So I can't -- again, you weren't to blame, or anyone. But I think they were responding to my comment yesterday. So --

MS. HERNANDEZ: Well, I'll blame you if you want me to.

THE COURT: I'll take, you know, the good and the bad that comes with the job.

But no. It's --

MS. HERNANDEZ: It's just very difficult.

THE COURT: I hear you.

Again, I don't think, given the witness we have on the stand and then given the length of the direct for the witness to come, you know, the truth is this issue may not -- probably wouldn't really ripen today. Heck, it might not even really ripen tomorrow. I mean, I'm sure the Government would like to do things in a particular order, but it didn't necessarily need to even potentially ripen tomorrow.

So, look, I think we all have to just sort of move forward, you know, in good faith and as efficiently as we can, and hopefully that won't happen too often.

MS. HERNANDEZ: And it also is a problem because these Defendants are intelligent men who are interested in their defense, and so there's -- once the lawyers are finished doing whatever, we also have a responsibility to fill them in on it and let them comment on it. So that's another layer of obligations.

THE COURT: All right. Does the Government want to respond to any of that really briefly?

MR. McCULLOUGH: Very briefly, your Honor.

Just so we're kind of framing this issue with the Minecraft slides, we offer those slides not as a way to kind of overcome the issue from the circuit, but rather to just address the way that we would offer this evidence to the jury, which is not to have the agent kind of offer a

conclusion as to what it means, but rather present, Here are other, you know, instances where that term has been used. Jury, you draw your conclusion.

That fits well within the bounds of the circuit precedent. And so just to make sure that we're kind of not talking past each other in terms of what the Government is intending to do, that was our approach in response to your Honor's ruling. And we offered the slides up so everyone could wrap their mind around it in advance of the testimony.

THE COURT: I mean, so it wouldn't be, to base -- it would actually -- then, in that case, whatever -- it wouldn't be to base an opinion on. You'd see it as, again, just introducing additional evidence and, Jury, you make the decision?

MR. McCULLOUGH: Correct.

THE COURT: Right.

MR. McCULLOUGH: Exactly. If they see -- and that is well within the bounds.

The agent is not saying, Okay. I've seen them use it --

MS. HERNANDEZ: I just -- your Honor -- your Honor, I would object to this argument, because the Court said you were going to take these arguments up --

THE COURT: I am going -- Ms. Hernández, you're going to have the opportunity. But I do think it's -- I

thought that the Government was proceeding under a particular theory, and they're at least letting me know that, no, that's not the theory they're going to proceed under.

You're all going to have ample time to address it. But if I fundamentally misunderstand what they're trying to do, that doesn't help me prepare to hear you.

MR. McCULLOUGH: Correct.

So, your Honor, we just wanted to orient you to that.

THE COURT: I understand.

MR. McCULLOUGH: And that if we had -- you know, kind of -- the circuit would be kind of in a drug case where they're saying, you know, Bring the white shirts to the spot; you know, white shirts means the cocaine. Right?

And so we're not saying -- the agent is not going to get up there and say, Okay. When they say white shirts, it means cocaine. We're just going to show the ten instances where they use the term "white shirts." The jury can decide what that -- what they think that means.

THE COURT: I mean, it -- it gets around the opinion problem, perhaps, but creates other potential problems.

So -- fair enough. Let's just defer it for now.

Yes, Mr. Roots.

MR. ROOTS: Roger Roots for Mr. Pezzola.

Yesterday was a very important witness for Mr. Pezzola on the stand, Mr. Ode. And I just want to say, we were prejudiced by the fact that Mr. Pezzola is not really having any adequate access to his discovery. He gets one hour. To open a laptop, it takes, you know, minutes to boot up, and he's not a technically proficient person. One hour twice a week, I believe.

He has had no access to the discovery. Yesterday there were photographs that were shown that he's never seen. In fact, I haven't seen them. I was told -- some of these numbers were, you know, 1108 to such. These binders we were given don't have the pictures that were shown in court yesterday. I was told they were in an email last week. Now, I get 200 emails a day. So there were pictures that I haven't seen.

Mr. Metcalf was prejudiced yesterday. He did a great job and it was -- but it could have been smoother. And one of the main problems, we are being prejudiced by the fact that Mr. Pezzola is not able to access his own discovery in this case. And he shouldn't be seeing pictures used against him for the first time at a trial.

THE COURT: Well, I'll just say this: Before Mr. Pezzola was being housed where he is right now -- you all have raised this issue during the trial, you know, the

access.

He has been in facilities for -- since he's been detained in this case in which there hasn't been any reason he hasn't been able to see, for example, exhibits or photos. Isn't that correct? I mean, all of the facilities that Mr. Pezzola has been in -- for example, when the Government produced the exhibits in the case, there wasn't any reason why counsel couldn't discuss those exhibits and show those exhibits to Mr. Pezzola.

MR. METCALF: Your Honor, if I may. Steven Metcalf.

THE COURT: Sure.

MR. METCALF: Those exhibits I received on January 13th as a new Dropbox link. That's what I believe Mr. Roots is referring to.

I attempted, I believe, at one point to show Mr. Pezzola those photos in the middle of breaking one day, as he was being escorted back to the marshals.

So there have been additions to the trial exhibits that have been made, and that's what I believe that Mr. Roots is referring to.

THE COURT: Okay. The particular photos of the incident?

MR. METCALF: 1108 to 1130 is what I'm referring to.

THE COURT: All right. And again, there hasn't been any reason -- I understand there have been issues with the amount of time your client can view electronic discovery alone. But again, given the centrality of those photographs, there hasn't been any reason why you haven't been able to walk in to see him and show him these new photos that the Government presented to you weeks ago. Correct?

MR. METCALF: Your Honor, yes, in an ideal world. I mean, let's put aside the fact that I've literally dropped my business and every single thing I possibly can and, when I'm outside of court, I'm trying to maintain a relationship with my law firm, my wife, who's six months pregnant, and my three children, who the oldest is five. So yes, in an ideal world, I would love for that to happen and I would love to be able to print these things out and run over to go see Mr. Pezzola when we're not in court on a Friday. But it's just not practical.

So -- I didn't raise this issue; Mr. Roots did. And that's just what we're dealing with.

MR. ROOTS: If I could maybe crystallize this into a request, which -- maybe I've made a version of this request before, but we really need Mr. Pezzola to have more time available to him, and helpers. These other guys are -- they've had podcasts; they are technically proficient, some

of his Co-Defendants. He is not. He needs help with people showing him how to open a file, open a zip file or whatever. He's not able to. And so he really needs more time, maybe all weekend long, with the laptop, with the files, and a helper that can help him.

THE COURT: All right. Look, there's nothing I can do about it as we sit here right now. We have got the jury waiting. I hear you. Before the end of the day, we'll take this up again.

Anything further from any party?

MR. KENERSON: If I could just, on those photos, put something on the record about timing:

Those were not, so far as we've been able to ascertain -- and we did do searches -- in the Government's possession prior to the day before we gave them to the defense. So these were newly acquired photographs. And the one that was in the Government's possession was previously on the Government's exhibit list going back to its inception -- maybe not inception, but certainly by the November one.

And with respect to the photos, we're talking about 1108 to 1130, so it's about 22 photos. It's not a lengthy video. They could have been shown to Mr. Pezzola in court on a break. They could have been shown any number of times.

So those were newly discovered and a discrete issue.

THE COURT: All right. Very well.

Let's bring in the jury and the witness.

Mr. Kenerson, were we at the end of your -- had you completed your direct?

MR. KENERSON: No, I had not. I had not much more, but some more.

(Thereupon, Examiner Jennifer "Kate" Cain entered the courtroom and the following proceedings were had:)

THE COURTROOM DEPUTY: Jury panel.

(Whereupon, the jury entered the courtroom at 9:42 a.m. and the following proceedings were had:)

THE COURT: You all may be seated.

Ladies and gentlemen, welcome back. We'll continue with the Government's direct examination.

MR. KENERSON: Thank you.

(JENNIFER "KATE" CAIN, GOVERNMENT WITNESS, PREVIOUSLY SWORN.)

CONTINUED DIRECT EXAMINATION

BY MR. KENERSON:

Q. Good morning, Examiner Cain. How are you?

A. Great. Thank you.

Q. I want to switch topics from where we were yesterday. You said one of the phones you examined was one belonging to

an individual named Jeremy Bertino. Is that right?
A. That is correct.
MR. KENERSON: And, Ms. Rohde, if we could bring up, just for the witness, Government's Exhibit 1137.
BY MR. KENERSON:
Q. And do you recognize what's on your screen?
A. I do.
Q. What do you recognize that as?
A. This is a video found on Mr. Bertino's device that he had screen recorded and then sent to someone else in a text message.
Q. And can you tell what -- well, what is a screen recording of?
A. When the user goes and actually takes a video of everything that is happening on the device.
Q. Okay. Does this show any particular application?
A. This is the Telegram app.
Q. And is this -- have you had a chance to view this video in its entirety before your testimony here today?
A. I have.
Q. Does this fairly and accurately represent what was recovered from Mr. Bertino's phone?
A. It does.
MR. KENERSON: Your Honor, I'd move for the --
MS. HERNANDEZ: I'm sorry. Your Honor, one of the

screens isn't working, so we --

THE COURTROOM DEPUTY: I'll send an email to John.

THE COURT: Oh, it's on. All right. Very well.

You may proceed, Mr. Kenerson.

MR. KENERSON: I'd move for the admission of Exhibit 1137.

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

(Whereupon, Government's Exhibit No. 1137 was entered into evidence.)

BY MR. KENERSON:

Q. And before we start playing, you said this was a screen recording. Can you tell us how a user would create a screen recording such as this?

A. There is a setting in the iPhone that you -- the user can go to and click "screen record," and then everything after that point will be recorded.

Q. And is that -- and so what we are looking at here is a video file, not a still shot. Correct?

A. That is correct.

Q. And if someone takes a video record as opposed to a still shot of a screen, what's the difference?

A. Well, a still screen shot is just an image of how it looks at that time. A video is actually the user interacting with the device. So if the user opens an

application, you'll see it open. If they scroll down, you'll see the screen scroll down. You'll see everything the user sees on that device as it's happening.

Q. So is this how a user would see this chat if they scrolled through it on their phone at the time the screen capture was created?

A. Yes.

Q. Now, was this file particularly associated with Telegram or was it found somewhere else on Mr. Bertino's device?

A. It was found in the camera roll of his device.

Q. Okay. And so you mentioned that this is how Telegram would appear to a user of Telegram. If you were looking at the Telegram application through your forensic tools, is this how it would appear to you?

A. No, it wouldn't. We build the data as similar and as close as possible, but it actually doesn't look like the application does.

Q. Okay. Now, on this, is there any significance to which side the chat bubbles are coming from?

A. The ones on the left-hand side are all of the incoming text messages -- or messages. And then the ones on the red -- sorry -- on the right side in green, those are all of the outgoing messages, just like they appear in regular text messaging.

Q. Now, let me ask you something about, as an example, the

message that I'm circling right now, which has Captain Trump at the top and then Noblebeard, the Immortal, under it at -- it looks like 12:34 p.m. What does that -- the message displaying in that manner signify?

A. So the author of this message is Captain Trump, and the message is an audio file. And when you see the blue bar like that, he's actually replying specifically to a voice message that Noblebeard, the Immortal, left.

Q. Thank you.

Now, up at the top, it says: Parler comment on post, Carol Jean, and then some words.

What is that denoting?

A. Those are the IOS notification banners that are coming across in realtime as the screen is being recorded.

Q. So notifications on the user's iPhone as he's recording?

A. Yes.

MR. KENERSON: Ms. Rohde, can we play until ten seconds.

(Whereupon, segments of Government's Exhibit No. 1137 were published in open court.)

BY MR. KENERSON:

Q. Now, we just saw the video scroll through at a certain pace. Are you able to control the pace of how this scrolls as we play the video?

A. I am not, as someone watching the video. That would

have been controlled by the person recording the video.

Q. And we just saw a bubble of a man who said something about storming the Capitol Building. Under that bubble, there is something that says 12:56 p.m. What does that 12:56 p.m. mean?

A. That was the time the message was sent.

Q. And have you had a chance, Examiner Cain, to compare -- first of all, did you have a chance to look at these messages and see whether you can link them up to any of the chats that you looked at?

A. I have, yes.

Q. Which chat was this recording from?

A. This chat was called New MOSD.

Q. And did you have a chance to look at the copies of that chat that were -- you were able to review from the forensic extractions and see whether the messages in this chat were present in any of the versions that you looked at?

A. I did.

Q. And did you take some notes from that?

A. I did.

Q. Would it aid your testimony to be able to refer to those notes?

A. That would help. Thank you.

MR. KENERSON: Your Honor, if I may approach the witness.

THE COURT: You may, sir.

MS. HERNANDEZ: Objection. Is there a question that she can't recall so that she needs to look at the notes?

THE COURT: I think this is the same -- let me hear counsel.

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

THE COURT: Mr. Kenerson, is this the same issue we went through yesterday?

MR. KENERSON: Yes. This is one of the three documents I brought to her yesterday. We just did not get to this point in the testimony.

THE COURT: All right. Do you have any objection, Ms. Hernández? It's just refreshing her -- it's as to particular details. Mr. Kenerson isn't using the technically formal refresh procedure, but I think -- I thought everyone had agreed that they didn't have an objection to this in this case.

MS. HERNANDEZ: Is he asking her about the metadata? I didn't hear him say that. I thought he was just going to ask her questions about everything. He said, You took notes.

If it's about the metadata, I have no objection. But I thought the question was broader than that.

MR. KENERSON: It's going to be whether certain messages were recovered from any of the chats she looked at.

THE COURT: Ms. Hernández, this is, broadly speaking, I would say, about metadata, about where things were recovered from, what the metadata shows, where things were recovered from. Do you have any objection to this, then?

MS. HERNANDEZ: I'll let him proceed. If there's a problem that I see, I'll object again, your Honor. Thank you.

THE COURT: Mr. Pattis?

MR. PATTIS: I'm looking at the exhibit. I don't know how far -- what the Government intends to do. But there's a notation -- there are notations from someone who calls themselves cracker, nigger, faggot. Are we getting into that here?

THE COURT: Mr. Kenerson?

MR. KENERSON: It is literally already on the screen right now. This was the subject of -- I'm not going to ask her any questions about that, but this was the -- kind of a subject of a pretrial motion *in limine*, and this was in the Government's opening as well.

THE COURT: Well, what do you mean, Mr. Pattis?

MR. PATTIS: I'll withdraw it. I forgot -- I had forgotten the pretrial order. My mistake.

I apologize to your Honor.

THE COURT: That's all right. I wasn't sure whether you meant that screen name or another -- the content of what the person says.

Mr. Kenerson, you may proceed.

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

MR. KENERSON: Your Honor, if I may approach the witness with what has been marked as Government's Exhibit 1136 for identification.

THE COURT: You may, sir.

BY MR. KENERSON:

Q. Examiner Cain, is what I just handed you the notes that you created in connection with this exhibit?

A. They are, yes.

Q. Now, the chat bubble that we've just been discussing at 12:56 p.m., was that message recovered on any device that you examined?

A. No, it was not.

Q. And what about the message right above it that says -- and I'll just say it directly -- "Fuck then" -- that comes from the right of the screen?

A. May I refer to my notes?

Q. Yes, please.

A. No, it was not.

MR. KENERSON: Ms. Rohde, can we play until 30 seconds now.

(Whereupon, segments of Government's Exhibit No. 1137 were published in open court.)

MR. KENERSON: Thank you.

BY MR. KENERSON:

Q. Now, that second bubble video that has a timestamp of 12:58 p.m., was that recovered from any device you examined?

A. May I refer to my notes?

Q. Please.

A. No, it was not.

Q. Now, under that, there's two messages coming from the right, one that says, "Form a spear," and one that says, "Holy fuck, do it, boys."

Were either of those recovered from any --

THE COURT: I'm sorry, Mr. Kenerson. I just -- can you keep your voice up?

And can the witness -- can you keep your voice up, please?

And can those at counsel table keep their voices down.

BY MR. KENERSON:

Q. So the two messages underneath the bubble at 12:58 p.m. -- one says, "Form a spear"; one says, "Holy fuck, do it, boys" -- were either of those recovered from any device

that you examined?

A. No, they were not.

MR. KENERSON: Can we play until one minute and one second, please -- or play to the end, I suppose.

(Whereupon, segments of Government's Exhibit No. 1137 were published in open court.)

BY MR. KENERSON:

Q. Examiner Cain, the chat bubble from the right with the individual with the beard at 1:00 p.m., was that recovered from any device you examined?

A. May I refer to my notes?

Q. Sure.

A. No, it was not.

Q. What about the two underneath? We'll start with, first, "Fuck, I'm so mad I'm not there."

Was that recovered from any device you examined?

A. No, it was not.

Q. What about, "More videos, Bro"?

A. No, it was not.

Q. What about the bubble from the left at 1:02 p.m.? Was that recovered from any device you examined?

A. No, it was not.

Q. Now, what about the one underneath it, "Push inside. Find some eggs and rotten tomatoes"?

A. Yes, it was.

Q. Which devices was that recovered from?
A. They were found on Mr. Rehl and Mr. Nordean's device.
Q. Now, it looks like we are at the end of the video at this point. Correct?
A. That is correct.
Q. Now, what, if any, conclusions can you draw as an examiner from the fact that the messages that we just discussed that weren't found on any device were not found on any device you examined?
MS. HERNANDEZ: Objection. Relevance.
THE COURT: Overruled.
THE WITNESS: These messages that were not found on the device had been deleted.
BY MR. KENERSON:
Q. Can you draw any conclusions as to who would have deleted them?
A. The user that posted the video.
Q. Why do you come to that conclusion?
A. Because when we found this chat on two different devices, the missing messages were gone from both of those devices. Therefore, if the user had selected just to remove it from their own device, then they would still be present on the other two devices. And since they weren't, the conclusion is that they removed them from all the devices for the chat.

Q. Now, in addition to --

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

BY MR. KENERSON:

Q. You said you also had a chance to review the extraction from Mr. Rehl's phone. Is that right?

A. That is correct.

Q. And did you have a chance to look at exhibits labeled Government's Exhibit 400A, 400D, as in delta, P, as in Paul, R, X, as in x-ray, G, as in gamma, P, as in Paul, Q, T, JJ, 402B, 403G and 403H?

A. I did. Yes.

Q. Were all of these found on Mr. Rehl's device?

A. They were.

Q. And do they appear to depict events from January 6th, 2021?

A. They do.

MR. KENERSON: Your Honor, I'd move to admit those exhibits.

THE COURT: They will be admitted.

(Whereupon, Government's Exhibit Nos. 400A, 400D, 400P, 400R, 400X, 401G, 401P, 401Q, 401T, 401JJ, 402B, 403G and 403H were entered into evidence.)

BY MR. KENERSON:

Q. Now, we talked about metadata yesterday. Did Mr. Rehl's

device have metadata associated with those files?
A. It did.
Q. Did you create a chart that includes some of that metadata?
A. I did, yes.
MR. KENERSON: Ms. Rohde, if we could have, just for the witness, Government's Exhibit 1132.
BY MR. KENERSON:
Q. Do you recognize what's on your screen?
A. I do.
Q. What is that?
A. This is the metadata that I extracted out of the device that corresponds with the exhibits that you just named and are listed here.
Q. Thank you.
And I need to correct how I read those exhibits. I said -- let me just read them over one more time: 400A, 400D, 400P, 400R, 400X, 401G, 401P, 401Q, 401T, 401JJ, 402B, 403G and 403H.
That's what's on the chart. Correct?
A. That is correct.
MR. KENERSON: And for the record, those are the exhibits I'm moving to admit.
THE COURT: All right. And so those will be admitted to the extent there was any discrepancy.

(Whereupon, Government's Exhibit Nos. 400A, 400D, 400P, 400R, 400X, 401G, 401P, 401Q, 401T, 401JJ, 402B, 403G and 403H were entered into evidence.)

MR. KENERSON: And I would also move at this point for the admission of Exhibit 1132.

THE COURT: It will be admitted.

(Whereupon, Government's Exhibit No. 1132 was entered into evidence.)

MR. McCULLOUGH: And seek permission to publish.

THE COURT: And permission to publish.

BY MR. KENERSON:

Q. Now, looking at the first column of this chart, does that represent the exhibit number in court that we just read out?

A. It does, yes.

Q. The second column that says Photo Title, what does that represent?

A. It's the name of the image or the video.

Q. The image as found where?

A. In the device.

Q. In Mr. Rehl's device?

A. In Mr. Rehl's phone. Yes.

Q. Okay. Now, Photo Taken Date/Time, what does that represent?

A. That is the actual creation date of the video or picture

listed. It comes from the EXIF data. So it actually is embedded in the file itself so that if it's moved to a different -- you know, saved somewhere else other than the device, that creation date is embedded inside the file itself so it will always remain the same.

Q. And you used the term EXIF data. Can you just tell the jury what that means?

A. Sure. It's actually a standard for photographers. When digital cameras became popular, it's a way for them to store all of the camera settings such as the aperture and the lens. And so among those are things that are relevant forensically, like the date the photo was taken and created and the type of camera that took it and the latitude and longitude of the photo as well.

Q. Now, speaking of latitude and longitude, that's what the next two columns represent. There's only, it appears, that data for one photo. Does that indicate that was the only photo that has that data?

A. It does. Saved as EXIF data, yes.

Q. Okay. And then what does the camera make denote?

A. These photos were taken with an Apple iPhone. Several of them with an iPhone 11 Pro and one with an iPhone 8.

Q. Now -- and what's the source of that data?

A. That is also in the EXIF data.

Q. And same question about the camera model.

A. Same. It's embedded in the photos itself, in the EXIF data.

Q. Now, the bottom two, 403G and 403H, do not have a camera make or a camera model. Is that because there was no EXIF data that indicated that?

A. That is correct. Telegram and most social media strip most of the EXIF data from the photos to make the size smaller. However, it does retain the creation date of the video or image.

Q. And were you able to tell which, if any, of these exhibits were taken by the camera on Mr. Rehl's phone?

A. Yes. Mr. Rehl's phone was an Apple iPhone 11 Pro. So wherever it says iPhone 11 Pro, those were taken with his actual device.

Q. Now, with respect to 402B, that says it was taken from an iPhone 8. Are you able to tell how that photo got onto Mr. Rehl's phone?

A. Yes. He received that photo via a text message.

MR. KENERSON: Ms. Rohde, can we put up 402B.

BY MR. KENERSON

Q. So that was the photo he received via text message?

A. It is, yes.

Q. Thank you.

MR. KENERSON: If we can go back to the chart.

MS. HERNANDEZ: Your Honor, I didn't hear

Mr. Kenerson's question. Was it received by Mr. Rehl, did he say? Or sent by Mr. Rehl?

THE COURT: This was -- the question was about whether he received it.

MS. HERNANDEZ: Thank you.

BY MR. KENERSON:

Q. Now, you mentioned that Telegram and most social media sites don't necessarily include camera make and model. 403G and 403H, what application were those associated with?

A. Those are from Telegram.

Q. And are those orphaned files like we were discussing?

A. They are.

MR. KENERSON: Ms. Rohde, can we play 403G, please.

(Whereupon, Government's Exhibit No. 403G was published in open court.)

BY MR. KENERSON:

Q. So was that video found on Mr. Rehl's device?

A. It was.

Q. Now, did you also have a chance to take a look at information provided by Google in connection to an account subscribed to by Joseph Biggs?

A. I did.

Q. How, for you, as a forensic examiner, does reviewing that type of data differ from reviewing phone data or

computer data?
A. It's very much the same. It comes to us usually in a container format, like a zip file. And inside there, just depending on the type of return it is, it has some type of file system structure to it. It could contain anything from text files to phone backups. And so we generally treat it with the same process we treat all of our digital extractions.
Q. And did you also -- first, did that information provided by Google include photos and videos?
A. It did.
Q. Did it also include metadata?
A. It did.
Q. Did you have a chance to create a chart that included some of that metadata linked to the photos?
A. I did.
MR. KENERSON: Ms. Rohde, if we could have 1133, please, just for the witness.
BY MR. KENERSON:
Q. And do you recognize 1133?
A. I do.
Q. What is that?
A. This -- when the Google return came back, each of these images or movies had a file with it that contained the metadata or EXIF data out of each of those files. And so

because they were all individually, I combined them onto one sheet, and that's the sheet that you see here.

Q. And did you have a chance to look at the exhibits in that chart? And I'll read them out: 404C, as in cat, 404F, as in Frank, 404G, as in gamma, 404K, as in kilo, 404N, as in Nancy, 404Q, 404V, as in Victor, 404W, 404X, 404Z, as in zebra, 404DD, 404EE, 404LL, 404V, as in Victor, V, as in Victor, 405I, 405M, as in Mary, 405N, as in Nancy, 405AA, 405BB, 405FF, and 405HH.

Did you have a chance to look at those exhibits?

A. I did.

Q. And did you have a chance to compare them to the data provided by Google?

A. Yes.

Q. Do they appear to be fair and accurate representations of the data provided to you by Google in connection with the account subscribed by Mr. Biggs?

A. Yes.

MR. KENERSON: Your Honor, I'd move for the admission of the exhibits I just read out.

MR. PATTIS: No objection on behalf of Mr. Biggs.

THE COURT: They will be admitted. And permission to publish.

(Whereupon, Government's Exhibit Nos. 404C, 404F, 404G, 404K, 404N, 404Q, 404V, 404W, 404X, 404Z, 404DD,

404EE, 404LL, 404VV, 405I, 405M, 405N, 405AA, 405BB, 405FF, and 405HH were entered into evidence.)

BY MR. KENERSON:

Q. And does this chart, 1133, fairly and accurately represent the metadata provided by Google?

A. It does. Google provided the photo taken time in UTC, and I did convert it to Eastern Standard Time for this chart.

MR. KENERSON: I would move the admission of 1133 as well.

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

(Whereupon, Government's Exhibit No. 1133 was entered into evidence.)

MR. KENERSON: Thank you.

BY MR. KENERSON:

Q. Examiner Cain, I'm going to ask you a couple of questions like we asked with the data associated with Mr. Rehl.

The first column, that's the court exhibit name that we just read out. Is that right?

A. Correct.

Q. All right. The second column, Photo Title, what's the source of that data?

A. That is the actual name of the file on the device -- or

in the Google return.

Q. Now, the Photo Taken Date/Time, what does that represent?

A. That's the EXIF data for the time that that file was created.

Q. And what about the EXIF latitude and EXIF longitude? What was the source of that data?

A. This is also in the EXIF data, and it is embedded in the actual photo itself.

Q. And just in a very broad sense, are you familiar with generally what those latitudes and longitudes on there correspond to?

A. Yes. Washington, D.C.

MR. KENERSON: And I'm going to ask Ms. Rohde to play just a couple of those. If we could have 404F, please.

(Whereupon, Government's Exhibit No. 404F was published in open court.)

MR. KENERSON: And if we could return to the chart really quick, Ms. Rohde.

BY MR. KENERSON:

Q. 404F, what we just watched, what does the metadata indicate in terms of the date and time of that?

A. January 6th, 2021, 12:55:54 p.m.

MR. KENERSON: Ms. Rohde, if we could have 404Z, as in zebra.

(Whereupon, Government's Exhibit No. 404Z was published in open court.)

MR. KENERSON: Thank you.

Ms. Rohde, if we could go back to the chart.

BY MR. KENERSON:

Q. 404Z, as in zebra, what was the date and time of -- associated with that exhibit?

A. January 6th, 2021, at 1:16:25 p.m.

Q. Now, these photos and videos that are represented in this chart -- well, first of all, let me ask you, there's -- I have not yet asked you about the final column that is labeled "is trashed." What does that represent?

A. These photos were deleted and in the trash bin.

Q. What's the source of that data?

A. The Google returns.

Q. And if a Google return lists "true" for "is trashed," what does that mean?

A. It means that the user deleted that file.

Q. Now, were these the only photos and videos in Mr. Biggs's iCloud account from January 6th, 2021?

A. No, they were not.

Q. Approximately how many more were there?

A. Roughly 40 to 50.

Q. And about what percentage of those had "true" labeled for "is trashed" in the Google return?

A. 100 percent.
Q. Thank you.
MR. KENERSON: I don't have any further questions, your Honor.
THE COURT: All right. Cross-examination for Mr. Nordean.

CROSS-EXAMINATION

BY MR. SMITH:
Q. Good morning, Ms. Cain.
A. Good morning.
Q. I just have a few questions about some of your testimony on direct. I'm Nick Smith. I'm representing Ethan Nordean.
So you testified about how groups work in Telegram, the Telegram application. Right?
A. I did.
Q. Okay. And you also testified about how users -- Telegram users gain access to those groups. Right?
A. Yes.
Q. Okay. And you testified about some of the digital forensics tools that your team and you use to analyze messages that were extracted from Telegram. Correct?
A. Yes.
Q. Okay. So let's assume that a Telegram user has been admitted to a group and gains access to messages going forward in that --

A. Okay.
Q. -- group.
The user can then open the window in the Telegram application and look at messages that are being sent within that group window. Is that sort of how that works?
A. Look at all the messages in that group chat?
Q. Yes.
A. Is that what you mean by window?
Q. Yes.
A. Then yes. Yes.
MR. SMITH: Ms. Rohde, would you help me bring up Government Exhibit 1137? I would do that, but that's not one that we have digitally. And not to play the videos, but just to show the display for the chats.
Okay. Can we publish that to the jury, Ms. Harris?
Thank you.
BY MR. SMITH:
Q. Ms. Cain, can you see the -- do you remember testifying about this image on Telegram?
A. Yes, I do.
Q. Okay. So is this sort of -- does this look, appear -- if you were a Telegram user and you were admitted to a group chat and you were to open that group chat and look at messages, is this roughly how that would appear to a user in

the chat window?
A. It is. There are some settings. You can change the colors. But this is how it would look, yes.
Q. Okay. So is this a group chat that we're looking at right here?
A. It is.
Q. Okay. So in our hypothetical, let's say that a Telegram user is admitted to this group chat. Okay?
A. Okay.
Q. And let's say we are the user right now looking at this window. Okay?
The user would be able to scroll through these messages going back and forth and look at all of them. Right?
A. That's correct.
Q. But the tools that you've been discussing that allow you to analyze these messages, those tools can't tell you when a user has looked at any given message within this window. Correct?
A. No. In the winter of 2021, Telegram did not do read receipts for individual users in a group chat.
Q. And if I'm -- correct me if I'm mistaken, but did you testify about read receipts on direct?
A. No, I did not.
Q. Okay. What is a read receipt?

A. When the user looks -- actually opens up and the phone is recorded as digitally have -- seeing the message.
Q. And how does a read receipt display on this? How would you know whether a user -- if you had access to a user's phone and the user was admitted into a Telegram group, how would you tell, from looking at their phone, that they've read a particular message? What would be the visual item?
A. Well, in group messages in 2021, the read receipts were for -- if any person in that one group had seen that message, then a checkmark would appear. So if you look in one of these -- any of these green bubbles in here, you can see that there is a check-checkmark in the bottom right-hand corner. That indicates that at least one group member has received that. It does not indicate which group member or how many group members. It just indicates that someone, just one at least in the group, has seen it.
Q. Okay. Thank you for that. That was very helpful.
So let's -- I'm going to give you another hypothetical here. I'm going to draw on the screen. So let's say -- can you see that I've circled the user Captain Trump, and there appears to be a message from them?
A. Well, this is a message from Mr. Bertino's account in direct reply to Captain Trump.
Q. Sorry. I should have clarified that.
So this message I've circled in green, the user

here we're looking at from the perspective of is Bertino. Is that correct?

A. That is correct. Yes.

Q. Okay. So if we're in the perspective of Bertino here, can we -- you can see that Bertino in this message is responding directly to one from Captain Trump. Correct?

A. That is correct.

Q. So we can make a fair inference that Bertino has seen that message from Captain Trump, because he's responding to it. You could make that inference.

A. Sure. Yes.

Q. It could be a mistake if someone is texting in response -- if Bertino is texting to Captain Trump there, it could be mistaken, but we can also make an inference that Bertino has seen that message from Captain Trump because he's responding directly to it. Correct?

A. Yes. He would have had to select that message in order to reply directly to it.

Q. Okay. Now, let's take a slightly different -- let's ask a slightly different question here. I'm circling a message from someone else, someone -- it appears to be -- this appears to be from a user called Aaron of the Bloody East.

A. That is correct.

Q. Okay. So that message I've circled was posted by Aaron of the Bloody East, whoever that may be.

A. Yes.
Q. On this window, just taking this window as our universe, we don't see that Bertino, the user, has responded to that message. Correct?
A. No. That is Aaron of the Bloody East.
Q. Right.
A. So that is an incoming message.
Q. And we don't see that Bertino, the user of this chat, is responding to that particular Aaron of the Bloody East message. Correct?
A. That is correct.
Q. Okay. So with the technology as it stood in these Telegram chats in this case, we don't know whether Bertino, the user, viewed that message. Correct?
A. No. All we can show is that his device received it.
Q. Okay. And so I guess one might make an inference that if Bertino -- let's remove that circle and let's draw Bertino's message that we were -- I've drawn a circle around Bertino's message again. You can see that Bertino's message is immediately below, in physical space, the Aaron of the Bloody East message. Correct?
A. Correct.
Q. So one might make an inference that the user there, Bertino, has seen that message because it's directly above. Correct?

A. You could. Yes.
Q. Yes.
So in your review of Telegram groups in this case, is it fair to say that some of them have hundreds or thousands of messages?
A. Across all their chats?
Q. Yes.
A. Yes.
Q. Okay. So the inference one might make about Bertino seeing -- Bertino seeing a message that's directly above one of Bertino's messages might not be the same kind of inference you'd make about Bertino, the user here, seeing a message that was, say -- let's say it was hundreds or thousands of messages above that one. Correct?
A. I don't presume to know what he -- you know, how he viewed his messages. I just know that the device received them.
Q. Well, so -- you've qualified as an expert in digital forensics and you've -- I think you said you've reviewed thousands of --
A. I have. Yes.
Q. Okay. So I guess I'm asking you based on your experience about -- are you familiar with the habits of users in chat apps?
A. I am. Yes.

Q. Okay. So is it fair to say that the inference one might draw about what Mr. Bertino, the user here, has seen is different for a text that's immediately above -- a chat that's immediately above where the user responds to a message and a chat that's, say, hundreds of messages above that -- a chat that the user has responded to? Do you understand my question?

A. I believe so. Yes. I mean, because he is responding directly to Captain Trump, I think it's safe to say that he has definitely received that message.

Q. Okay. So let's say -- let's assume this were -- we're in a group chat window here. Right? And let's say the group chat had hundreds of messages in it, like some of these. Okay?

A. Uh-huh.

Q. Then let's say there was a user who didn't send any messages at all in the chat group. None. Would you make an -- is there any tool that you have that allows you to say that that person who's been admitted to a chat group but has not sent any messages there -- is there any tool that allows you to show that that user has seen anything in the chat group?

A. No. I can just tell if the device has received them or not.

Q. Okay. So you've testified about a few -- the names of a

few chat groups in this case that you've -- where you've analyzed the Telegram data. Right?

A. Correct.

Q. The original MOSD group was one of those?

A. There is -- I don't believe the title was original MOSD. There was one --

Q. Ministry of Self-Defense?

A. Yes. There was one called Ministry of Self-Defense.

Q. And I think -- have -- have you been characterizing this as maybe the first Ministry of Self-Defense group or the original Ministry of Self-Defense group?

A. Yes. There are, in fact, two groups with that name. And there was one that was created first. Yes.

Q. And the second one was what you were characterizing as a super group?

A. That is correct.

Q. Okay. So those are two groups we have there, the first MOS -- Ministry of Self-Defense, or MOSD, group, and then the super group. Correct?

A. Yes.

Q. Did you also testify about a chat group called the MOSD op group -- O-P, for operations, I guess?

A. Yes.

Q. So did there come a time when you had conversations with the prosecutors about whether particular Defendants in this

case had communicated in those chat groups?
A. Yes. I looked for membership in those groups.
Q. And you looked for membership by particular Defendants to see whether they were involved in these groups?
A. Yes.
Q. Okay. So isn't it the case that you advised the Government that Mr. Nordean was not involved in any of -- did not send messages in any of those three groups I've just listed?
MR. KENERSON: Objection to what she advised.
THE COURT: Sustained.
BY MR. SMITH:
Q. Did there come a time when you learned that Mr. Nordean did not send messages in those three groups I just mentioned -- and to recall your memory, the original MOSD group, the super group and the MOSD op group?
A. I believe he did not contribute actual messages to the MOSD op group. However, I believe he contributed messages to the others.
Q. Can you recall any of those messages?
A. Not off the top of my head, no.
Q. Okay. Do you know whether -- has the Government made an inquiry with you about any of those messages that Mr. Nordean apparently sent in the other two groups?
A. Not specifically. I know that I have --

Q. Do you recall seeing any of them?
A. I do recall seeing some of them. Yes.
Q. And what were those?
A. I don't remember the content, but I know there were quite a few in the Ministry of Self-Defense larger group.
Q. So if I told you that the Government has conceded in this case Mr. Nordean did not send any messages in that group, you would say they're mistaken about that?
MR. KENERSON: Objection. Vague. Which group?
THE COURT: Sustained as to vagueness.
BY MR. SMITH:
Q. So if I were to inform you that the Government has taken the position that the original MOSD group -- in the original MOSD group and the super group, Mr. Nordean has not sent any messages, you would say that's inconsistent with your memory?
MR. KENERSON: Again, objection. Vague. Which group?
THE COURT: Overruled.
THE WITNESS: I know that -- I know he has sent messages in one of the Ministry of Self-Defense groups. I am not sure whether it was the smaller one or the larger one. I know he did not contribute messages to the Ministry of Self-Defense op group.

BY MR. SMITH:

Q. Okay. So let's -- let's cover Telegram handles. I don't know if that was the term you used, handle or nickname or -- so what I'm referring to is people will -- users in Telegram will use pseudonyms to identify themselves sometimes. Correct?

A. Usernames. Correct.

Q. Username. And the username is not -- sometimes is not the same as the legal name of the user. Right?

A. That is correct.

Q. Okay. So just for an example, your name is Kate Cain. You could appear in Telegram as something other than Kate Cain?

A. Correct.

Q. Okay. So there's no -- you testified about an identification number that each user has, like a -- kind of like a snowflake, has a unique fingerprint for each user. Correct?

A. That is correct. Yes.

Q. Okay. But there's no way in the application for a user to look behind the Telegram name and the identification number and find the legal name of a user. Is that right?

A. No, not the legal name. Not unless they chose to provide it.

Q. Okay. So it would be possible for individuals to

communicate on Telegram without having any way to determine who that person is -- what the legal name of that person is. Correct?

A. Well, you are required to register your Telegram account with a phone number. And so we can use that as attributable to a certain person because you must verify -- when you create the Telegram app, it sends you a text message verification. So we do know the phone number associated with most Telegram accounts. Yes.

Q. Thank you. So that is very informative.

But I was asking about someone who's not law enforcement. So when you say "we" -- you know, you have access to certain data because you have search warrants and grand jury subpoenas. I'm asking about somebody who's a civilian user.

Say you and I are both civilian users of Telegram. Okay?

A. Yes.

Q. And we're not using our legal names when we communicate with each other.

A. Okay.

Q. Okay? And there is no way in the Telegram application for me, a civilian user, who does not have search warrants and grand jury subpoenas -- there's no way for me to look behind your Telegram name and find that you are Kate Cain.

Correct?
A. You can choose to expose the phone number or have it hidden. So --
Q. You could choose -- so a user can choose --
A. The user chooses.
Q. A user can also choose not to reveal their phone number and their legal name. Correct?
A. Correct.
Q. And if you and I are communicating on Telegram and we choose not to use our legal names and our phone numbers, there would be no way for me to know who I'm talking to in the real world. Correct?
A. Correct.
Q. Okay. So if you and I are communicating in Telegram and we've chosen not to use our real names, if I was using the name Captain Trump and you were using Sergeant Trump, for example, okay, I can't be sure it's you and I who are speaking unless we communicate outside of Telegram using another medium, like the telephone, for example. Right?
A. Sure.
Q. Okay. So -- are you familiar with what chatbots are?
A. In what context?
Q. In the context of social media use.
A. Somewhat familiar.
Q. What are they?

A. You can have, essentially, artificial intelligence create posts and create content. I mean, I'm just vaguely familiar with them.
Q. Are they algorithms that allow -- are they algorithms that mimic human speech --
A. Yes. That's fair --
Q. -- that are not controlled by humans?
A. That's fair to say. Yes.
Q. Okay. And you testified that you're an expert in social media use. Correct?
A. In digital forensics behind social media applications. Yes.
Q. And have you -- in the thousands of phones and computers that you've conducted forensics on, have you familiarized yourself with social media use on those devices?
A. Yes.
Q. Okay. So is it fair to say that chatbots are a relatively prevalent phenomenon on social media?
A. They are used. Their uses are limited these days, as most social media blocks the ability to use them nowadays.
Q. Does Telegram?
A. It does, as of this fall. Yes.
Q. This fall?
A. Yeah.
Q. But it wasn't at the time?

A. No. Not at the time.
Q. Okay. You testified about Telegram encryption. Right?
A. I did.
Q. Okay. So other -- that -- explain what -- did you testify that the users in Telegram chat groups are communicating through an end-to-end encryption system?
A. No, I did not.
Q. What did you testify about encryption?
A. Telegram, by default, uses encryption anytime the message is in transit. And we consider it a client side to a user side encryption, meaning you create a message on your device. It is sent to the Telegram server. And while it is being sent to the Telegram server, it is encrypted. And then once the Telegram server delivers that message, as it's being sent to the recipient, it is also encrypted. So anytime that message is in transit, it is encrypted and locked with those keys and cannot be accessed with anyone without those keys.
Q. So there were a wide range of commercially available chat applications that feature encryption. Correct?
A. There are. Yes.
Q. Like WhatsApp is one?
A. Yes.
Q. Signal?
A. Yes.

Q. Telegram is another?
A. Yes.
Q. So -- you said you're familiar with these applications. Right?
A. I am.
Q. So you're familiar that billions of users around the world use encrypted chat apps to communicate?
A. Yes.
Q. Okay. So it's not intrinsically a proof of criminal activity if individuals are speaking through a chat app that's encrypted?
A. No.
Q. I think you testified that you yourself use Telegram, perhaps?
A. Yes.
Q. Okay. So you testified about -- what are some of the tools from the toolbox you used to analyze the messages from?
A. We have a variety of in-house tools and commercial tools available to us. I think the ones we spoke about earlier was Cellebrite's Physical Analyzer.
Q. And you used the tool Cellebrite here to manage your extraction of Telegram devices. Right?
A. Some of them.
Q. But you didn't use -- would you say the vast majority of

them?
A. Yes. I would say.
Q. Okay. But Cellebrite is actually not equipped to handle extracting Telegram messages, is it?
A. No, that's not correct.
Q. That's not correct?
A. No.
Q. Have you ever taken the position with the Government that it was not adequate for extracting Telegram messages in this case?
A. I have taken the position that it was not adequate for a programming project, that -- we had a team developing an in-house commercial tool to parse Telegram messages, and they wanted to build it based off of Cellebrite's platform, and I said that that was not an appropriate use of the tool.
Q. Okay. And have you taken the position in this case that using Cellebrite to extract Telegram messages gets you wonky message extraction?
A. Up until a certain point -- I believe 7.38 -- was that it gave some wonky messages. Everything used here in this case today was 7.42 and above. So those messages are accurate.
Q. Can you explain what you mean by -- what's that distinction about?
A. Sorry. That's a version distinction. So we are

currently on Cellebrite .60. So that's, you know, a range of about 22 different versions over the last two years.

You know, as -- there are 4 billion apps in the -- or 4 million apps in the Google store and 3 million apps in the Apple store, and so our tools don't parse all of them. You know, they -- our commercial tools focus on what is relevant to the digital forensics community, what is relevant to the casework of the people buying their product.

And so early on, in those earlier versions, you know, as Telegram was just being used and just being parsed by the digital forensic community, there were some limiting capabilities. Sure.

Q. So --

A. But every release adds new functionality.

Q. So did there come a time when you took that position that Cellebrite would get you wonky Telegram messages with respect to the prosecutors in this case? Did you inform them of that?

A. With respect to this case?

Q. Yes.

A. No. To our programming team, who is developing a solution, I told them they should not base their solution on an old version of Cellebrite.

Q. Okay. And how are you sure that the current version of Cellebrite is any different from -- has resolved the

problems that you identified yourself with wonky message extraction on Telegram?

A. I provide -- I do testing and validation on all of my tools, and pretty much every version I use undergoes some type of testing and validation by both my unit and personally by myself.

Q. So it's not the case that you have taken the position that Cellebrite itself, just Cellebrite period, not a specific version, is the very worst tool for extracting Telegram messages? You've never taken that position?

A. I told that to our programming team when they were writing a solution. Yes. I told them they should not use that particular version of Cellebrite to parse those messages in a tool that they were currently building, that there were others ways to build the tool more effectively. Yes.

Q. Okay. So your position is that you were not -- your position before was not that Cellebrite, period, is ineffective at extracting Telegram messages?

A. No. Not at all.

Q. Okay. So --

MR. SMITH: Your Honor, I'm going to bring up an email from Ms. Cain on February 9th, 2022. This is impeachment material.

MR. KENERSON: Objection. Can we go to the

phones?

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

THE COURT: Let's just do this. It would be helpful for me to see the document while we're having this discussion, but we don't want to bring it up for the witness.

MR. SMITH: I can proffer for your Honor that -- she took the position that she formally advised the Government that it was a specific version of Cellebrite that would produce wonky Telegram extraction. And the email says Cellebrite, period, produces wonky Telegram extractions.

THE COURT: Mr. Kenerson?

MR. KENERSON: I think she's already -- I don't think that there is anything inconsistent with her testimony there. I mean, the Court can see the email. But I think her testimony has been, yes, I said those things. That's what was in the process. I don't think there's anything inconsistent to impeach her with at this point.

MR. SMITH: Your Honor, the inconsistency is she just -- we went through a colloquy several times where I asked her, Is it Cellebrite itself that produces wonky extractions or is it a particular version? The witness said, a particular version.

The inconsistency is, in this statement she made,

it's Cellebrite, period.

THE COURT: I think -- look, again, if you give her a chance -- I think it's at least arguable it's inconsistent. The witness has to be given the opportunity, though, to explain the statement. When it comes -- and we've sort of tabled the question of whether these things come into evidence.

But I think Mr. -- and to be clear, when you say, "taken the position," the impeachment is about prior statements, not prior positions. The witness has --

MR. SMITH: This is a prior statement. Thank you, your Honor.

And, your Honor, under the D.C. Circuit precedent, we're entitled to publish it to the jury under 613(b), because this is -- the best evidence, the D.C. Circuit has held, of an inconsistent statement is the statement itself.

THE COURT: I'm not sure there is an inconsistency. You can show it to her and ask her about it.

MR. SMITH: That's all we're asking for.

MR. KENERSON: On the question of what can be published to the jury, I think to the extent that there is an inconsistent statement, this is just that statement. It's not the entire email and not the entirety of her -- I think it needs to be redacted if it's going to be shown to the jury.

THE COURT: That's fair. That's a fair point.

Isn't it?

MR. SMITH: Your Honor, we will draw a line above the irrelevant and immaterial information that has no bearing on this case earlier in the email. But, your Honor, the jury has to have some context. If I redact everything except the word "Cellebrite," then the jury won't see what the statement is.

THE COURT: Obviously. But I mean, if we're going to put up -- it's a fair request from the Government. I want you to show it to Mr. Kenerson before we continue so at least we can have -- we don't waste more time with this redaction issue.

MR. SMITH: Okay, your Honor.

THE COURT: Thank you.

Mr. Smith, the other thing we could do -- I know you've set up the impeachment. If you have more to do -- we're coming up on a break. If you want to, we can circle back during the break and do your redaction cleanly when we come back.

MR. SMITH: That works, your Honor. Thank you.

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

BY MR. SMITH:

Q. So apologies for that.

MR. SMITH: Your Honor, how many minutes before --

THE COURT: I think we're about ten or 15 minutes away from a break for the court reporter.

BY MR. SMITH:

Q. Ms. Cain, I'll come back to that question after a break.

So you testified about the means by which a user can delete, who within that chat group can delete messages. You testified about the potential ways that could occur. Right?

A. Yes.

Q. Okay. And you said that one way that can happen is when the user deletes their own message. Correct?

A. Correct.

Q. Okay. And you testified that in the case of -- there might be a distinction when it comes to administrators, group chat administrators, deleting messages between super groups and smaller groups. Correct?

A. That is correct.

Q. And I think you testified that in the case of a super group, which has a certain number of members in it, an administrator of a chat can delete any message they choose to delete within that group. Correct?

A. They can. Yes.

Q. But you testified that when it comes to groups that are not super groups, a smaller number -- that the administrator

of the chat cannot delete messages. Right?
A. That is correct.
Q. That's not correct. Right? So --
A. No, that is correct. As of the winter of 2021, administrators of a small group cannot delete messages for the entire group that they did not author.
Q. So it -- how do you know that? Is that -- well, scratch that. Let me rephrase the question.

Have you reviewed Telegram user protocols and instructions from the Telegram company?
A. I have.
Q. And don't they indicate that at any time, both in the winter of 2021 and the present, that a user -- that an administrator of a chat group of any size can always delete messages?
A. They can always delete their own messages and delete for everyone.
Q. Don't those -- don't those Telegram instructions indicate that they can always delete anyone's message?
A. No, they do not.
Q. Okay.

MR. SMITH: Your Honor, I think we would want to use that impeachment material now.

THE COURT: All right. Let's just take our break just a few minutes early.

Ladies and gentlemen, we're going to take a quick break for the court reporter's sake. Ten minutes. We'll come back and pick up the cross-examination then.

(Whereupon, the jury exited the courtroom at 10:42 a.m. and the following proceedings were had:)

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

THE COURTROOM DEPUTY: Jury panel.

(Whereupon, the jury entered the courtroom at 10:58 a.m. and the following proceedings were had:)

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

MR. SMITH: Your Honor, just an update. We have an agreement with the Government on the proper redactions. It looks like there's a crayon on the page, but...

THE COURT: Very well.

(The witness retakes the witness stand.)

MR. SMITH: Permission to publish the redacted email on the jury screen?

THE COURTROOM DEPUTY: Do you have an exhibit number?

MR. SMITH: It's called impeachment material. The judge has indicated that these are not --

THE COURT: Well, let's identify it by a number.

MR. SMITH: We can identify it as Nordean Exhibit No. 4.

THE COURT: All right.

THE COURTROOM DEPUTY: Exhibit 4.

Permission to publish?

THE COURT: Yes. Permission to publish is granted.

BY MR. SMITH:

Q. Ms. Cain, I'm sorry for how this looks, but do -- you see this appears to be an email with some green redactions. Right?

A. It is. Yes.

Q. And do you see that the "from" line says from Jennifer Katherine Cain?

A. I do.

Q. And it says: Sent Wednesday, February 9th, 2022?

A. I do.

Q. Okay. Now, there's a couple of points I would like to direct your attention to here.

In the middle paragraph, the second paragraph -- I've drawn a yellow line next to it. And you appear to be referencing parsing Telegram extractions through Cellebrite. And you indicate here that, "I don't have any other cases on your list, but I can pretty much say with certainty that they will be missing or have wonky Telegram data as well if

you relied solely on Cellebrite to parse it."

Then I would direct your attention to the last sentence in the next paragraph, with the yellow line next to it, where you say, "However, the issue is that Cellebrite simply cannot handle Telegram the way that some of our other tools can. It's the very worst, actually."

So you testified that there was a particular Cellebrite version that had created a wonky or missing Telegram extraction?

A. I did.

Q. Here, it appears you're saying, "The issue is that Cellebrite cannot handle Telegram the way some of our other tools can. It's the very worst, actually."

A. Yes.

Q. Would you like to explain?

A. Sure. This is an email I wrote to our programming team, who I had been working with for the better part of a year. They were trying to create a custom solution to parse Telegram. The version that we were working with, since we had been working on it for over a year, was 7.38. That did parse Telegram -- what I consider wonky. And the way I determined that is the effectiveness for my case agent to be able to go in there as a nontechnical person and review that data.

So the way -- for instance, the way they parsed it

at the time was they did not parse the group name; they only parsed the group identifier.

And as this case has heavily relied on the names of these Telegram groups, it's not attractive for me to present a solution -- to present a report to my case agents in my investigative review by saying, this is group No. 4097987677. You know, they like to see, this is group Ministry of Defense.

And so those earlier versions, while technically not incorrect -- all the messages were there, the dates and times were correct, the sender, whether it was incoming or outgoing, was correct, the content of the message itself was correct, the attachment was correct -- none of that was in question.

What was in question was the fact that it wasn't optimally suited for a non-technical person to review that data. For instance, I'd love to see it separate into a section called private chats and then for the user to be able to go down and see a section called groups, and then maybe super groups, and then channels. I like to see a division. I like to lay it out very easy for the investigative team. That is my job, is to take hard-to-understand technical data and present it in a way that is very easy for a non-technical person to understand.

The way that Cellebrite parsed it back in 7.38 is

not the easiest way for a non-technical person to read that data. So I did not think that we should develop a tool that was not only going to be used on this case, but future cases, based on an output that I just couldn't hand to my case agents and let them run with it.

So this was to that programming team. We actually came up with other solutions --

MR. JAUREGUI: Your Honor, objection. Narrative.

THE COURT: Overruled. The witness can complete her answer.

THE WITNESS: So when I came to this case and this came up as a question, I took all of the Cellebrite reports that correspond to the devices that were used in this case and I simply validated them all. I opened them all up. I reran them in a multitude of different programs, including parsing the database myself in some instances. I compared the data that Cellebrite was parsing back to the actual device and the way it was displaying in the Telegram app itself on that actual device.

And I came up with the -- just that all of the data was technically correct, and that the only thing that, you know, from a forensic standpoint that I wanted to do was add those group names in.

So what I ended up doing is, because they parse it in Cellebrite and it only showed the group number, I created

a master list of all of the group IDs and their corresponding group names, and I turned that over to the case agents so they were able to review all of their data in the best way and easiest way possible.

BY MR. SMITH:

Q. Thank you.

So I have one final question for you. You indicated that the version of Cellebrite that you're testifying today that was problematic with respect to Telegram extraction, that was 7.38, you said. Right?

A. Yes, it was.

Q. Okay. Do you see the first line in your email right there? It says, "I can rerun it through Cellebrite. I've been working with Cellebrite's programming team to fix the portions of Telegram, so some fixes have gone through as the 7.52 version."

You appear to be referring to the later version right there. Right? 7.52?

A. In this email for the changes that we had talked about.

Q. Yes. And then, several sentences below, after having obtained 7.52, that version, nevertheless, you say, "The issue is that Cellebrite simply cannot handle Telegram the way that some of our other tools can. It's the very worst, actually."

So you made that statement after receiving 7.52.

Right?

A. Well, after I said, "So some fixes have gone through as of 7.52," the next sentence says, "I can run it in 7.52," which has been redacted. So I had not actually run it in 7.52.

Q. Just so you understand, the Government asked me to redact that.

A. I understand.

Q. Okay.

MR. SMITH: Thank you for your testimony. Thanks.

THE COURT: Counsel for Mr. Biggs.

CROSS-EXAMINATION

BY MR. PATTIS:

Q. I'll be very brief, ma'am.

My name is Norman Pattis. Dan Hull and I represent Joe Biggs. How are you?

A. Well. Thank you.

Q. You graduated University of South Florida in 2017. Correct?

A. Yes, sir. For my master's.

Q. University of North Carolina, 2003. Correct?

A. Yes, sir.

Q. Tell us about your first job, your internship with the Disney World Company.

A. Out of college, I took an internship in the hospitality

industry with Walt Disney World. I worked in a variety of hotels down there in recreation.

Q. Were you giving people tours, like where they could meet Mickey, Goofy, Mary Poppins?

A. I did not, no.

Q. Okay. Because, as you testified -- the way you look at the jury and testify, I sort of feel like I'm on one of those intern tours when you go to Disney World.

A. I wish. But no.

Q. Me, too. Bye.

MR. PATTIS: Nothing further.

THE COURT: Counsel for Mr. Rehl.

CROSS-EXAMINATION

BY MS. HERNANDEZ:

Q. Good morning.

A. Good morning.

Q. My name is Carmen Hernandez and I represent Zachary Rehl. You know his name --

THE COURT: Use the microphone, please.

MS. HERNANDEZ: I need a lavalier.

BY MS. HERNANDEZ:

Q. I'm going to ask you a number of questions. I'll stipulate that you know more about technology than I do. Let's start there.

A. Okay.

Q. Let me show you --

MS. HERNANDEZ: Ms. Rohde, could you pull up Government's Demonstrative Exhibit -- I think it's 1131.

BY MS. HERNANDEZ:

Q. I'm going to show you the Government's demonstrative exhibits. I believe they're 1131 or 32. Ms. Rohde is pulling it up for us.

MS. HERNANDEZ: You can just do one of the later ones -- the one that has all the info on it.

BY MS. HERNANDEZ:

Q. So I want to start there. And this is supposed to demonstrate what happens when you -- you got a phone. You extracted -- or someone extracted the information from the phone. That's the second column. Is that correct?

A. Yes, ma'am.

Q. And when we say extracted the information from the phone, it's literally this little device takes the information that is on the phone and -- does it download it into, like, this hard drive or something?

A. It creates a containerized file, either an extraction or a binary file. And we just save it to another location. So that just represents just a location that we have saved that copy to.

Q. Okay. And in theory, it's supposed to have all the information that was on the phone that you extracted?

A. Depending on the type of extraction that we get, it could differ from device to device. Yes.
Q. Okay. And does that mean you can extract only certain information, if that's the only information you're looking for?
A. When we do an extraction, whatever is available for that type of extraction, we would get it all.
Q. All of it?
A. Yes.
Q. Okay. And then there's this next column, which is supposed to represent, I guess, some messaging on -- is this the way it would look on Telegram?
A. Well, we've used the common iPhone green bubble/blue bubbles here. It doesn't necessarily look exactly like that. We've obviously left out date stamps and message ID numbers. But -- it's just a visual, yes.
Q. But it's a visual -- so this visual, this type of visual -- I understand it's missing dates and names and whatever -- is this what you would find on the phone itself or is this what you would find once you extracted it?
A. When we extract the phone, we get the data from each application. Most commonly, these are stored in databases.
Q. So that means you would get, like -- words like "hello" and "hi," but the extraction doesn't show these little bubbles. Is that correct?

A. The extraction would not show the bubbles. No.
Q. Okay. But if, instead of the extraction, if you were -- let me back up one other question.
Although -- you've extracted phone information. Correct?
A. Yes.
Q. And one of the phones you extracted was Mr. Rehl's phone. Correct?
A. Yes, ma'am.
Q. You still have the phone?
A. I don't personally have the phone.
Q. Okay. The Government -- someone still has the phone. Someone --
A. I assume so, yes.
Q. -- over here still has the phone?
A. I assume so, yes.
Q. If I or if you were provided that phone and you opened -- would you be able to open a Telegram chat?
A. Possibly, yes. It depends on a couple of factors.
Q. Okay. And if you open that Telegram chat on the phone, would it appear as -- in this third column?
A. Well, this is a representation. But a chat would appear with -- you know, visually similar to this.
Q. Okay. So visually similar to this. And we've all agreed that it would have words in these bubbles and maybe a

date and the name of the person?
A. Yes.
Q. But the information that you've extracted -- so the phone would give you a representation that is much more similar to this chat ID, third column. Is that correct?
A. That is correct.
Q. Whereas the information you extract -- and I'm not suggesting you're doing anything wrong -- it's just that's the way technology works. When you extract, you're just extracting the words.
A. We get all of the raw data. So we get much more than you see on the device itself or represented in these chat bubbles.
Q. And this particular demonstrative appeared to be a conversation maybe between two people?
A. Yes.
Q. And this would -- if this were all you were dealing with, this would allow you to say -- let's say this were Mr. Rehl's phone. Would Mr. Rehl be in green?
A. No. He probably would be in blue, because the outgoing messages are usually on the right-hand side.
Q. Okay. So if this were, for example, a chat between Mr. Rehl and his wife, for example, then you would be able to see Mrs. Rehl and Mr. Rehl and you would be able to clearly say they were having a conversation between the two?

A. Uh-huh.

THE COURT REPORTER: Is that yes?

THE WITNESS: Yes, ma'am. Sorry.

BY MS. HERNANDEZ:

Q. Now, obviously, you've talked about these chat groups that you have in this. And these chat groups can contain -- what's the outer number that some of these chat groups you've looked at in this case? How many people?

A. I think just above 100.

Q. Okay. So in a chat that contained 100 people, the raw data that you got obviously would not be -- but you would have a large amount of raw data?

A. We do. Yes.

Q. And you wouldn't be able to identify in the same way as you can with two people who they're talking -- that they're talking to each other. Correct?

A. We would see the chat. It would be that this message belongs in this particular chat group.

Q. But you would not be able -- let me break that up into two boxes.

In your raw data extraction, you would know that there's 100 people in this chat. Correct?

A. Yes, ma'am.

Q. This is an example. At any one time, all or some of those 100 people would be posting?

A. Yes, ma'am.
Q. But you would not necessarily know whether they were responding to each other. Is that correct?
A. If a message was in direct reply to another message? Is that what you're asking?
Q. Yes.
A. We can get that information out of the database.
Q. Sometimes?
A. Yes.
Q. So in other words, if I -- if the message was, "What time is it," and the very next message said, "It's 3:43" --
A. Yes, ma'am.
Q. -- you could infer that the 3:43 is a response to "What time is it?"
A. That would be logical. Yes.
Q. Okay. But some of these messaging threads -- is that the right terminology?
A. Sure. Yeah. That works.
Q. Some of these messaging threads aren't so clear that it's a direct response. Would you agree?
A. In the chat database?
Q. Yes.
A. There is a column that tracks if a message is in direct reply to another message.
Q. Okay. Let's talk about that.

When you say there is -- I'm sorry. There is a what that tracks it?

A. The database tracks it.

Q. You said there is something that tracks whether it's a direct response.

A. Yes. Potentially there's a table with a record.

Q. And would that be -- would I need the phone to see if it's a direct response?

A. We could see that in the database.

Q. You could see that in the database?

A. Yes, ma'am.

Q. You could see that in Cellebrite?

A. Not earlier versions. That is a functionality that they added this past year in one of their releases. Yes.

Q. So do you know whether you've reextracted Mr. Rehl's phone using this new database?

A. We did not -- well, we don't -- it's not reextracting. It would be reprocessing that extraction. We would still work off of that original copy of the device.

Q. So as to Mr. Rehl's phone, do you know whether you reprocessed it with this new upgraded format?

A. No, we did not. I believe it came out in November or December past, when we had made all of our final exhibits for this.

Q. So today, you could go back and reprocess -- tell me if

this is true. Today, if you wanted to go back and reprocess, you could reprocess the information from Mr. Rehl's data and actually see which messages he responded to or which he didn't respond to?

A. Well, it wouldn't be -- it would be if the user directly replied, took the action of selecting a message and then replying directly to that message.

Q. Okay.

A. Yes.

Q. So maybe you can -- before I go on, so let me -- so the program that you used, or the model number or however you want to define it, you used when you extracted Mr. Rehl's phone on Cellebrite did not have this function that you're describing for the jury today?

A. At the time, no. None of our forensic tools did.

Q. So the information that we -- and the Cellebrite extraction that you did, I believe you know was provided to the defense. Correct?

A. Yes, ma'am.

Q. Okay. So the Cellebrite extraction that we have -- we, the defense counsel and Mr. Rehl -- does not contain this new function that you're describing today. Correct?

A. I do not believe it does. No.

Q. So what we have doesn't -- what we have -- and I believe it's what the Government has, what the prosecutors have

also -- does not let us determine whether any particular person was responding to another person. Correct?

A. In direct response, no.

Q. It doesn't. But today, you have the -- is it the technology to actually determine that?

A. I believe so. I believe one of the Cellebrite releases that came out at the very end of last year, either November or December, I believe they added that capability in.

Q. Okay. So using the old system, which is the one we're all working on, if you have a large chat with a lot of people, the only way you could tell, from the Cellebrite extraction, whether the responses were directly to another person or not is, would you say, by inference?

A. Yes. That's accurate.

Q. And again, by inference, the example, "What time is it," says one person, and the next person, seconds later says, "It's 4:36 p.m."?

A. Yes, ma'am.

Q. And so that would be inference that he's responding to that?

A. Yes, ma'am.

Q. But under the old system, which is what we have, unless you can draw that inference, the answer could be to what someone posted two weeks ago. Correct?

A. Yes, ma'am.

Q. Or could be just an idle comment that isn't even related to anything previously posted?
A. We just wouldn't be able to tell.
Q. You couldn't tell. Okay.
So if I get a string of messages one right after the other that were posted all on the same day, that still wouldn't be able to tell you whether they were responses to each other under the system that -- under the extraction that you've provided to us?
A. Correct.
Q. Okay. Thank you.
So let me -- before I go on, Telegram is -- there are millions of users in the United States and in the world who use Telegram. Is that correct?
A. I believe so. Yes.
Q. It's not -- did I hear you say that you have Telegram also?
A. Yes, ma'am. I test all of our applications.
Q. Okay. So you just have it on your phone just to test it, not because you use it?
A. I -- yes. I test it. That's why I have it.
Q. Do you also use it?
A. I use it extensively for testing.
Q. Okay. You also mentioned other -- like WhatsApp?
A. Yes, ma'am.

Q. And that's another messaging app?
A. Yes, it is.
Q. I'm getting better at this. That's another messaging app --
A. Yes, ma'am.
Q. -- that people can use to communicate?
A. Yes.
Q. For example, WhatsApp, I -- I use it because you can make international calls without having to pay a toll or something like that. Is that right?
A. I believe so. Yes.
Q. Okay. So that's a useful tool?
A. Yes.
Q. And it doesn't -- and these multiple -- did you say there's like 3,000 apps?
A. There's 4 million apps in the Google store and almost 4 million -- or 3 million apps in the iTunes store.
Q. So these apps are just apps that are out there that people can use. They don't denote any -- in any particular case -- they don't mean that you're a criminal if you use these particular apps. Correct?
A. I don't know why anyone -- no.
Q. So it's just an app that you can -- one of many apps that people -- that the young ones use to communicate with each other these days. Is that correct?

A. It is an app. Yes.
Q. Okay. So one of the things you spoke about was orphaned files?
A. Yes, ma'am.
Q. Okay. And tell me a little bit about an orphaned file. I tried to follow, but I'm not sure. How does an orphaned file -- how is an orphaned file created or why does it exist?
A. For this particular case, the term "orphaned file" means any kind of attachment. It's a known attachment from the Telegram database, so it's an image, video, audio file or document that we know has been transmitted as an attachment, but we don't actually have the message that corresponds with that attachment being sent.
Q. And I do understand correctly that if you have an orphaned file -- let me back up.

So an orphaned file is someone at some point, using Telegram, say, for example, sent another person or sent a chat, an email -- I'm sorry -- say a video or a photograph?
A. Yes, ma'am.
Q. And would that file that was sent -- could it have been sent to an individual or to a whole chat group?
A. Either one. We would not know.
Q. Okay. So if it's orphaned, the reason it's orphaned is

because the original message is no longer found on Telegram?
A. That's correct. We consider the message the parent. So it's a child without a parent.
Q. So you have this video, for example, out there. And did I also understand, from some of the information that we've been provided, that these orphaned files, you cannot tell when it was created?
A. We can tell based on the type of file it was. There are certain things, such as when I talked about EXIF data earlier, on videos and images -- the creation date is embedded in that EXIF data, so we can tell the creation date.
Q. So, for example, if I took a picture right now, there would be some information on that photograph that showed that the picture was taken today?
A. Yes, ma'am.
Q. Okay. So even on those orphaned files, you would know when the picture was taken; is that correct?
A. For a picture or a video. Yes.
Q. Okay. But for those orphaned files, you would not know when it was transmitted; is that correct?
A. That is correct.
Q. So if I took a photograph -- let's say I took a photograph today and, for whatever reason, it became orphaned. You would not be able to know -- you would not be

able to tell us whether it was sent today or it was sent seven weeks from today?

A. Well, forensically, we could narrow down that window based on the EXIF data and the other metadata of that file.

Q. So how far can you narrow it?

A. It just depends on the file. For instance, we take a picture today. The EXIF data would have a creation date embedded in that file. And then I send that message through Telegram to my friend.

When my friend's phone gets that message, the attachment is added to that device's file system, and that file system will have a date on it. So if I sent it today -- if I took it today, I sent it today, I would have that embedded in the actual image itself. And then, on my friend's device, if he looked at it this afternoon, that same image would have a file system date on his device of, say, 3:00 p.m. this afternoon, so I would know that that image had been transmitted sometime between my creation date at 11:00 a.m. and his file system date of 3:00 p.m. So I could narrow that window down based on those two types of dates.

Q. So if your friend didn't open the video until two weeks from the day you sent it --

A. Yes, ma'am.

Q. -- then the window would be two weeks?

A. Yes, ma'am.
Q. So you couldn't narrow it any further?
A. No, ma'am.
Q. Okay. And is that because you're using Cellebrite or is that just because it's an orphaned file?
A. That's just the forensic science between how the date stamps work in image files and how file system date stamps work.
Q. So even if you went back to the original phone, the receiving phone and the -- or the receiving device and the sending device, you still wouldn't be able to narrow it more than as you've described?
A. Correct, because the message is gone.
Q. Okay. So one of the videos that was shown to you by the Government -- and I'm going to need Ms. Rohde's help again. So the Government played a video, 403G, for you.

MS. HERNANDEZ: Ms. Rohde, could you take this down?

So 403G -- could you please pull it up. I'm sorry, Ms. Harris.

MR. KENERSON: This screen is still showing the PowerPoint.

THE COURTROOM DEPUTY: That's what I have, too. But it's set on "Plaintiff."

MS. HERNANDEZ: Do I have to delete this maybe?

THE COURTROOM DEPUTY: I'll reset it. It's still coming up.

THE COURT: Also, for the record, could the Government identify the exhibit that -- I think, when we first brought up the prior exhibit that Ms. Hernández was asking questions about, I'm not sure it was identified for the record.

MR. KENERSON: The demonstrative is 1131.

THE COURT: 1131. Very well.

MS. HERNANDEZ: Thank you, your Honor.

BY MS. HERNANDEZ:

Q. So the Government played this video for you. It's 403G.

MS. HERNANDEZ: Could you play it.

(Whereupon, Government's Exhibit No. 403G was published in open court.)

BY MS. HERNANDEZ:

Q. So your testimony on direct --

MS. HERNANDEZ: Thank you.

BY MS. HERNANDEZ:

Q. Your testimony on direct was that was -- that you found that video on Mr. Rehl's phone?

A. I believe so. Yes. I don't recall the exact device. But if that is what I said prior, then yes. Yes, it is.

Q. Let me show you -- and I believe this is Government's Exhibit 32 and it's already -- it's Government's

Exhibit 1132. And I have a paper copy.

So this is the exhibit that the Government showed you. And I believe that video is 403G, this one. Correct?

A. Yes, ma'am.

Q. And your testimony was that this was taken from Mr. Rehl's phone?

A. Yes, ma'am.

Q. And you're showing the photo was taken January 6 at 2:34 p.m.?

A. Yes, ma'am. Video.

Q. But you're not showing any other information with respect to that video?

A. Correct. When --

Q. So --

A. Telegram will strip most of that EXIF data out due to size restrictions.

Q. So you cannot tell us when that video was received by Mr. Rehl?

A. No, I cannot.

Q. And do you know how he received it?

A. Through the Telegram app.

Q. Through the Telegram. But you don't know whether it was posted on a chat?

A. I don't know where the original message is. No.

Q. Or whether it was sent to him as an attachment?

A. No. The original message has been deleted.
Q. Or whether he saw it on the 'net, for example?
A. Well, no. It would have been sent to him as an attachment.
Q. As an attachment through Telegram?
A. Through Telegram.
Q. But according to this, you were unable to determine when it was sent to him?
A. Correct. I just have the date the video was created.
Q. Or when he actually received it?
A. I do not know.
Q. Or when he opened it. Or how about if he opened it? Can you tell if he opened it?
A. No. But the file exists on his device, so I know that he did receive that message.
Q. You know that he received it. You don't know when he received it and you don't know whether he actually viewed it?
A. No, because the original message has been deleted.
Q. Okay. And is there anything -- can you rule out some things? So let me ask you this: Can you rule out whether that was sent to him contemporaneously? And by that, I mean at -- January 6th at 2:34 p.m.
A. No. That is a possibility.
Q. But it's also -- it's just a possibility?

A. Yes.
Q. It could have been sent to him three days later?
A. Yes. The message has been deleted.
Q. And you can't determine how the message was deleted?
A. I do not know how the message was deleted.
Q. And when you say the message was deleted, that doesn't mean he deleted the message. Correct?
A. No. It's most likely whoever authored that message.
Q. Whoever authored that message --
A. -- is most likely --
Q. -- the person who would have deleted the -- the post or the chat? I don't know how -- what's the term?
A. That is the most likely scenario.
Q. Okay. Thank you.

You were also shown a number of -- I believe you were shown Government's Exhibit 1136. I believe you have a copy of 1136 in front of you.

A. I do.
Q. And I have a copy here.

And I believe you were asked a number of questions about how this was deleted from all the -- several devices. Is that correct? Do --

A. Yes, ma'am.
Q. -- you recall?
A. Yes, ma'am.

Q. And I believe you were asked questions -- it was deleted from all the devices, I believe was what you answered?
A. For the messages that do not appear in this chat thread, yes.
Q. So -- and you -- let me -- I believe what you said, with respect to 1136, was that it was not -- the 12:56 p.m. message, it was not recovered from any device. Is that correct?
A. May I refer to the notes?
Q. Yes. And if you need anything else to refer to.
A. Yes, ma'am. The video at 12:56.
Q. Okay. And the video at 12:56 was this thing here. And you believe that that was a video sent by Mr. Bertino. Is that correct? Or recorded by Mr. Bertino?
MR. KENERSON: Objection. Both misstates and kind of vague as just referring to "here" without noting for the record --
MS. HERNANDEZ: I'm sorry.
BY MS. HERNANDEZ:
Q. That's the 12:56 message that we're talking about that you just said was not recovered on any device.
A. Oh, the 12:35?
Q. No. I thought it was at 12:56. I'm sorry. I'm pointing to the wrong thing. The 12:56 was the one that I understood you to say was not recovered from any device.

A. Oh, okay. The video. 12:56 video message. Yes.
Q. That was sent by Mr. Bertino? Do you know?
A. It appears that the video message was from Mr. Donohoe.
Q. Okay. It was Mr. Donohoe.

And do you know -- it appears that someone on the ground in D.C. on January 6th was videotaping some of what was going on. Do you recall these videos that you played?
A. I recall the videos that we entered. Yes.
Q. And is that accurate the way I'm describing? Somebody on the ground on January 6th of 2020 was recording some of what was -- 2021 -- was recording -- somebody on the ground on January 6th, 2021, was recording some of what was going on outside the Capitol?
A. Yes. We had a number of videos.
Q. I mean, we know a lot of people were recording. But I'm talking with respect to this particular exhibit, 1136, that you were shown, someone on the ground was recording some of this information and posting it on this chat?
A. Yes.
Q. And do you know -- the person who was doing this recording, was that -- if you know, was that Mr. Donohoe?
A. I believe for this message it was.
Q. Okay. And you indicated that the messages -- that the reason they weren't recovered from any device is that you believe the message had been deleted?

A. That is correct.
Q. And I believe you were asked your opinion, since it was deleted from all the devices, does that mean that the administrator for this group was the one who deleted it?
A. I don't remember if this was a group or a super group.
Q. Okay.
A. I just know that the message went -- whoever selected to delete it, instead of deleting it for just the device, selected to delete it and remove it from all of the users.
Q. And what does that tell you about who could have deleted it?
A. The user could have deleted it.
Q. The user could have deleted it?
A. And -- sorry. I don't recall if this was a super group. But then in that case, the administrator could have also deleted it.
Q. Okay. And can you tell from here who -- which group it was?
A. I believe it was the New MOSD chat.
Q. Okay. And is there any document that would tell you who was the administrator for New MOSD that you could look at?
A. I do not recall if I recorded that in writing.
Q. Okay. But essentially -- so the fact that it was deleted from all the devices would indicate to you that one person with some administrative capacity deleted it?

A. Or the person that authored that message.
Q. Or the person that authored it. Because otherwise, you would find it in one of the other devices. Is that correct?
A. That's true. I mean, there is the possibility that the two devices we have that contain this chat, that both of those users selected to remove that message from their device. I cannot rule that out as a possibility.
Q. Okay. And at one point, I believe you indicated that some of these messages were found on Mr. Rehl's phone but not on other devices. Correct?
A. That is correct.
Q. And that means he didn't delete them. If they were found on his device but not on others, that means he -- he had not deleted them from his device?
A. Correct.
Q. Okay. You talked a little bit about encryption.

MS. HERNANDEZ: I can take this down.

BY MS. HERNANDEZ:
Q. Encryption is something that is fairly common with the internet; is that correct?
A. Depending on certain chat applications. It is widely used today.
Q. And the reason for encryption, the primary reason, is to secure data. Correct?
A. Correct.

Q. I mean, the average person who sends an email through any number of -- Hotmail, AOL, whatever -- ordinarily, those applications have encryption in them. Correct?
A. Those do not --
Q. So if I send you --
A. -- use encryption.
Q. Those do not?
A. Not by default. No.
Q. But you can choose it?
A. Certain providers allow you to.
Q. Retail stores use -- like, if I go online and purchase something from a retail store, it's likely that the information I'm sending is encrypted?
A. I can't speak to that.
Q. Banks?
A. I don't know how their systems are run. I really can't speak to the encryption services that they use.
Q. Do you know of any encryption -- Department of Justice, when they send an email to you, that's encrypted?
A. I believe it is.
Q. Any other entities that you're familiar with that encrypt their -- their information so -- at least in transmitting the information. Correct?
A. Yes, ma'am.
Q. That's much more common, in transmitting the

information, it's encrypted?
A. Correct.
Q. And that's done so that the entire world, except maybe the hackers and the 13-year-old boys in this country, can't read what you're writing. Correct?
A. It's to secure the data in transit. Yes.
Q. Okay. And in fact, there's a lot of websites where you go on and the prefix is HTTPS.
A. Yes.
Q. When the S is added to the end of that HTTPS, that's because -- that means it's secure?
A. It does. The protocol used to transmit.
Q. And that's likely to -- let me write this so that you can see that. And you can see that -- HTTPS, that's what we're talking about?
A. Yes, ma'am.
Q. And you can go on any number of websites and, if you see that S, it denotes that there's some security in the --
A. That's what the S stands for. Yes.
Q. Okay. And again, that's pretty common and ordinary in today's world?
A. Yes.
Q. And would you say that's much different or the same as what the Telegram encryption is?
A. Well, this is a totally different type of --

Q. Encryption?
A. -- securing data. This is not technically encryption. It's the protocol used to transmit the website contents, so...
Q. But do you agree with me that the encryption used by Telegram is fairly common and ordinary for a number of these apps?
A. They do use a combination of established encryption protocols. Yes.
Q. Okay. And the theory is that encryption keeps the internet somewhat safe or secures Internet privacy?
A. For your data, yes.
Q. And in fact, there's a number of federal regulations that demand that kind of encryption. Correct?
A. I would assume so.
Q. Like if you are communicating with an M.D. or a hospital or something with health insurance -- with the HIPAA regulations, usually those people have to -- hospitals and doctors, doctors' offices, have to have encryption to secure the information being transmitted. Correct?
A. I would assume so.
MS. HERNANDEZ: Just a moment, your Honor.
BY MS. HERNANDEZ:
Q. I know there was some questions about your view of Cellebrite and how useful it was in extracting Telegram

information.

Am I correct that there are other programs that extract information that may be more suited -- may have been more suited to extracting Telegram when the extraction in this case took place?

A. Every -- we use a variety of commercial tools, and they all have their strengths and weaknesses. So it's a personal preference.

Q. But you identified, I think, an entity named Oxygen -- or a program named Oxygen?

A. That is the tool I used for one of the devices. Yes.

Q. And you believe that was, at least in some instances, a better fit to extract Telegram data?

A. For that particular device, it was.

Q. And that particular device, is it because it's Android versus Apple?

A. That's a large part of it. Yes.

Q. And just -- Apple is the iPhone?

A. It is, yes.

Q. And Android is?

A. Any non-iPhone, aside from the Windows phone, most of them run on a version of the Android platform.

Q. And again, that's -- and I may be misstating, but that's basically a -- it's like the brand -- maybe "brand" is not the accurate description, but the difference between Apple

and whatever else -- the other one is essentially the manufacturer?

A. It's the operating system.

Q. The operating system. But certain manufacturers -- Apple uses Apple whatever, technology, whereas the other phone companies might use a different -- anyone other than Apple uses a different system. Correct?

A. Relatively speaking, yes.

Q. And I think I'm at the end of my questions. I just want to make sure.

So one of the concerns with Cellebrite is that while it extracts information, when it displays it, it loses some of the information that is found in Telegram itself?

A. It displays the messages. However, you know, databases store many types of different information. And as we see the need to include more, we request enhancements from those programs to include additional functionality.

Q. But you lose the ability to see -- what's a pinned message on Telegram?

A. A pinned message?

Q. Pinned, P-I-N-N-E-D.

A. In a super group, in a larger group like that, the administrator can -- it looks like a little pin tack that you'd use on a bulletin board. And that essentially puts that message at the top of the chat so that, when new users

come on, they see that this somehow has been flagged for an important message and that they should read it. And so no matter when they come in the chat, no matter how the history is set, even if that message was made and pinned two years ago, anybody new coming in can see that because it's been designated as important.

Q. And -- I mean, if you use Facebook or Twitter or something, you can pin certain messages. That's a similar concept?

A. They each have their own version, I believe. Yes.

Q. Which means, I want you all to know that I have -- that I gave birth last week or that I got married a year ago or whatever?

A. Sure.

Q. And you lose that ability to see whether a message was pinned when you just extract?

A. No. Cellebrite parses the pinned messages.

Q. It does?

A. It does.

Q. How about -- I should probably leave some of this for some of my more technically adept people, but let me -- co-counsel. But just one last question on Cellebrite. The Cellebrite program that you used when you extracted the information in this case was not as -- would you say it was not as good as the current version?

A. It's always adding functionality.
Q. So the current version is -- has more functions than the one that you used at the time that you downloaded this -- that you extracted this info?
A. It does potentially display more data. Yes.
Q. And again, if I -- is there some -- there is some information on the device itself, on the phone, that, if I had the phone here, I could ask you to go to a particular message and you could provide me more information about whether that message was responding to a particular message or that type of thing than you can from the Cellebrite extraction. Am I correct on that?
A. That's something we could determine from the device itself or from the database, the Telegram database.
Q. I know. But what I'm asking you, is that accurate, that if you had the device itself and you could -- if you had the device itself right now, if you had Mr. Rehl's phone right now, you could go to -- the phone should still have the Telegram app on it?
A. It should. It just depends on a variety of circumstances.
Q. Okay.
A. The type of extraction we got and how it interacted with that device, if we were provided the PIN or passcode to that device. If it had been removed or placed into airplane mode

since the extraction, that could have an effect. But in a perfect scenario, we could look at the device and see that.

However, we are able to get a lot more data from the database itself than we can by looking at the device itself.

For instance, all of these orphaned files, they would not be present -- if you were to just open up the Telegram application on the device, you couldn't see those. Those were items that we pulled out of the Telegram application itself. So you wouldn't -- the end user wouldn't be able to see them. So in that case, reviewing the physical device would not --

Q. Let me go back to the orphaned video files that we discussed earlier. I understood that Cellebrite timestamps may or may not have any correlation whatsoever to when the actual message containing the video was sent. Is that accurate?

A. So the -- when you say the Cellebrite timestamp, that's most likely referring to the file system timestamp. As we discussed in our earlier scenario, if I were to send a video and it had a creation date embedded in it and then, when it hit that other user's device, that file system timestamp -- in my scenario, I had -- I sent a message -- I composed it at 11:00 a.m. The device received it at 3:00 p.m. I could not say from the file system timestamp that the message was

received at 3:00 p.m.

Q. But you -- and that's different, I guess -- and I think you said this already, but I just want to make sure. The embedded timestamp does tell you when it was created. That's -- on an orphaned file, that's pretty much -- and particularly, the one I showed -- the one that we played, the only thing you have on that is the time it was created?

A. For videos and images, we would have the creation date embedded in the file and then, on any other devices that it was present on, we would have the file system timestamp.

Q. But the one we played -- and there was an exhibit that went along with that -- only had the time it was created. Do you remember that?

A. Yes, ma'am. I don't believe we pulled any other dates surrounding that.

Q. Okay. One last thing. You looked at a number of chats. Is that correct? A number of Telegram chats?

A. I did.

Q. And there were a number -- and you know the Defendants in this case. Correct? You know the names of the Defendants in this case?

A. Yes, ma'am.

Q. And some of the chats -- some of the Defendants in this case were not in all the chats. Would you agree with me with that?

A. I believe that's accurate.
Q. Like, for example, there's a chat that's identified as the Elders chat. Are you familiar with that chat?
A. Yes, ma'am.
Q. Mr. Rehl was not in that chat?
A. I don't -- sorry. I don't recall from memory who was present -- a member of which chat.
Q. Okay. If I showed you something --
MS. HERNANDEZ: I will mark this as Mr. Rehl Exhibit 40, which is a list of chats that the Government produced.
And if I may approach.
THE COURT: It will be marked for identification purposes?
MS. HERNANDEZ: Yes, your Honor.
THE COURT: Very well.
BY MS. HERNANDEZ:
Q. Mr. Kenerson gave me that, just so you can be confident.
A. Thank you.
Q. And are there a number of chats that Mr. Rehl did not belong to?
A. May I?
Q. Yes, please.
A. Yes. There are a number of chats.
Q. Can you identify what those are?

A. May I read from this?
Q. Yes, please.
A. Mr. Rehl was not a member of Skull and Bones, 2020-2021, the MOSD Vetting chat, which was renamed to Noble-MOSD Vetting chat.
Q. And Vetting, that's V-E-T-T-I-N-G?
A. V-E-T-T-I-N-G, yes.
The chat called Elders; the chat -- MOSD Prospect chat, which we referred to in our exhibits as East Coast Prospect; OG Pickle Back Crew; Space Force chat; WB Stream chat.
Q. Thank you.
One last question. I understood you didn't do all the extractions yourself. It was a team effort?
A. It was a team effort. Yes, ma'am.
MS. HERNANDEZ: Thank you very much for your time.
May I get the exhibit back?
THE COURT: You may, ma'am.
Counsel for Mr. Tarrio.
MR. JAUREGUI: Thank you.

CROSS-EXAMINATION

BY MR. JAUREGUI:
Q. Good morning again, Ms. Cain.
A. Good morning.
Q. Almost good afternoon.

A. Good afternoon.
Q. Ms. Cain, who's the lead FBI agent on this case?
A. The lead agent that I worked with is Special Agent Nick Hanak, H-A-N-A-K.
Q. Is he here today?
A. Yes, he is.
Q. Now, Cellebrite was developed in Israel. Correct?
A. I believe so.
Q. And they sell this product, the Cellebrite product, to Russia, China, Myanmar, Iran, some pretty oppressive governments. Correct?
A. I don't know who they sell it to.
Q. Now, Cellebrite has two parts; is that correct?
A. Could you elaborate more?
Q. Sure. The first part is the UFED, which stands for the universal forensic extraction device. Correct?
A. That is one of their products.
Q. Okay. And that extracts data from a mobile device and backs it up to a Windows PC. Correct?
A. I actually don't use that product, so I'm not familiar with how it works.
Q. Which product is the one that you use?
A. I used -- with this case, we used Cellebrite Premium.
Q. Got it.
And the latest version of that is 7.60. Correct?

A. Cellebrite Premium, I'm not sure what the latest version is. It's probably somewhere between 7.58 and 7.60.

Q. Okay. And you're an expert in computer forensics. Correct?

A. Yes.

Q. You didn't bother to look up what the latest version of the most important tool in this case is?

A. I believe a version came out last week, and I'm just not sure which version that is.

Q. Understood.

And Cellebrite itself has various trainings and classes. Correct?

A. They do.

Q. Okay. And you've taken, I assume, the Cellebrite mobile forensics fundamentals course.

A. I have not.

Q. Okay. I assume you took the Cellebrite certified operator course.

A. I did not.

Q. Well, then, you must have taken the Cellebrite certified physical analyst course.

A. I did not.

Q. How about the Cellebrite -- since we're talking about Premium -- the Cellebrite certified Premium operator course?

A. I did take that.

Q. Great.

Did you take the Cellebrite in-system programming course?

A. No.

Q. How about the Cellebrite advanced smartphone analysis course?

A. No.

Q. Did you take the Cellebrite Apple fundamentals course?

A. No.

Q. How about the Cellebrite Android fundamentals course?

A. No.

Q. Then you definitely didn't take the Cellebrite advanced forensics course?

A. No.

Q. Now, in this case, I think it's very important -- you're saying you did not do the extractions in this case or you only did some extractions?

A. Only some of them.

Q. Out of the gentlemen here in court, which extractions did you do?

A. None of their devices.

Q. You didn't do a single extraction of a single Defendant in this case?

A. No. I believe they were all done by different divisions.

Q. Is that because you're in Knoxville, Tennessee?
A. I am now. When I began work on this case, I was in the Tampa division.
Q. Now, you've testified before, and you compared an extraction to a blood draw at a doctor's office. Correct?
A. I believe I did. Yes.
Q. You get a phone, just like a nurse or a doctor at a hospital or at a medical setting, and under controlled conditions, they draw somebody's blood. Correct?
A. Yes.
Q. And the reason you draw the blood in these controlled conditions is because you don't want any contamination in that blood. Correct?
A. Well, I believe you draw it so that you can test it.
Q. Of course.

But if you draw it incorrectly, if you contaminate the blood, once you take it to the lab, the results aren't going to be correct. Wouldn't you agree?
A. That's correct. You would not want to contaminate it.
Q. And in one of the most important cases in the United States of America, you decided it was not important to do the extractions yourself?
A. Oh, no. It is a generally accepted practice, especially when we have cases that span the entire country -- we have 56 field offices -- it's neither practical nor probable for

me to visit every single one of those divisions when we have CART-trained examiners in every single field office that can do it locally.

Q. So I can order something from Amazon and have it the same day, but the FBI cannot send you a phone next-day air for you to do the extraction yourself. Is that what you're telling the ladies and gentlemen of the jury?

A. No. It's more preferable to have the local division do it. We wouldn't want any outside factors to come in. It's important that, if it comes in powered on or if we have the code, that we take the best steps to preserve that evidence. And so I wouldn't risk sending a phone across the country just so I could extract it when my team in, say, Seattle has the exact same capabilities and tools to extract that locally and just get it done on the same day.

Q. I'm glad you said that.

And the reason is, because when you do the extraction, you have to make sure that the phone is not connected to the outside world. Correct?

A. We try to.

Q. Right.

A. We always try.

Q. Right. Well, I mean, it's easy. You turn it on, you immediately put it into airplane mode, you turn the Wi-Fi off, those kind of steps. Correct?

A. Well, you do have to have the passcode, nowadays, to turn airplane mode off [sic]. So we try to preserve it in any way we can.

Q. Understood.

And as you sit here today, you cannot testify to the ladies and gentlemen of the jury that you have any personal knowledge whatsoever of the extraction process. Correct? You're just relying on somebody else's work, are you not?

A. We all follow the standard operating procedures to extract the device. And so when they created that extraction, they -- the examiners provided a hash value. And then when I received that extraction, when they copied it over to my network, I verified it, confirming that what they had done matched.

Q. Where are the handwritten lab notes that accompany the summary report of the extraction?

A. Where are the what?

Q. The handwritten notes that, under procedure, are supposed to accompany the extraction.

A. We don't -- we're not required to take handwritten notes.

Q. Okay. Aren't you supposed to create a summary report that describes the date and times that the action was taken in the extraction?

A. Our tools generate reports that say that for us. Yes.
Q. And where is that report? Did you provide that to the Government?
A. Those reports should come with the extractions themselves. The tools generate them. I know that, in this case, we used a variety of tools, both Cellebrite Premium and Grayshift GrayKey. And in those extractions, there are attached files that document that process.
Q. I'm talking about your forensic report or the forensic report of the person that actually did the extraction. Have you seen the forensic report of the actual person that did the extraction?
A. I looked at what they wrote up into our case file. Yes.
Q. Okay. And did you provide that to the Government?
A. I do not have a copy of that today.
Q. Do you know if it was provided to the Government, is my question.
A. I do not know.
Q. Did you create a forensic mobile phone submission form, as is required?
A. That is not a form that I am familiar with.
Q. Do you know if the person that actually did the extraction created that form?
A. That's not a term I've ever heard before.
Q. Now, Cellebrite can extract live data and hidden data.

Correct?
A. By live data, you mean what you would see displayed on the device?
Q. Yes.
A. Then yes.
Q. Now, live data is typical user info, like SMS, MMS, video, email, et cetera. Correct?
A. Sure.
Q. There's also hidden data. Correct?
A. There can be. Yes.
Q. And that typical hidden data is web history, email headers, picture data. Correct?
A. Well -- I'm sorry. I now don't follow what you mean by hidden data.
Q. Okay. Let me move on.
There's two types of extractions. Correct?
A. There are many types of extractions.
Q. Right. There's a logical extraction, which is what we're dealing with here. Correct?
A. No. That is not correct.
Q. Okay. What are we dealing with here?
A. Well, depending on the different devices, most -- for most of the devices in this case, we got full file system extractions.
Q. Would that be a physical extraction?

A. We use the term interchangeably. Some of our tools call it a physical extraction; some of them call it a full file system. They're kind of used interchangeably. Neither are -- you could say that. Yes.

Q. Right. But you would agree with me a logical and a physical extraction are two different things. Right?

A. They are two different things.

Q. Okay. And since you didn't do the extraction, you don't know what kind of extraction was done in this case. Correct?

A. Oh, no. I know what type of extraction was done.

Q. Because of the hash value that you testified earlier?

A. Well, no. That doesn't tell me the type of extraction. The accompanying report that comes with the extraction itself tells me what type of extraction it is.

Q. And that --

A. I believe it's also in the name of the extraction [indiscernible].

Q. -- will then --

THE COURT REPORTER: I'm sorry? Say that again.

THE WITNESS: The accompanying printout that our tools generate tell the type of extraction that it is. And also, most of our tools report the type of extraction in the actual extraction name itself.

BY MR. JAUREGUI:

Q. And the extraction is through Cellebrite?

A. The extraction is what?

Q. This extraction report you're speaking about, that's through Cellebrite?

A. It's the tool that generates it. So it would have been Cellebrite Premium generates a log file, and our Grayshift GrayKey generates a summary report in a PDF format.

Q. That's what I'm trying to figure out. When you say the report that's generated, are you talking about the report generated through Cellebrite or through GrayKey?

A. Yes.

Q. Which one is it?

A. Both.

Q. Both.

And in this case, you have both reports?

A. I reviewed all -- yes. I reviewed -- that came along with each extraction. Yes.

Q. Thank you.

Now, these extractions and these reports, they're not 100 percent reliable, are they?

A. Well, they're log files of how the system interacted with the device.

Q. How the tool interacted with the device. Right?

A. Yes.

Q. Now, you know -- you said you followed the releases, the updates on social media and the tools' websites, so on and so forth. Correct?
A. Yes, sir.
Q. And you know, of course, that Moxie Marlinspike, who's the creator of Signal, he had Cellebrite. You know that. Right?
A. I know that Signal and Cellebrite have interacted with each other. Yes.
Q. Okay. But you know that the tool was hacked by the founder of Signal?
A. It wasn't --
Q. It's a famous hack case. You've heard about it. Right?
A. It wasn't hacked. But I know to what you are referring, yes.
Q. You know what I'm talking about?
A. I do.
Q. Thank you.

Now, you're saying you did not personally extract Mr. Tarrio's phone. Correct?
A. That's correct.
Q. Okay. Now, isn't it true that Grayshift GrayKey is actually better at processing Telegram than Cellebrite?
A. Well, Grayshift GrayKey doesn't process anything. It's only a tool used to extract the data from the device.

Q. Right. But the question was, it works better than Cellebrite. Correct?
A. No. The extraction that you would get from Cellebrite Premium, if it was a full file system extraction, and the full file system extraction you would get from GrayKey would be nearly identical.
Q. Okay. And the reason you use Cellebrite is what? It's easier to use for the agents -- for the Government?
A. It's just depending on availability. Right now, we only have GrayKey for iPhones and we have Cellebrite Premium that works on Androids and iPhones. And as of today, all of our divisions are equipped with both of those. Back in 2021, each division typically only had one or the other just based on availability at the time.
Q. Okay. And you would agree with me there's a big difference between the Apple IOS and the Android systems. Correct?
A. Yes. There's a big difference in their operating systems.
Q. And, actually, the Android even varies by phone. I have a Samsung, and on the Samsung, there's all this bloatware, and actually, there's an extra kernel on top of the Android operating system. Correct?
A. I can't speak to the bloatware, but yes, Samsung would be different than, say, LG. They all use the Android

platform, but they are slightly different operating systems.
Q. Okay. Now, my colleagues asked you about the different messaging apps, Signal, WhatsApp. Those are all encrypted. Correct?
A. They are.
Q. And even the simple Apple iMessage, that is also encrypted. Correct?
A. The iMessage is, yes.
Q. Now, on Telegram, it's also encrypted, but it's not end-to-end encryption. Correct?
A. Not by default.
Q. Okay. And not only that, but in these group chats, it's not even encrypted at all. Correct?
A. No. They are encrypted.
Q. Okay. Just not end-to-end encrypted?
A. Not end-to-end encrypted.
Q. Now, when a person does the extraction, they control all the factors, correct, as to the variables that they want to extract from the phone. Right?
A. No. When we do a full file system extraction, because of the way that our tool interacts with the device, we have to pull all of the data off. We do not get to select which portions. We copy the entire file system.
Q. And you know that because somebody wrote it on a report. Correct?

A. Because I know that's how the tools work. Yes.
Q. Okay. But when they use the tool, you would agree with me that the tool has endless variations and variables in it. Correct?
A. Not the extraction tools, no. When we hook it up to our extraction tool, it identifies the chipset in the certain device, the type of device it is, the chipset. And then the tool makes the determination on how to best extract that. It's not interactive with the user. The tool does it.
Q. So you can't pick a timeframe on the tool; is that what you're telling me?
A. For extraction, no. We would extract the entire device.
Q. Okay. Now, you did look at Mr. Tarrio's extraction. Correct?
A. I did.
Q. Okay. And you saw that he communicated through multiple mediums, text messages, Telegram and other applications. Correct?
A. I saw that there were many applications on there.
Q. And in the Telegram application, you saw he had countless threads and group chats and private and individual chats. Correct?
A. There were a number of messages and chats. Yes.
Q. And actually, he had about 32 and a half million unread messages. Do you remember that?

A. I do not remember that.
Q. You don't remember that.
Do you know how many unread messages he had?
A. No, I do not. But I know it was not 32 million.
Q. Okay. How many do you think it was?
A. I don't know, but I know that the total number of artifacts that we reviewed for that case did not reach anywhere near 32 million, so I know there weren't 32 million unread chats.
Q. And is there an easy way to look that up after -- you know, between -- you know, during lunchtime? Can you look that up through a Cellebrite report, perhaps?
A. No, not here, because the data set that we have provided has been scoped to the parameters of the search warrant. So it would not include --
Q. Okay.
A. -- the entirety of his --
Q. When you say that the data was scoped to the search warrant, what does that mean?
A. When we provided the final reports, we selected data that was relevant to the case here today.
Q. So you used a timeframe. Correct?
A. That was part of the consideration, but not the entire consideration.
Q. Got it.

So you were able to limit that to variables that you picked out in the tool. Correct?

A. For the final reports, yes.

Q. Got it.

Now, isn't it true that when data is not collected in a forensically sound manner, you inherently change the metadata?

A. I'm sorry. I'm just not sure what you mean by that question.

Q. Sure. If the extraction was not done correctly, the metadata could be contaminated. Isn't that true?

A. I'd have to see an example.

Q. Well, you'd have to see the phone and extract it, I guess. Right?

A. I would, yes.

Q. And just by seeing the extraction, you can't check the integrity of the data on the actual phone. Correct?

A. Well, as our tools are extracting the data, they take a hash value of the data that it expects to extract, and then, once it's done, it takes the hash -- that same hash value of the data that's come out, and that's how we receive that.

Q. But wouldn't it be best practice to have that report and then you have the phone with you to compare them both to make sure they're the same?

A. I did as part of my process, Yes.

Q. Yeah. But you didn't have the phone, did you?
A. I did not have the physical device. I did have the extraction with that. Yes.
Q. Understood.
So if the extraction was done incorrectly, the data is dead on arrival. Isn't that true?
A. I would assume -- I have -- I'd have no way to know that. I know that the data I looked at in this case, all the hash values matched; all the extractions were valid.
Q. I understand.
Now, you had already testified that you're not an expert in Telegram. So let me ask you just as to your personal knowledge. When using Telegram, when you use a reply or a swipe reply function, a review byline is created that allows two users to directly communicate without disrupting the flow of the overall chat with unnecessary confusion. Correct?
A. I'm not -- I'm not sure what --
Q. I'll break it up into pieces. I'm sorry. It's a long question.
You know what using a reply or a swipe reply is in Telegram. Correct?
A. Yes. When you reply directly to another message.
Q. Okay. When that happens, there's like a little review box that opens up. Correct?

A. There is.
Q. Okay. And that's done so that, as you're speaking back and forth, it doesn't create any kind of disruption in the conversation. Right?
A. I don't know the intent of it. I know that it does then display that message as your reply is in direct response to this other reply.
Q. Okay. When you extract that in Cellebrite, it doesn't show that. Correct?
A. In the earlier versions it didn't. As we discussed with Ms. Hernández, I believe the version that came out in November or December now does display that data.
Q. Okay. And again, you don't know if, in this new latest version, if it does that, because you haven't really looked at it. Correct?
A. No. I know that as of the version that came out in November or December, it does.
Q. It does. What version is that, to be clear?
A. I believe it was as of 7.58 or 7.59. I'm not sure of the exact version number. Just in the last few months.
Q. Understood.

But the version that we're working with, that Mr. Kenerson and I are working with, is that old one. Right?
A. Not the very first one that I had referenced, but

somewhere in the 40s, the 7.40s.

Q. 7.40s or something?

A. Yes.

Q. And -- I mean, that's important. I mean, I get an update on my phone every few weeks. I can't even drive my car if I don't get it updated. Isn't that important for us to be working on the most updated Cellebrite version tool?

A. We try to use the latest tools. Yes.

Q. Okay. Now, extraction creates a complication in terms of the contextual conversation. Correct?

A. I'm sorry. Can you repeat that?

Q. Sure. You already said that in the extraction in Cellebrite, we can't see swipe replies or replies. So if we can't see that, it creates a big contextual complication. We don't really know who's responding to what or to whom. Correct?

A. Sure.

Q. Now, it's really problematic when you're using Telegram to explain a person's state of mind. Correct?

A. I don't have any knowledge of using Telegram to explain a state of mind.

Q. Well, the user interface factors in most of how the user conducts themselves. Isn't that true?

A. I'm sure that's personal to each person.

Q. Okay. And actually, some data gets missed if it's in a

different format, like in a voice chat. Correct?
A. I don't -- I don't understand what you mean by "data missed."
Q. Well, isn't it true that in a lot of these Telegram messages the voice chats are missing?
A. We do have a lot of voice chats that have been deleted, yes.
Q. Yeah. And there's a lot of missing GIFs or photos, things that add context. Correct?
A. Yes. A lot of messages have been deleted.
Q. Okay. And, actually, there's missing messages that haven't been deleted. Isn't that true?
A. I --
Q. Not every single missing message was deleted. Isn't that true, Ms. Cain? Some of it are just artifacts that Cellebrite can't recognize correctly. Isn't that true?
A. No. The reply -- the message would still be there. It just wouldn't show that it was in direct reply to another message.
Q. I'm not talking about the replies; I'm talking about missing messages. Missing messages in a thread.
A. Uh-huh.
Q. Okay? You've seen those in these Telegram chats, correct, where there's just empty spaces?
A. Yes.

Q. Okay. Not every single empty space was a deleted message. Isn't that true?
A. No. That's -- if the message is missing and all that remains is the timestamp, then that is a deleted message.
Q. Isn't it true it could be a pinned message of some kind that Cellebrite can't recognize correctly?
A. No. Cellebrite parses pinned messages.
Q. It shows up as a big red X?
A. I think it has, like, a little icon and it says Pinned Message.
Q. Okay. But you can't actually see the pinned message. Isn't that true?
A. Well, it would be the message inside that container.
Q. Okay. Now, when looking backwards at these messages, without the user interface, we're pretty much guessing what the intent was. Correct?
A. I don't speak to the intent of these messages. My job is to provide the technical data in a useable format.
Q. And are you the person with the most technical knowledge in this prosecution team?
A. I did parse these Telegram chats and provide technical advice based on them, yes.
Q. Did anybody above you provide technical advice to the Government in this case?
A. Not to my knowledge.

Q. Okay. So you're the Government's tech person in this case. Would that be fair?

A. For this case, yes.

Q. Thank you.

Now, isn't it true that Telegram allows for editing and deleting of comments after being sent?

A. Individual messages?

Q. Yes.

A. I'm not sure if you can edit them back in the winter of 2021.

Q. Okay. Are you aware you can do that now?

A. I did not know that. No.

Q. Okay. So you didn't know that I can send a message, somebody can reply to my message, and then I can go back and change the initial message? You didn't know you could do that in Telegram?

A. I don't know if you could do that in the winter of 2021. No.

Q. Now, when checking to see if a comment has been read by other users, a double-checkmark will appear next to the comment. Correct?

A. That's correct.

Q. One checkmark means that the comment was sent and is ready for others to view and respond in the actual application. Correct?

A. That sounds correct. Yes.
Q. Now, we can't see any of these checkmarks in Cellebrite. Correct?
A. I don't recall if they included them or not, no.
Q. Okay. Would something refresh your recollection? Perhaps a Cellebrite report?
A. If we have those available.
Q. I do.
A. Sure.
MR. JAUREGUI: Ms. Harris, this is going to be Tarrio Exhibit 6. If we could just publish it just to the witness, please.
BY MR. JAUREGUI:
Q. Now, Ms. Cain, I'm showing you some Telegram messages between my client, Tarrio, and Lieutenant Shane Lamond, the head of the intelligence of the Metropolitan --
MR. KENERSON: Objection.
BY MR. JAUREGUI:
Q. -- Police Department.
THE COURT: Hold on. Is the witness being asked to refresh her memory about something?
MR. JAUREGUI: That's it, Judge.
THE COURT: All right. So why don't you just ask her the question about the topic at hand.
MR. JAUREGUI: Thank you.

BY MR. JAUREGUI:

Q. I'm going to show you this Telegram. I'm just going to scroll there.

Do you see these Telegram messages --

A. I do.

Q. -- between my client and Lamond? Are there any --

MR. KENERSON: Objection.

THE COURT: Sustained.

BY MR. JAUREGUI:

Q. Are there any checkmarks there?

A. There are no checkmarks.

Q. Okay. So in the Cellebrite version that we have, it doesn't display checkmarks, one or two, to determine whether something has been read?

A. Well, this is also not a group chat. This is an individual chat between two users.

Q. Okay. Does it show the checkmarks, yes or no?

A. It does not.

Q. Okay. Would it be fair to say, if it doesn't show it in an individual chat, it won't show it in a group chat? I could find you a group chat if you'd like.

A. I would prefer that you found a group chat. Yes.

Q. Sure.

MR. JAUREGUI: If we could publish this to the witness, please.

BY MR. JAUREGUI:

Q. Now, this is a group chat between Lamond --

MR. KENERSON: Objection.

THE COURT: I'm sorry, sir. Just ask your question about whether this refreshes the witness's recollection about the topic you've asked.

MR. JAUREGUI: Understood.

BY MR. JAUREGUI:

Q. I'm showing you some Telegram messages between different people -- we won't name who they are -- in a group chat. Any checkmarks on any of these?

A. No. But that's also not a group chat.

Q. It's not a group chat?

A. No.

Q. What is this? It's a group text?

A. It's two individuals.

Q. Oh, sorry. I have it as multiple people. I have it as -- I'll move along.

I have that one as three people. You didn't see three people there?

A. Well, it doesn't necessarily make it a group chat. It could still be a private message and not an official group with a name.

Q. Got it. Got it.

I'm showing you another Cellebrite report. Is

this a group chat?
A. It is.
THE COURTROOM DEPUTY: What number is this?
MR. JAUREGUI: This is Tarrio Exhibit 50.
THE COURTROOM DEPUTY: 50.
BY MR. JAUREGUI:
Q. Did I finally score on this one? Is this one a group -- group chat?
A. Group chat. Yes.
Q. There's a lot of people on this one. Right? How many people do you think are in this one?
A. I have no idea.
Q. Hundreds, maybe?
MR. KENERSON: Objection. Are we refreshing at this point?
THE COURT: Does this refresh your recollection?
BY MR. JAUREGUI:
Q. Does this refresh your recollection, Ms. Cain?
THE COURT: About?
BY MR. JAUREGUI:
Q. About whether --
A. It does. There are no checkmarks.
Q. There's no checkmarks?
A. There are no checkmarks.
Q. Thank you.

Now, what this proves is that simply extracting the phone doesn't give you an accurate picture of what's happening on Telegram. Correct?

A. No. Extracting the phone will get all of the data off of the phone. The next portion is to then process that data into a readable format. So, yes, extracting the data still does get a complete picture of the data off of the phone.

Q. You mean you're getting a copy of the data of the phone. Correct?

A. That is correct, in the extraction.

Q. Right. But what I'm trying to say is the Cellebrite that we're all using does not give a real picture of the communications on Telegram. Isn't that fair?

A. I would say that's not accurate. I would say it does give a good picture of the communications, as it has every group in it, every private message; it has the users that contributed a message, the message itself, a timestamp, the name of the attachment, the attachment itself. So it has all of the key features included in order to read any given chat thread.

Q. So a good 50, 60 percent, let's say 70 percent -- that's good enough for court. Right?

A. No. I would say more like 95.

Q. 95 percent. Okay. Not 100 percent. I guess I got you there. Not 100 percent, right, of the communication?

A. I mean, maybe later versions -- I could put in some enhancement requests.

Q. It's a shame we didn't use that later version, huh, Ms. Cain?

Isn't it true that when somebody joins a group chat, they miss entire sections of the conversations that came before then?

A. There is a setting in the super groups where the administrator can choose to show the history from all time or choose to just show the history from when that person joins the chat. The default is to just show when that person joins onward.

Q. Got it.

And in the extraction, you can't tell that using Cellebrite. Correct?

A. You can't tell what?

Q. What you just said. That -- the administrator can activate a setting as to what a user can see. You can't tell whether the administrator activated that setting on Cellebrite. Correct?

A. Oh, no. I do not know that.

Q. Again, we're just guessing, right, on Telegram, whether the administrator did or did not do such a thing?

A. I could look in the database for an individual chat and find that information.

Q. But you didn't do that in this case. Correct?
A. Not for this one. No.
Q. I understand.
Now, this leaves us to try and piece together the original context based on our speculation. Isn't that right?
A. I'm not sure what your question is.
Q. Well, I just asked you, When somebody joins a group chat, do they know what was said before they got there? And you basically said no. Correct?
A. That is correct. They would just see messages going forward in the default setting.
Q. Got it.
So if they start writing, we don't even know what they're responding to. Correct? Because we don't know whether they did a swipe reply. Correct?
A. Well, if they just joined the chat, I would assume they're not responding to anything, because they haven't seen anything.
Q. Right.
A. So they would be replying to nothing.
Q. Right. But they can't do it the minute they get there. They can do a swipe reply. You just can't show it on the Cellebrite. Correct?
A. Well, if you join the chat and you can't see the

history, then you can't reply to a previous message because there are no previous messages.

Q. Got it.

Isn't it true that Cellebrite processes the database inaccurately sometimes?

A. In my testing, in validation of the earlier versions of Cellebrite, I did find that Cellebrite was duplicating some of the records. And the way that databases work is they have a write-ahead log, which is called the WAL file, and when a user sends a new message, it writes that to the WAL file first, and then that's moved over to the database at a later time.

And so we noticed that, in the earlier versions of Cellebrite, they were processing and displaying some messages twice. So they were just duplicating messages. So the content was accurate; the timestamp was accurate; who the message was from was accurate. We were just seeing it in the database two times. And obviously, that person didn't send the exact same message at the exact same time twice because we were seeing it for several messages.

Q. And you actually told that to Agent Hanak in an email. Correct?

A. I did. I wanted him to be able to correctly interpret the data.

Q. Right. And you even told him, Cellebrite doesn't report

with enough accuracy. Correct? That's why I hadn't sent you Paul Ray's phone before, even though you guys were clamoring for it. Correct?

A. For his device, I processed it with a different tool because, at that date and time, and the number of groups that he was a member in, I felt that the interface was more appropriate as a review tool. Yes.

Q. And you even said Cellebrite has weird ways of displaying the pinned messages. Correct?

A. Oh, we did have a question about one of the ways that the pinned messages were displayed. It put an icon -- it created an icon. Essentially, instead of just saying at the bottom of the bubble, "This message was pinned," it created a little pin icon as -- to draw attention to the fact that that message had been pinned. It's just a programming preference. They wanted to be able to draw attention, so they assigned an icon to it.

Q. Okay. And you also told Agent Hanak that whenever there's extensive group threads, they may not be parsed correctly, nor coherently, in Cellebrite. Correct?

A. When -- we have a lot of groups and super groups for these particular devices, and because each one of those has a unique identifier, and because Cellebrite doesn't display the chat by the group name, but it displays the chat by the group identifier, one chat thread could appear as two. So I

wanted to just make sure that I drew the case agent's attention to that so that, if they were to look at any particular group, they knew that, for some groups, they needed to look at two chat threads in order to see the whole picture of that.

THE COURT: All right. Ladies and gentlemen, we're going to break for lunch. We will see you on the other side of our break. Thank you again for your attention and patience.

(Whereupon, the jury exited the courtroom at 12:35 p.m. and the following proceedings were had:)

THE COURT: You may step down from the witness stand.

Madam Court Reporter, do you have another ten minutes in you?

THE COURT REPORTER: Yes, Judge.

THE COURT: So we'll wait for Ms. Harris to return, and then I'll hear from you on the overnight issue, if you will.

Just in case the issue ripens today, why don't I hear from the parties on the issue that you all -- that was raised overnight, I guess, first by the Government and then Ms. Hernández responding in kind about what the Government wants to do with these additional exhibits. Whoever from the Government, I will hear from you. Then I will hear from

Ms. Hernández.

MR. MULROE: Thank you, your Honor. Conor Mulroe for the Government.

The term "Minecraft" is one that appears throughout the chat exhibits that the Government intends to offer. It's one that we have flagged for some time. I think it was mentioned in our briefing on the motion *in limine*, and we conveyed in those papers what the Government's position was about the meaning of that term.

It's important that the jury know what the term means. And so our original plan was for the agent to offer a lay opinion about the meaning of that term, which, in our view, was appropriate under the Rules of Evidence. It was going to be an opinion not based on any special or expert knowledge, and also not based on any facts or evidence outside the scope of the Telegram chats that he was reviewing.

So he, as he's going to testify at the beginning, reviewed quite a lot of chats -- I mean, many, many chats beyond those exhibits that we're offering here in court. And based on his review of all those things, he saw that this was a term that came up with some frequency within these groups. Based on its context and usage, he was able to determine the meaning of the term.

That was our original intention.

Now, we heard the Court's concerns that I think your Honor raised on Monday, and then again at the end of the day on Tuesday. And so in an effort to conform with what I think your Honor identified as a potential issue there about the witness offering an opinion or a conclusion based on evidence that is not before the jury, we put together this set, which is some but not all of the usages of the term "Minecraft" in the chat groups in question, so that the jury can see for themselves and reach their own conclusion of whether they agree or don't agree with what that term means.

As Mr. McCullough said this morning, having shown the jury those exhibits, we are happy to just let them draw their own conclusion and not even ask the witness, Well, what did you learn that it meant?

So that would be our intention at this point, to offer the exhibits, show the exhibits, and leave it at that.

I do think that the jury needs to know one way or the other what the word means. And so -- again, we could offer the exhibits, as we plan to do now. If they want those out, then I think we would ask them to waive any objection to the opinion being offered.

But I do think that the exhibits themselves, the actual texts and usage of the term, is going to be the best and most direct and most reliable way for the jury to make

that decision.

THE COURT: All right. I mean, I guess we're kind of -- I'll hear from Ms. Hernández in a moment. But we're sort of dancing around the fact that you also have the option of putting someone on who used the term in particular ways and was on these chats and would say, Yes, this is how we all used it. Correct?

MR. MULROE: Your Honor, we do happen to have that option available in this case. But I think that that should not change the legal analysis of whether this is a proper way to do it. And I think we should be entitled to, consistent with the Rules of Evidence and with your Honor's rulings, present the case in the way that we think is going to make it most understandable to the jury.

THE COURT: I agree with you. I agree with you. It is -- well, let's put it this way: I agree with you that it doesn't dictate the outcome under the Federal Rules of Evidence for sure. But it's context for how, at least in an uncontroversial way, the same thing could be accomplished. But it doesn't mean that you can't do it this way. I agree with you.

MR. MULROE: And your Honor, I think that, you know, even if we did have a witness who had used the term himself testifying to it, we would want to corroborate that and show the jury that you can believe him because here's

all the examples.

THE COURT: All right. Ms. Hernández?

MS. HERNANDEZ: Ding, ding, ding, ding. As Judge -- as then-Judge Garland explained in *Evans*, the Government is free to introduce a whole lot of evidence but it has to do that consistent with the Rules of Evidence. And putting an agent on the stand to explain what Minecraft -- what these Defendants meant when they used the term "Minecraft" is exactly what the Rules of Evidence do not allow.

And the Government has been shut down in this area multiple times. They try to do it -- or they used to try to do it in drug cases when they wanted to put an agent on the stand to say, Oh, when they said ten shirts, they really meant ten kilos. And the D.C. Circuit has repeatedly said: If the agent was not a member -- if you have an undercover officer, sure; the undercover officer can come in and say, I was -- I can explain what was meant.

But if you have a person who was not part of that conversation, you cannot have that person come in and essentially relay what the agent learned through his internet search, through conversations with cooperators. And in fact, in *Evans*, Judge Garland clearly said, you know, instead of having the snitch or -- he didn't use the term "snitch" -- the guy in jail come in and explain, the

Government seeks to put a clean-cut FBI agent -- I think it was Judge Garland's words -- seeks to put a clear-cut FBI agent whose credibility -- who has all this credibility to explain things that are clearly outside the scope of an agent's testimony.

This is a fact witness. He's not -- you know, they can go hire -- go subpoena someone from the company who manufactures Minecraft and have them testify about Minecraft. They can prove it through competent evidence. And the manner in which they're seeking to prove it is not competent. The messages that they want to introduce are all out-of-court statements, hearsay statements, dating to early 2020.

I mean, we keep on -- so I would object. And I certainly object at this point in time, your Honor.

THE COURT: Ms. Hernández, let me just try to clarify.

You keep mentioning a case, *Evans*, although all the cases you cited last night are not *Evans*. So what case should I look at over lunch?

MS. HERNANDEZ: Those cases that I have cited are the summary witness cases, the Government's summary witness cases that the Supreme Court -- I'm sorry -- that the D.C. Circuit referenced. And I think the issue was a Rule 702 issue and the hearsay rules issue and the relevant -- the

cases I cited.

But the Garland case is the case I cited in objecting to the Telegram messages in which -- and that was the motion I filed, I believe, on Saturday or whatever day we were supposed to object to the Telegram messages. And that's the motion where Judge Garland -- I didn't look for him, but I found his case, so I figured I might as well exploit the fact that he was the judge who wrote the opinion at the time. That's *Evans*.

Evans is the case authored by Judge Garland, and it dovetails -- the reason I raised it, because it dovetails into the Government's argument that they get to put the agent on the stand and they'd like to corroborate the testimony, I guess, of Bertino and Stewart and Donohoe, who are the witnesses that they have to put on, because they're the witnesses who would know how the term was used in those chats.

THE COURT: Sure.

MS. HERNANDEZ: The agent doesn't know how the term was used in those chats.

THE COURT: Right. Right. So their now fall-back position is -- or position, I guess, is -- and I hadn't definitively ruled, but I have raised the issue that I thought -- whether it was *Evans* -- I actually think it was one of the ones you cited last -- or very early this morning

about these concerns about an agent coming on and saying, Here's what I believe, based on things that are not ultimately before the jury.

And the Government so -- has read the case, I think, and heard what I said, and is now shifting to something that's separate, which is to say, no opinion testimony. Right? The agent won't say, Oh, I understand this word to mean whatever.

What they're saying is, just put this -- again, we've talked about limiting instructions extensively. But the idea would be, I assume, that we would say, look, here's a bunch of Telegram messages. Some of them are from -- related to your clients; others are not. Here's how, in these chats, the Proud Boys were using that term. Jury, you figure out what to make of the term as they're using it in the days and weeks leading up to January 6th.

So tell me what your objection is to that.

MS. HERNANDEZ: Okay. So those are the summary witness cases that I cited to you this morning --

THE COURT: Right.

MS. HERNANDEZ: -- that the D.C. Circuit has said: You cannot put a witness on the stand to essentially testify based on hearsay. What the witness would be saying is, I've looked at all this stuff -- the Court -- the D.C. Circuit has been real clear that when you put on these Government

witnesses, they cannot be testifying as to what they read in the case and how they interpret it. They want -- Minecraft is a game. It's commercially sold. The Government wants to explain how these Defendants used that term.

The only way -- the only person who can explain that is someone -- is one of the Defendants or one of the persons who was communicating using that term. An outside person cannot come in and say: When Tarrio, when Rehl, or when -- whoever said Minecraft, what they meant was...

THE COURT: Right. And so they have -- they're not -- if you just heard what I said, they just said, we're not doing that.

MS. HERNANDEZ: That's exactly what Mr. Mulroe said he was going to do.

THE COURT: No. No. You're not listening. You're just not listening, Ms. Hernández.

MS. HERNANDEZ: I am, your Honor. I am.

THE COURT: Then how can you explain to me how -- Mr. Mulroe just said: That's not what we're doing. And I repeated it: Oh, that's not what you're doing. And now you're telling me, no, they are doing it.

MS. HERNANDEZ: Well, they want to put in some text messages -- some messages --

THE COURT: Okay. Now we're getting somewhere.

MS. HERNANDEZ: -- where the term "Minecraft" was

used.

THE COURT: Right.

MS. HERNANDEZ: They don't need an agent to explain anything other than --

MR. SMITH: Your Honor, can --

THE COURT: No. Ms. Hernández is -- she is the one who filed the objection. I want to hear her out.

Continue.

MS. HERNANDEZ: So first of all, the messages that they're trying to introduce are hearsay statements. They are -- they predate the conspiracy and they're out-of-court statements. And they want to introduce it to show the term "Minecraft."

Fine. The term is a term. It's one of two things. It is the game that's commercially sold --

THE COURT: Right.

MS. HERNANDEZ: -- or it is a term, say, of art that these Defendants used. No one can explain how these Defendants understood that term except one of the persons involved in those conversations.

It's the same way as when the Government puts on intercepted communications. The only persons who can explain what the intercepted communications mean is someone who was part of the conspiracy. They cannot bring in a law enforcement officer who said, I've listened to a lot of

calls and this is what they mean.

That's exactly what the Circuit has said cannot be used.

I only mentioned the *Evans* case because, on top of that, Judge Garland said whatever -- there's a lot of things that the Government can introduce about background, about context, about all sorts of things in a case. And they're entitled to introduce it.

But Judge Garland said explicitly: That still has to come in through competent, nonhearsay evidence.

And the Government wants to put on an agent, as Mr. Mulroe said -- and that will be fine. They can elicit this information from Bertino and Stewart and Donohoe. But they want to corroborate that testimony. How? Through a clean-cut agent -- and I use that term because that's -- I'm quoting from Judge Garland. They want to corroborate that through a clean-cut agent who gives some credibility.

But the clean-cut agent cannot -- does not have the competence, under the law, to explain what was in the Defendants' minds when they used the term.

THE COURT: Does anyone else want to be heard from defense side on there?

MR. SMITH: Yes, your Honor. Very briefly.

There are some additional problems beyond what Ms. Hernández is referring to. If your Honor looks at the

first proposed Minecraft PDF, it's Government's Exhibit 514-62 --

THE COURT: I don't want to -- I'm going to hear you. Let me just -- well, I'll ask at the end.

MR. SMITH: Thank you. So there are foundation problems, your Honor, and there are 403 issues.

The foundation issue is we have -- to take one example, your Honor, there's a statement from someone named Memphis King. That's their Telegram handle. That's 514-62. He says, Let's go shoot them all in Minecraft.

THE COURT: Yes.

MR. SMITH: Okay. So there's a pile of problems here. There's no foundation indicating the Defendants have seen this, much less adopted it.

There's no --

THE COURT: Wait. Let me stop you right there.

MR. SMITH: Yeah.

THE COURT: What does that -- I mean, this is not a question of adopting. Right? This is a question of, how was a term of art used within a community?

MR. SMITH: Within the community, right, your Honor. So there has to be some sort of common understanding for -- the predicate for relevance here is common understanding. So if -- your Honor, if there's a word -- there's an old famous argument in linguistics about a

private language. There is no such thing as a private language. Words either have meaning communally or they mean nothing. So they have to be shared -- there has to be a shared understanding.

THE COURT: Okay.

MR. SMITH: So if there's no foundation that a Defendant has seen this statement saying, "Let's go shoot them all in Minecraft," and associates Minecraft with shooting people, then there's no basis for the relevance argument the Government is making that this is relevant because there's a communal understanding in this group that Minecraft means, let's go shoot people.

So there has to be --

THE COURT: To be fair, they're not saying that.

MR. SMITH: That's another problem.

THE COURT: That's not the argument.

MR. SMITH: So your Honor is pointing out another problem, which is what -- if no one is explaining what Minecraft means -- and I think Mr. Mulroe has backed off that because of Ms. Hernández's objection -- then we just have -- the relevance is just supposed to be this statement sitting here. Minecraft is -- "Let's go shoot them all in Minecraft."

What are we -- what is the relevance that is being presented to the jury here in this statement? Is it

Minecraft means harming people? Does it mean committing any sort of crime? It's just this mysterious, vague, unexplained statement that has no foundation in the Defendants' knowledge.

And then, your Honor, there's another problem, which is -- Ms. Hernández said, either Minecraft is -- you know, it means nothing -- it means a video game or it's a special kind of thieves' camp that the Defendants have.

Actually, there's many other options. This is a generic slang term on the Internet, your Honor. And if your Honor looks at -- just sort of goes online and looks --

THE COURT: Then maybe the agent can testify to it.

MR. SMITH: Well, then -- your Honor, he can't, because there's many meanings.

Your Honor, then there's -- there's another problem, your Honor. There's many meanings. If your Honor just -- if you look online for even five minutes, you'll see that it's a catchphrase used to qualify a statement as not relating to the real world, meaning -- which would be the exact opposite of what the Government is trying to present its relevance as.

THE COURT: I think you have -- let me say this: I think you have arrived at a place that -- let me -- so this is an important question that does bear, it seems to

me, on the admissibility of these exhibits and what a jury could or could not make from them.

Let me just have the Government articulate for a moment what they -- I realize you're not going to have anyone opining this, but at closing or -- either through a subsequent witness or at closing, what is the Government's position on what this does mean? What would you, at the end of the day -- again, whether you have a witness who testifies to this or whether you would just be arguing in closing, "This is what we think this means"?

MR. MULROE: The short answer, your Honor, is Minecraft means violence and crime.

And the longer answer is this: Mr. Pattis elicited, during the testimony of Agent Camiliere, the kind of sense of humor of the Proud Boys. I think he called it the culture of irony. I think the -- Minecraft is related to that.

Minecraft, as I think these examples show, is a somewhat winking or tongue-in-cheek tag line that they put on the end of a statement -- when it's a, you know, facially incriminating statement, they will put on the end "... in Minecraft" to make it seem like we're not talking about the real world, as Mr. Smith said.

Now, I don't think the Government's position is that they viewed this as a serious way of insulating their

communications from law enforcement scrutiny, like it would really protect them if they were able to point to, "Oh, I didn't really mean it; I was just saying 'in Minecraft.'"

I think it was partially a joke. But it's a signifier that we're talking about something illegal.

And so we've illustrated that in the chat exhibits we've offered when there's discussions of what does appear to be real-world criminal activity, selling prescription drugs and --

THE COURT: Right.

MR. MULROE: -- the references to violence. And some of the references to violence is over the top. We're not suggesting they actually want to go cut people's heads off.

THE COURT: Right.

MR. MULROE: But there are other cases where it appears to be a reference to real things. And so all that is necessary context for the jury to understand, what do they mean when they refer to Minecraft?

And I think that the meaning, based on these examples from these same chats that the Defendants were part of, will make the meaning clear. But if any of these Defendants disagree and think that it means something else in that context, they're free to pull up other examples from the chats and say, Well, look at what they said Minecraft

here; that rebuts the Government's theory.

I don't think they're going to be able to find anything like that. But I think that we're entitled to show through example what the term means.

And I want to point out, just -- I think your Honor and most of the parties are tracking this -- this is not a hearsay question. If we were putting a chat up that had a member of the group saying, Minecraft means X, that would be offered for the truth; that would be a hearsay issue. None of these are being offered for the truth of any statement offered.

MR. SMITH: Your Honor, I have to say, we heard Mr. Mulroe use the pronoun "they" throughout that entire statement, your Honor. The whole issue is who "they" are. That is the foundation issue.

So the argument that I just made to your Honor is, there isn't a foundation showing that the Defendants have this understanding.

THE COURT: Let's just --

MR. SMITH: But Mr. Mulroe keeps saying "they," your Honor.

THE COURT: Okay. So you would say it would be different if -- again, I'm just -- just conceptually -- if the Government put on a witness that said, Oh, yes. Not just my dealings with the Proud Boys generally, but in my

dealings with these Defendants, oh, yeah, we would use that term, and this is what we meant. That would be perfectly fine?

MR. SMITH: That would be different, your Honor.

THE COURT: Well, would it be perfectly fine? It would be different.

MR. SMITH: Your Honor, then it becomes more of a credibility issue of the witness, frankly. But I would say that is -- that's different. That's different.

The problem I have, your Honor, is we just have these statements, these, you know, isolated statements from people without legal names, without any indication of whether the Defendants saw it or understood -- had the same understanding. That's the --

THE COURT: Some of them, of course, are your clients, just to make that point. Right? I mean, I -- some of them are the Defendants in this case.

MR. SMITH: Well, your Honor --

THE COURT: I understand there's other arguments about that. But it's not -- these are not all folks who we may or may not know who the identity is.

MR. SMITH: Well, your Honor, I agree that, if you're referring to 514-64, where at least the Defendant's handle is responding to someone using the word "Minecraft," I agree. That's a different issue. So there might be 403

issues there.

But, your Honor, I'm primarily concerned about, like, the first example, 514-62, where it's just an isolated statement from someone named Memphis King saying, "Let's shoot them all in Minecraft." No --

THE COURT: Right.

MR. SMITH: No context. No indication that a Defendant has seen it or understands what he's talking about.

THE COURT: All right. Mr. Pattis.

MR. PATTIS: These are serious charges that the Defendants face, and I think they're entitled to contest the seriousness of the evidence. There has to be an outer limit.

And I adopt Mr. Smith's claims as to foundation and would say that, with respect to 403, I think there is a risk of jury confusion.

When I first saw Minecraft, I thought it was the game, and I talked to one of the prosecutors and I said: Are you contending there were secret communications in the game chat function? And I was assured there wasn't.

At some point, the Government has to be held to its burden of proof and say, you know, you're entitled to put on links in a chain, but you can't make stuff up out of whole cloth and attribute it to people without a foundation

whatsoever. And if you try, then that opens this case up to hours of -- not hours -- maybe an hour of cross-examination about the various meanings and permutations of Minecraft that are available in an urban dictionary.

And we're going to be right back to where Mr. Mulroe says he doesn't want to go, which is the agent giving -- giving the agent a lay opinion.

So if you put it out there and we cross-examine it, we're opening the door to a lay opinion. And then we're not going to be able to cross-examine on the lay opinion because you don't permit recross-examination. And the whole thing just becomes a mess with the --

THE COURT: I don't -- well, let me just respond to a few things you said.

Number one, I think it's -- I mean, I have permitted recross-examination in this case --

MR. PATTIS: Once or --

THE COURT: -- which is quite unusual unto itself. So -- I mean, to dispense with that.

Number two, you know, jeez, the fact that there might be an extra hour of cross-examination is not a response to the question of whether these are properly admitted.

MR. PATTIS: No. It's a 403 issue as to jury confusion.

THE COURT: I haven't -- fair enough. But I haven't -- let me put it this way: We have a witness on the stand right now whose testimony is, essentially, Here's how Telegram works -- and you all can do whatever you'd like on cross-examination. But I don't think -- the fact that something is going to create an extra hour of cross-examination is not --

MR. PATTIS: No. My point, sir, was jury confusion, frankly, on an issue that's really tangential. How many rays -- what's the heat of the sun on the dark side that we don't see at a moment we see it? And isn't that relevant to the heat here on Earth? Well, I guess you could make an argument, if you were an astrophysicist. But at some point the Court has to say, this is material and relevant, and at some point there's a risk of jury confusion. And I think that's the problem with the 403 thing.

And given what Mr. Smith notes with respect to the various meanings of Minecraft, I think there is a substantial risk of jury confusion, unless they're going to put those words in the mouth of a Defendant, in which case it's an admission of a party opponent and then we're on to something.

But absent that, it's remote.

THE COURT: I do think -- look, I do think one of

the things -- and then we will go to lunch. And I think -- look, we'll finish up with this witness, and I think the prudent thing would be, if the Government just pushes this whole Minecraft thing to the end of the direct for the witness you're about to put on, then then we can move ahead. It's, I assume, a long direct. And I can take it up -- if I don't come back to you with an answer, I can at least take it up overnight.

I would say this: I do think part of this -- Mr. Mulroe, you, in laying -- I think you very accurately -- from my review of what you all have put forth -- the tricky part is I don't think it's necessarily universal. Like you said, there are times when I think it's clearly meant to be a sort of -- not a serious way -- you're mentioning something that you don't really think -- well, it's linked to things that I think are probably not serious, and no one is really seriously considering doing, but as a way to kind of wink and I'm saying something that is -- I mean, let's go, you know, beat somebody up. But nobody is really thinking of doing that.

And then the other times -- there are times when it's, I think, clearly being used -- I shouldn't say clearly -- to the best we can tell, from -- from what I have, it is being used to reference ongoing conduct that is probably, you know, ongoing illicit conduct.

MR. MULROE: Your Honor, on the sequence of the direct, I think it would probably be fine for us to push this to tomorrow morning. I think to push it to the very end of the entire direct would be difficult, but I think we can get through the afternoon without doing it.

The one thing I do want to just point out is the -- it's not a limited single instance of the term in the chats that we want to present. You know, you could do a control-F. It sounds like maybe your Honor has already done that.

THE COURT: Already done it.

MR. MULROE: But it's the Defendants themselves talking about, you know, things in direct connection with the events of January 6th and Minecraft. So it's an important term.

THE COURT: Let me say this: You also have the option of just steaming through in whatever way you would like, knowing that you can come back to the question. And knowing that, even if I don't allow what you'd like to do here, you have the option of tying it up later. But that's a risk, you know, you would have -- you all would have to take.

MR. MULROE: You know, a lot of these things can cut one way or the other. I think in terms of jury confusion and in terms of the nuance of the term that your

Honor has identified, both those, in our view, are reasons to put these examples in front of the jury and let them understand it themselves and draw their own conclusion.

And I think that the way to do that is with these examples. And they can pull up however many counter examples they want to.

THE COURT: All right. We will -- I'll let you know after lunch if I've decided. If not, it would be helpful if the Government is just prepared to at least tee it up for tomorrow morning.

We'll be back at -- it's 1:04. Let's come back in an hour, at 2:04.

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

(Proceedings concluded.)

CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings produced to the best of my ability.

Dated this 8th day of February, 2023.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the District of Columbia
333 Constitution Avenue, Northwest
Washington, D.C. 20001
(202) 354-3269

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