

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

United States of America, )  
)  
Plaintiff, ) Criminal Action  
) No. 21-cr-175  
vs. )  
) JURY TRIAL  
Ethan Nordean, ) Day 37  
Joseph R. Biggs, )  
Zachary Rehl, ) Washington, DC  
Enrique Tarrio, ) February 22, 2023  
Dominic J. Pezzola, ) Time: 1:30 p.m.  
)  
Defendants. )

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

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\* \* \* \* \* P R O C E E D I N G S \* \* \* \* \*

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

THE COURT: All right. Good afternoon to everyone. We'll bring back in the witness and the jury and proceed.

MR. KENERSON: Can I just address one point before we bring the jury in, Your Honor?

THE COURT: Yes.

MR. KENERSON: I just wanted to apologize to Your Honor and counsel for the issue with the exhibit earlier today. It was unintentional, but still something I should have caught, so, apologies for that.

THE COURT: All right, apology accepted. I'm glad --

MR. PATTIS: We're not so quick on that. Will they drop a charge in exchange for the apology?

THE COURT: I'm glad I caught it, anyway.

Ms. Harris, if you would retrieve the jury and we'll -- if we retrieve the witness, we'll proceed.

(Whereupon the jurors enter the courtroom.)

THE COURT: Everyone may be seated.

Welcome back, ladies and gentlemen.

Mr. Kenerson, you may proceed.

MR. KENERSON: Thank you, Your Honor.

JEREMY BERTINO,

DIRECT EXAMINATION (Contd.)

BY MR. KENERSON:

Q. Good afternoon, Mr. Bertino.

A. Good afternoon.

Q. I think before the lunch break, we were talking about you having felt patriotic at some point during the day. Do you remember that?

A. Yes.

Q. Did you stay with that feeling of patriotism throughout January 6th?

A. The basic feeling was there, for the most part, yeah.

Q. Did you ever start feeling less patriotic than you had at the point we were talking about before the break?

MR. METCALF: Objection. Leading, Your Honor.

MS. HERNANDEZ: Objection. Relevance.

THE COURT: Sustained as to leading.

BY MR. KENERSON:

Q. Did you or did you not feel less patriotic, at some point, than you did at the point we were talking about earlier?

A. Later on that --

MR. METCALF: Objection.

THE COURT: Overruled.

A. Later on that evening, I started to feel a bit less patriotic about what had happened, yeah.

1 BY MR. KENERSON:

2 Q. Why?

3 A. Felt like it was a complete waste of time and failure.

4 Q. Let me ask to bring up, just for the witness,  
5 Exhibit 510-40.

6 And, Mr. Bertino, you see the messages on your screen?

7 A. I do.

8 Q. That from a chat you participated in on January 6, 2021?

9 A. It is.

10 MR. KENERSON: Move for admission of 510-40.

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

13 BY MR. KENERSON:

14 Q. Mr. Bertino, can you read us the first message in that from  
15 the user I am Neegan, at 4:25:17 p.m.?

16 A. "Trump just told everyone to go home. What the fuck?"

17 Q. What was your response 20 seconds later?

18 A. "Fuck that."

19 Q. Why was that your response?

20 A. Because I felt like it wasn't about him anymore. It was  
21 about the people. And we weren't there for him. We were there  
22 for ourselves.

23 Q. And can you scroll down to -- Ms. Rohde, to a message from  
24 a user named Michael Priest at 4:29:37 p.m.

25 MS. HERNANDEZ: Just for the record, Your Honor,

1 objection, hearsay, to these statements.

2 THE COURT: All right. Overruled.

3 BY MR. KENERSON:

4 Q. Can you read the message Michael Priest posted at 4:29:37?

5 A. "If anyone is at there now, get out now. National Guard  
6 and police force mobilizing."

7 Q. What was your response to that?

8 A. "Fuck that."

9 Q. And the message just below that?

10 A. "Don't be pushed out. We are on the cusp of saving our  
11 nation."

12 Q. Why was that your response to that statement?

13 A. It's because --

14 MS. HERNANDEZ: Objection. Relevance to "why."

15 THE COURT: Overruled.

16 A. Because the way I felt at the moment, like, if we gave that  
17 building up, we were giving up our country.

18 MR. KENERSON: And, Ms. Rohde, if you could scroll up  
19 to the top for us.

20 BY MR. KENERSON:

21 Q. What message group is this posted in?

22 A. Ministry of Self-Defense, Main 2.

23 Q. All right. Screen just for the witness, again, please.  
24 Can we have 509-37.

25 Do you recognize -- recognize this statement,

1 Mr. Bertino?

2 A. I do.

3 Q. And is this a chat group you were involved in?

4 A. It was.

5 Q. January 6, 2021?

6 A. Correct.

7 MR. KENERSON: Move to admit 509-37 and ask to  
8 publish.

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

11 BY MR. KENERSON:

12 Q. Can you read us the message that you posted in New MoSD at  
13 6:07:55 p.m.?

14 A. "We failed. The House is meeting again."

15 Q. What were you referring to there?

16 A. The revolution had failed.

17 Q. Why did you believe that?

18 A. Because the House was still going to go on and certify the  
19 election.

20 Q. At 6:08:02, what was your post?

21 A. "That woman died for nothing."

22 Q. What were you referring to there?

23 A. Referring to Ashli Babbitt's death, and how she was shot.

24 Q. Why were you saying she "died for nothing"?

25 A. Because they had given up all the ground they gained that

1 day by walking back out of the building.

2 Q. Can we have, again, just for the witness, 510-43.

3 If you would scroll down just a few, Ms. Rohde.

4 You recognize this as some chats you participated in  
5 again on January 6th?

6 A. That's correct.

7 MR. KENERSON: Move for the admission of 510-43.

8 THE COURT: I believe -- can I have counsel at  
9 sidebar?

10 MR. KENERSON: Keep scrolling.

11 THE COURT: I take it back. I misunderstood. Yes,  
12 it will be admitted. And permission to publish.

13 MR. KENERSON: Thank you.

14 BY MR. KENERSON:

15 Q. Ms. Rohde, if we could play the first message from  
16 President Elect Leo Kuznetsov.

17 (Audio played.)

18 And the second one from Goat Farmer.

19 (Audio played.)

20 And, Ms. Rohde, if you could scroll down just a  
21 little bit more.

22 6:27:31, what did you post?

23 A. "Exactly. Today was a disgrace when they walked away."

24 Q. Why did you think that?

25 A. Because I felt like, just in agreeance with what those



1 other messages had said, that, you know, once I took that step,  
2 there was no coming back from it. And they decided to,  
3 basically, balk and walk away after creating all that chaos up  
4 there.

5 Q. Ms. Rohde, if we could scroll down a few more messages.

6 Can we scroll up just a bit. Play the 6:28:53 message  
7 from President Elect Leo Kuznetsov.

8 (Audio played.)

9 What did you post at 6:29:18 p.m.?

10 A. "Half measures mean nothing."

11 Q. What about 6:29:30?

12 A. "Fuck fear. They need to be hung."

13 Q. Why did you post those messages?

14 A. That's how I felt at that moment.

15 Q. What did you mean by "Half measures mean nothing"?

16 A. Basically, that going halfway into the Capitol and then  
17 relinquishing it did absolutely nothing but, obviously, create  
18 a lot of problems for the country and a lot of problems for  
19 people that went in there, and they didn't accomplish anything.

20 Q. If we could have now, again, just for the witness, 509-38.

21 Do you recognize this as --

22 MS. HERNANDEZ: Your Honor, before we go forward,  
23 could we have a sidebar?

24 (Bench discussion:)

25 MS. HERNANDEZ: Your Honor, I believe all of these

1 are the ones I objected to. Those are the posts.

2 THE COURT: Right.

3 MS. HERNANDEZ: Again, I know we've been going back  
4 and forth on a limiting instruction. I submitted a limiting  
5 instruction earlier this week, I believe. I really do believe  
6 that a limiting instruction needs to be given. Most of these  
7 people on the message that was just read, they weren't even in  
8 D.C. on January 6 -- all of them -- none of them were in D.C.  
9 on January 6.

10 THE COURT: Right. Almost everything that has  
11 been -- we've been talking about so far has been because it's  
12 for the effect on this witness who is responding to these  
13 things. So, I don't know what you want me to say. The --

14 MS. HERNANDEZ: It doesn't come in against any of our  
15 clients.

16 THE COURT: Well, it depends on what -- how it's --  
17 it depends on whether it's being -- what it's being admitted  
18 for. But, to the extent it's coming in to show a  
19 co-conspirator's state of mind, I'm not in -- we've been around  
20 and around on this quite a few times -- there is no limiting  
21 instruction appropriate in that circumstance under the *Anderson*  
22 case.

23 MS. HERNANDEZ: The *Anderson* -- yeah, I disagree with  
24 that. *Anderson* says: Unless it's a coconspirator statement  
25 that fits the 801(d)(2)(e), it doesn't come in. Only --

1       Anderson says: Actions of co-conspirators come in, but  
2       statements, unless they're 801(d)(2)(e), it doesn't come in  
3       against the others.

4               And besides that, Mr. Kenerson is reading the  
5       statements of other persons, not this defendant.

6               THE COURT: Right. Again, he's reading them because  
7       this defendant -- this individual is responding to them. And,  
8       again, I remember -- I recall, actually, having had in front of  
9       me your email which you laid out the limiting instruction  
10      and -- I don't -- I recall thinking that it was not an  
11      appropriately crafted limiting instruction.

12              Again, I'm open to giving a limiting instruction, if  
13      the parties propose one and I think it is -- and it is  
14      appropriate -- lawfully appropriate. But, I recall looking at  
15      what you had proposed and believing that it was not -- it did  
16      not reflect the state of the law.

17              MS. HERNANDEZ: So, I mean, this is the second one  
18      I've proposed. The government has not come back with an  
19      alternative or with an objection. I believe under Rule 105,  
20      for the fairness of evidence, I'm entitled to a limiting  
21      instruction. I mean, we've been -- I understand the Court's --  
22      I don't know exactly what the Court -- I don't know how to  
23      draft one that meets the Court's requirement, is what I'm  
24      trying to say, so, if the Court wants to modify it.

25              But, I think I'm entitled -- I mean, a lot of the

1 evidence that's been coming in for the last -- through the  
2 Special Agent Dubrowski and through this gentleman, I think,  
3 requires a limiting instruction and --

4 THE COURT: With regard to the other agent, I agree  
5 with you. That's why I had the -- I asked you all to work on  
6 one that would reflect my ruling, and that's why I did a very  
7 detailed ruling, and no one has come back.

8 MS. HERNANDEZ: Well, I --

9 THE COURT: I haven't had -- so --

10 MS. HERNANDEZ: I thought I had come back. And,  
11 again, the government -- I filed them with the Court, or  
12 emailed to the Court, and the government has not yet come back  
13 with an alternative.

14 THE COURT: Okay. Look, as far as what we're doing  
15 now, these are not even the kinds of things -- the kinds of  
16 statements that are at issue here are only relevant insofar as  
17 they're -- this witness is responding to them. So, this is a  
18 particular area where I don't think there's the -- quite the  
19 same danger. But I'll give one, but we've got to -- I mean,  
20 let's just save this to talk at the end of the day.

21 Ms. Hernandez, all I'll say is, I do have what you  
22 proposed. I remember going through it and believing that under  
23 *Anderson*, it was not appropriate. Again, I'm open to an  
24 appropriate limiting instruction that is crafted to reflect the  
25 law.

1           Mr. -- let me let Mr. Kenerson get a word in  
2           edgewise, if he would like.

3           MR. KENERSON: Just to note that I believe we did  
4           object on the record, and certainly, I think, to the first  
5           iteration of what Ms. Hernandez proposed. But, we certainly  
6           agree with the Court that it is not an accurate statement of  
7           the law. We remain willing to engage with the defence on  
8           crafting an appropriate limiting instruction, and that has  
9           remained the case, but I do not think what Ms. Hernandez has  
10          proposed is an accurate statement of the law.

11          MS. HERNANDEZ: I merely -- okay. Again, I propose  
12          something. They say they're willing to work with us, but if  
13          they don't come back with an alternative, I don't know --  
14          anyway --

15          THE COURT: All right.

16          MS. HERNANDEZ: -- I just think I'm entitled to a  
17          limiting instruction.

18          THE COURT: I'm going to ask -- I'm not going to ask,  
19          I'm going to order the parties to talk about this at -- once  
20          we're done today. So if there is something appropriate -- and,  
21          Ms. Hernandez, I'll hear from you first thing tomorrow. If  
22          there's something -- I mean, we can do this two different ways.

23                 I understand you want something now, but on the other  
24          hand, a lot of different statements have come in for a lot of  
25          different ways and -- for a lot of different reasons and that's

1       why I thought the parties were -- it made sense for you to  
2       globally come up with something.

3               MS. HERNANDEZ: It is --

4               THE COURT: But, I understand. If you want something  
5       more interim, and I'll hear from you on it first thing tomorrow  
6       morning, after you all have had a chance to talk about it  
7       overnight.

8               MS. HERNANDEZ: Yes. I mean, it's very difficult to  
9       craft something based on the Court's ruling. I looked at it.  
10      I mean, the only way to do it based on the Court's ruling is to  
11      literally list exhibit numbers and say -- so, I think it has to  
12      be a more generalized --

13              THE COURT: I don't see how that's possible. But,  
14      I'm not going to -- this is not appropriate for us to be doing  
15      this now, in the middle of the witness's testimony.

16              MS. HERNANDEZ: Thank you. Sure.

17              (Open court:)

18              MR. KENERSON: Thank you, Your Honor.

19              I think we left off with me having moved for the  
20      admission of 509-38.

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

23      BY MR. KENERSON:

24      Q. Mr. Bertino, what date are these text messages -- or, these  
25      messages from? Excuse me.

1 A. January 6, 2021.

2 Q. In what group?

3 A. New MoSD.

4 Q. And can you read aloud your message at 7:32:12 p.m.?

5 A. "God, I hope their eyes burn forever."

6 Q. And, Ms. Rohde, can we play the message below that.

7 (Audio played.)

8 Mr. Bertino, does that accurately capture your mindset  
9 at about 7:30 p.m. on January 6?

10 A. Yes.

11 Q. Why do we need fucking war?

12 A. Just felt like the country had been taken from us by a  
13 outside entity, either the elites or whoever we were blaming it  
14 on at that moment. That's -- I just felt like we didn't have a  
15 future left for this country after that.

16 Q. 7:37:23 p.m., Johnny BlackBeard posts a message that says:  
17 Are you ready to go full fasc?

18 Are you familiar with the term "full fasc"?

19 A. Yes.

20 Q. What does that mean?

21 A. It means going full fascist.

22 Q. Ms. Rohde, if you could have 510-49, just for the witness,  
23 please.

24 Mr. Bertino, do you recognize this as a message you  
25 posted on January 6, 2021?

1 A. I do.

2 MR. KENERSON: And I would move for the admission of  
3 510-49.

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

6 BY MR. KENERSON:

7 Q. What chat group was this in?

8 A. Ministry of Self-Defense, Main 2.

9 Q. What time did you post this message?

10 A. 9:42 and 20 seconds in the evening.

11 Q. Ms. Rohde, can we play the message, please.

12 (Audio played.)

13 Did that also capture how you felt on the evening of  
14 January 6?

15 A. Yes.

16 Q. Did Enrique Tarrío reach out to you and say anything like:  
17 Hey, you took that a little too far?

18 A. Never.

19 Q. Any other MoSD leader?

20 A. Never.

21 Q. Any other member of the Proud Boys?

22 A. Never.

23 Q. Ms. Rohde, can we have, just for the witness, 509-40.

24 Do you recognize these chats as chats you  
25 participated in?



1 A. It is, yes.

2 MR. KENERSON: Move for the admission of 509-40.

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

5 BY MR. KENERSON:

6 Q. Mr. Bertino, what date are we in now?

7 A. January 7, 2021.

8 Q. And what chat group?

9 A. New MoSD.

10 Q. And, Ms. Rohde, if we could scroll down, give the witness a  
11 chance to read the messages himself.

12 (Pause.)

13 MS. HERNANDEZ: Objection. Hearsay and relevance.

14 THE COURT: Overruled.

15 BY MR. KENERSON:

16 Q. Did you have a chance to look at those, Mr. Bertino?

17 A. I have.

18 Q. What are folks talking about here?

19 A. Talking about the January 6th riot.

20 Q. If you could scroll back up, Ms. Rohde, please.

21 When you say, "There's definitely not enough planning  
22 for this rally. We are trying to set this thing up," what are  
23 you talking about?

24 A. I was talking about how there was -- we didn't plan  
25 thoroughly for what we were going to do, step by step, at the

1 rally. And we were too busy trying to set up the MoSD as a  
2 chapter to be able to focus enough on that aspect of it.

3 Q. Scroll down a little bit further.

4 (Pause.)

5 Can you play the message from Johnny Blackear at  
6 9:55:17 a.m.

7 (Audio played.)

8 What was your response?

9 A. "Everything you said times about 10 million."

10 Q. I want to ask you about the statement: Proud Boys can't  
11 bear this burden.

12 Why did you agree with that particular portion of the  
13 statement?

14 A. Because it was too much of an undertaking for us to be able  
15 to do it all ourselves. We couldn't do it.

16 Q. What was the burden?

17 A. Taking back the power for the people.

18 Q. Ms. Rohde, can we have, just for the witness, 509-41. And  
19 can we scroll through 509-41 and -42, please.

20 (Pause.)

21 Do you recognize those chats as chats you participated  
22 in on January 8th, 2021?

23 A. Yep.

24 MR. KENERSON: We would seek to admit 509-41 and -42.

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

1 publish.

2 MR. KENERSON: We can go back to 509-41, please.

3 BY MR. KENERSON:

4 Q. There's a message --

5 MS. HERNANDEZ: Same continuing objection to these  
6 posts, January 6 texts.

7 THE COURT: Overruled.

8 BY MR. KENERSON:

9 Q. The message at 7:23:48 from Aaron Wolkind saying, "They got  
10 Nick," followed by a message about "Journalist Nick Ochs has  
11 been arrested," who is Nick Ochs?

12 A. Nick Ochs is one of the Proud Boys.

13 Q. What did you respond to that?

14 A. "Fuck."

15 Q. Why was that your response?

16 A. Because, number one, I like Nick; number two, they arrested  
17 him, and I just -- I was pretty upset at that.

18 Q. Can we scroll down, please.

19 What does Johnny BlackBeard say at 10:31 a.m.?

20 A. The first message?

21 Q. 10:31:08. Yes. Thank you.

22 A. "It's probably time to clean up the chats from D.C."

23 Q. And the following message?

24 A. "We don't need the Boots on the Ground one."

25 Q. And, Ms. Rohde, can we play the message from Noblebeard at

1 10:32:43.

2 (Audio played.)

3 When you say "I left it and I can't delete it," what are  
4 you talking about?

5 A. The Boots on the Ground chat.

6 Q. Did you try to do something to Boots on the Ground chat?

7 A. Yeah. I tried to delete it.

8 Q. Why?

9 A. This is why. We're -- you know, I didn't want anybody to  
10 get in trouble, and if we said anything in there that could  
11 have been illegal, if we deleted it, there's a good chance that  
12 there would be no evidence of it.

13 Q. Can we go to the next, 509-42, please.

14 Now, on January 13th, 2021, for this second chat, what  
15 chat are we in?

16 A. New MoSD.

17 Q. And what is your question that you ask at 3:50:54?

18 A. "Who owns this chat?"

19 Q. How did Zach Rehl respond?

20 A. "@YutYut owns it."

21 Q. Who is @YutYut?

22 A. Charles Donohoe.

23 Q. When Charles Donohoe says "Want me to nuke it," what is  
24 your understanding of what "nuke" means?

25 A. It means erase, delete, destroy the chat.

1 Q. What was your response to that?

2 A. "Yes."

3 Q. What happened after you said "yes"?

4 A. He left the group.

5 Q. And what was Johnny BlackBeard's response?

6 A. "That didn't nuke it. LOL."

7 Q. What did you do after that?

8 A. I invited YutYut back.

9 Q. And what did you tell him he needed to do?

10 A. He had to nuke it.

11 Q. Why?

12 A. Because he didn't do it right the first time.

13 Q. Ms. Rohde, can we have 516-1, please. Just for the  
14 witness.

15 Do you recognize those chats as chats you participated  
16 in?

17 A. Yes.

18 MR. KENERSON: I would move for the admission of  
19 516-1, and seek to publish.

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

22 BY MR. KENERSON:

23 Q. What's the date of these chats?

24 A. January 20th, 2021.

25 Q. And what's the title of this chat?

1 A. MoSD Leaders, January 9th.

2 Q. What's the first message at the top, at 2:14:02, from Rufio  
3 Panman?

4 A. "Everyone needs to just shut the fuck up."

5 Q. What about the second one, at 2:14:48?

6 A. "There's way too many videos and pictures and words being  
7 shared."

8 Q. What did Mr. Rehl respond?

9 A. "Yeah, exactly."

10 Q. And what was your response?

11 A. "Yes."

12 Q. Did you agree with that?

13 A. Yes.

14 Q. Why?

15 A. Just too much talking. Too much -- again, too many videos  
16 were being shared everywhere. Didn't want anything getting out  
17 too far or the wrong people seeing it.

18 Q. And who is Rufio Panman?

19 A. That would be Ethan Nordean.

20 Q. Mr. Bertino, on the evening of January 6 of 2021, did you  
21 record a podcast?

22 A. I did.

23 Q. Video or audio?

24 A. Both.

25 Q. Have you had a chance to watch clips from that podcast?

1 A. I have.

2 Q. Did those clips fairly and accurately capture your words  
3 that night?

4 A. Yes.

5 Q. Did those words capture your state of mind?

6 A. Yes.

7 MR. KENERSON: Your Honor, at this point, pursuant to  
8 prior rulings, we move for the admission of 606-B as in boy, -F  
9 as in frank, -G as in gamma, -K is in kilo, -L as in light  
10 year, -O, -P as in Paul, -Q as in queen, -S as in Sam, -T as in  
11 today, -U as in ukulele, and -V as in Victor.

12 THE COURT: All right. They will be admitted. And  
13 permission to publish.

14 MS. HERNANDEZ: Objection -- continuing objection to  
15 these out-of-court statements, Your Honor.

16 THE COURT: Very well. The objection is overruled.

17 MR. KENERSON: Can we have 606-B as in boy, please,  
18 Ms. Rohde.

19 BY MR. KENERSON:

20 Q. And before we start playing, do you recognize that to be  
21 video from this podcast?

22 A. I do.

23 Q. All right. Ms. Rohde, can we play 606-B, please.

24 (Video played.)

25 Can we have 606-F, please.

1 (Video played.)

2 "Half measures do nothing," we heard that before,  
3 correct?

4 A. Correct.

5 Q. What did you mean by that?

6 A. Going halfway through a revolution doesn't get you a  
7 revolution.

8 Q. 606-G, please.

9 (Video played.)

10 606-K, please.

11 (Video played.)

12 Let me ask you, Mr. Bertino, about that clip. When you  
13 say "they escalated," what did you mean by that?

14 A. Meaning that the law enforcement had escalated the conflict  
15 and made it physical. That they had gotten physical and  
16 eventually shot somebody and killed them.

17 Q. 606-L, please.

18 (Video played.)

19 What did you mean by, "If we don't have a voice in the  
20 law, should those laws apply to us anymore?"

21 A. I believe I was referring to the feeling of disconnection  
22 between lawmakers and the citizens of the country, and how we  
23 didn't feel like our input was actually taken into  
24 consideration before laws were made. So if -- you know, if you  
25 feel like you just never had a chance to even voice your



1 opinion about a law, why should you have to follow it, is,  
2 basically, what I was thinking.

3 Q. 606-O please.

4 (Video played.)

5 Does that accurately capture your mindset on January 6?

6 A. Yes.

7 Q. 606-P, please.

8 (Video played.)

9 Made reference to "1776" in there. What was that  
10 reference?

11 A. I'm sorry?

12 Q. What was your reference to 1776 in there?

13 A. Again, revolution -- American Revolution.

14 Q. 606-Q, please.

15 (Video played.)

16 You said, "My really good friend Enrique," there. Who  
17 were you referring to?

18 A. Enrique Tarrio.

19 Q. 606-S, as in Sam.

20 (Video played.)

21 606-T, please.

22 (Video played.)

23 You said "Good" in relation to fear. Why was fear good,  
24 in your mind, at that point?

25 A. Because the idea that the government should fear the

1 people, not the people should fear the government, was an idea  
2 that, you know, I believed and was shared amongst pretty much  
3 my -- all my inner circle.

4 Q. May I have 606-U, please.

5 (Video played.)

6 Mr. Bertino, I think used the words, "You were fucking  
7 around for years. Today, you found out."

8 Is there significance to that language?

9 A. Yes.

10 Q. What's the significance?

11 A. Felt like the government --

12 MS. HERNANDEZ: Speaks for itself.

13 THE COURT: Overruled.

14 A. Felt like the government had been screwing with us for  
15 years. And, you know, that old -- the term we used in the  
16 club, the "FAFO," just kind of felt like it fit there. That  
17 they finally found out what a bunch of pissed-off patriots  
18 could do.

19 MR. KENERSON: Ms. Rohde, could we have 606-V, as in  
20 Victor, please.

21 (Audio played.)

22 What was your statement in there about leadership,  
23 Mr. Bertino?

24 A. If there was some actual leadership on the scene of --  
25 inside the Capitol, that maybe things would have been different

1 and we wouldn't have given up.

2 Q. Ms. Rohde, can we just put an image back on the screen,  
3 without playing, of Mr. Bertino.

4 You mentioned, I think, earlier -- earlier in your  
5 testimony, about some laurels, if I'm -- circle what's on your  
6 hat. What's that (indicating)?

7 A. That's a laurel.

8 Q. What about the laurels around the skull and the "Dangerous  
9 Times" flag?

10 A. Same thing. Proud Boys laurels.

11 Q. What about on your sweatshirt?

12 A. Laurels.

13 Q. Mr. Bertino, in the course of your testimony, have we  
14 covered every single thing that you said in your chats in and  
15 around January 6?

16 A. I don't think so.

17 Q. Did you sometimes say violent things in chats?

18 A. Yes.

19 Q. How did you feel about that now?

20 MR. PATTIS: Objection. Relevance.

21 THE COURT: Overruled.

22 BY MR. KENERSON:

23 Q. How do you feel about that now?

24 A. I regret it.

25 Q. Did you go to Miami after January 6?

1 A. I did.

2 Q. Who did you see in Miami?

3 A. I saw Enrique and a bunch of the other guys from the Miami  
4 area chapter.

5 Q. Did you talk about January 6?

6 A. I did.

7 Q. Did you talk to Enrique about January 6?

8 A. I did.

9 Q. Did he tell you whether he was in D.C. or not?

10 A. Yes. He told me he was not.

11 Q. Did you talk about what he would have done if he was there?

12 MR. HASSAN: Objection.

13 MR. METCALF: And speculation.

14 THE COURT: Overruled.

15 BY MR. KENERSON:

16 Q. Did you talk about what he would have done if he was there?

17 A. Yes.

18 MS. HERNANDEZ: And hearsay, Your Honor.

19 THE COURT: Let me hear from the parties at sidebar.

20 (Bench discussion:)

21 THE COURT: Ms. Hernandez, why isn't this admitted,  
22 at the minimum, a statement of party opponent?

23 MS. HERNANDEZ: Well, he's going to say whatever  
24 Tarrio said to him sometime -- I don't know when -- sometime  
25 long after January 6th. That's classic hearsay.

1           THE COURT: No. It's a classic statement of a party  
2           opponent, isn't it?

3           MS. HERNANDEZ: You mean -- it is hearsay as to my  
4           client. It is admission by Mr. Tarrío, but it's hearsay as to  
5           my client.

6           THE COURT: Well, it would require a limiting  
7           instruction as to your client. It would not come in as to your  
8           client, that's correct.

9           MS. HERNANDEZ: So, at a minimum, I would ask the  
10          Court to give that limiting instruction.

11          THE COURT: All right. Mr. Pattis, you have your  
12          hand raised.

13          MR. PATTIS: Briefly. What he would have done sheds  
14          light on his state of mind at the time of the declaration. It  
15          can't be imputed back. So, I would say it's irrelevant and  
16          speculative.

17          THE COURT: No. I think he's -- his statement about  
18          what he would have done if he hadn't been ordered out of D.C.  
19          is relevant, and it's a statement --

20                 Is the government eliciting it for -- on any other  
21          basis, other than it being a statement of a party opponent?

22          MR. KENERSON: I mean, I think it would also come in  
23          as to Mr. Tarrío's state of mind. So, I mean, I think, whether  
24          a limiting instruction were crafted for those types of  
25          statements would be covered by it. But, I think those are the

1 two basis of admission.

2 THE COURT: Yeah. I mean --

3 MS. HERNANDEZ: Your Honor, when is the statement  
4 made?

5 MR. KENERSON: I'm happy to lay further foundation on  
6 the timing.

7 THE COURT: Ms. Hernandez, complete your thought.

8 MS. HERNANDEZ: Well, I think the Court should give a  
9 limiting instruction right now, however you want to say it, it  
10 comes in against Mr. Tarrio alone. Period. I'm not sure what  
11 date this was given.

12 THE COURT: So, you know, I was -- Ms. Hernandez, I  
13 was looking back at what you were requesting about a -- your  
14 proposed limiting instruction as to the podcast and the other  
15 state-of-mind evidence, and I think the problem with it is --  
16 what an instruction will say is: It comes in for the  
17 declarant's state of mind. Period.

18 A proper instruction in this regard doesn't say, "And  
19 you may not consider it against any other defendant," because  
20 the reality is, the jury can consider the state of mind as to  
21 one co-conspirator as to the other. So, you just say -- the  
22 proper instruction is: You can only consider it for the  
23 purposes of Person A, the declarant's state of mind. Period.  
24 You don't say anything else.

25 MS. HERNANDEZ: I don't think that's what *Anderson*

1 says. But, again, if Mr. Kenerson would tell us when  
2 Mr. Tarrio supposedly made this statement, that would help.

3 THE COURT: No. No. We're not having discovery in  
4 the middle of -- the statement is going to come in one way or  
5 the other. We can talk about whether it -- what limiting  
6 instruction is appropriate afterward, but this is -- this is  
7 crazy. This is -- I mean, the statement is relevant and  
8 admissible. Let's proceed.

9 Mr. Pattis, you had your hand up.

10 MR. PATTIS: I didn't want to be disrespectful. I'm  
11 sorry. I thought we were done.

12 THE COURT: Sorry. No. That's fine.

13 MR. PATTIS: I might agree with the characterization  
14 of "that's crazy," but for different reasons.

15 What he would have done had he been there is -- you  
16 know, is counterfactual, and his state of mind at the time, you  
17 know, is -- you know, may or may not relevant. But, absent  
18 more -- I mean, "if I was there, I would have blown up the  
19 building. You know, I would have used the material that we had  
20 hidden away in the corner," those kinds of things might be  
21 relevant.

22 But, to just say you couldn't be there and adopt an  
23 argumentative posture, "if you hadn't been ordered off the  
24 grounds," that's really -- you know, that's really not relevant  
25 either.

1           So, if anything, it suggests a further reason why it  
2           ought not to be admissible. So, I don't think it's crazy. I  
3           think at some point into this exercise of Jonah swallowing the  
4           whale -- the whale swallowing Jonah has to stop. The  
5           government has to produce evidence of a plan. You just can't  
6           paint a whale and say: Jonah must be tucked away in there  
7           somewhere.

8           THE COURT: So, the question about what else you  
9           think the government should prove or not prove doesn't really  
10          have anything to do whether this statement is admissible.

11          MR. PATTIS: Speculative and no foundation.

12          THE COURT: All right. Mr. Kenerson, what's the  
13          answer going to be?

14          MR. KENERSON: The answer will be something --

15          THE COURT: If you know.

16          MR. KENERSON: -- something along the lines of that  
17          he would have been there screaming: Go. Go. Go.

18          THE COURT: All right. I mean, that's -- I'm going  
19          to allow the question.

20          (Open court:)

21          BY MR. KENERSON:

22          Q. Mr. Bertino, let me just back up before we ask you the  
23          question I was about to ask you.

24                 You said you went to Miami at some point after  
25          January 6, correct?



1 A. I did.

2 Q. Approximately about how long afterwards are we talking?

3 A. About a week or two.

4 Q. Okay. And I think the question I had asked you was what  
5 Mr. Tarrio told you he would have done if he were there.

6 A. Correct.

7 Q. What did he say?

8 A. He said he would have said: Go. Go. Go (indicating).

9 Q. And for the record, you made a motion with your hand,  
10 pointing -- moving it forward, correct?

11 A. Correct.

12 Q. Mr. Bertino, did anyone in the Proud Boys ever tell you a  
13 specific plan to storm the Capitol ahead of January 6?

14 A. No.

15 Q. Did you, nonetheless, plead guilty to seditious conspiracy?

16 A. I did.

17 Q. If you didn't know of a plan, why?

18 MS. HERNANDEZ: Objection as to "why," Your Honor.

19 THE COURT: Overruled.

20 A. Because there doesn't have to be a specific plan for an  
21 objective. And I looked at everything that I said --

22 MR. SMITH: Objects to legal.

23 THE COURT: Sustained as to a legal conclusion. Let  
24 me have counsel at sidebar.

25 (Bench discussion:)

1 THE COURT: All right. Mr. Kenerson, I don't think  
2 it's appropriate for him to be talking about what's legally  
3 required and not required. Why don't you just ask him about --  
4 you know, why can't you ask him this question in an open-ended  
5 way? I mean, for him to be saying, well, this is required and  
6 that's not required, isn't that a legal conclusion?

7 MR. KENERSON: Yeah. And I did not think the  
8 question elicited -- I understand that's what he said.

9 THE COURT: Okay.

10 MS. HERNANDEZ: I'm sorry, Your Honor. Why -- I  
11 don't understand why he pled guilty is -- how is that relevant  
12 to the case -- to any facts at issue in this case?

13 THE COURT: I understood the question not to be -- I  
14 mean, you can interpret that question different ways, but,  
15 Mr. -- in any event, the answer is what it was, and I sustained  
16 the objection as to calling for a legal conclusion.

17 Mr. Kenerson, just, you know, you need to elicit the  
18 facts from which -- you need to elicit the facts from which he  
19 concluded he was in the conspiracy in a nonleading way, and not  
20 talking about what would be required and not required under the  
21 law.

22 MS. HERNANDEZ: Your Honor, I don't believe that  
23 that's the objection I have. How is that relevant to the case?  
24 I don't understand.

25 THE COURT: Right. Again, the question of -- he's

1 going to -- Mr. Kenerson is about to ask him to explain the  
2 contours of the conspiracy, so he can do that. But, I don't  
3 think it's appropriate for the witness to be saying this or  
4 that is required for purposes of a legal conspiracy.

5 Mr. Pattis, why do you look confused?

6 MR. PATTIS: I thought I heard you say -- and I  
7 didn't raise my hand because I just wasn't sure I heard it --  
8 that the witness was about to explain the contours of the  
9 conspiracy. The conspiracy is a legal conclusion. He can  
10 explain the context of his conduct, and the trial has to  
11 persuade the jury they meet the elements of a conspiracy.

12 THE COURT: Well --

13 MR. PATTIS: So it struck me -- and I'm sorry, sir.  
14 I just want to get it out. And you called on me. I didn't  
15 raise my hand.

16 It struck me that you were telling the -- signaling  
17 to the government that this man could say why he thought there  
18 was a conspiracy. I don't think that's his role.

19 THE COURT: No. No. No. No. No. No, that's not  
20 what I said. He's going to giving factual testimony -- factual  
21 testimony, right, and that's my point. I don't think it's  
22 appropriate for him to say this or that is required. And I  
23 don't -- so, he can give factual testimony from which it can be  
24 inferred, and you all will challenge that inference, that there  
25 was a conspiracy.

1 But, that's what he can give, not: Well, I -- you  
2 know, I found out that this or that is or is not required.

3 MS. HERNANDEZ: I'm sorry, Your Honor, but I think  
4 there's no way to ask this question that isn't going to elicit  
5 the kind of answer that the Court finds objectionable.

6 THE COURT: We're off this question.

7 MS. HERNANDEZ: He's been talking about -- for the  
8 last day or whenever, however long he's been on it, that's what  
9 he's been doing, is giving us factual statements. To ask this  
10 wrap-up question of why, I don't know that there's any way to  
11 ask that question that won't elicit the kind of objectionable  
12 response that the Court is identifying.

13 THE COURT: Okay. Well, we're off that question now,  
14 so we don't have to worry about that question.

15 Mr. Kenerson, does all that make sense to you?

16 MR. KENERSON: I think so, yes.

17 THE COURT: I mean, I don't think it's -- I mean, of  
18 course, why you pled guilty, I want to take responsibility, I  
19 wanted to take responsibility, that's a different -- those are  
20 a different sets of questions. But, I don't think it's  
21 appropriate for him to be saying: Well, I researched it, and I  
22 found this was -- this --

23 You know, they're going to get an instruction on what  
24 a conspiracy is and what they have to find. All right. Very  
25 well.

1 MR. METCALF: Your Honor, really quickly, on that  
2 point specifically, the cat is now out of the bag. The jury  
3 just heard this individual say that there doesn't need to be a  
4 plan, so on and so forth. I ask that there be a specific  
5 limiting instruction -- I don't know how we could even craft it  
6 at this point in time -- specifically to this witness's  
7 testimony and what the jury can consider.

8 THE COURT: All right. I don't -- you know, there  
9 was such an objection so quickly, and I don't think it's -- I  
10 don't think that's necessary at this point. He hasn't really  
11 given any testimony. And, look, to the extent he's saying  
12 he's -- so, I don't think that's necessary at this time.

13 Mr. Kenerson, you may proceed with a new question,  
14 again, that elicits -- that stays away from the legal  
15 conclusions about what is or is not required for a conspiracy.

16 (Open court:)

17 BY MR. KENERSON:

18 Q. Mr. Bertino, in the lead-up to January 6, did you have any  
19 reason to believe that the other leaders of the Ministry of the  
20 Self-Defense felt differently than you did about the state of  
21 the country?

22 MR. SMITH: Objection. Compound.

23 MR. METCALF: And leading.

24 MS. HERNANDEZ: And irrelevant.

25 MR. PATTIS: And speculative, I might throw in.

1 MR. KENERSON: Can we add some more?

2 THE COURT: I'm going to overrule all of them.

3 A. No, I didn't.

4 BY MR. KENERSON:

5 Q. And why do you say that?

6 MS. HERNANDEZ: Objection.

7 THE COURT: Overruled.

8 BY MR. KENERSON:

9 Q. Why do you say that?

10 A. Because I was never told of anybody feeling any different.  
11 Nobody ever told me that's not the right way to feel, that's  
12 not what's going on. Everyone that I spoke with agreed with  
13 pretty much every sentiment that I would spit out.

14 MR. METCALF: Objection as to vague and hearsay in  
15 that answer, Your Honor. I move to strike a portion of that  
16 answer as nonresponsive.

17 THE COURT: Overruled.

18 BY MR. KENERSON:

19 Q. Mr. Bertino, how close did you feel to the other leaders in  
20 the Ministry of Self-Defense?

21 A. Pretty close to most of them.

22 Q. Can you just describe a little bit the nature of that  
23 closeness?

24 MR. METCALF: Objection. Asked and answered. We've  
25 gone through this now for some time.

1 THE COURT: Overruled.

2 BY MR. KENERSON:

3 Q. Can you describe for us the nature of that closeness?

4 A. Shared a brotherhood between all of us. Especially those  
5 that were in a leadership position, we felt like the men looked  
6 up to us. We looked up to each other. We knew that we had  
7 each others' backs. And they -- you know, there was loyalty  
8 there, and there was -- most of us would have taken a bullet  
9 for the other person.

10 MS. HERNANDEZ: Objection. Move to strike.

11 THE COURT: Overruled.

12 A. At least, that's the way I felt about it.

13 BY MR. KENERSON:

14 Q. And what led you to feel that -- like, what types of  
15 interactions led you to feel that way?

16 A. For example, when I was stabbed.

17 MS. HERNANDEZ: Your Honor --

18 THE COURT: Overruled.

19 A. For example, the way that everybody looked out for me when  
20 I was stabbed -- just, there was -- there was countless --  
21 countless things that we had all been involved in together. We  
22 all shared some sort of drama within the club, a trauma.  
23 Something had happened. Somebody had been arrested. It was  
24 always something that always brought everybody close together,  
25 and definitely felt that way with these guys.

1 BY MR. KENERSON:

2 Q. Do you feel like you could speak freely amongst that group?

3 MS. HERNANDEZ: Objection. I'm sorry. Objection.  
4 Relevance.

5 THE COURT: Overruled.

6 BY MR. KENERSON:

7 Q. Did you feel like you could speak freely amongst that  
8 group?

9 A. Yes.

10 Q. Why?

11 A. Because they wouldn't judge me for how I felt. And, more  
12 than likely, they wouldn't disagree with what I had to say.

13 Q. What about, from your perspective, the other members'  
14 ability to speak freely with you?

15 A. 100 percent, they could.

16 MR. METCALF: Objection as to vague, "all members."

17 THE COURT: It's sustained as to vagueness, if you're  
18 asking about these defendants or members of the club generally.

19 BY MR. KENERSON:

20 Q. Leaders of the Ministry of Self-Defense.

21 A. Did they feel like they could speak freely with me?

22 Q. Yes.

23 A. Yes.

24 Q. What about whether you had to have explicit discussions  
25 about things?



1 A. I'm sorry. I couldn't hear you.

2 Q. Within that group, the MoSD leaders --

3 A. Okay.

4 Q. -- did you need to have explicit discussions about things  
5 with them all the time?

6 A. No.

7 MR. PATTIS: Objection. Judge, may we be heard?

8 (Bench discussion:)

9 MR. PATTIS: I didn't think that I would live long  
10 enough to see the Salem Witch Trials replayed in American  
11 courthouses, but you may recall the use of so-called "spectral  
12 evidence" in those trials, where occult properties were used so  
13 that we could determine peoples' affiliation with the spirit  
14 world. And this is a foundation for him to say that: We  
15 didn't have to have explicit discussions to, nonetheless, have  
16 agreements.

17 THE COURT: Right.

18 MR. PATTIS: And that just cannot be proper. And --

19 THE COURT: Why can it not be proper?

20 MR. PATTIS: Because --

21 MR. SMITH: It's calling for a legal conclusion.

22 THE COURT: Hold on. Hold on. Mr. Smith, please.

23 MR. PATTIS: Judge, I will yield to Mr. Smith. I  
24 didn't mean to steal the -- if that's all right with you.

25 THE COURT: Whatever -- you had the floor. Whatever

1       you would like.

2               MR. PATTIS: I will yield to my brother.

3               THE COURT: But, I cannot have individual lawyers  
4 jumping in when I have, you know, seven or eight of you on that  
5 side.

6               Mr. Smith?

7               MR. SMITH: Thank you, Your Honor.

8               There's several problems. One, it's vague.

9 Mr. Kenerson asked the witness: Did you need to have explicit  
10 conversations with them to agree to something? That's a very  
11 vague question, Your Honor.

12              The second question -- the second problem is, it's  
13 calling for a legal conclusion. He's asking Mr. -- the witness  
14 to explain to the jury that one can reach -- have a conspiracy  
15 without reaching an explicit -- it's called "tacit conspiracy,"  
16 Your Honor. That's a legal conclusion, whether an agreement is  
17 a tacit conspiracy.

18              THE COURT: How is he supposed to build the  
19 foundation for asking those questions without saying: Are  
20 these people of a certain type that you were able to reach  
21 implicit agreement?

22              MR. SMITH: That's an improper question, Your Honor,  
23 because that question is calling -- there's no answer for that,  
24 that it's not a legal -- so, Your Honor, the question is: Did  
25 you reach a tacit agreement?

1           That is the question, Your Honor, and that is a legal  
2           question, whether there is a tacit agreement.

3           THE COURT: Right. You're formulating in terms of  
4           legal jargon. But, isn't he allowed to ask factual questions  
5           in support of that legal conclusion? And if not, how in the  
6           world is he supposed to be able to elicit facts?

7           MR. SMITH: Your Honor, the other problem is it's  
8           calling for speculation of another person's mind. A tacit  
9           agreement is a meeting of the minds between two parties. So  
10          Mr. Kenerson is trying to elicit from him: Did you have a  
11          tacit agreement with several other individuals?

12          That is not for one party to say, whether there was a  
13          tacit agreement.

14          THE COURT: So you can never prove a tacit agreement  
15          without two people saying it, I guess. There's no possible way  
16          to prove it?

17          MR. SMITH: Your Honor, the government has been doing  
18          it circumstantially this entire case.

19          THE COURT: Right.

20          MR. SMITH: Well, you had a conversation with Tarrio  
21          about X, Y, and Z. What did Mr. Tarrio say?

22          THE COURT: Right.

23          MR. SMITH: It's for the jury to conclude whether  
24          that's a tacit agreement. It's not for the witness to say: We  
25          reached an unexplicit agreement.

1 THE COURT: He's asking about the nature of the  
2 relationship. He's asking about the nature of the  
3 relationship.

4 MR. SMITH: Your Honor, he asked: Isn't it true -- I  
5 don't have the exact words like Your Honor does, but he said:  
6 Isn't it true that you sometimes would reach unexplicit --  
7 inexplicit agreements with one another?

8 That is not about the question that goes to the facts  
9 of the nature of the relationship. That is calling for him to  
10 say whether they had tacit agreements with one another.

11 THE COURT: In the past, right.

12 MR. SMITH: But, that is a legal conclusion. He can  
13 ask him -- for example, here's a way of establishing the facts.  
14 You and Mr. Tarrio -- this is hypothetical, for the record.

15 You and Mr. Tarrio were in a room together.  
16 Mr. Tarrio said this. You said this. Then, what happened  
17 after that fact? Did you and he do something after that fact  
18 that gives evidence of having --

19 So, asking about "do you have inexplicit agreements"  
20 is a legal conclusion.

21 THE COURT: And he can't talk about whether he  
22 believed he had reached an agreement?

23 MS. HERNANDEZ: That's not what he's asked.

24 THE COURT: I realize that. But, is that what you're  
25 saying also?

1 MR. SMITH: Your Honor, I think that would be an  
2 appropriate question. But, again, like Ms. Hernandez said,  
3 that's not what he was asked. He was asked: Do you reach  
4 inexplicit agreements?

5 THE COURT: Let's do this: We're doing this early,  
6 but this is -- we may as well plow this ground while the -- we  
7 may as well plow this ground now. So, let's -- I'm going to  
8 tell the jury we're going to take a ten-minute break and we  
9 will talk about this. All right.

10 (Open court:)

11 THE COURT: All right. Ladies and gentlemen, we're  
12 going to take our ten-minute break a little bit early. And for  
13 you, it may be a little bit longer than ten minutes because we  
14 do need to give the court reporter her break and we need to  
15 discuss something outside your presence. So, we'll take that  
16 quick break. We'll be back with you as soon as we can.

17 (Whereupon the jurors leave the courtroom.)

18 THE COURT: All right. Sir, you may step down.

19 All right. Everyone may be seated.

20 And, so, let's -- we may as well go ahead and just  
21 have this discussion.

22 Mr. Smith, the -- well, we're going to end up going  
23 beyond the pending question here, I think, in terms of talking  
24 about what's appropriate, but -- and, you're right, I do have  
25 it with me, but we've gone so far past it, I don't know what it

1 was.

2 Mr. Kenerson, what do you have as the pending -- at  
3 least as the pending question that was objected to?

4 MR. KENERSON: I'm also doing this from memory  
5 because I had -- based on prior Court's ruling, going off what  
6 my outline had said. But, what I'm trying to get at is the  
7 closeness of his relationship such that they have the ability  
8 to form unspoken agreements.

9 THE COURT: Right. So, basic questions of how close  
10 they are, I think, are, clearly, fair game. I think your  
11 question -- I think where we left off was, you know: Have  
12 you -- have you -- have you had unspoken agreements with him in  
13 the past? Or something along those lines, maybe?

14 MR. KENERSON: I think it was -- well, what I  
15 recall -- and, again, the transcript will control --

16 There you go. Mr. McCullough has it -- had it.

17 "Within that group, the MoSD leaders, did you need to  
18 have explicit discussions about things with them all the time?"

19 THE COURT: Yeah.

20 MR. SMITH: So, the first objection, Your Honor, was:  
21 Vagueness. Do you need, according to -- where is the concept  
22 "need" coming? "Need" in order to do what? Do you need to  
23 have explicit agreement? Conversations?

24 So, Your Honor, there's no relevance to this line of  
25 inquiry except to establish that they have tacit agreements.

1 THE COURT: Right.

2 MR. SMITH: Mr. Kenerson can simply ask whether  
3 they're close. He's been doing that. The rest is argument --  
4 is legal argument that they're trying to filter through a fact  
5 witness. Whether something -- whether Mr. Tarrio  
6 hypothetically saying something to Mr. Bertino and Mr. Bertino  
7 saying something back and then they're taking action, whether  
8 that constitutes an agreement is an argument, not something for  
9 a witness to talk about.

10 THE COURT: I don't know. He can't testify as to --  
11 let me pull it up here.

12 MR. SMITH: And that's true, Your Honor, if it's a  
13 contract or a criminal conspiracy. If this were a contract  
14 case, a witness couldn't get on the stand and say: Yes, jury,  
15 we had a contract. That's not --

16 THE COURT: I'm sorry. "Did you need to have  
17 explicit discussions about things with them all the time?"

18 I mean, that is just a question of: Is -- is your  
19 relationship such that you could have, you know, unspoken --  
20 there were things you didn't need to speak to each other  
21 directly about to know you were on the same page?

22 Why isn't that just a way of characterizing a  
23 relationship that's an appropriate -- he can say: Yeah, we had  
24 that kind of --

25 I mean, for someone to say: Yeah, I had that kind of

1 relationship with someone else that we didn't need to -- we  
2 could reach agreements without having to explicitly state them,  
3 that's how close we were. Right?

4 We answered each others' sentences.

5 MR. SMITH: If he says his belief is that I believed  
6 I had an agreement with someone, that's a different answer than  
7 "I had an agreement with them. I know I had an agreement with  
8 them," because an agreement is a meeting of the minds, and  
9 that's a legal conclusion.

10 If he's going to testify that, "I said this,  
11 Mr. Bertino said that, and then we went somewhere. It was my  
12 understanding that we went somewhere pursuant to what I thought  
13 we agreed on," that's appropriate. But, for him to say, We  
14 reached agreements on -- inexplicit agreements is the case,  
15 that's not --

16 THE COURT: But I don't -- okay. You're bringing up  
17 a separate question that is not pending. So we can -- but, the  
18 question that's pending is --

19 MR. SMITH: Well, the question is couched as an  
20 agreement.

21 THE COURT: -- "did you have that kind of  
22 relationship with these individuals?" Put aside that it's --

23 MR. SMITH: Compound.

24 THE COURT: -- vague. But: Did you have a  
25 relationship with them such that you were able to form implicit



1 agreements?

2 MR. SMITH: Your Honor, "implicit agreement" is a  
3 legal conclusion. It's --

4 THE COURT: No. Agreements without talking to each  
5 other about it specifically, fine.

6 MR. SMITH: He could testify that that was his  
7 belief, that's his understanding, but it's for a jury or it's  
8 for a factfinder to determine whether a thing is a meeting of  
9 the minds. That's a legal question.

10 THE COURT: Sure. But he's not -- again, that's not  
11 the question. The question is: Did you have a relation -- as  
12 I word it slightly differently, but, I think the question he's  
13 getting at is: Did you have the kind of relationship with  
14 these individuals such that you could agree without having a  
15 specific discussion about something?

16 Now, it's obviously all from his perspective. He's  
17 saying: Yes, I think I had -- I assume he'll say, "Yes. I had  
18 that kind of relationship with these people."

19 I don't understand why that's objectionable.

20 MR. SMITH: So, another objection is when we say  
21 "these" -- when the government or the Court's saying "these  
22 people," I think that's -- there's a compound and vagueness  
23 problem. What is -- on foundation. What is the nature of your  
24 relationship with Mr. Biggs that would allow you to believe  
25 that you had an agreement with him generally?

1 THE COURT: So put aside the compound question. But,  
2 otherwise, why isn't -- I think that is appropriate.

3 MR. SMITH: So, we're saying it's inappropriate  
4 because there's jury confusion. The whole issue in the case is  
5 whether the defendants reached a tacit agreement.

6 THE COURT: Right.

7 MR. SMITH: So, for him to testify: My relationship  
8 with them gives me to understand we had a tacit agreement  
9 generally, or something. So, that's -- to me, Your Honor,  
10 that's like a witness saying: Yeah, it's my understanding that  
11 the defendant was guilty of murder when I saw him do that.

12 That's what we're here -- that's what the jury is  
13 deciding --

14 THE COURT: Right.

15 MR. SMITH: -- not a fact witness saying: I have a  
16 special ability that allows me to say there's a guilt.

17 THE COURT: It's not a special ability. It's his  
18 relationship with them. That's the special ability. And I  
19 don't -- to more fundamentally, I don't understand -- you seem  
20 to be objecting to the idea that he can say: Based on  
21 conversations we had, based on our relationship -- based on  
22 whatever you want to put in that box -- based on conversations  
23 we had, the circumstances, our relationship, I believe we had  
24 an agreement to do X.

25 You're saying he can't say that?

1 MR. SMITH: No. No. That would be true in a  
2 criminal conspiracy case, a contract case because that is the  
3 issue at dispute that the jury is deciding.

4 THE COURT: I get it.

5 MR. SMITH: So the facts are different than the  
6 conclusion.

7 THE COURT: I get what you're saying. I get what  
8 you're saying. And, I guess, I -- I wouldn't have him frame it  
9 as a conspiracy, but whether the layperson would call it an  
10 agreement, I don't understand how -- I mean, that's what he --  
11 that's -- that's the factual basis for his --

12 MR. SMITH: Here's the jury confusion, and I didn't  
13 put it very clearly, but I think I can now: Because an  
14 agreement is the crime in this case, a criminal agreement,  
15 right, and an agreement is a meeting of the minds, for the jury  
16 to be told "I understood there's an agreement," it leads --  
17 it's sort of like an instruction saying: If one person between  
18 two parties says there's agreement, there's agreement.

19 But that's not the law. The law is a meeting of the  
20 minds. So, for him to say "we could have these tacit  
21 agreements," it's implying that it's for him to say whether  
22 there's an agreement, but it's not. It's for at least two  
23 parties to say whether there's an agreement.

24 THE COURT: Sure.

25 MR. SMITH: So he testifies to what facts lead him to

1 believe there might have been an agreement. I said this to  
2 him, he said this to me, and then we did something. Not, we  
3 had a -- a relationship that gave us tacit agreements. That's  
4 just not --

5 THE COURT: Okay. I think your -- there's two  
6 separate things here.

7 But, Ms. Hernandez?

8 MS. HERNANDEZ: Along the lines what Mr. Smith is  
9 saying, he's being asked to give opinions, not facts. "In your  
10 opinion, was your relationship so close that you could have" --  
11 blah, blah, blah. No. He's only here to testify about facts,  
12 not to give an opinion about what that relationship was, number  
13 one.

14 Number two, again, the questions are compound. Your  
15 Honor, he had no conversations with my client. Multiple times  
16 he said: I don't recall. I don't remember.

17 No calls. There's no text messaging with my client,  
18 or most of the other defendants. There's no phone calls with  
19 the other defendants. There's no meetings with the other  
20 defendants. So, in addition to the compound nature of these  
21 questions, which the government continues to do throughout this  
22 case, there is the problem of he's being asked for an opinion,  
23 whether it's a legal opinion or a general opinion.

24 He can testify to facts, but he cannot testify to an  
25 opinion, particularly on the question at issue. He can say,

1 I -- I agreed, yes, I had an agreement with Terry or I had an  
2 agreement with Biggs or with Rehl or whoever. You know, he can  
3 testify to the facts, not to the conclusion. Whether it's  
4 legal or just an opinion, he cannot testify to that.

5 And this whole nature of why, why, why, why he did  
6 what he did is irrelevant to the facts at issue in this case.  
7 It's what he did. I don't care why he pled guilty. That  
8 doesn't make our clients any more or any less guilty. If -- if  
9 he believed he was guilty, that's great.

10 He believed he was guilty or he thinks it's good for  
11 him to plead guilty or he thinks all the garbage he said on  
12 January 6 makes him guilty, that's great, but it doesn't --  
13 that does not put any issue in fact -- any fact at issue in  
14 this case any further to the truth.

15 THE COURT: All right. You are -- Ms. Hernandez,  
16 just for me to say it, I just totally disagree with that point.  
17 He is allowed, he is -- he's an alleged co-conspirator, and by  
18 his terms an admitted co-conspirator, who is absolutely allowed  
19 to explain why he took the actions he did. I mean, I'm just --  
20 I'm stunned, I'm totally stunned that this is controversial.

21 MS. HERNANDEZ: I don't see that he -- I don't think  
22 that it's relevant why he pled guilty. Why? Who cares why he  
23 pled guilty?

24 THE COURT: Sure. Well, that's a separate question.  
25 But, more broadly, you're talking about him not even being able

1 to explain his actions, and I find that bizarre.

2 Let's -- Mr. Pattis, I'll hear from you, and then let  
3 the government have a word in edgewise.

4 MR. PATTIS: I think the law of conspiracy is that if  
5 two or more people agree to commit some unlawful act and a  
6 person acts in furtherance of it, that's the crime. And I  
7 think the standard charge is that these agreements are rarely  
8 made in a formal way, and that they can be proven by  
9 inference -- that is, by the surrounding facts and  
10 circumstances, the conduct and the inferences that can  
11 reasonably be drawn therefrom, and from conduct.

12 When you apply the law of evidence to that, you get  
13 certain things that are admissible for certain reasons. Verbal  
14 acts are things that are done that have legal significance, and  
15 they're held to be reliable because of what -- the context in  
16 which they take place.

17 Sometimes, as the Court has ruled here, the nature of  
18 the relationship is necessary to show an extension of trust.  
19 But it seems to me a bridge too far for him to say: I knew  
20 these guys. We were a band of brothers. And we did this,  
21 that, and the other thing, and, therefore, we could agree,  
22 without stating, to do certain things.

23 That's almost -- that's almost, like, an unconscious  
24 agreement, and I'm not aware of any case that says conspirators  
25 can reach an agreement absent a meeting of the minds. And to

1 suggest that they do so implicitly, I adopt the arguments of my  
2 co-counsel -- or, fellow counsel, that that is a legal  
3 argument.

4 You know, I agree, there's no contract here. We've  
5 gone through as many statements as the government can find in  
6 the last five or six weeks, and thus far, Waldo has not  
7 appeared. And so we are entitled to say: Where's Waldo?

8 The government doesn't get to say: Well, it was  
9 implicit.

10 THE COURT: Well, they do get to argue that.

11 MR. PATTIS: They get to argue that, but their  
12 witnesses don't get to say that.

13 THE COURT: Okay.

14 MR. PATTIS: And that's the difference.

15 THE COURT: So, taking that part out of it -- I mean,  
16 you were -- your argument is, in a typical case -- let's say  
17 they had a conversation in which they -- which -- let's say  
18 this was the atypical case in which two alleged criminal  
19 conspirators had a conversation in which they said: Okay. We  
20 agree.

21 I guess I --

22 MR. PATTIS: There would have to be a course -- I  
23 think I know where the Court is going. May I, sir?

24 THE COURT: Well, let me just ask the question, just  
25 in case, so that we are on the same wavelength for sure.

1           And your argument to me is, that person would not be  
2           able to take the stand and say: We agreed because --

3           MR. PATTIS: I think that when there's a course of  
4           dealings -- so, for example, two shrimp salesmen, you know, a  
5           boat pulls up and somebody says, I suddenly bought 20 tons of  
6           shrimp, and I'm, like, I never said I bought that. Well, you  
7           know, you've stood at this harbor with me any number of times  
8           when the boat came in, and when you wink at me, that usually  
9           means we got a deal. I saw a wink.

10          THE COURT: Right.

11          MR. PATTIS: There'd be a course of dealing that  
12          places this in context. There was nothing like this in the  
13          Proud Boys' history.

14          THE COURT REPORTER: Please speak into the mic.

15          MR. PATTIS: I'm sorry. I'm sorry.

16          There was nothing like that course of dealing in this  
17          conduct. It's a sui generis sort of arrangement.

18          THE COURT: Right. But the final question would have  
19          been based on, again, whatever. In your mind, sir -- because  
20          that's all you can say -- had you reached an agreement?

21          MR. PATTIS: That's a different question.

22          THE COURT: It is a different question. But, it's  
23          sort of lurking back behind what some of you are arguing, that  
24          they're not allowed to ask the question based on A, B, C, D  
25          circumstances, right, relationships, shared goals, whatever you



1 want to say: Did you believe you had reached an agreement?

2 I'm not sure, but I'm -- I take some of what you all  
3 have said to suggest the government can't ask that question.

4 MR. PATTIS: I might not have objected to that  
5 question. The question I heard was, you know: Were there  
6 circumstances -- did you have to have an explicit agreement at  
7 all times?

8 That's what my notes reflect.

9 THE COURT: Okay.

10 MR. PATTIS: In which case, that was the predicate.  
11 And the conclusion would have been: In this case, did you  
12 think you had an agreement?

13 Yes. It wasn't explicit.

14 What was the agreement?

15 To storm the Capitol. Save the republic at whatever  
16 cost -- or whatever the dramatic flourish will be that ends the  
17 direct exam.

18 That, I think, is improper. I think that he can say,  
19 you know, that he thought he shared certain goals with them,  
20 but I don't think he can say -- and I began the objection, you  
21 know, talking about occult properties and the Salem Witch  
22 Trial. I mean, we try cases based on competent evidence in  
23 this courtroom, and implicit agreements are not a thing.  
24 People -- the circumstances that --

25 THE COURT: Well, first of all -- no. No. To be

1 clear, they absolutely are a thing.

2 MR. PATTIS: Not from a witness. A witness can  
3 testify about his observations, his conclusions, and a party  
4 can argue that there was an unstated agreement based on  
5 admissible evidence.

6 THE COURT: Right. His observations and his  
7 conclusions. His conclusion is: Based on A, B, and C, we had  
8 an agreement.

9 MR. PATTIS: To do what?

10 THE COURT: Well, I don't know. We'll find out.

11 MR. PATTIS: And neither does he. But, absent some  
12 terms --

13 THE COURT: No. No. No.

14 MR. PATTIS: No. I mean, Judge, suppose I go down to  
15 the cafeteria right now and I splurge on cookies and I say,  
16 well, based on the argument I had with the Judge, we had an  
17 implicit agreement that everybody needed a sugar boost. Are  
18 you going to pay the bill for those cookies?

19 THE COURT: Listen, listen, the question -- that's --

20 MR. PATTIS: Yeah, exactly. That's my point.

21 THE COURT: Like all the lawyers like to say, that's  
22 an inapposite analogy. Let me give just the government a  
23 chance to get a word in edgewise here, and then we'll take a  
24 break. But, look, I think, again, we started this conversation  
25 when, I think -- and fairly, you all objected to, well, I --

1       whatever the testimony was headed to, I found out that A was  
2       required and B wasn't required for -- to meet the standard for  
3       conspiracy, and I think that is -- and I sustained that  
4       objection, I think, appropriately.

5               But, again, for -- and I take your point, also, and  
6       I -- you know, that for the government -- I mean, I don't know.  
7       This is a double-edged sword about the question of whether it's  
8       vague as to who he's referring to because, you know -- well,  
9       it's a double-edged sword about how close you want them to ask  
10      the question: Were you conspiring with each of your  
11      defendants?

12             But, I don't know why the government can't elicit  
13      facts about a relationship and the circumstances, all these  
14      other things, and then say: And based on all of that, in your  
15      mind, had you come to an agreement about what you were about to  
16      do? And what was your agreement?

17             Now, you all are free to say: Why, in the world, you  
18      thought you had an agreement under those circumstances because  
19      of A, B -- because of all these other things in -- that point  
20      in the other direction?

21             MR. PATTIS: Those are different questions than the  
22      question that was posed.

23             THE COURT: Fair. I just -- I just figure we may as  
24      well flesh all this out while we're here.

25             Mr. Roots?

1 MR. ROOTS: Yeah. One of the most dangerous things  
2 that is going on is this: We've had more than one witness,  
3 this is the second one, the other was Matthew Greene, who has  
4 testified: Well, I didn't think I had done anything until it  
5 was explained to me by experts.

6 And so this is very dangerous, and I think it  
7 fundamentally misinforms the jury. Here are these witnesses  
8 who pled guilty, and we all know why they did: Because they  
9 get benefits from pleading guilty. And then to stand there and  
10 say, well, my lawyer explained that I was guilty. I had  
11 experts explain that I was guilty.

12 And, of course, in Matthew Greene's case, he actually  
13 said: The Judge agreed that I was guilty.

14 So, this is very dangerous, and it just borders on  
15 just totally inappropriate evidence.

16 THE COURT: Mr. Roots, you recall, the reason that  
17 was, as I recall, only elicited after cross along those lines,  
18 as I recall, about: Well, did you really think you had --

19 You know, Mr. Pattis is smiling because he knows this  
20 is true. So, my point is, for them to re -- I think what this  
21 was was the government rehabilitating a witness because  
22 Mr. Pattis had gone down that road. I don't think that was  
23 elicited on direct.

24 Let me just give the government a chance to get a  
25 word in edgewise here about what they think the proper contours

1 are before we take our break.

2 MR. KENERSON: Thank you, Your Honor.

3 I think our view is that the Court has it pretty much  
4 right on. The question that is pending is not an  
5 ultimate-issue question, which I take to be Mr. Smith's main  
6 objection to it. The word "agreement" certainly can have a  
7 legal meaning, but it also has a meaning to lay people. And  
8 the ability to form -- the closeness of a relationship such  
9 that you have the ability to form implicit -- again, we did not  
10 use the word "implicit." We're all lawyers and using legal  
11 jargon. The question posed to the witness did not have  
12 "implicit agreements" in it.

13 But, the closeness of relationship such that you have  
14 a person who is in the relationship has the ability to form  
15 those agreements, I think, is a proper foundational question  
16 for the jury to hear. I don't think it's improper opinion  
17 testimony for a witness to testify as to his or her own  
18 relationships, the depth of his or her own relationships, what  
19 those relationships may mean.

20 This is not any sort of expert testimony. He's not  
21 being asked to opine whether there was an agreement. He's  
22 being asked to opine on this question: Whether the  
23 relationship was such that he has the ability to form those  
24 agreements with the other folks in it.

25 THE COURT: What say you to -- just to press pause

1 for one moment, what say you about the issue of whether this is  
2 a vague question? Because I think you're asking it in terms of  
3 the MoSD leadership, as opposed to these defendants.

4 MR. KENERSON: I --

5 THE COURT: I mean, it gets trickier because he  
6 probably wouldn't answer that question that way with regard to  
7 Mr. Pezzola, I assume.

8 MR. KENERSON: Correct. I mean, yeah. I do not  
9 think he would answer that question that way with regard to  
10 Mr. Pezzola, but Pezzola is not in leadership. That's why we  
11 asked the -- correct. I mean, that's the difference between  
12 leadership and the defendants. So, I -- I don't -- obviously,  
13 we asked the question. We thought it was proper. I don't  
14 think it's vague. I think that it is perfectly permissible for  
15 them to explore on cross-examination, and, I think, you know,  
16 we would be happy to lay out why he felt close with each of  
17 these particular defendants.

18 But, I don't think that asking about MoSD leadership  
19 as a whole is a vague question, especially given how much --  
20 how much talking that group did during the timeframe in  
21 question here.

22 THE COURT: Okay. And -- sorry. Continue on the  
23 points that you were going to make, Mr. Kenerson, before I put  
24 you down that --

25 MR. KENERSON: Sure. May I have one minute to confer

1 with co-counsel?

2 THE COURT: Sure.

3 (Pause.)

4 MR. KENERSON: So, I think I'm continuing on down the  
5 road. I mean, his -- he is a fact witness to, kind of, his  
6 perception of these interactions with these defendants. That's  
7 what he's testifying to as a fact witness, and the other  
8 leaders and co-conspirators of the Ministry of the  
9 Self-Defense. So, just in terms of the way that -- to go back  
10 to one of our favorite idioms in this trial, "the bologna has  
11 been sliced here," I think asking about, generally, the ability  
12 to form this type of question, which is the question pending, I  
13 think, is perfectly permissible.

14 And if we go and ask the question about whether he  
15 believed he had reached an agreement, I agree, we would cabin  
16 it to his belief, and not to whether, in fact, there was one at  
17 this point. But his ability to do so generally with these  
18 defendants or the other leaders of the MoSD, I think, is a fair  
19 question.

20 THE COURT: Right. Based on relationship --  
21 whatever -- whatever the -- whatever you would say.

22 Ms. Hernandez?

23 MS. HERNANDEZ: So, Your Honor, I think the  
24 government has already asked these questions about the nature  
25 of the relationship, right? They spent all day today asking

1 phone, text messages, Telegram, conversations, interactions, so  
2 they laid the groundwork. They can argue in closing argument  
3 what that groundwork leads to, but they cannot -- I think what  
4 they're trying to do now is elicit from this witness his  
5 conclusion of what he thinks this relationship meant, and  
6 that's the problem that we're having with this line of  
7 questioning.

8 THE COURT: Right.

9 MS. HERNANDEZ: The facts -- did you meet with  
10 Mr. Tarrío ten times? I think they already elicited that he  
11 was having text messages with Tarrío every day for whatever  
12 number of months. He never had any text messages with my  
13 client. He never had text messages with Pezzola or whatever.

14 THE COURT: Right.

15 MS. HERNANDEZ: So he's already laid the factual  
16 groundwork from which they can argue whatever they want. It's  
17 that next step that they're trying to get to that they can't.

18 And I will say, even the plea agreement doesn't seek  
19 the type of -- doesn't -- the statement of facts in the plea  
20 agreement doesn't include this conclusion that the government  
21 wants from this witness. The plea agreement says: Bertino was  
22 not given details of the plan referred to by Biggs, but he  
23 understood from discussions.

24 Not he understand because of his relationship to  
25 these people, he understood from discussions, because that's a



1 fact. What he understood might be a fact, what the discussions  
2 might be a fact. What the nature of the relationship, that's  
3 an opinion. That's not a fact.

4 THE COURT: No, it's not. It's not.

5 MS. HERNANDEZ: The nature of a relationship?

6 THE COURT: Yes. The nature of a relationship --

7 MS. HERNANDEZ: Is an opinion. It's not a --

8 THE COURT: No. No.

9 MS. HERNANDEZ: You can't say, I have a close -- you  
10 know, the fact would be: I speak to him every day, that's a  
11 fact. Or, I see him every day, that's a fact. What that  
12 means, if you speak to someone every day, or whether you never  
13 speak to them, that's an opinion.

14 THE COURT: Whatever you want to call it, it's a  
15 characterization of the facts that's absolutely within a fact  
16 witness's ability to say. I mean, I can't testify as to I have  
17 a close relationship with my mother or I have a strained  
18 relationship with my mother? I mean, come on now.

19 MS. HERNANDEZ: I think you can testify that I  
20 haven't talked to her in ten years or the last time we spoke I  
21 hung up on her.

22 THE COURT: No. No.

23 MS. HERNANDEZ: I didn't, by the way, but --

24 THE COURT: I disagree with you there. Look, I think  
25 where we've left all of this is just, the thing that -- where

1 we left off and your objection is just to the -- did you  
2 have -- circling all the way back, I think we're clear on -- at  
3 least I'm clear on where the government can go and where they  
4 can't. I do think the one -- where we left off is just the  
5 question of: Was your relationship such that you could form  
6 implicit agreements?

7 Essentially, which is, I think, the pending question  
8 fairly construed, and that -- that is a little bit more than  
9 characterizing the witness, the relationship is close or not.  
10 So, I'll ponder that. But, I think, really, the rest of this  
11 way forward, I think, is actually pretty clear.

12 MS. HERNANDEZ: Your Honor, hand in hand with that,  
13 can we get from the government not to ask these generalized  
14 questions? We've got people -- different people here on trial  
15 whose relationships with this particular witness are completely  
16 different. The nature of their relationships are completely  
17 different.

18 THE COURT: Right. I think what Mr. Kenerson just  
19 explained is the reason they're asking the question the way  
20 they are is it's excluding Mr. Pezzola and including the rest  
21 of the defendants.

22 MS. HERNANDEZ: Again, I would object to that because  
23 multiple times, when he was asked about different events  
24 with -- whether it be text messaging or telephone calls or  
25 whether he recalls having conversations, time and again, he

1 said "no" as to Mr. Rehl. Sometimes "no" as to some of the  
2 other defendants, but time and again as to Mr. Rehl.

3 I don't think it's appropriate to ask that  
4 generalized question, Your Honor, and I would object.

5 THE COURT: It's a question that encompasses your  
6 client and other clients. So, it's not vague. It's very --

7 MS. HERNANDEZ: It is vague.

8 THE COURT: It's a question that encompasses a  
9 defined group of people, of which your client is one.

10 MS. HERNANDEZ: But we're each individuals, Your  
11 Honor. And the conspiracy -- a conspiracy has to be found as  
12 to each defendant. It can't be just because they charged it as  
13 one -- again, they're not charged as the Proud Boys. They're  
14 charged as individual human beings, and there's no question  
15 that the evidence that has come out is that each of these  
16 persons has different relationships with him.

17 THE COURT: Okay.

18 MS. HERNANDEZ: Some are closer than others.

19 THE COURT: Okay. I think that's something for you  
20 to explore on cross-examination.

21 Let's take our break for the court reporter, and come  
22 back in ten minutes.

23 (Recess.)

24 THE COURTROOM DEPUTY: We're back on the record in  
25 criminal number 21-175, United States of America versus Ethan

1 Nordean, et al.

2 THE COURT: Okay. Just so we don't have to talk  
3 about this at the end of the day, let me just re-mention  
4 something I mentioned while we were at sidebar on another  
5 matter.

6 Ms. Hernandez, if you want to sort of draw a circle  
7 around the Bertino podcast stuff and have a limiting  
8 instruction directed at that, because that just happened and  
9 you think that's particularly -- the risk of prejudice to your  
10 client is particularly strong, as I said, I think the proper --  
11 under *Anderson* -- I didn't just review it over our break, but  
12 under *Anderson*, I think the right instruction is: Look, all  
13 that podcast stuff comes in for Bertino's state of mind and --  
14 period, and the jury should consider it for that purpose.

15 I think going beyond that, as I've said, and saying,  
16 and you can't consider it against Mr. Rehl, I actually don't --  
17 I don't think that is appropriate because the jury can  
18 inferentially consider the state of mind of one co-defendant  
19 against another.

20 MS. HERNANDEZ: I don't believe that -- I understand  
21 that's the Court's ruling. I would rather have that short  
22 instruction --

23 THE COURT: Sure.

24 MS. HERNANDEZ: -- than nothing at all. So, I would  
25 ask that the Court --

1 THE COURT: Okay. So, just -- what I just wanted to  
2 put a button on is, you know, this evening, via email, confer  
3 with the government. I don't know if the government will agree  
4 with what I just said or not, but come up with something, and  
5 I'll give it first thing tomorrow so that you -- at least as to  
6 the -- at least as to the podcast stuff.

7 I did -- I did admit it all for the same purpose, so  
8 it's not the checkerboard that some of these other things are,  
9 and I think you're particularly concerned about that. So we  
10 can draw a circle around that, and I'll get you that limiting  
11 instruction tomorrow.

12 MS. HERNANDEZ: I actually would like the Court to  
13 just give it this afternoon, if that's all that -- just  
14 statement. And the reference to a checkerboard, I was taking a  
15 look at the Court's opinion on those -- on the Telegram. It is  
16 a mess in terms --

17 THE COURT: No.

18 MS. HERNANDEZ: -- not that the Court's opinion is a  
19 mess, but in terms of separating out the limiting instruction,  
20 it's not an easy task.

21 THE COURT: Agree. All right. That's number one.

22 Number two, I do think -- so, I think -- again, I  
23 think we ended up in a place where, I think, we agreed on most  
24 of the -- of where this is all headed in terms of this witness  
25 and the agreement and testimony on that. I do think -- so,

1 where we left off was the pending question, and I do think the  
2 objection is well taken to the pending question.

3 You know, whether you consider it sort of leading, or  
4 baking in the -- the -- I really think, at the end of the day,  
5 it's sort of a -- leading is the best objection. I mean, if  
6 the question was, why do you think you came to that agreement,  
7 and the witness offered up out of their own mouth, well, you  
8 know, we had such a relationship that, like, that's the kind of  
9 relationship we had, where we were doing that all the time,  
10 that's one thing.

11 Maybe you all would object to that answer, but I  
12 think that -- if that was the answer, that was the answer.  
13 But, I think, baking in on the back end more than just "you had  
14 a close relationship," I think the defendants are right.  
15 You've elicited a close relationship. I won't preclude you  
16 from eliciting more about a close relationship. But, at the  
17 end of the day, after that, it's really about argument and  
18 about whether he would say, that's one of the reasons I thought  
19 we had an agreement, or not.

20 So, you know, I think -- look, you have leeway to get  
21 in all the facts you want and -- you know, and to ask him why  
22 you thought you had come to an agreement and what you thought  
23 the contours of that agreement are, what you believed the  
24 agreement was. I think we all agree on that, and we go from  
25 there. But, I -- I think --

1           And I know, Mr. Kenerson, you were operating on the  
2       fly there, so -- but, I think -- I think that question, as it  
3       stands, probably is objectionable. So I'll sustain the  
4       objection as to that. If that makes sense.

5           Anything further before we bring the jury and the  
6       witness in?

7           (No response.)

8           THE COURT: All right. Let's do that, then.

9           (Whereupon the jurors enter the courtroom.)

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

11          After sustaining the objection to the pending  
12       question, Mr. Kenerson, you may proceed.

13          MR. KENERSON: Thank you, Your Honor.

14       BY MR. KENERSON:

15       Q. Mr. Bertino, I think you testified before the break that  
16       you got close with some of the Ministry of Self-Defense leaders  
17       after your stabbing. Did I hear that testimony correct?

18       A. Yes.

19       Q. Can you tell us what about your interactions with that  
20       group led you to feel close to them after your stabbing?

21       A. Just the way they greeted me when I got -- you know, when  
22       they heard from me after I survived. The way, you know, they  
23       took care of me when I was hurt, helped me out, it just built  
24       an even stronger bond between everybody.

25          MS. HERNANDEZ: Your Honor, could we have a

1 specificity as to which defendants?

2 THE COURT: No. Your objection is overruled.

3 BY MR. KENERSON:

4 Q. How often would you participate in discussions in the MoSD  
5 Leaders chat?

6 A. I would be willing to say, every day.

7 Q. By January 6, 2021, did you believe that you had reached an  
8 agreement with respect to the events of January 6?

9 MR. METCALF: Objection. Vague.

10 THE COURT: Overruled.

11 A. Yes.

12 BY MR. KENERSON:

13 Q. What was your understanding of that agreement?

14 A. That we had to do anything that was necessary to save the  
15 country.

16 Q. Why is it you thought you had come -- why is it that you  
17 believed you had come to an agreement along those lines?

18 A. It was the constant conversation in all of the MoSD chats.  
19 The lack of any detractors from that. There was a ton of the  
20 same rhetoric, the same things all being said by all the  
21 members of the MoSD, both the leaders and the regular chat.

22 Q. Mr. Bertino, I'm going to ask you a few questions about  
23 your plea agreement in just a moment.

24 But, did the FBI search your residence on March 8th,  
25 2022?



1 A. They did.

2 Q. Following that search, did you get a lawyer?

3 A. I did.

4 Q. Did you meet with FBI agents and prosecutors with that  
5 lawyer a few days later?

6 A. Yes.

7 Q. Were you fully forthcoming in that first interview with the  
8 FBI with regards to your actions on January 6?

9 A. No.

10 Q. Why not?

11 A. I was trying to protect myself. Trying to protect the  
12 others. I was afraid of something like this happening.

13 Q. When you say "something like this," what are you talking  
14 about?

15 A. Having to be in court. Having to face charges.

16 Q. Why did you want to protect yourself?

17 A. Um --

18 MS. HERNANDEZ: Objection as to "why," Your Honor.

19 THE COURT: Overruled.

20 A. I guess natural instinct to protect yourself and protect  
21 those you love.

22 BY MR. KENERSON:

23 Q. Why did you want to protect the others?

24 A. I loved them. I didn't want to see anything bad happen to  
25 them. Still don't.

1 Q. Mr. Bertino, I think you mentioned, earlier in your  
2 testimony, this idea of doxxing. Do you remember that?

3 A. Yes.

4 Q. Did you participate in that type of behavior back in the  
5 timeframe when you were with the Proud Boys?

6 A. Yes.

7 Q. Why?

8 MS. HERNANDEZ: Objection as to "why."

9 THE COURT: Overruled.

10 A. It was a tactic that was pretty much used by both sides,  
11 antifa. We didn't do it as much, obviously, but sometimes it  
12 just got to the point where our guys kept getting doxxed or  
13 fired or de-homed, canceled, that it felt like retaliation, to  
14 get back at them for what they had done to us.

15 BY MR. KENERSON:

16 Q. How do you feel about having engaged in that type of  
17 behavior now, looking at it?

18 MS. HERNANDEZ: Objection.

19 MR. PATTIS: Objection. Relevance, Judge.  
20 Bolstering.

21 THE COURT: Overruled.

22 A. I regret it.

23 BY MR. KENERSON:

24 Q. Now, at the time of your first interview with the FBI, how  
25 was your memory at that point as to the events between your

1       stabbing and January 6?

2               MR. METCALF:  Objection as to leading.

3               THE COURT:  Overruled.

4       A.  It's pretty hazy, and pretty much I had selective memory at  
5       that point.

6       BY MR. KENERSON:

7       Q.  Now, did you eventually enter a guilty plea?

8       A.  I did.

9       Q.  Do you remember what month that was?

10      A.  October.

11      Q.  If you weren't fully forthcoming in -- well, strike that.

12              At the time of the FBI search of your house, did you  
13      have firearms in your house?

14      A.  I did.

15      Q.  Are you the same Jeremy Bertino who was convicted of  
16      reckless endangerment in New York state in 2004?

17      A.  I was.

18      Q.  What's your understanding as to what affect that conviction  
19      had or did not have on your ability to possess firearms as a  
20      matter of federal law?

21      A.  I was not allowed to.

22              MR. METCALF:  Your Honor, objection to that as far as  
23      goes to a legal conclusion.

24              THE COURT:  Overruled.

25      BY MR. KENERSON:

1 Q. So was it unlawful that you have those guns in your house?

2 A. It was unlawful.

3 Q. You said you entered a guilty plea, correct?

4 A. Yes.

5 Q. What judge was that before?

6 A. Before Judge Kelly.

7 MS. HERNANDEZ: Objection.

8 THE COURT: Overruled.

9 MR. KENERSON: Can we have the screen just for the  
10 witness, please. And then, Exhibit 1212.

11 BY MR. KENERSON:

12 Q. Mr. Bertino, do you recognize the document on your screen?

13 A. I do.

14 Q. What's that?

15 A. My plea agreement.

16 MR. KENERSON: Your Honor, I move for the admission  
17 of Exhibit 1212.

18 MR. ROOTS: Objection. Sidebar, please.

19 THE COURT: All right.

20 (Bench discussion:)

21 THE COURT: Yes, sir.

22 MR. ROOTS: Your Honor, again, the law says they can  
23 introduce a guilty plea for purposes of the honesty or  
24 dishonesty of the witness or that kind of thing, not to go  
25 through and bolster the witness, bolster the credibility of the

1 charges.

2 The guilty plea can only be entered, really, for --  
3 usually, they're entering it to stop us from attacking the  
4 credibility of the witness. That's what they're really doing.  
5 But, here, they're going way beyond that. They are using the  
6 guilty plea aggressively and not defensively, but offensively,  
7 to falsely inform the jury that there is guilt in this case.

8 THE COURT: Okay. Mr. Roots, this is very -- what  
9 they're doing right now is done in virtually every case in  
10 which there's a conspirator in this -- and which there is a  
11 cooperator in this jurisdiction. I know Mr. Pattis had  
12 indicated the practice is different in other circuits, but  
13 this, what they're doing right now, is very common.

14 Ms. Hernandez?

15 MS. HERNANDEZ: Your Honor, there was no need to ask  
16 what judge in front of the judge he entered his plea.

17 THE COURT: Right. I've already ruled -- I ruled on  
18 this.

19 MS. HERNANDEZ: I understand you ruled. But, it  
20 really was irrelevant to the actual plea.

21 THE COURT: I -- I don't think it's prejudicial. I  
22 don't think it is of -- let's put it this way: I don't think  
23 it has great meaning in either direction. I don't think it's  
24 objectionable.

25 You may proceed, Mr. Kenerson.

1 (Open court:)

2 MR. KENERSON: All right. Your Honor, I move for the  
3 admission of Exhibit 1212.

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

6 BY MR. KENERSON:

7 Q. And, Mr. Bertino, directing your attention to paragraph 1.

8 And Ms. Rohde will make that bigger.

9 What counts did you plead guilty to?

10 A. Counts 1 and 2.

11 Q. And what were those charges?

12 A. Seditious Conspiracy and Unlawful Possession of a Firearm  
13 by a Prohibited Person.

14 Q. And, Ms. Rohde, if we could scroll down to paragraph 9?

15 And while she's doing that, Mr. Bertino, is this  
16 what's known as a cooperation plea?

17 A. Yes.

18 Q. Does that lay out responsibilities that you have under the  
19 agreement?

20 A. Correct. It does.

21 Q. Do you see paragraph 9 is labeled "Cooperation"?

22 A. I do.

23 Q. Is there a fair amount of language on there?

24 A. A lot.

25 Q. Did you have a chance to review these terms with your

1 lawyer prior to entering a guilty plea?

2 A. I did.

3 Q. What is your layman's understanding of what the cooperation  
4 terms require of you?

5 A. They require me to be fully and truthfully honest, meet  
6 with the government, give them information about -- whatever  
7 information I have about this case, and be fully and truthfully  
8 honest about it. And it may require me to be a witness in  
9 court.

10 Q. What are you hoping to get out of this plea agreement?

11 A. I'm sorry?

12 Q. What are you hoping to get out of this plea agreement?

13 A. I mean, I -- I understood that I committed the crime, so I  
14 had to take the plea. There was -- you know, it just didn't  
15 make any sense to fight something that was inevitable.

16 MR. PATTIS: Objection. Move to strike.

17 Nonresponsive.

18 THE COURT: All right. And it's sustained. And the  
19 answer will be stricken.

20 BY MR. KENERSON:

21 Q. What were you hoping -- well, let me ask you: In terms of  
22 your ultimate sentence, are you hoping to get something out of  
23 the cooperation aspect of this plea?

24 A. I would hope that cooperation would help.

25 Q. Has anyone promised you what your sentence will be?

1 A. No.

2 Q. Who decides your sentence?

3 A. The judge does.

4 Q. That's Judge Kelly?

5 A. Yes.

6 MS. HERNANDEZ: Objection.

7 BY MR. KENERSON:

8 Q. Are you familiar with the term "substantial assistance  
9 motion"?

10 A. Subs -- not directly.

11 Q. A 5K?

12 A. Yes.

13 Q. What's your understanding of what that is?

14 MR. METCALF: Objection. Your Honor, again, calls  
15 for a legal conclusion or a legal definition.

16 THE COURT: He can give his lay understanding.  
17 Overruled.

18 A. Basically, the government gets to decide whether or not  
19 they'll file a 5K motion on my behalf, which would possibly  
20 lead to a reduction in sentence.

21 BY MR. KENERSON:

22 Q. And if the government files that 5K motion, what's your  
23 understanding as to who decides whether to grant it?

24 A. The judge would -- Judge Kelly would have to decide that.

25 Q. Now, do you have an understanding, one way or the other, as



1 to whether the outcome of this case has anything to do with  
2 whether the government files that motion?

3 A. Yes, I do.

4 Q. What's your understanding?

5 A. That doesn't matter.

6 MR. PATTIS: Objection. Judge, that may call for  
7 waiver of the attorney-client privilege. Objection.

8 THE COURT: If the witness can answer without --  
9 without waiving his attorney-client privilege, he may.

10 BY MR. KENERSON:

11 Q. So, without referencing any conversations you may have had  
12 in private with your lawyer, what is your understanding of  
13 whether the outcome of this case has anything to do with  
14 whether the government files a substantial assistance motion?

15 A. It has nothing to do with it.

16 Q. What about any other case?

17 A. Nothing to do with it.

18 Q. As part of your plea agreement, did you have to agree with  
19 what's called a Statement of Offense?

20 A. I did.

21 Q. And without getting into what the Statement of Offense  
22 says, in general terms, what is that?

23 A. That I acknowledge that I took part in a crime and --

24 Q. Did you review that Statement of Offense before you entered  
25 your guilty plea?

1 A. Yes.

2 Q. Do you agree that it described facts establishing a  
3 seditious conspiracy and unlawful possession of a firearm?

4 MS. HERNANDEZ: Objection. Relevance, based on  
5 *Tarantino*.

6 THE COURT: Overruled.

7 A. Yes.

8 MR. KENERSON: Your Honor, I do not believe I have  
9 any further questions at this time.

10 THE COURT: All right. Very well. We'll move to  
11 cross-examination.

12 While you are -- I'll give you a moment to --  
13 Mr. Smith, to take care of the technology. Let me know when  
14 you're done.

15 (Pause.)

16 MR. SMITH: I'm ready, Your Honor. Thank you.

17 THE COURT: Mr. Smith, let me just have a sidebar,  
18 very briefly, before you begin.

19 (Bench discussion:)

20 THE COURT: All right. Mr. Smith, I was hoping we  
21 wouldn't get to this point today. I know we've -- I want to  
22 try to avoid having to interrupt -- having the government  
23 interrupt. I assume -- are you planning on using prior  
24 inconsistent statements?

25 MR. SMITH: Well, that would depend on the witness's

1       answers.

2               THE COURT: All right. Well, I mean, I guess -- all  
3       right. Well, there's nothing we can do to front this now.  
4       We'll just deal with it as it comes. I just had hoped -- if we  
5       hadn't gotten to this point, I was going to try to have you  
6       disclose what you thought you would be doing, at least as far  
7       as those statements go, to the government, so we can try to,  
8       you know, get at this ahead of time. But, we are where we are,  
9       so you may proceed.

10              MR. KENERSON: Your Honor, if I may, just on that  
11       topic.

12              THE COURT: Yeah.

13              MR. KENERSON: One suggestion that I would have on  
14       that -- on that front, and the Court's, obviously, free to take  
15       it or leave it, is: I don't know whether Mr. Smith plans to  
16       use the audio recordings or the transcripts. There are both  
17       for many of the prior statements. But, if Mr. Smith is able to  
18       point to either a timestamp or a page and line of a transcript  
19       before he actually puts the question to the witness, that might  
20       allow us to solve anything before it gets before the jury.

21              MR. SMITH: Your Honor, we plan to do one better for  
22       Mr. Kenerson, and give them a page number, a citation to a  
23       timestamp, and the Nordean exhibit number.

24              THE COURT: All right. So, hopefully, Mr. Smith, if  
25       you -- you know, you can do it as you see fit, but, the best, I

1 think, then would be, even before you pose the question, at  
2 least alerting the government somehow to this so we can try to  
3 do it as best we can without -- you know, without having to  
4 interrupt your questioning.

5 MR. SMITH: Your Honor, may I simply say: I'm  
6 planning to play a prior inconsistent statement, cite the  
7 exhibit number, the timestamp?

8 THE COURT: Okay. We just need -- they need a chance  
9 to be able to see what it is and object. That's my only point.  
10 It is what it is. We'll go forward as best we can.

11 MR. SMITH: Okay. Thank you, Your Honor.

12 THE COURT: All right.

13 (Open court:)

14 CROSS-EXAMINATION

15 BY MR. SMITH:

16 Q. Good afternoon, Mr. Bertino.

17 A. Good afternoon.

18 Q. I'm Nick Smith. I'm going to ask you some questions for  
19 Ethan Nordean about your testimony.

20 A. Okay.

21 Q. Okay. Is it fair to say that before your testimony today,  
22 you've had some encounters with the government about the  
23 subject of your testimony?

24 A. Yes.

25 Q. A few meetings with them?

1 A. Yes.

2 Q. You had meetings with FBI agents and prosecutors?

3 A. That's correct.

4 Q. How many meetings would you say you've had?

5 A. I don't recall an exact number.

6 Q. Over six?

7 A. Probably, yes.

8 Q. And a few of those meetings were -- involved you working on  
9 your testimony today, correct?

10 A. I wouldn't say "working on," but I definitely -- practiced  
11 a little bit of testimony, yes.

12 Q. Practiced. So, do you know that it's -- I believe you  
13 understand that it's a federal crime to give -- knowingly give  
14 false information to FBI agents, correct?

15 A. Yes.

16 Q. Okay. And you understand that that's an offense that's  
17 punishable by up to five years of prison, correct?

18 A. I don't know the statute off the top of my head.

19 Q. Okay. So, you understand that your interviews with FBI  
20 agents were recorded, correct?

21 A. Yes.

22 Q. Okay. And you understand that those recordings were  
23 provided to the defense in this case, right?

24 A. I would assume so, yeah.

25 Q. Okay. So, you testified right at the end of direct about

1 your plea agreement with the government, right?

2 A. Yes.

3 Q. And we'll get to the details of that in a minute. But, you  
4 understand that despite that plea agreement, if you gave false  
5 information knowingly to the FBI in your interviews, that is  
6 still a criminal offense, despite your agreement. You  
7 understand that, right?

8 A. I don't know. I'm not -- I don't know. I'm not a legal  
9 expert.

10 Q. Okay. So, you understand that you could be prosecuted for  
11 each false statement you gave to the FBI, if you gave any,  
12 correct?

13 A. It's a possibility, yeah.

14 Q. Okay. You haven't been told that you wouldn't be  
15 prosecuted for them, right?

16 A. I don't believe so, no.

17 Q. Okay. So, I think you also just indicated at the end of  
18 your testimony that you -- when you first were interviewed by  
19 agents, they found firearms in your home, correct?

20 A. When I was first interviewed?

21 Q. Before you were first interviewed by agents, agents found  
22 firearms, they recovered them from your home, correct?

23 A. Yes.

24 Q. Okay. And at that time, you indicated that you were a  
25 felon. You were -- you had a felony conviction in your record

1 at the time you owned the firearms, right?

2 A. I don't know if I indicated that to them directly or not.

3 I don't remember.

4 Q. Is it the case?

5 A. Is what the case?

6 Q. Is it the case that you had a felony conviction before you  
7 possessed firearms?

8 A. Yeah. I think we've already established that. Yes.

9 Q. Okay. Oh, I thought you just said we hadn't. So, I  
10 apologize.

11 So, the felony conviction that you had was reckless  
12 endangerment in the first degree; is that what it was?

13 A. Yes.

14 Q. Okay. So, around the time the guns were found from your  
15 residence, you spoke with some FBI agents about January 6,  
16 right?

17 A. A few weeks later, yes.

18 Q. A few weeks later. You had a meeting with an agent in a  
19 car, right?

20 A. Meeting with an agent in a car?

21 Q. Yeah.

22 A. They originally grabbed me while I was at work, put me in  
23 the car, asked me some questions. And then I left and went to  
24 get an attorney.

25 Q. Okay. What questions did they ask you?

1 A. I don't recall off the top of my head.

2 Q. You don't recall?

3 A. No.

4 Q. Do you recall that they indicated there was some connection  
5 between whether you might be charged and how you might be  
6 charged with the guns and what you might have to say about  
7 these defendants?

8 A. Could you ask that again?

9 Q. Do you recall that when the agents were talking to you  
10 about what you knew at January 6, they linked your exposure  
11 with the firearms to what you might tell them about January 6?

12 A. Are you talking about in the car?

13 Q. Yeah. Or after.

14 A. No.

15 Q. Never?

16 A. No.

17 Q. Okay. So, let's -- I want to start with a document that's  
18 in evidence already. I'm going to put it up on the screen.  
19 It's Government Exhibit 528-1A.

20 And, Ms. Harris, I would like to publish that to the  
21 jury.

22 Mr. Bertino, do you see that document on the screen?

23 A. Yes.

24 Q. Do you recognize that?

25 A. Yes.



1 Q. So, you were shown this document by some of the agents?

2 MR. METCALF: The screen is not working. Sorry.

3 BY MR. SMITH:

4 Q. All right. So, Mr. Bertino, you were shown that document  
5 when some of the agents interviewed you after the seizure of  
6 the guns from your home, right?

7 A. Yes.

8 Q. And they told you, the agents, that this reflected a plan  
9 that Enrique Tarrio might have pursued on January 6, correct?

10 A. I don't remember if that's the wording they used. They  
11 just said that he had possession of it.

12 Q. Okay. They actually told you that he created it, right?

13 A. I don't remember specifically.

14 Q. Oh, you don't remember.

15 A. No.

16 Q. Okay. So, would it help refresh your recollection if I  
17 played the section -- the relevant section of the interview for  
18 you?

19 A. It might.

20 Q. Okay.

21 MR. SMITH: So, Your Honor, I'm going to play what's  
22 been marked as -- what's been marked as Nordean Exhibit 506,  
23 and I'm going to play it at 1 hour, 15 minutes, and 49 seconds.

24 MR. KENERSON: Your Honor, if we may be heard?

25 THE COURT: Yes, I understand.

1           Mr. Smith, you can complete your sentence, but the  
2       government wants to be heard before we play the --

3           MR. SMITH: Okay. Your Honor, I've completed the  
4       sentence.

5           THE COURT: -- exhibit.

6           All right.

7           (Bench discussion:)

8           MR. KENERSON: I think our request for refreshing --

9           THE COURT: Ms. Harris, we need the husher.

10          MR. KENERSON: I think our request --

11          (Audio interruption.)

12          MR. SMITH: That was a mistake, Your Honor.

13          MR. KENERSON: I think our request for -- request for  
14       refreshing would be where there's a transcript available,  
15       Mr. Smith, use it just for the purposes of not playing whatever  
16       it is to refresh Mr. Bertino's recollection in front of the  
17       jury.

18          THE COURT: I think that is -- Mr. Smith, that is the  
19       issue, whether it's that, or whether we actually -- and I don't  
20       know technologically whether we have this or not -- to be able  
21       to put -- I mean, in theory, we could put headphones on the  
22       witness, if we knew how to do that. But, I do think it's --  
23       the normal way to refresh the witness's recollection is just to  
24       have the witness be exposed to whatever it is, rather than the  
25       jury.

1           So, I think, Mr. Smith, if you have the transcript  
2           there, that's sort of the easier and better thing to do because  
3           it will refresh him without putting the matter before the jury.

4           MR. SMITH: Your Honor, I am happy to show the  
5           witness a transcript.

6           THE COURT: Okay. All right. Very well. Very well.

7           (Open court:)

8           THE COURTROOM DEPUTY: Mr. Smith, will you say the  
9           exhibit again?

10          MR. SMITH: Excuse me?

11          THE COURTROOM DEPUTY: Can you tell me what exhibit  
12          this is? I was working with the monitor.

13          MR. SMITH: It's Nordean Exhibit 509.

14          THE COURTROOM DEPUTY: Nordean 509.

15          MR. SMITH: Correct.

16          THE COURTROOM DEPUTY: Thank you.

17          BY MR. SMITH:

18          Q. So, Mr. Bertino, I'm putting up a transcript on the screen  
19          here. And -- so, I'm going to draw a line on the screen and  
20          ask you, in particular, about the shorter line on the  
21          right-hand side of the page (indicating). Let me know when you  
22          finish reading that.

23          A. You want me to read it to myself?

24          Q. Yeah, to yourself, and see whether you recall that  
25          conversation with agents during your March 2022 interview.

1 THE COURT: Mr. Smith, while he's reading that, could  
2 you just let us know what page this is for the record?

3 MR. SMITH: This is page 79 of the March 18th, 2022,  
4 transcript.

5 BY MR. SMITH:

6 Q. Mr. Bertino, have you read that?

7 A. I have.

8 Q. Okay. Now, does that refresh your recollection about  
9 whether agents told you that Enrique Tarrío created the 1776  
10 Returns document?

11 A. Yeah, I see that they did. I didn't remember specifically  
12 in the moment.

13 Q. So, let me just clarify what you said.

14 When you say, "They did," you're agreeing that agents  
15 informed you that Enrique Tarrío created the 1776 Returns  
16 document?

17 A. That's what it says there, yes.

18 Q. Right. And now that I've refreshed your recollection, do  
19 you recall that that changed your opinion about what might have  
20 happened on January 6?

21 A. No. The document itself changed my opinion.

22 Q. The document itself changed your opinion?

23 A. Yep.

24 Q. And when you had this conversation with agents, did you  
25 come to understand that that document might have been something

1 that was pursued on January 6th?

2 A. Did I believe that it was something that was pursued?

3 Q. Um-hum.

4 A. I believe it resembled something like what happened, so,  
5 yeah.

6 Q. Right. Right. And, in fact, after agents told you that  
7 Enrique Tarrío created that document, you indicated to them  
8 that your understanding of Enrique Tarrío had changed, right?

9 A. Not after he created it. After I saw that he had it.

10 Q. Okay. So, I'm going to see whether another section of this  
11 refreshes your recollection.

12 So, I'm going to point you to one section of the  
13 transcript. It's a paragraph that I've put a yellow line next  
14 to. And let me know when you finish reading that.

15 (Pause.)

16 THE COURT: And, again, Mr. Smith, just for the  
17 record, the page number.

18 MR. SMITH: The page number here, Your Honor, is 81.

19 BY MR. SMITH:

20 Q. So, now that you've read that paragraph, do you recall  
21 informing agents that you did not have any idea that Mr. Tarrío  
22 had something like that reflected in the 1776 Returns document  
23 planned?

24 A. Yeah, I definitely said I didn't know anything about it.

25 Q. Okay. And the phrase "Winter Palace," you recall telling

1 the agents you weren't aware of what that meant either, right?

2 A. That's correct.

3 Q. Okay. So, do you recall informing agents after that you  
4 were very upset that a good friend like Enrique Tarrío wouldn't  
5 bring you in on the 1776 Returns plan?

6 MR. KENERSON: Objection to hearsay, what he told the  
7 agents.

8 MR. SMITH: This is not offered for the truth, Your  
9 Honor. This is about his state of mind for -- if I can --

10 (Bench discussion:)

11 MR. SMITH: Your Honor, the question is --

12 THE COURT: Mr. Smith, hold on. Okay.

13 MR. SMITH: -- in this direction, and Mr. Bertino  
14 changed his mind about whether he recalled that he understood  
15 there were plans to storm the Capitol on January 6 after he saw  
16 this document. So, what I'm explaining here is the process by  
17 which he arrived at his testimony that he gave today, and it  
18 happens in this moment, Your Honor.

19 So, it's not being offered for the truth about what  
20 he understood about what Mr. Tarrío was doing, but his -- the  
21 change in his position, Your Honor, which is fruitful ground  
22 for cross-examination.

23 THE COURT: You get to -- Mr. Smith, you can't offer  
24 this for his state of mind. You can cross-examine him with  
25 prior inconsistent statements.

1 MR. SMITH: I'm not -- sorry. I'm not using a prior  
2 inconsistent statement, Your Honor, right now. I'm just asking  
3 him about his conversation with agents because this impeaches  
4 his testimony, not through a prior inconsistent statement, Your  
5 Honor, but because he initially believed one thing about  
6 January 6 --

7 THE COURT: Right.

8 MR. SMITH: -- and then he changed his position. So,  
9 the explanation for why that happened involves this  
10 conversation. I'm not offering -- asking him to recall what he  
11 said to an agent to prove the truth of what he believed about  
12 Enrique. In fact, that would be contrary to the defense  
13 interest because I don't want to prove that Enrique Tarrio  
14 planned January 6 with 1776 Returns.

15 So, it's not being offered for its truth, Your Honor.  
16 It's being offered to show, Your Honor, the agents deceived  
17 Mr. Bertino when they told him Enrique Tarrio created the  
18 document. He still, to this day, doesn't know that he was  
19 deceived. So, Your Honor, this is very relevant testimony for  
20 its proof.

21 THE COURT: I haven't heard -- and, first of all, the  
22 question of whatever the agents told him is totally irrelevant.  
23 I mean, you've elicited that they told him whatever they did.  
24 But, I guess I'm -- explain to me, again, the basis why --  
25 again, this -- his state of mind when speaking to law

1 enforcement agents is not -- is not admissible.

2 MR. SMITH: True.

3 THE COURT: So -- go ahead.

4 MR. SMITH: Your Honor, before he was shown this  
5 document in the transcript, he was informing the government,  
6 many times, there was no agreement or plan to storm the  
7 Capitol, in so many words. We can go through it. It's shown  
8 in many different ways. He's shown this document --

9 THE COURT: Right.

10 MR. SMITH: -- and then informed that Enrique Tarrio  
11 created it.

12 THE COURT: Um-hum.

13 MR. SMITH: That's false information, Your Honor.  
14 And, so -- then, after he's told that, he says: Well, gosh, if  
15 I had known that, I see all the facts I've talked about in a  
16 different light, your Honor.

17 So, the fact that his opinion is based on inaccurate  
18 information is relevant to the testimony because it impeaches  
19 what -- it goes to the credibility of the testimony, Your  
20 Honor. Even if he's not giving false information, he has an  
21 inaccurate premise that's been given to him from the  
22 government. We have to be able to elicit this, Your Honor.  
23 And, it's not for the truth that Mr. Tarrio was storming the  
24 Capitol. We don't want to prove the truth of that.

25 THE COURT: Mr. Kenerson, your response?



1 MR. KENERSON: Your Honor, I still don't think that  
2 that entitles Mr. Smith to go straight to the transcript. I  
3 don't think that what -- I think that --

4 MR. SMITH: I'm not going straight. I just want to  
5 ask the question, Your Honor.

6 THE COURT: Please.

7 Mr. Kenerson, you can continue.

8 MR. KENERSON: Mr. Smith did go straight to the  
9 transcript, and that's why I objected. I don't disagree that  
10 he has a right to explore this issue on cross-examination with  
11 Mr. Bertino, but I think he has to ask the question of  
12 Mr. Bertino first. He has all kinds of good faith basis to ask  
13 questions along the lines of what he's suggesting.

14 And I don't disagree that it's relevant for him to  
15 ask questions about it, but I don't think he gets to come  
16 straight out with, When you told the agents X, Y, and Z, unless  
17 it's inconsistent with what he says on the stand.

18 THE COURT: I think that's right, Mr. Smith. You  
19 have --

20 MR. SMITH: I don't disagree. I don't disagree.

21 THE COURT: You have --

22 MR. SMITH: I'm just trying to ask the question.

23 And I'm sorry this is still up on the screen. I can  
24 put it back up after --

25 THE COURT: That's all right. The point is, you have

1 to ask: And once you learned that, you changed your tune  
2 before those agents, didn't you?

3 And if he says, yes, I did, then that ends. And if  
4 he says, no, I did not, then you have it, then it's a prior  
5 inconsistent statement. But that's the way to do it.

6 MR. SMITH: I understand, Your Honor.

7 THE COURT: Okay.

8 MR. SMITH: And that's what I was going to do, but  
9 there was an objection, so -- because it was still up on the  
10 screen, Your Honor. That's it.

11 Okay. Thank you.

12 THE COURT: All right.

13 (Open court:)

14 BY MR. SMITH:

15 Q. So, after you were shown this document, the 1776 Returns  
16 document, and you were told that Enrique Tarrío created it, you  
17 then told the agent interviewing you that you had a -- that  
18 changed your opinion of what happened on January 6, right?

19 A. Again, I don't think I was talking about the fact that he  
20 created it. I don't even remember that part. The only part I  
21 remember was being shown that he had it, that it was in his  
22 possession, and that's what affected it.

23 Q. Okay. Okay. And then I showed you a document and you  
24 indicated that that refreshed your recollection and that agents  
25 informed you that you had created it and you said, "wow,"

1 right?

2 A. Yes.

3 Q. Okay. So, now that the -- after the agents showed you this  
4 document and after they told you that Enrique Tarrío created  
5 it, your opinion about what might have happened on January 6  
6 changed in that interview, right?

7 A. In the entire interview?

8 Q. Well --

9 A. Or are you linking it to that one part?

10 Q. After you see the document, your position with the agents  
11 about happened on January 6 changed, right?

12 A. Yes.

13 Q. You told the agents that someone, if they were a good  
14 friend of yours, like Enrique Tarrío, they wouldn't hide  
15 something from you like the 1776 Returns document, right?

16 MR. KENERSON: Objection to hearsay.

17 MR. SMITH: Your Honor, we just went through this on  
18 sidebar. This isn't being offered for its truth.

19 (Bench discussion:)

20 THE COURT: Mr. Kenerson, why isn't this what we just  
21 discussed?

22 MR. KENERSON: Maybe I'm confused. I thought it was  
23 what we just discussed. I don't think that that statement is  
24 inconsistent, and I think he's able to explore with Mr. Bertino  
25 what his --

1 MR. SMITH: Your Honor, this isn't being offered as a  
2 prior inconsistent statement. I'm asking him a question.

3 MR. KENERSON: He's asking a question about what  
4 Mr. Bertino told the agents, if -- that the -- he had asked  
5 Mr. Bertino about why he changed his version of events, I  
6 think, all day long on the stand. The only way he gets to ask  
7 him about why Mr. Bertino told the statements is if what he  
8 told the agents is different than what he says on the stand.

9 MR. SMITH: Your Honor --

10 THE COURT: Right. But he's asking -- but, Mr. --  
11 how can Mr. Smith set this up unless he asks: Well, then after  
12 that, you told them X?

13 If he says, yes, that's right, then --

14 MR. SMITH: Your Honor, may we just be allowed to  
15 continue? There's been an objection after every --

16 THE COURT: I understand. But, you're doing  
17 something, Mr. Smith -- in fairness to the government, this is  
18 an unusual way of using this, number one.

19 And, number two, I think you kind of -- well, you've  
20 kind of toggled between saying "I'm using it as a prior  
21 inconsistent statement" versus some other thing linked to his  
22 intent. So, in fairness to them, I think you've kind of  
23 shifted the basis here.

24 So, I think the --

25 MR. SMITH: I'm not getting into the truth of what

1 he's telling the agents, Your Honor. I'm getting into how he  
2 changed his position after he saw a document. I can't do that,  
3 as Your Honor points out, without asking about a conversation.  
4 But, the facts, what he says to the agent, is not being offered  
5 for the truth. It's being offered to show why he changed his  
6 position about a relevant matter. This is -- so, when the  
7 government puts a witness on, they'll ask him about why he took  
8 the position. Why? The government would ask: Why did you do  
9 this? And what did the --

10 THE COURT: Correct. It's not a comparable  
11 situation. You get to -- again, because his intent in the  
12 middle of this interview is not relevant, you can ask him --  
13 use it as a prior inconsistent statement, but -- look,  
14 Mr. Smith, this is -- you're seeking to do something that is  
15 outside the box here. What I would ask you to do is move on  
16 from this. We'll come back to it, and you'll have a chance to  
17 talk to me before we -- before the end of the day.

18 But, again, this is -- this is not the usual use of a  
19 prior inconsistent statement. And I want to hear you on it,  
20 but I don't want to -- and if I'd had the opportunity to hear  
21 this before now, we wouldn't be in this spot. So, I would just  
22 ask you to just move past it and we'll come back to it. And if  
23 I -- we can talk about it before the end of the day.

24 MR. SMITH: Okay. Thank you, Your Honor.

25 THE COURT: All right.

1 (Open court:)

2 BY MR. SMITH:

3 Q. So, Mr. Bertino, we're going to get back to that document.

4 So, you testified on direct that on January 6, you  
5 anticipated a, quote, All out revolution.

6 Right?

7 A. I don't know if that was my exact --

8 Q. You anticipated a revolution on January 6. That was your  
9 testimony.

10 A. If that's -- I don't know if that's -- do you have it  
11 written that that's exactly the words I said? I don't --

12 Q. Sir, this isn't a game. I'm asking you if you recall  
13 testifying about anticipating a revolution on January 6. Do  
14 you recall testifying that?

15 A. I don't think I said that exactly.

16 Q. What did you say?

17 A. I said, once it started happening, that I was happy about  
18 it happening.

19 Q. Are you sitting here right now and saying you don't recall  
20 that you anticipated a revolution on January 6 about an hour  
21 ago; is that what you're saying?

22 A. I don't know if that's the exact wording I used. I would  
23 have to see the record.

24 Q. Do you recall using the word "revolution," sir?

25 A. Yes.

1 Q. Okay. What was your comment about "revolution"?

2 A. I don't remember specifically exactly what it was.

3 Q. As you sit here today --

4 A. I said the word a lot.

5 Q. Yes. So, what did you --

6 A. You have to pick out which one you want me to quote.

7 Q. Okay. The use of the term "revolution." In connection  
8 with January 6, 2021, you used the word "revolution" in your  
9 direct testimony.

10 A. Yes.

11 Q. Okay. And what was your comment about revolution? Do you  
12 recall?

13 A. There was a few comments about it.

14 Q. What are they?

15 A. That we were looking forward to it, and that that was the  
16 only option left.

17 Q. Okay. It -- so "it" being January 6 and revolution?

18 A. The American Revolution was the only option left.

19 Q. Yes. And were you referring to what happened on January 6  
20 when you referred to "it" and the "revolution"?

21 A. I don't understand your question.

22 Q. When you said "We're looking forward to the revolution,"  
23 are you referring to what happened on January 6?

24 A. I was -- I would assume that that would be the exact thing  
25 we're talking about today.

1 Q. I'm not asking you to make an assumption. It was your  
2 comment. You said: We're anticipating looking forward to the  
3 revolution.

4 Right?

5 A. I believe so.

6 Q. Yes. And were you referring to January 6, 2021, the  
7 subject of your testimony in this trial?

8 A. Yes.

9 Q. Okay. So, you also testified, generally, that the Proud  
10 Boys should be considered the, quote: Tip of the sphere.

11 Do you remember that testimony?

12 A. Yes.

13 Q. Okay. You testified that: After the Supreme Court  
14 rejected the 2020 election challenges, all legal avenues were  
15 closed off and people grew desperate.

16 Right?

17 A. Yes.

18 Q. So, you testified that on January 4th 2021, you thought it  
19 was "go time," right?

20 A. I believe so, yes.

21 Q. Yeah. So, you testified that on January 6, you wanted the  
22 city to be burned to ash, right?

23 A. I did say that.

24 Q. Okay.

25 A. I think I agreed with somebody else who said that, actually.



1 Q. Right. And you adopted that position, right?

2 A. I guess you could say that.

3 Q. So, you also testified that the all-out revolution you  
4 anticipated was consistent with what happened on January 6,  
5 right?

6 A. The all-out revolution was consistent?

7 Q. Is the revolution that you're referring to consistent with  
8 what you saw happen on January 6?

9 A. No.

10 Q. It's not?

11 A. No. That's not a revolution.

12 Q. Okay. You testified you saw video on a phone display, a  
13 chat window, showing what happened at the Capitol on January 6,  
14 and you were asked whether that video display of the chaos  
15 there was consistent with the MoSD leaders -- with your  
16 conversations with MoSD leaders. Do you recall saying that?

17 A. Yes.

18 Q. Okay. And that's true, right, it's consistent with your  
19 conversations with MoSD leaders?

20 A. Consistent about us being up front, yes. Right at the  
21 front lines, yes.

22 Q. Okay. So, you've affirmed in court, on an earlier  
23 occasion, that it was true and accurate you entered into an  
24 agreement to use force to prevent the execution of a federal  
25 law on January 6, right?

1 A. Did I say that earlier, directly?

2 Q. No. I'm asking you about whether you've ever appeared in  
3 court and affirmed under oath that it is true and accurate that  
4 you entered into an agreement to use force to prevent the  
5 execution of law on January 6.

6 A. Yes.

7 Q. Okay. Is that true and accurate?

8 A. Yes.

9 Q. Okay. So, the government asked you some questions about  
10 the moods and feelings and tenor of other Proud Boys. Do you  
11 remember those questions?

12 A. Yes.

13 Q. Leading up to January 6, right?

14 A. I was asked those questions, yes.

15 Q. Okay. But, it didn't just ask you point blank: Did you --  
16 do you believe you agreed with someone to use force to prevent  
17 the execution of law on January 6?

18 Did the government ask you that question point blank?

19 A. I don't believe so. I don't know. I don't remember.

20 Q. Okay. So, you weren't lying in court when you affirmed  
21 that that was true, right?

22 A. I was not.

23 Q. Okay. So, you're testifying today, taking all this  
24 together, that prior to January 6, you anticipated violence on  
25 January 6, right?

1 A. Yes.

2 Q. Okay. Now, Mr. Bertino, you have assured FBI agents, on  
3 many occasions, that all of those things I just said were not  
4 true, right?

5 A. I don't know if all of them --

6 Q. You told the FBI, on pain of prosecution for false  
7 statements, that none of what you just said is true, right?

8 A. On which occasion are you talking about?

9 Q. March 2022.

10 A. Yes.

11 Q. You told them all of those things I just said were not  
12 true, correct?

13 A. I don't know, I would have to look line by line to figure  
14 out if I said that specifically.

15 Q. I'm going to help you do that.

16 A. Okay.

17 Q. I'm going to help you do that.

18 So, you told the FBI -- you were asked: Were you  
19 aware that the --

20 MR. KENERSON: Page and line, please.

21 MR. SMITH: This is Nordean Exhibit 506, March 18,  
22 2022 transcript, page 79.

23 BY MR. SMITH:

24 Q. You told the FBI --

25 MR. KENERSON: Line, please.

1 MR. SMITH: 5 to 12.

2 BY MR. KENERSON:

3 Q. The agents asked you: Were you aware that the Proud Boys  
4 were initially going to go to the Capitol at any point?

5 And you said: No. I thought that they were -- the plan  
6 was supposed to be that everyone would meet at the monument and  
7 you would go hear Trump's speech, and that's what it was going  
8 to be. That's the plan that I was aware of.

9 Did you make that statement?

10 A. If it's in there, then I did, yes.

11 Q. Okay.

12 MR. SMITH: So, Your Honor, we are now moving in the  
13 prior inconsistent statement because this is -- under the best  
14 evidence rule. This is Nordean Exhibit 506, and we're playing  
15 it at 1 hour, 15 minutes, and 23 seconds to 1 hour, 15 minutes,  
16 and 40 seconds.

17 THE COURT: All right. It will be admitted.

18 MR. SMITH: Thank you, Your Honor.

19 (Audio played.)

20 BY MR. SMITH:

21 Q. Is that true, Mr. Bertino?

22 A. I did say that. Yes, that's true.

23 Q. I asked you if it's true.

24 A. If that's true -- the statement is true?

25 Q. Was that you, sir?

1 A. Yes, that was me.

2 Q. Was your statement to the FBI true?

3 A. Not fully.

4 Q. "Not fully" how?

5 A. It wasn't a full --

6 Q. What's the partial part that's true?

7 A. Well, they were supposed to meet at the monument, but the  
8 plans for the rest of the day were supposed to be laid out  
9 there, and I never was told what the rest of the plan was.

10 Q. And you were never told what the rest of the plan was?

11 A. Yes.

12 Q. Okay. Then, why is that statement partially true and not  
13 100 percent true?

14 A. Because they were supposed to meet at the Washington  
15 Monument.

16 Q. That's what you said, sir.

17 Do you want to hear the statement again?

18 A. Yeah. That's the part that was true.

19 Q. What was the untrue part?

20 A. That the only plan was to listen to Trump's speech.

21 Q. And what was the rest of the plan?

22 A. The rest of the plan was to -- I mean, I don't even know if  
23 it was a plan. It was just a -- the reason that they were  
24 there was to stop the certification of the election.

25 Q. So, you bring up a good point, sir. You said: I don't

1 know if it was a plan.

2 Right?

3 A. Yeah. I didn't know the specific plan.

4 Q. You said: I don't know if it's a plan, but -- but, then --

5 How did you finish?

6 A. I don't know if it was the plan, the specific plan.

7 Q. Oh. How do you know it's any plan?

8 A. Like I said, I wasn't told what the plan was from the  
9 Washington Monument.

10 Q. Okay. So, you've pleaded guilty to using force to stopping  
11 the execution of the law, right?

12 A. Yes.

13 Q. And you're saying you don't know what any plan was  
14 involving the defendants except from going to the Washington  
15 Monument on the morning of January 6, right?

16 A. No. I didn't say that that's the only -- I said the plan.  
17 I don't know the exact plan of how it was going to get done. I  
18 know what the objective was.

19 Q. Okay. So when you said here: That's all it was going to  
20 be, going to the meeting at the monument, and then go to  
21 Trump's speech.

22 So, that was a false statement to the FBI, right?

23 A. Yes.

24 Q. Okay. So, sir, do you recall telling the FBI that --

25 MR. KENERSON: Page and line, please.

1 MR. SMITH: This is March 18th, 2022 interview, page  
2 101, lines 6 to 15.

3 BY MR. SMITH:

4 Q. Mr. Bertino, did you tell FBI agents --

5 THE COURT: Mr. Smith, I'm going to -- can I have you  
6 at sidebar, just for one second.

7 (Bench discussion:)

8 THE COURT: Mr. Smith, here's the issue: If the  
9 government -- you know, the government has -- and maybe they're  
10 not going to hear, but they have -- you have to pause a beat  
11 for them to be able to object. Because the whole point is, if  
12 they don't think, for example, that it's an inconsistent  
13 statement, they have the right to object.

14 MR. SMITH: Your Honor, that brings up a good point.  
15 I'm not actually moving it into evidence until I ask Your Honor  
16 to move it in. So, at that point, ideally the government would  
17 have seen it. But, at this point, Your Honor, I, obviously,  
18 have a good faith basis because I'm looking at a transcript.  
19 So, I don't need to pause a beat before asking a question.  
20 But, I will pause a beat, Your Honor, before moving it into  
21 evidence at that point.

22 THE COURT: Well, let me put it this way: We've been  
23 down this road with another witness before. And I'll just say  
24 this: There was a lot of trickiness about -- well,  
25 "trickiness," it sounds like -- too pejorative.

1           There was a lot of close calls about whether  
2           something was truly an inconsistent statement or not. So, I  
3           just ask you -- again, this could have all been avoided. But,  
4           I understand you don't want to give the government a heads-up.  
5           Fair enough. But, I would ask you to pause a beat just before  
6           you ask the question to give the government an opportunity to  
7           see what you're referencing.

8           MR. SMITH: And, so, Your Honor, just to be clear,  
9           I'm asking the question first. And because I have a good faith  
10          basis to ask the question, I don't need to, you know, identify  
11          anything for the government.

12          But, then, Your Honor, before I move it into  
13          evidence, I'm -- I plan on giving the government the citation,  
14          the page number, and everything because, Your Honor, I don't  
15          actually need the government's, kind of, approval to ask the  
16          question first because I'm looking at a transcript. I'm just  
17          asking about this prior statement. And if -- before Your Honor  
18          accepts it into evidence or not, Your Honor can then determine  
19          whether it's an inconsistent statement.

20          THE COURT: Well, let me put it this way: I'm going  
21          to order you to pause to give the government a chance to look.  
22          You may think you don't have to, but I'm ordering you to do it.

23          MR. SMITH: Okay. Okay, Your Honor.

24          THE COURT: Okay. All right. It's -- I'm talking  
25          about --



1 MR. SMITH: How long should I wait, Your Honor?

2 THE COURT: I'm talking about five seconds.

3 MR. SMITH: Okay. Thank you, Your Honor.

4 THE COURT: All right.

5 (Open court:)

6 MR. SMITH: For the benefit of the government and the  
7 Court, we are now looking at the March 18th, 2022 transcript,  
8 on page 101, from line 6 to 15.

9 BY MR. SMITH:

10 Q. Mr. Bertino, do you recall telling agents that: I can say  
11 100 percent that the target, if anybody was talking about the  
12 Capitol, I'm going to speculate that it was plan a protest  
13 there, because that's where everything was supposed to be  
14 happening, where protest was supposed to be planned there. I  
15 don't specifically remember anyone saying, Go attack the  
16 Capitol. I just -- I don't remember that at all. But if  
17 anybody mentioned the Capitol -- because, again, to my  
18 knowledge, everything was supposed to happen that day was a  
19 peaceful protest.

20 Do you remember saying that?

21 A. Yes.

22 Q. Thank you.

23 MR. SMITH: Your Honor, I am now moving that  
24 statement into evidence as it's inconsistent with several  
25 things in his direct testimony.

1 THE COURT: All right. It will be admitted.

2 THE COURTROOM DEPUTY: Is this still 506?

3 MR. SMITH: This is Nordean 506.

4 THE COURTROOM DEPUTY: Thank you.

5 MR. SMITH: And I'm going to, Ms. Harris, 9 minutes  
6 and 35 seconds.

7 (Audio played.)

8 BY MR. SMITH:

9 Q. Do you recall saying that to FBI agents, sir?

10 A. Now I do.

11 Q. Now you do. Was that true?

12 A. No.

13 Q. It wasn't?

14 A. No.

15 Q. Okay. But you're telling the truth today?

16 A. Yes.

17 Q. Okay. So, you testified about how Enrique Tarrío was  
18 arrested on January 5th -- or, excuse me -- was arrested before  
19 January 6, and then was released on January 5th, right, 2021?

20 A. Yes, I believe those dates are correct.

21 Q. Okay. And, so, we're now looking at the transcript  
22 March 18th, 2022, page 59, at lines 7 to 23.

23 MR. KENERSON: 59, lines 7 to 23?

24 MR. SMITH: 7 to 23.

25 BY MR. SMITH:

1 Q. So, Mr. Bertino, do you recall telling agents that after  
2 Enrique Tarrío was arrested, quote: There was no rhyme or  
3 reason at that point that I was aware of. There was no plan of  
4 anything?

5 A. I probably did say that.

6 Q. Okay.

7 MR. SMITH: Your Honor, I'm moving into evidence  
8 Nordean 506 at 55 minutes and 9 seconds.

9 MR. KENERSON: We would object to this one as not  
10 inconsistent.

11 (Audio interruption.)

12 MR. SMITH: Your Honor, if I may. Just, I think this  
13 one --

14 THE COURT: I'm going to overrule the objection.

15 MR. SMITH: Okay. Thank you.

16 This is at 55 minutes and 9 seconds, again,  
17 Ms. Harris.

18 Apologies for the delay, Mr. Bertino.

19 (Audio played.)

20 BY MR. SMITH:

21 Q. Do you recall saying that, Mr. Bertino?

22 A. Yes. I obviously said that, yes.

23 Q. Is that true?

24 A. Is it true that --

25 Q. Is it true --

1 A. -- once Enrique got arrested --

2 Q. -- there was no -- I'll read your quote: There was no  
3 rhyme or reason at that point, that I was aware of. There was  
4 no plan of anything?

5 A. Yeah. Because Enrique was arrested, so nobody knew where  
6 to go or what to do.

7 Q. And you agree with the sentiment. There was no plan of  
8 anything at that point?

9 A. Yeah, because we hadn't anticipated that.

10 Q. Okay. But, you still had an agreement to comit a seditious  
11 conspiracy?

12 A. Yes.

13 Q. You had no plan, but you had an agreement?

14 A. Correct.

15 Q. Can you explain how you can have no plan, but you can have  
16 an agreement?

17 A. Okay. I can give you an example, if you like.

18 Q. Sure.

19 A. So, if my girlfriend and I wanted to have bacon and eggs  
20 for breakfast that morning. We didn't have bacon, we didn't  
21 have eggs. Would I have to lay out every bit of the plan and  
22 what we had to do to get to the bacon and eggs to bring it home  
23 and make it?

24 Q. No. So, let's say someone asked you about your agreement  
25 with your wife -- or did you say your girlfriend?

1 A. Um-hum.

2 Q. Was it --

3 A. Girlfriend.

4 Q. Girlfriend. Someone asked you about your agreement with  
5 your girlfriend to eat bacon and eggs, right?

6 A. Uh-huh.

7 Q. And you tell them: You know what, at that point in the  
8 morning, there was no rhyme or reason at all. We didn't have  
9 any plan to do anything. There was no bacon. There was no  
10 eggs. We didn't know where to get the bacon and eggs. There  
11 was no hope of getting bacon or eggs.

12 So, you're saying you had an agreement with your  
13 girlfriend to make bacon and eggs?

14 A. If we both said, hey, you want bacon and eggs for  
15 breakfast? then we know that we have to do certain things to  
16 get bacon and eggs for breakfast.

17 Q. What's another word for doing certain things?

18 A. What's that?

19 Q. What's another word for, you know, an agreement to do  
20 certain things?

21 A. What's another word for an agreement?

22 Q. Yeah. When you agree with someone to do certain things,  
23 what do you call that?

24 A. There's a lot of things --

25 Q. Is it a plan?

1 A. I mean, it could be.

2 Q. What else is it?

3 A. Yeah, it could be a plan.

4 Q. When you agree with someone to do something in the future,  
5 is that what a plan is?

6 A. No. I would say a plan is the step-by-step, laid-out way  
7 that you're going to get it done.

8 Q. So, like, you're talking about maybe theoretically eating  
9 something, but not necessarily actually taking any steps to  
10 pursue it, right?

11 A. I mean, do I have to discuss with her how we're going to  
12 get it done? Or she knows, hey, we're going to have bacon and  
13 eggs for breakfast. Do I have to lay out: Hey, I'm going to  
14 have to go to the store, go down this aisle, buy the bacon, buy  
15 the eggs, get back in the car, drive home, put it on the oven,  
16 and then cook it?

17 I don't think we have to --

18 Q. Well, if you tell someone there's no rhyme or reason at all  
19 to what you're doing and you don't have bacon and you don't  
20 have eggs, yeah, you might have to discuss with somebody how  
21 you are going to do something, right?

22 A. I don't think I would need to discuss with her how we were  
23 going to get bacon and eggs for breakfast. I think she  
24 would --

25 Q. Is making bacon and eggs --

1 A. -- ultimately know.

2 Q. -- in your mind, trying to interfere with the government's  
3 peaceful transfer of power?

4 A. No, I don't think that's anything like that. I'm just  
5 trying to explain to you how you can do something without  
6 having a specific plan.

7 Q. But, sir, you just said it's like -- nothing like the  
8 analogy you just give me. You said, "Do you want an analogy?"  
9 And I said, "Yes," and then you started talking about bacon and  
10 eggs.

11 I'm talking about a plan to, effectively, topple the  
12 government. You're saying you had an agreement to do it, but  
13 no plan?

14 A. Yes.

15 Q. Okay. So you testified about the Telegram transcripts --  
16 the Telegram chats, right?

17 A. Yeah. Obviously, yes.

18 Q. Yeah.

19 A. There was a lot of them.

20 Q. Yeah. And, in your view, some of those chats -- some of  
21 those chats reveal your -- what you believe is your agreement,  
22 without a plan, to forcibly stop the execution of law, right?

23 A. Yes.

24 Q. Okay. So, I'm directing the government to March 18, 2022  
25 transcript, at page 75, lines 8 to 11.

1           So, Mr. Bertino, did you say, referring to the  
2 defendants: Whatever planning they were doing --

3           Excuse me. So, this is actually the June 9th, 2022  
4 transcript, page 15, 20 to 24.

5 BY MR. SMITH:

6 Q. So you had an interview --

7           THE COURT: Mr. Smith, if you can --

8           MR. SMITH: I'm not going to ask him the statement  
9 yet. I'm just -- foundation.

10          THE COURT: All right.

11 BY MR. SMITH:

12 Q. Mr. Bertino, you had an interview with the FBI in June of  
13 2022, correct?

14 A. Yes.

15 Q. Okay.

16 A. Two of them, I think.

17 Q. Okay. So this is page 15, lines 20 to 24.

18          Mr. Bertino, did you tell the FBI agent that, "If the  
19 Proud Boys had any plan, you know, plans they didn't want  
20 anyone to know about, they obviously weren't saying them in the  
21 Telegram chats"?

22 A. I don't know if I said that or not, specifically.

23 Q. Okay. So I'm going to bring up a copy of the transcript --

24          MR. SMITH: Well, actually, Your Honor, we'll just go  
25 with the impeachment at 16 minutes and 18 seconds.



1 (Audio played.)

2 BY MR. KENERSON:

3 Q. So, was that true?

4 A. I did say that, yes.

5 Q. I didn't ask you if you said it. I asked if it's true.

6 A. Is it true that they didn't put a specific plan in the  
7 Telegram chat?

8 Q. I think you added the adjective "specific," so I'll read  
9 your your quote again.

10 "If the Proud Boys had any plans, you know, plans they  
11 didn't want anyone to know about, they obviously weren't saying  
12 them in the chats."

13 That was your quote?

14 A. Yes.

15 Q. Okay. Is that true?

16 A. Yes. They didn't put it directly in the chat, yes.

17 Q. You keep -- do you notice how you keep adding adverbs and  
18 adjectives? I didn't ask you about "directly" or  
19 "specifically."

20 MR. KENERSON: Objection. Argumentative.

21 BY MR. SMITH:

22 Q. Is that statement true?

23 THE COURT: Overruled.

24 BY MR. SMITH:

25 Q. Is that statement true?

1 A. Yes.

2 Q. It's true. So, the Proud Boys did not have plans that they  
3 put into the Telegram chats?

4 A. I did not see the plan in the Telegram chat.

5 Q. Okay. Thank you.

6 So, just to take one step back, you testified, before I  
7 played that clip for you, that you believe your agreement that  
8 you entered into to use force at the Capitol was reflected in  
9 the Telegram chats, correct?

10 A. Yes.

11 Q. Okay. So, now, one thing I want to drill down here is --  
12 so, I was initially asking you about a March 2022 interview you  
13 did with the FBI, and I played you some audio clips from that,  
14 right?

15 A. You did.

16 Q. And the last one I just played was from a June 2022  
17 interview, right?

18 A. Correct.

19 Q. So --

20 A. If that's what you say. I don't have it on the screen,  
21 so --

22 Q. Okay. Well, you --

23 A. -- I'm taking your word for it.

24 Q. Okay. So, did you lie on multiple occasions to the FBI or  
25 just in that initial interview, when your memory was bad in

1 March?

2 A. I think I was a lot less honest in the first one than I was  
3 in the last ones, yeah.

4 Q. So -- so, you were more honest in the June 2022 interview?

5 A. Yes.

6 Q. Okay. So, this is the June 9th, 2022 interview transcript,  
7 page 81, lines 4 to 7.

8 THE COURTROOM DEPUTY: Exhibit number?

9 MR. SMITH: Thank you, Ms. Harris. It's Nordean 509.

10 THE COURTROOM DEPUTY: Thank you.

11 BY MR. SMITH:

12 Q. So, Mr. Bertino, you were asked by agents: When the Proud  
13 Boys group gets to the Washington Monument on January 6, where  
14 were they going to go?

15 MR. KENERSON: Objection. It's not inconsistent.

16 MR. SMITH: I haven't --

17 THE COURT: All right. Let me hear you at sidebar.

18 (Bench discussion:)

19 MR. SMITH: Your Honor, the next statement is: I  
20 don't have any direct information on what they were planning.

21 So, Your Honor, again, this is not about quibbling  
22 with the word "planning." He says that he had an agreement to  
23 use force on January 6, 2021. It's not about the semantics  
24 over the word "planning." This is inconsistent with maybe a  
25 dozen statements he's made.

1 THE COURT: Mr. Kenerson?

2 MR. KENERSON: This is, in fact, inconsistent -- or,  
3 not inconsistent with the statement that Mr. Bertino testified.  
4 He's testified that he did not have any direct information on  
5 what they were planning. This is exactly consistent with what  
6 he's testified.

7 THE COURT: Yeah. I mean, I think -- look, I think  
8 this is -- I understand the position the government is taking  
9 here, but I think -- again, to use a phrase we've used many  
10 times, that feels like it's slicing the bologna very thin.

11 I get what you're saying, Mr. Kenerson, but it's at  
12 least -- it's at least -- let's put it this way: It's at  
13 least -- the argument that it is inconsistent is strong enough  
14 to let the -- I think, to let the defense use it in the way  
15 they're going to -- how they're going to argue it, and you all  
16 can ask questions on redirect, if you would like, making the  
17 point you're saying.

18 So you may proceed, Mr. Smith.

19 MR. SMITH: Thank you, Your Honor.

20 (Open court:)

21 BY MR. SMITH:

22 Q. Mr. Bertino, I'm pulling up Nordean Exhibit 509 at 20  
23 minutes and 5 seconds.

24 (Audio played.)

25 So this is an interview you gave in June 2022, when

1       you're being honest, you said, right?

2       A.   Yes.

3       Q.   Okay.  So, you said here:  I don't have any direct  
4       information on what they were planning.

5       A.   I don't think that's what I said.  I think I said:  I don't  
6       have any direct information on where they're going to go.

7       Q.   Oh, well, that's not right.  So, I'll just -- I'll play  
8       that again for you so you can hear this one.

9               (Audio played.)

10      A.   Where they were planning on going?

11      Q.   No.  No.  No.  Okay.

12               (Audio played.)

13               I just hearing "planning" there, sir.  Did you hear a  
14      silent "go"?

15      A.   I'm pretty sure I heard myself say:  Where they're planning  
16      on going.

17      Q.   Oh, okay.  So there's an agreement that you entered into to  
18      use force on January 6, 2021, right?

19      A.   Yes.

20      Q.   And it involved the count of the Electoral College votes,  
21      right?

22      A.   Yes.

23      Q.   Where does that happen?

24      A.   At the Capitol.

25      Q.   Hmm.  So, you have an agreement to interfere with something

1 at the Capitol, but you don't know where the conspirators are  
2 planning on going?

3 A. I didn't know exactly where they were going from there,  
4 yes.

5 Q. I'm not saying "exactly," sir. You said you didn't know  
6 where they were planning on going.

7 A. And I'm telling you, I didn't know exactly where they were  
8 going.

9 Q. No -- exactly?

10 A. Yes.

11 Q. Are you saying it's more specific than the Capitol  
12 building?

13 A. It might have been.

14 Q. So you're saying that when you were truthfully answering  
15 that agent's question and you said you didn't know where they  
16 were planning on going, you knew in your head they were going  
17 to the Capitol, but you had a silent reservation because he  
18 didn't say exactly where they're going?

19 A. No. I --

20 Q. So you didn't want to tell him they're going to the Capitol  
21 because you thought: Well, did he mean at East Wing, West  
22 Wing? He didn't specify, so I won't say the Capitol.

23 Is that what you're saying?

24 A. No. I'm just saying that I didn't have the direct idea of  
25 exactly where they were going, how they were going to get

1       there, what route they were going to take, I didn't know.

2       Q.   You said you didn't know where they're going.

3       A.   Yeah. I didn't know which way they were going, yeah.

4       Q.   What? The agreement is to stop --

5       A.   I don't know where they were going.

6       Q.   Sir, the agreement is to stop something from happening in a  
7       specific place, right? Do you think -- was -- okay. Let me  
8       put it to you this way: Was the agreement not to use -- was  
9       the agreement to use force, in your view, to stop the Electoral  
10      vote count, would that have happened at Dunkin' Donuts?

11      A.   Could have.

12      Q.   How?

13      A.   I don't know. I'm just saying, I didn't know how they were  
14      going to get to the goal. I didn't have the exact laid-out  
15      plans of how they were going to achieve the goal.

16      Q.   So -- wait.

17      A.   I didn't have to have the plan to know what the goal was.

18      Q.   Didn't have to have a plan to know what the goal was.

19      You're being very -- I mean, this is getting kind of semantics  
20      right now. But, you're saying the agreement that you had could  
21      have contemplated interfering with members of Congress at some  
22      place other than the Capitol building?

23      A.   What I'm saying is, I did not know the specific plan that  
24      they had to achieve the goal that we all had.

25      Q.   But, what you said here to the agent is -- you didn't know

1 where they were planning on going, you said.

2 A. Yes.

3 Q. Okay. So, you're saying your agreement to use force to  
4 stop members of Congress from counting Electoral College votes  
5 could have happened -- could have been executed anywhere?

6 A. I don't know.

7 Q. You don't -- well, what do you know about it?

8 A. I know that --

9 Q. You don't know where it was going to take place, right?

10 A. I do --

11 Q. You don't know where the agreement was going to take place?

12 A. Well, are you going to let me answer?

13 Q. Yes.

14 A. Okay. I didn't need to know exactly where they needed to  
15 go to achieve the goal. That's what I'm trying to explain to  
16 you.

17 Q. Okay. You're saying you didn't know where they needed to  
18 go to achieve the goal. So --

19 A. Correct.

20 Q. -- I am asking you a second question, which is: How that  
21 goal could have been achieved in any place other than the one  
22 specific place, the Capitol building?

23 A. There's a lot of places that could have been taken care of.  
24 There was a plan with a whole bunch of other buildings  
25 involved.



1 Q. And how would they use force to stop the vote count in  
2 Dunkin', like you said? Dunkin'.

3 A. I don't know what the plan was. I don't know how they  
4 could have done it. Again, I didn't have that information.

5 Q. It sounds like you don't know what the agreement is.

6 A. No, I know what the agreement was.

7 Q. Okay. So, I'm now -- I want to go to your point about  
8 being more honest -- or, more honest in this June interview,  
9 right? So we're going to June 9th, 2022, page 85, lines 10  
10 to 24.

11 MR. KENERSON: Lines again, please.

12 MR. SMITH: 10 to 24, page 85.

13 BY MR. SMITH:

14 Q. So, Mr. Bertino, did you tell agents, "I don't want to seem  
15 like I'm being dishonest, but I did not have conversations  
16 about -- with anybody about going into the Capitol building  
17 previously"?

18 A. I did say that.

19 Q. Is that true?

20 A. Yes.

21 Q. Okay. Do you recall telling the agent, "I can't remember  
22 ever saying, hey, is anybody going to go into the Capitol?"

23 A. Yes. I did probably say that, yes.

24 Q. Okay. So -- so, the agreement, in your view, that you  
25 pleaded guilty to involved, again, no one going into the

1 Capitol building?

2 A. I didn't say that. I just said that nobody ever told me  
3 directly how they were going to go in or when they were going  
4 to go in or if they were going to go in.

5 Q. Okay. So, again, I guess, my question for you is: How did  
6 you understand the agreement being executed, sir?

7 A. Because I didn't need to know the plan to understand that  
8 everybody had the exact same goal in mind.

9 Q. So, if the agreement is to use force to stop a specific  
10 activity, okay --

11 A. By any means necessary, yes.

12 Q. -- you agreed to that much, right?

13 A. Yes.

14 Q. And that specific activity, you agree, happens in one  
15 place, right?

16 A. I don't know specifically -- I'm not a tactician. I can't  
17 figure out exactly where everything needs to happen. I didn't  
18 write a plan to do it, so, therefore, I don't know how the  
19 objective was supposed to get taken care of. I wasn't there in  
20 D.C., so I wasn't given the ground information.

21 Q. Can you come up with some way, sitting here right now, that  
22 that agreement would be executed without anyone going to the  
23 Capitol?

24 MR. KENERSON: Objection. Speculation.

25 THE COURT: Sustained.

1 MR. SMITH: Your Honor, if he's saying, I had an  
2 agreement, there was no plan on -- I didn't have any conception  
3 of where it would occur, I'm asking him to explain how he had  
4 a -- an agreement with someone if there was no understanding of  
5 how it would be executed.

6 THE COURT: Um --

7 MR. SMITH: And my question is what he thought would  
8 happen in his agreement.

9 THE COURT: Okay. Ask the question again.

10 BY MR. SMITH:

11 Q. So, sir, if -- you've testified that you had no aware --  
12 awareness of any plan of any kind involving the Capitol. You  
13 never had that conversation with anyone; is that --

14 A. Correct. I did not have a specific plan, yes.

15 Q. Right. So when you reached your agreement to use force to  
16 prevent members of Congress from counting votes and you didn't  
17 have a conception of where that would occur, did you think to  
18 yourself: How is this going to unfold?

19 A. No.

20 Q. No? Okay.

21 A. I didn't need to know.

22 Q. So that's -- that's something to ask your lawyer, not to  
23 testify about.

24 MR. KENERSON: Objection.

25 THE COURT: Sustained.

1 BY MR. SMITH:

2 Q. Now, you've said, a couple of times, that you weren't aware  
3 of a plan. I mean, you're saying you didn't -- you had the  
4 agreement, but you didn't know a plan, right? Is that right?

5 A. Yes.

6 Q. Okay. So this is June 9th, 2022 transcript, page 14, lines  
7 8 to 20.

8 But, Mr. Bertino, you did know the plan. And, in fact,  
9 in the honest interview you said -- you told the agent what the  
10 plan was. Mr. Bertino, you said the plan was, "Tarrio told me  
11 he was going to be speaking, and I said I would go if we could  
12 speak -- if I could speak. And, so, essentially, the --  
13 originally the plan was supposed to be a small group of guys  
14 were supposed to go and protect."

15 And then you said, "So a small group of guys were  
16 supposed to be around, you know, us and getting us from stage  
17 to stage.

18 Did you say that?

19 A. That was definitely an original plan.

20 Q. I thought you said you didn't know the plan.

21 A. That was the original plan, before everything went south.

22 Q. Okay. So --

23 A. That plan changed. Obviously, they didn't do that that  
24 day.

25 Q. Oh, that plan changed, right. But, do you know how it

1 changed or when?

2 A. No. Because once I was not going, I was not in on the  
3 actual planning anymore.

4 Q. So, sir, do you understand that you've pleaded guilty to an  
5 agreement to use force on January 6, and the agreement was  
6 reached before January 6? Do you understand that?

7 A. Yes.

8 Q. Okay. So here you're saying that before January 6 -- do  
9 you know when -- strike that.

10 Do you know when Enrique Tarrio was arrested?

11 A. January 4th.

12 Q. Okay. So you're saying right here, the plan, until January  
13 4th, was supposed to be a small group of guys would go and  
14 protect people giving speeches, right?

15 A. No.

16 Q. That's not what you said there?

17 A. It happened -- whatever date Trump decided he was going to  
18 be speaking, that's when all those plans got thrown out the  
19 window.

20 Q. So I'm playing Nordean Exhibit 509, at 14 minutes and 24  
21 seconds.

22 MR. KENERSON: Is that what we just asked him about?

23 MR. SMITH: Yes. He's -- this is the statement where  
24 he explains what the plan was, before Enrique Tarrio was  
25 arrested.

1 MR. KENERSON: Object to that last characterization.

2 (Audio played.)

3 BY MR. SMITH:

4 Q. So, that is the one plan that you are testifying you were  
5 aware of, correct?

6 A. Yes.

7 Q. Okay. Now, I want to ask you about another statement you  
8 made. In March of -- the March interview, did you tell  
9 agents -- this is page 93, lines 3 to 8 -- "I mean, I'll be  
10 honest, I thought we were just making stupid social media posts  
11 and marching flags and, you know, protecting people"?

12 A. I guess I did. I can't see it on my screen, so I don't  
13 know.

14 Q. Okay.

15 MR. SMITH: So, Your Honor, I'm -- this is Nordean  
16 Exhibit 506. I'm playing at 1 minute to 1 minute and 25  
17 seconds.

18 (Audio played.)

19 BY MR. SMITH:

20 Q. Do you remember saying that?

21 A. Yes.

22 MR. KENERSON: Your Honor, can we have a sidebar?

23 THE COURT: Yes.

24 (Bench discussion:)

25 MR. KENERSON: I will note that what was just

1 played does -- the last portion of it matches up with the page  
2 and line number that Mr. Smith identified for the government  
3 ahead of time. The first portion, where he's talking about  
4 "that right there just blew my mind," does not. So, in terms  
5 of what Mr. Smith was instructed to do for the government, it  
6 does not match up with that, number one.

7 Number two, I don't know if this was what Mr. Smith  
8 was trying get to earlier that the Court said we would come  
9 back to later, but, if so, this was not an appropriate way to  
10 do it.

11 MR. SMITH: I'm not exactly sure what Mr. Kenerson is  
12 alluding to there, Your Honor. I was just playing this clip  
13 for the statement that he believed that on January 6 he was  
14 just making stupid social media posts, marching flags, you  
15 know, and protecting people.

16 THE COURT: Yeah. Mr. Smith, that -- I mean,  
17 Mr. Kenerson, I mean, the "blew my mind" part -- I mean,  
18 Mr. Smith, you should try to be more precise, although I'm not  
19 sure that's very prejudicial one way or the other. I don't  
20 sense -- this doesn't have anything to do with the issue we're  
21 coming back to, does it, Mr. Smith?

22 MR. SMITH: Your Honor, it could because that -- what  
23 Mr. Kenerson was picking up on was the tail end of that earlier  
24 conversation, but it's really to splice up the quotes with, you  
25 know, military precision on this, so -- yeah.

1 THE COURT: Understood.

2 It's 5:10. So I'm going to -- this is the time I was  
3 going to let the jury go anyway, only because -- maybe a few  
4 minutes earlier than I thought, only because I want to hear  
5 from you, Mr. Smith, on this issue before we break for the day,  
6 the issue that you had wanted to do. So, let's just break now  
7 and I'll hear from you on that and we'll come back in the  
8 morning. All right.

9 MR. SMITH: Okay. Thank you.

10 THE COURT: All right.

11 (Open court:)

12 THE COURT: All right. Ladies and gentlemen, it's 10  
13 after 5. We're going to break for the -- today. So we'll see  
14 you back here tomorrow morning, bright and early. Thank you,  
15 again, for your attention.

16 (Whereupon the jurors leave the courtroom.)

17 THE COURT: All right. Sir, you may step down.

18 MR. SMITH: Your Honor, so --

19 THE COURT: Please, you all may be seated.

20 And I just -- all right. Go ahead, Mr. Smith. I  
21 just wanted the witness to leave the courtroom.

22 MR. SMITH: So, what Mr. Kenerson picked up on there  
23 in that last audio clip that was played, is the -- is a piece  
24 of what I was trying to bring in through the witness earlier.  
25 So -- and I'll just play this for the Court right now. This



1 is --

2 THE COURT: Well, rather than play it for me, just --  
3 look --

4 MR. SMITH: Explain the relevance --

5 THE COURT: My job is to enforce the Rules of  
6 Evidence, and the Rules of Evidence are that, you know, the  
7 witness gives testimony and that prior -- and that there are  
8 certain ways in which prior statements can be used to  
9 cross-examine, as you know.

10 Prior statements that are inconsistent can be used in  
11 the way we all know they can be used. But, the reason I asked  
12 you to wait a beat is because by asking the question and going  
13 into the prior statement, if it's truly not inconsistent, then  
14 it's not a proper question. And, so, that's why I had asked  
15 you to wait the beat.

16 Now, this -- what you plan -- what you had planned to  
17 do with the issue we were going to come back to, if you could  
18 just explain it conceptually to me, government can respond, we  
19 can retire for the evening, and I'll have -- I'll be able to  
20 talk to you about it in the morning.

21 But, go ahead.

22 MR. SMITH: So, Your Honor, in this clip, which Your  
23 Honor heard, Mr. Bertino is saying -- he's being shown the 1776  
24 Returns document.

25 THE COURT: Right.

1 MR. SMITH: And he says that it blew his mind and,  
2 The thought that your friend -- and he's referring to  
3 Mr. Tarrío -- would involve you in something like this,  
4 referring to the document, is, he says: It's mind blowing.

5 Then he contrasts that. He says, I'll be honest, I  
6 thought, before I -- he's saying, before I saw this document, I  
7 thought we were just making stupid social media posts and  
8 marching flags and, you know, protecting people.

9 So, what happens in this clip is -- and I don't know  
10 if we need to get into all this complicated stuff about where  
11 it fits -- which particular rule it fits in. But, he's seeing  
12 the document, and he's saying: Wow. My understanding of what  
13 happened that day changed based on what you're showing me right  
14 now.

15 THE COURT: Right.

16 MR. SMITH: So, the reason I was asking him about,  
17 you know, did the agents tell you Tarrío created this, is  
18 because that, in the audio, is clearly a part of his surprise.  
19 He says -- I can play it for Your Honor. He says: Wow. And  
20 he says: Wait a second. I thought you just told me he  
21 received this, not that he made it.

22 And the agents, they were, like: No. In fact, he  
23 helped create this document.

24 Which is false. I mean, there is no evidence  
25 indicating he created it. So -- but, that changes his position

1 on what he -- you can hear it in the audio.

2 THE COURT: Right.

3 MR. SMITH: So, we're trying to show him that his  
4 understanding of what happened that day is based on an  
5 inaccurate fact.

6 THE COURT: Tell me what Rule of Evidence permits  
7 you -- I mean, I know you disclaimed: Well, do we really have  
8 to talk about the rules?

9 But, I actually -- his perception of this and, again,  
10 his position -- you know, you often talk about positions -- you  
11 get to use prior inconsistent statements, if the position  
12 someone has in their head is not really the relevant thing.  
13 And I don't think there's a basis -- it, frankly, doesn't --  
14 the delta -- what matters is the delta between his testimony  
15 here today and any other statements you have that you can  
16 show -- you can use to show that, in fact, on a prior occasion  
17 you said something different.

18 The fact that the -- he was shown something and told  
19 something untrue about it in a prior statement, and then within  
20 that prior statement his tone or his reaction to it changed, is  
21 just of no moment.

22 MR. SMITH: So, Your Honor, the inconsistent  
23 statement is this piece, quote, I thought we were just making  
24 stupid social media posts and marching flags and, you know,  
25 protecting people.

1           That's inconsistent with saying, I have an agreement  
2           to use force to -- okay.

3           THE COURT: I think that's fair, and you just did  
4           that.

5           MR. SMITH: And then, when he says, I thought we were  
6           doing that to get -- I guess, what you could characterize this  
7           is as a complete statement issue. He's changing his position  
8           here. He's saying, I thought -- I used to think X. Now that I  
9           see this, I think Y.

10          THE COURT: Um-hum.

11          MR. SMITH: To leave out that part of the prior  
12          inconsistent statement is misleading. Why should the jury not  
13          know that the reason he's saying, I thought this thing which is  
14          inconsistent with my guilty plea and my testimony, the reason  
15          I'm changing my mind is a false fact?

16          I mean, that's --

17          THE COURT: Because it doesn't matter. It doesn't  
18          matter for his testimony here today.

19          MR. SMITH: It doesn't matter --

20          THE COURT: Look, his testimony today --

21          MR. SMITH: What about foundation?

22          THE COURT: -- you all think it's false. Look, you  
23          all think he's not telling the truth. You get to leverage  
24          prior inconsistent statements to do all the things the Federal  
25          Rules let you do with prior inconsistent statements. The

1 fact that in a -- it doesn't -- it is -- it has no bearing on  
2 his truth today that he was shown a document in an interview,  
3 however long ago it was, and that based on that, his position  
4 or his statements seem to change within that interview. It  
5 doesn't matter.

6 MR. SMITH: Your Honor, can I use one analogy, and  
7 then I'll let it go and I won't --

8 THE COURT: Yes. Or cite me a rule that allows you  
9 to do this. But, go ahead.

10 MR. SMITH: So, let's say there's a murder  
11 investigation and there's a witness who is being interviewed by  
12 the investigators and the investigators -- I mean, it's not  
13 illegal to lie when you're interviewing someone. That happens.  
14 And, so, let's say the investigators tell the witness: Look,  
15 we found the suspect's DNA on the weapon. We found it on the  
16 weapon --

17 THE COURT: Um-hum.

18 MR. SMITH: -- and it's not true. It's false  
19 information.

20 THE COURT: Um-hum.

21 MR. SMITH: And up to that point, the witness had  
22 been saying: Well, you know, I don't really know. I don't  
23 really have any information for you.

24 And then the agents tell them -- the investigators  
25 tell them, Well, the DNA is found on the knife.

1 THE COURT: Um-hum.

2 MR. SMITH: And then the witness says, and this is  
3 recorded: Well, you know what? If the DNA was found on the  
4 knife, then that -- I mean, maybe -- you know -- maybe -- maybe  
5 that changes my position, maybe that --

6 (Ms. Hernandez handed note to Mr. Smith.)

7 MR. SMITH: You know, Ms. Hernandez is characterizing  
8 this as effect on the listener, which is a fair statement.

9 THE COURT: But here's the problem: And that's  
10 whether it's effect on the listener or intent. The Rules of  
11 Evidence do not permit you to -- the whole point about things  
12 like intent or effect on the listener is, When is the thing  
13 happening, and is that relevant to the case?

14 So, yes, in the middle of the conspiracy, someone's  
15 intent could be relevant. In the middle of a conspiracy, the  
16 effect on the listener could be relevant. But, in the FBI  
17 interview, unless you're going to show me a case in which a  
18 court has ever said this, that is not the person's state of  
19 mind in the FBI interview six months later, a year later is not  
20 relevant to the case in the same way that these -- in these  
21 other circumstances intent or effect on the listener can be  
22 relevant.

23 MR. SMITH: So, Your Honor, Your Honor, I think, has  
24 made the point yourself that this witness is characterizing  
25 statements that others make. He's not just reading them off

1 the screen. He's hearing lots of statements, and he's  
2 characterizing them. His -- the way he characterizes  
3 statements is based on his understanding of facts and context.

4 THE COURT: Um-hum. Um-hum.

5 MR. SMITH: If we can't show the jury that his  
6 understanding is based on a false premise, then we're basically  
7 prevented from -- it's a -- you could call it foundation, a  
8 foundation, a premise of his -- the characterization of his --  
9 of other statements as being conspiracy is inaccurate. And  
10 why? It's inaccurate because he was told that Tarrío created  
11 the document.

12 You could say I'm just spinning what the witness is  
13 saying. I would like to play it for Your Honor, and Your Honor  
14 can hear it. He's changing after he hears that.

15 THE COURT: Again, it doesn't matter that he changed  
16 within that -- within that statement. If he said something in  
17 that -- at any point in any of these statements that's  
18 inconsistent with his testimony today, you get to hit him over  
19 the head with it. But, it doesn't -- and to your point, I  
20 don't know -- maybe the government knows, I don't know whether,  
21 sitting here today, he believes this thing that he was told by  
22 the agents.

23 You know, I suppose it's -- it wouldn't be -- let's  
24 put it this way: It may well be that you can ask him that  
25 question. I mean: Do you today believe that -- whatever he

1 was told was -- that Tarrio created the document, or something  
2 like that. I mean, because arguably, that could have an effect  
3 on his testimony, I suppose.

4 But, that's -- that's a different question from  
5 getting all bollixed up about how he changed in a prior  
6 statement at a time when his intent or state of mind -- doesn't  
7 matter.

8 Mr. Pattis, I'll hear from you.

9 Oh, Mr. Pattis, I'm sorry. The microphone.

10 MR. PATTIS: It's the end of day. I'm old. I may be  
11 missing something. But, isn't it this simple: Didn't you  
12 initially tell the agent you didn't know anything about a plan?

13 Yes.

14 And now you're saying something differently, and the  
15 reasons you're saying something differently is you were shown a  
16 document and you were lied about it. Do you recall that, sir?

17 And if he denies it, show him then.

18 Well, I mean, it seems to me that that's directly  
19 relevant to why he's changed his testimony and it's within the  
20 grounds of proper impeachment and I can't see why it's not. I  
21 can see why the government doesn't want the jury to know the  
22 FBI lied to the guy, especially on the record before the case  
23 in front of us right now.

24 But, even as to investigative steps, if they're  
25 inducing someone to change their testimony based on deceit, I



1 think the jury is entitled to know it as a separate grounds for  
2 admissibility.

3 And I don't mean to step on Mr. Smith's  
4 prepresentation, but I'm simply not understanding the  
5 difficulty here.

6 THE COURT: Let me hear from the government, just as  
7 Mr. Pattis teed it up.

8 MR. KENERSON: I think -- Your Honor, our position  
9 is, I think as we stated at the first sidebar on this, we  
10 don't -- we think we agree that this is a ground, generally,  
11 that is proper cross-examination.

12 What we don't think is proper is for the witness's  
13 statements to the FBI to be elicited, unless they are  
14 inconsistent with something in testimony. So, in other words,  
15 they can ask him: Did you change because the FBI told you  
16 Tarrio created the document?

17 And then we go from there.

18 THE COURT: Right. Which is what Mr. Pattis just  
19 said.

20 MR. KENERSON: Yeah. And I have no problem with  
21 that.

22 THE COURT: Okay. That's what I thought as well.  
23 And then it becomes, you know, the statement -- whatever  
24 statement you believe -- I agree with that, but we have to --  
25 so, I think it sounds like, maybe, with the exception, maybe,

1 of Mr. Smith, we're all on the same page: You have to start  
2 with an inconsistent statement.

3 And I -- and that was my knee jerk reaction, but I  
4 wanted to hear what the government thought.

5 It is fair to say: Ah-ha, your statement that you  
6 gave in this interview is different, not from the -- another  
7 statement in the interview, but from your testimony here today.  
8 Because isn't it true, your statement back then was different  
9 than what you're testifying here today because the government  
10 lied to you?

11 That, I think, is -- that does seem fair game to me.

12 MR. SMITH: Your Honor, if I can rephrase it as just:  
13 Isn't it true that you changed your story about whether there  
14 was anything beyond mere protest after you were told -- after  
15 you were told by agents that --

16 THE COURT: But the relevant delta is between what he  
17 said in the statement and what he's saying today, not within --  
18 not within the prior statement, I think.

19 MR. SMITH: So if what he's saying today is the same  
20 as what he said after he changed his story, I guess -- I mean,  
21 I can ask --

22 THE COURT: Just summarize for me how you think --  
23 and I'll mercifully -- we'll break for the evening. Tell me  
24 how you -- what is the earlier -- just summarize for me what  
25 the earlier statement is, and then he's told, Tarrio --

1 MR. SMITH: The earlier statement, what he thought --  
2 had thought was: We were just making stupid social media posts  
3 and marching flags, you know, and protecting people.

4 THE COURT: Okay.

5 MR. SMITH: That's what he had thought.

6 THE COURT: Right.

7 MR. SMITH: And then he says -- when he sees the 1776  
8 Returns document and told Tarrío created it --

9 THE COURT: Yes.

10 MR. SMITH: -- he says: That just blew my mind, you  
11 know.

12 And then, you know, he goes on to explain: Well, you  
13 know, maybe there was this plan -- you know, maybe there was  
14 this plan in the testimony.

15 So, I'm going to ask him -- so, the question is --

16 THE COURT: What does he say exactly? I don't have  
17 any of these documents in front of me.

18 MR. SMITH: I can show it -- I can file it for the  
19 Court. Judge, I think the question is: Did your position --  
20 didn't your position on whether the nature and scope of the  
21 agreement change after you were told Tarrío created this  
22 document?

23 THE COURT: All right. I'll -- if you would,  
24 Mr. Smith, just email the transcript to me so I can see it.

25 MR. SMITH: I will. Thank you, Judge.

1 THE COURT: What's the government's final -- let me  
2 give you the --

3 First, let me hear from Mr. Roots, who did have his  
4 hand up.

5 MR. ROOTS: Yeah. It also needs to be admitted  
6 because it shows bad faith by the investigators. So here's  
7 someone that they pull in, the investigators tricked -- they  
8 tricked the person into changing his -- basically, they tricked  
9 him into pleading guilty. So they -- first he says, no, there  
10 was nothing and then they show, here's this thing that Tarrío  
11 wrote.

12 They tricked both that witness and his lawyer. They  
13 tricked his lawyer. This is bad faith under the *Youngblood*  
14 case, U.S. Supreme Court. It can come in to show that.

15 THE COURT: Well, it's -- as Mr. Smith did say,  
16 there's actually nothing unlawful about it, right? I mean, the  
17 case law is very clear about that, just to make that clear.  
18 I'm not saying that doesn't mean it's not fodder for  
19 cross-examination, and the government is not saying that  
20 either.

21 But, it is lawful for agents to do what -- what -- I  
22 don't know whether they did it intentionally here. But in a  
23 circumstance -- in a different circumstance, where they are  
24 doing it intentionally, there's nothing unlawful about it, as  
25 far as I know, under the case law. Again, doesn't mean it's

1 not fodder for cross.

2 What's the government's final -- well, I'll give you  
3 the final word, and then we will break for the evening.

4 MR. KENERSON: I think we agree with where it sounds  
5 like the Court is -- the Court is headed. This is -- we have  
6 never disagreed that this was a fertile ground for  
7 cross-examination. I think -- and we agree, as well, that the  
8 relevant delta for any inconsistent statement is between what  
9 he testifies on the stand now and what he testifies then.

10 I don't -- and I -- I think the question Mr. Smith  
11 suggested along the lines of: Your view that there was an  
12 agreement -- or something like that -- did that happen after  
13 you were shown this document, that -- probably something along  
14 those lines is probably a fair one. But, just to put what his  
15 statements were in this FBI interview to him is not proper.

16 THE COURT: Okay. All right. I'll look at it --  
17 Yes, Mr. McCullough?

18 MR. McCULLOUGH: I think, Your Honor, we would ask  
19 the Court -- move this Court to order the defendants to provide  
20 the specific statements that they believe are prior impeachment  
21 of his testimony so that we can evaluate these prior to and in  
22 advance of this. I think Mr. Smith has shown nothing, if not  
23 being very well prepared and organized in terms of saying he  
24 knows exactly where the transcript is. He knows exactly where  
25 the audio file is.

1 And, Your Honor, at this point there's no potential  
2 that if Mr. Smith provides that to the government, that he is  
3 in any way jeopardizing or prejudicing his case. It just  
4 allows both parties to be prepared and tee up these issues for  
5 Your Honor.

6 And just a very specific example here is that this  
7 clip that kind of kicks all this off, it does say: I've never  
8 seen anything like that.

9 And he was sent this?

10 The answer: He created that.

11 And then Bertino: Enrique created this? I thought  
12 he was sent this from someone else, isn't that what --

13 And then an agent steps in: He was, he was sent it  
14 and he had access to it.

15 So, Your Honor, that obviously is, you know, kind  
16 of --

17 MR. SMITH: We would ask Mr. McCullough to keep  
18 reading one more line, if that's okay.

19 MR. McCULLOUGH: "But he created this with  
20 assistance."

21 MR. SMITH: Thank you. That's all.

22 MR. McCULLOUGH: Yeah. Yeah. I mean, isn't it --  
23 but, you know, kind of in terms of the completeness in terms of  
24 putting these things in front of not only the witness, but also  
25 the jury, it's all kind of relevant. And, so, I think at this

1 point, Your Honor, we're past direct examination, it's just  
2 the -- frankly, the proper thing to do at this point.

3 THE COURT: It is appropriate. And, look, because I  
4 have no way -- unless you want to proceed in the very bulky way  
5 we've been doing this, I have no way of smoothly trying to  
6 apply the Rules of Evidence without this. So --

7 Yes, Mr. Smith?

8 MR. SMITH: Thank you, Your Honor.

9 Your Honor, in the middle of our cross, Your Honor  
10 ordered the defense to wait five seconds and give the exact --  
11 the pincite. And, Your Honor, that worked, so we would just  
12 ask -- ask to stick to that.

13 And, Your Honor, the government hasn't cited any case  
14 requiring a defendant to preview in advance the nature of their  
15 cross-examination. There is none, Your Honor.

16 THE COURT: Mr. Smith --

17 MR. SMITH: And that's --

18 THE COURT: Mr. Smith, it -- actually, I didn't jump  
19 in. But, the reality is, you didn't always wait the five  
20 seconds. Even beyond that, the government -- I mean, this  
21 is -- they can't talk to the witness. The witness is on cross.  
22 And in order to manage this trial, I am going to order any  
23 defendant who wants to confront the witness with a prior  
24 inconsistent statement, any defendant to provide that by -- to  
25 the government by 9 o'clock tonight.

1           The -- actually, let's do it this way: At least the  
2       first three defendants, because I don't think we're going to --  
3       I'll give the two trailing defendants a little bit of a  
4       reprieve until the next day because I don't think you all -- we  
5       probably won't get to you tomorrow.

6           But, I think for tonight, at least the first three  
7       defendants, if you all can tee those up for the government by  
8       9 o'clock tonight, just give them the page and line numbers --  
9       this is trial management 101 -- so that I'm in a position to be  
10      able to rule about whether it is an inconsistent statement so  
11      we're not dealing with this in the very awkward way we are.

12           MR. SMITH: Your Honor, we would just note that this  
13      is an asymmetry between the defense and the government. The  
14      government produces video clips that can sometimes last  
15      30 minutes to -- 30 seconds to 30 minutes. They do not tell  
16      us -- give us timestamps, pincites, like we're citing. So,  
17      Your Honor is imposing a burden on the defense that doesn't  
18      exist on the government. We're just pointing that out for the  
19      record, and we would argue that's a due process issue.

20           THE COURT: This is the only time in which the  
21      asymmetry is working the other way. The government has  
22      provided you all exhibits and all the rest, and things that  
23      I've required them to do, and I've always -- whenever -- if the  
24      defendant -- if the defense had a request, an objection, if our  
25      procedures over the last few days show nothing, it's that --



1 for example, when Ms. Hernandez articulated some objections, I  
2 maneuvered around, in terms of time, to make sure I understood  
3 them. I absolutely gave her the opportunity to amplify them,  
4 the government to respond, and me to be able to rule. So, I  
5 don't think this is an asymmetry at all.

6 MR. SMITH: Can we just put one fact on the record,  
7 Your Honor?

8 THE COURT: Sure.

9 MR. SMITH: Your Honor just indicated that the  
10 government has provided the defendants exhibits in advance.  
11 Your Honor, the government has been provided these defense  
12 exhibits in advance -- in November, to be absolutely clear,  
13 Your Honor. These are the government's own transcripts. These  
14 are interviews that the prosecutors themselves conducted.

15 Now, Your Honor, when the government gives us  
16 exhibits in advance, they do not give us pincites when each  
17 exact piece of information in a video will be played. So, Your  
18 Honor, respectfully, this is an asymmetry. You have not  
19 required the government to give us pincites for every video  
20 that's going to be played, and this is extremely burdensome.  
21 So, Your Honor, this is not fair fundamentally.

22 THE COURT: Okay. Okay. I understand --

23 MR. McCULLOUGH: Your Honor --

24 THE COURT: Hold on. Hold -- hold on.

25 I understand your position, Mr. Smith.

1           Ms. Hernandez, I'll hear from you, and then I will  
2           hear from the government.

3           MS. HERNANDEZ: Your Honor, prior consistent  
4           statements are only -- we only become aware of the prior  
5           inconsistent statements after the witness testifies on  
6           direct --

7           THE COURT: Right.

8           MS. HERNANDEZ: -- after the witness testifies on  
9           direct. I have notes from his testimony, but I won't really  
10          know until I get the transcripts, which are not coming my way  
11          until -- the morning transcript comes in late tonight -- I  
12          mean, really late -- and the afternoon transcript comes in in  
13          the middle of the night. So, I cannot tell the government  
14          prior inconsistent statements until I am aware of what those  
15          prior inconsistent statements are.

16          That's different from the government's having to show  
17          us their exhibits because they're putting on direct testimony.  
18          I just want the Court to know I --

19          THE COURT: So --

20          MS. HERNANDEZ: This isn't -- we're not -- in  
21          advance, we don't know what those prior inconsistent -- I --  
22          and would object on Sixth Amendment grounds. Ordinarily, the  
23          government -- the defense does not have to preview its cross to  
24          the government --

25          THE COURT: Um-hum.

1 MS. HERNANDEZ: -- which is what the Court,  
2 essentially, is asking us to do.

3 And it's not that I'm hiding the ball. I will be  
4 working on this cross through the night, through Mr. Smith's  
5 cross, because I don't want to repeat what he's done, so I  
6 won't know what I'm doing -- I'll be working on it until I get  
7 up and start crossing.

8 THE COURT: All right. Let me hear from whoever. I  
9 saw both -- I saw more than one prosecutor with their hand in  
10 the air.

11 MR. McCULLOUGH: Your Honor, the  
12 government's exhibits, as Your Honor knows, read -- the  
13 government's exhibits, particularly the video exhibits, are  
14 kind of alphabet soup. As Your Honor knows, I think we had an  
15 appearance of Lightyear --

16 Is that -- was it Lightyear? Ukulele and Lightyear  
17 this afternoon in terms of Mr. Kenerson reading off the  
18 specific video exhibits. The government has provided specific  
19 clips of all of its videos. We often provide the entire video,  
20 as well, so that they have the entire reference document.

21 But in terms of the way that the government has been  
22 presenting the evidence and providing in advance to defense  
23 counsel the specific clips that it intends to play, those are  
24 clipped. The assertion that we are providing long clips and  
25 then cherry-picking little snippets from it is, Your Honor,

1 just inconsistent with our understanding of the way we have  
2 proceeded here.

3 THE COURT: So that was my understanding as well.

4 Mr. Smith, is that not correct, that the government  
5 has indicated -- I'm not -- I'm not saying in every single --  
6 let me put it this way: I understand on both sides -- and I'm  
7 going to say something about Ms. Hernandez's concern that she  
8 raised. So, I understand we're proceeding in good faith on  
9 both sides.

10 But, in general, is not Mr. -- what Mr. McCullough  
11 said correct, that they have provided the individual clips?

12 MR. SMITH: Your Honor, I can give Your Honor a super  
13 specific example where what Mr. McCullough said is not  
14 accurate.

15 THE COURT: No. But that's not --

16 MR. SMITH: Government Exhibit 492-G.

17 THE COURT: Mr. Smith, I'm so sorry, but that's  
18 actually not what I asked. What I asked was: I understand  
19 that there might be exceptions to the general rule, but in  
20 general, is that not the case?

21 MR. SMITH: Your Honor, it's hard for me to say, in  
22 general, how long an average clip is that the government  
23 submitted. I -- off the top of my head, because that's what I  
24 can speak about now, there are -- there are clips where we  
25 don't know what the government is going to play. One example

1 of that is this -- the one we are complaining about with the  
2 Trump debate clip. Because a certain segment of it was played  
3 in opening, we understood that's what would be played.

4 Now the government says: Well, you should have known  
5 otherwise.

6 Okay. We're just taking the position we have not  
7 always known that, and there are -- I don't know how many  
8 examples there are of government clips that they don't play the  
9 whole thing, but they're there, Your Honor. And there isn't a  
10 hard-and-fast rule saying to the government, you must identify  
11 timestamps that you want to play, but that's what the Court is  
12 saying we should do on cross.

13 So, Your Honor, we just think it's -- this is a case  
14 where the government conducted the interview. The claim of  
15 surprise here is ludicrous, Judge. If you, yourself, conducted  
16 an interview, how could you claim you don't know what's coming?  
17 And, Your Honor, these clips were produced to the government in  
18 November.

19 THE COURT: So, let me just say this: If the  
20 government -- look, I have bent over backwards to give both  
21 sides, in my view, due process here. If there's been any --  
22 and, again, I point the parties to what we've gone through over  
23 the last 48 hours with regard to some of the objections  
24 regarding the Telegram chats. So, this is all an attempt to  
25 try to manage this process, as efficiently as I can, while

1 giving you all as much process as possible.

2 And if there was any occasion in which the defendants  
3 raised their hand on a particular video clip and said, Oh, my  
4 goodness, Judge, we've had no advance notice of what they're  
5 going to play, we don't know how to react to this, and raised  
6 their hand, I would have figured out a way to give you that  
7 process. I do think it's fair, and let me just say why.

8 I understand it's not a question of surprise. But, I  
9 do think, again, the question of whether -- the way that,  
10 Mr. Smith, you have proceeded with cross, in particular, and  
11 some other defendants, I would say, as well, has been an  
12 attempt to sort of troll through the prior statements of the --  
13 of the witness without -- without, I would say, regard for  
14 whether it's truly inconsistent.

15 The Rules of Evidence only allow you -- the point --  
16 the focus of the jury's attention should be on the witness's  
17 testimony today. And then, of course, to the extent there are  
18 prior inconsistent statements, in whatever form they are, you  
19 are allowed to use them the way the Federal Rules allow.

20 But, that presupposes that the statements are  
21 inconsistent. And, in this case, there are a lot of, I mean,  
22 close calls, which, candidly, I've always given to the defense,  
23 I think, because I think -- there are close calls, but I am  
24 erring on the side of allowing you to use statements that I  
25 think, at times, the government has said, oh, gee. That's not

1 really inconsistent, Judge. But, I think it's fair that they  
2 be prepared.

3 And, Ms. Hernandez, to your point, I'm just imposing  
4 a good faith basis. If you come back and get that transcript,  
5 okay, and say, tomorrow morning, Judge, actually, I wasn't able  
6 to provide this by 9 o'clock. I looked at the transcript.  
7 We're using something else, I'm not going to -- you know, I'm  
8 not going to cut your head off or prohibit you from using the  
9 statement.

10 MS. HERNANDEZ: You'll yell at me.

11 THE COURT: But, I think -- well, you know, I need --  
12 Ms. Hernandez, I need to do --

13 MS. HERNANDEZ: I'm sorry. I was joking. That was a  
14 joke, Your Honor. I apologize.

15 THE COURT: I need to do far more yelling, all right,  
16 to make the trains run on time here, frankly.

17 So, 9 o'clock tonight, good faith basis. If you come  
18 in and say, I saw the transcript, and here's something else I  
19 want to do, Judge, you know, by and large, I'm probably going  
20 to let you do it.

21 Mr. Pattis?

22 MR. PATTIS: There are lots of ways to skin the  
23 evidentiary cat. I mean, my style is a little less direct, and  
24 so I'll ask a witness: Do you recall? And I suppose -- and I  
25 don't know whether he's going to recall it or not, and I don't

1 want to get trapped tomorrow. If I say, Do you recall saying  
2 that the sky was blue? and then he says, No, I don't --

3 THE COURT: You don't have to --

4 MR. PATTIS: -- and I look and he shows it's green, I  
5 don't know whether to anticipate that or not. So, I mean, I'll  
6 do my best to provide the government with some notice, but my  
7 hunch is, it's not going to be satisfactory.

8 THE COURT: If you say the sky is blue, if your  
9 question is, do you remember the sky is blue, you have every  
10 reason to believe he's going to say, of course, the sky is  
11 blue. So, that's not your intention of yours to use a prior  
12 inconsistent statement at all.

13 MR. PATTIS: No, it's not. But it might happen in  
14 the moment, and I just want to make sure I'm covered.

15 THE COURT: Well, okay. And if that happens, it  
16 happens.

17 MR. PATTIS: Okay. That's all I need.

18 THE COURT: I'm talking about statements you all  
19 intend to use -- that you know you're going to be trying to use  
20 as a prior inconsistent statement. End of story.

21 See you all at 9 o'clock tomorrow.

22 \* \* \*

23

24

25



CERTIFICATE OF OFFICIAL COURT REPORTER

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

Dated this 23rd day of February, 2023

---

Janice E. Dickman, CRR, CMR, CCR  
Official court reporter  
Room 6523  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

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