

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,)
) Criminal Action
) No. 21-00175
Plaintiff,)
)
vs.)
)
ETHAN NORDEAN, JOSEPH R. BIGGS,) Washington, D.C.
ZACHARY REHL, ENRIQUE TARRIO and) March 13, 2023
DOMINIC J. PEZZOLA,) 1:38 p.m.
)
Defendants.)
)
* * * * *

TRANSCRIPT OF JURY TRIAL - DAY 46
AFTERNOON SESSION
BEFORE THE HONORABLE TIMOTHY J. KELLY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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I N D E XDirectCrossRed.WITNESSES FOR THE GOVERNMENT:

Nicole Miller

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EXHIBITS RECEIVED IN EVIDENCEPAGE

Defendant Nordean's Exhibit No. 317X

13134

1 THE COURTROOM DEPUTY: We're back on the record in
2 Criminal Matter 21-175 --

3 THE COURT: (Strikes gavel.)

4 Ms. Harris, you may continue.

5 THE COURTROOM DEPUTY: Thank you.

6 -- United States versus Ethan Nordean, et al.

7 THE COURT: All right. Before we get to the
8 dispute on the tape, let me just say this, Mr. Smith. I got
9 the opportunity to read what -- the motion on the witness
10 you filed. As related to that, I had said to the Government
11 when they asked that we would not -- I had represented to
12 everyone that we would not have trial on Friday.

13 It appears that one of the two larger items that I
14 had lined up for Friday, the parties have moved to continue
15 it. So if I can move my Monday -- I know Ms. Harris is
16 looking into whether I can move the larger item I have on
17 Monday --

18 No? They can't do it?

19 Ms. Harris, why don't you pick up the phone.

20 THE COURT: (Confers with the courtroom deputy
21 privately.)

22 All right. So, Mr. Hassan, go ahead.

23 MR. HASSAN: Judge, so I just want to advise the
24 Court, the Court noted this morning -- advised us that there
25 was no court on Friday. Some of us made travel arrangements

1 immediately after that, Judge. I can tell the Court that
2 both myself and Mr. Jauregui made travel arrangements to
3 bump up our travel from Friday, which was previously
4 scheduled, to Thursday, Judge, on the evening of Thursday,
5 to travel out of here on Thursday night, Judge.

6 I believe some of my colleagues also scheduled
7 hearings for Friday morning as a result of what the Court's
8 scheduling had informed us that there would be no court on
9 Friday. So I just wanted to advise the Court that may
10 impact things.

11 THE COURT: You made those arrangements today?

12 MR. HASSAN: Yes, Judge.

13 THE COURT: Well, I don't know what to tell you.
14 I've got -- I had one cancellation that could open up the
15 whole morning. And if you have to make arrangements to
16 change your plans, I think you're going to have to make the
17 arrangements.

18 I'll let you know as soon as we know whether I can
19 make it work. But obviously, you're in trial here; and if
20 we can have that half day on Friday, we're going to have it.

21 That dovetails into your request, Mr. Smith, for
22 the issue of the witness on the 20th.

23 I don't know if the Government -- and I also had a
24 chance just to see the situation this witness has found
25 himself in where, you know, the person has spent a lot of

1 their -- there's not a specific representation about the
2 amount of money, but has a vacation planned. And if I were
3 to take him on the 20th out of order, it might well be only
4 a day or two out of order, given where we are.

5 So what's the Government's view on that,
6 particularly when, as I said, again, we're talking about it
7 being out of order only a day or two?

8 MR. KENERSON: Could I have a moment to confer?

9 THE COURT: Sure.

10 MR. SMITH: Your Honor, I can't remember if I
11 mentioned this earlier, but we think the direct testimony
12 would take 30 to 45 minutes.

13 THE COURT: Right. I think that's the other piece
14 of it. As was described in the motion, we're talking about
15 testimony that would be relatively short and relatively
16 compact in terms of its scope.

17 MR. KENERSON: (Confers with co-counsel
18 privately.)

19 THE COURT: If the Government wants to --

20 MS. HERNANDEZ: Is this the first huddle? Is this
21 their first huddle?

22 MR. McCULLOUGH: For the record, the Government is
23 conferring, as we said we would.

24 MR. PATTIS: And that's Mr. McCullough speaking.

25 THE COURT: Folks, please.

1 Does the Government want more time to respond to
2 the request?

3 MR. KENERSON: We haven't had a chance to confer
4 yet.

5 MS. HERNANDEZ: Go ahead.

6 MR. KENERSON: Could we get back to you at the end
7 of the day today?

8 THE COURT: Sure.

9 I just wanted everyone to be aware, it's quite
10 possible we could have half a day on Friday. If so, maybe
11 that moves up the schedule such that it's so close that this
12 isn't worth -- this is an accommodation that's worth me
13 considering providing. That's number one.

14 Number two, on the --

15 MS. HERNANDEZ: On scheduling, your Honor?

16 THE COURT: I'm sorry?

17 MS. HERNANDEZ: On scheduling.

18 THE COURT: All right.

19 MS. HERNANDEZ: I had told the Court I have a
20 sentencing in front of Boasberg -- Judge Boasberg on Friday.
21 He's aware that I'm in the case, so it's just a matter of
22 letting him know. Should I tell him I'm --

23 THE COURT: I'll let you all know. We're working
24 on whether this is definitive or not.

25 MS. HERNANDEZ: Okay.

1 THE COURT: And as soon as I know it is, we'll let
2 you know.

3 MR. SMITH: Your Honor, we'd just like to make an
4 offer to the Government, if they might prefer, for their own
5 scheduling reasons, to have -- if the witness is going to
6 testify, to do it Friday rather than Monday, so that that
7 doesn't interrupt the conclusion of the Government's case,
8 meaning, you know, so it would be taken out of order but out
9 of order front-loaded rather than back-loaded, if that makes
10 any difference.

11 THE COURT: All right. So again, we don't know
12 the availability of Friday morning at the moment, but as
13 soon as we do know, I will let you all know. And if that's
14 something that makes this more convenient for the
15 Government, not more convenient than not doing it at all, I
16 understand, but something that plays a role, you all will
17 let us know.

18 With regard to the tape and what the parties have
19 gone back and forth with over the lunch hour on email, I
20 guess, you know, Mr. Smith, let's put it this way: Both
21 this transcript and the tape -- well, the transcript is
22 based in part on a tape that has been --

23 MR. SMITH: Enhanced.

24 THE COURT: -- you know, enhanced, right, through
25 a procedure that I don't have any way to know what it is.

1 So I'm not -- I think the Rules of Evidence require me not
2 to allow you to do this with this witness.

3 If you want to put someone on in your case to say,
4 Here's what I did and I manipulated the tape in this way and
5 all it did was enhance it and, look, this is what it says
6 and introduce it all that way, that strikes me as, you know,
7 potentially a way you could do it.

8 But I don't think you get to ask her, Hey, here's
9 this -- here's an enhanced tape or a transcript based on an
10 enhanced tape.

11 Don't you think that's right?

12 MR. SMITH: So I would want to make sure your
13 Honor got the opinion letter as well, because there's a
14 second document we sent called "CFS Report."

15 THE COURT: Yes.

16 MR. SMITH: And it explains the process. The
17 argument we would make -- I know the Court has ruled this is
18 a self-authenticating document because this is a signed
19 statement from the creator of the transcript explaining how
20 they made it.

21 THE COURT: I mean, it's a letter -- it's an
22 informal letter.

23 MR. SMITH: Well, so I think -- I believe -- I
24 might be mistaken, but I believe the rule for the
25 self-authenticating document is a signed statement from the

1 person who created the record, indicating how the record was
2 created, the source of the information, et cetera.

3 THE COURT: What rule are you referring to?

4 MR. SMITH: So, your Honor, I'll defer to my
5 counsel here who have the evidence book in front of me, but
6 I know the rule is self-authenticating document.

7 So, your Honor, when a Government transcript is
8 admitted, it's created by a transcriber who is not present
9 in court. And there was -- the defense never thought to
10 object to the Government's transcripts. But, your Honor,
11 they would not have needed to bring in the transcriber to
12 court to testify how they made a transcript because that's a
13 type of -- what they would provide is a letter signed from
14 the office of the transcription indicating how they
15 transcribed the transcript, when it was done.

16 So that's -- we don't think there's anything
17 different with this transcript than the ones the Government
18 has used.

19 THE COURT: Listen, with regard to what the
20 Government did, I would have taken out -- by the way, it's
21 Rule 902, for those scoring at home -- I would have taken up
22 whatever argument to admissibility people wanted to make
23 about those things. Of course, you know, that was teed up
24 for you a while ago.

25 But here, there is an objection. And Rule 902 has

1 domestic public documents that are sealed and signed. It
2 has to be -- it has to have a seal; it has to have a
3 signature purporting to be an execution or attestation. So
4 I don't think it meets the evidence that is the
5 self-authenticating bar. I don't rule out what you might be
6 able to do with this in your case; but at this point, I have
7 to rule it out.

8 MR. SMITH: Okay.

9 THE COURT: Anything further from either side
10 before we bring the witness back in?

11 All right. Then let's bring the witness and the
12 jury back in.

13 MR. SMITH: Your Honor, I've just been told by
14 wiser heads than mine that the transcripts are just aids for
15 the jury, not evidence, under D.C. Circuit case law. We're
16 just using it as an aid for the jury.

17 Just to be clear, can I show your Honor the
18 transcript that we would be using?

19 THE COURT: But here's -- Mr. Smith, again, the
20 problem is, it's based on an enhanced version of a tape that
21 I have no foundation to know what was done to it.

22 MR. SMITH: So, your Honor, it's also based on the
23 video clip that's in evidence that we're using. That's what
24 the opinion letter says.

25 THE COURT: It says both things. Right.

1 MR. SMITH: Both.

2 THE COURT: I can't pull apart what the person
3 said -- what the person relied on to say A or what the
4 person relied on to say B.

5 MR. SMITH: So, your Honor, I guess the way we
6 were thinking about it is not that, you know, we're
7 introducing this as evidence, but as the witness is
8 listening to -- and watching the videotape, the words are a
9 demonstrative to ask her, Can you see that? Can you hear
10 this?

11 And it just helps keep people who are the
12 fact-finder -- keep the statement in mind. It's not
13 something they can refer to later.

14 THE COURT: I hear what you're saying.

15 MR. SMITH: Yeah.

16 THE COURT: It is slightly -- and it is a
17 different issue than admitting it.

18 MR. SMITH: Yes.

19 THE COURT: But again, when I don't have any
20 foundation to know what was done to the tape, I can't allow
21 it. I can't allow it.

22 Ms. -- I can't allow it.

23 MR. SMITH: Your Honor, the same procedure has
24 been used, Ms. Hernández is pointing out, with another
25 government agent, Dubrowski, where he was put on the stand,

1 and one of the MOSD videos was played. And there's a
2 transcript: Did you hear this? Did you hear this? The
3 witness was asked of the audio, in the audio file, and there
4 was a transcript on the screen. I don't think that
5 transcript was admitted into evidence. But that's
6 essentially what we're trying to do here.

7 So there's no -- first, the opinion letter
8 explains how the enhanced audio file was played. But in any
9 case, we're not going to play the enhanced audio file. And
10 this transcript was created from a listener who listened to
11 this video file. If the witness doesn't see the same
12 statement that is on the transcript, she's free to say, I
13 don't recognize that statement.

14 But we're just -- this is just a tool that allows
15 us to walk through statements with her and ask her if she
16 understands them without it just being oral.

17 THE COURT: Again, if this were a transcript that
18 wasn't in part based on an enhanced audio, then -- and you
19 had teed it up for the Government in advance and they didn't
20 object, that would be one thing.

21 But they are objecting, in part because the
22 transcript was based on something technical that was done to
23 the video that I have no foundation to know what it is.

24 MR. SMITH: Your Honor, nothing was done to the
25 video, your Honor.

1 THE COURT: I'm sorry; The audio.

2 MR. SMITH: There are two -- just to be clear,
3 there are two clips here at issue. There's a video file and
4 there's an audio file. The audio file was enhanced. The
5 video file was not enhanced. It's in evidence.

6 The transcript was created after someone listened
7 to both the video file and the audio file.

8 THE COURTROOM DEPUTY: Jury panel.

9 (Whereupon, the jury entered the courtroom at 1:53
10 p.m. and the following proceedings were had:)

11 (Thereupon, the witness entered the courtroom and
12 the following proceedings were had:)

13 THE COURT: Everyone may be seated.

14 (NICOLE MILLER, GOVERNMENT WITNESS, PREVIOUSLY SWORN.)

15 CONTINUED CROSS-EXAMINATION

16 BY MR. SMITH:

17 Q. Good afternoon, Agent.

18 A. Good afternoon.

19 Q. So I think before we broke I was asking you -- I was
20 playing an audio and video file for you depicting Ethan
21 Nordean and some others discussing a plan. That was the
22 first statement that we heard, Mr. Nordean.

23 Do you remember that video clip I was showing you?

24 A. I do.

25 Q. I'm going to bring that back up, and I'm going to walk

1 you through specific statements that are made in it and see
2 if you can hear them. Okay?

3 THE COURT REPORTER: If I could just have an
4 identification for the record.

5 MR. SMITH: Yes. This is Nordean Exhibit 316, and
6 I'm beginning at 11 minutes and 8 seconds.

7 (Whereupon, segments of Defendant Nordean's
8 Exhibit No. 316 were published in open court.)

9 MR. SMITH: So I'm going to stop right there.

10 Ms. Harris, can we put that up on the screen?
11 We'll go back to 11 minutes and 8 seconds here.

12 (Whereupon, segments of Defendant Nordean's
13 Exhibit No. 316 were published in open court.)

14 BY MR. SMITH:

15 Q. Did you hear "We have a plan"?

16 A. I did.

17 Q. Okay. Do you understand that to be the voice of the
18 individual I've circled here, who is Ethan Nordean?

19 A. I do.

20 Q. Okay. Now I'm going to ask you to keep listening. And
21 can you see the timer on the bottom of the screen?

22 A. Yes.

23 Q. I'm going to ask you to listen around 11 minutes and 12
24 seconds. Okay?

25 A. Uh-huh.

1 (Whereupon, segments of Defendant Nordean's
2 Exhibit No. 316 were published in open court.)

3 BY MR. SMITH:

4 Q. Sorry. I should have said 11 minutes and 15 seconds.
5 Did you hear, "We're going to wrap around"?

6 A. I was listening to the -- for patriots.

7 Q. I'll let you listen again. This time, about 11:15 to
8 11:16. Can you see the timer on the screen?

9 A. Yes.

10 (Whereupon, segments of Defendant Nordean's
11 Exhibit No. 316 were published in open court.)

12 BY MR. SMITH:

13 Q. Did you hear, "We're going to wrap around"?

14 A. I heard "Wrap around."

15 Q. Okay. Now, just keep listening here.

16 (Whereupon, segments of Defendant Nordean's
17 Exhibit No. 316 were published in open court.)

18 BY MR. SMITH:

19 Q. I'm going to ask you to listen at 11:20 again for a
20 statement, "Bad-ass picture." Okay? I've gone back to
21 11:18 on the timer. Can you see that?

22 A. Yes.

23 (Whereupon, segments of Defendant Nordean's
24 Exhibit No. 316 were published in open court.)

25 BY MR. SMITH:

1 Q. Did you hear "Bad-ass picture"?

2 A. I did.

3 Q. Now I'm going to ask you to keep listening. See how it
4 says 11:21 on the timer?

5 A. Uh-huh.

6 Q. We're going to go from 11:21 to about 11:25. And what
7 you should hear from the same voice -- well, let me take a
8 step back.

9 Did "Bad-ass picture" appear to be the same voice
10 that we were listening to earlier?

11 A. I can't tell because it's faint.

12 Q. So -- but you can -- you did hear "Bad-ass picture"?

13 A. I did hear "Bad-ass picture."

14 Q. So I'm asking you to listen for that voice again between
15 about 11 minutes and 25 seconds and 26 seconds. You should
16 hear "Walking towards" and "Head back." That's what I'm
17 going to ask you for.

18 (Whereupon, segments of Defendant Nordean's
19 Exhibit No. 316 were published in open court.)

20 MR. SMITH: I'll play that again.

21 (Whereupon, segments of Defendant Nordean's
22 Exhibit No. 316 were published in open court.)

23 BY MR. SMITH:

24 Q. Did you hear "Head back" right as the timer is moving
25 from 25 to 26 seconds?

1 A. I didn't, because I think it's as the person's laughing.
2 I did hear "Walking towards," but I can't -- I didn't hear
3 the other thing you're asking about.

4 Q. I'll try it one more time and then we'll move on.

5 (Whereupon, segments of Defendant Nordean's
6 Exhibit No. 316 were published in open court.)

7 BY MR. SMITH:

8 Q. Did you hear "Head back" there?

9 A. No, but I got "Walking towards" again.

10 Q. Okay. So I won't keep torturing you with this.

11 So do you recall before we broke that I asked you
12 about some video shots where Nordean and others were
13 pointing in the direction of the -- pointing west in the
14 direction of the Washington Monument?

15 A. Yes.

16 Q. And I asked you questions about whether the rally was in
17 the same direction as the Washington Monument.

18 A. Yes.

19 Q. And then I think in response you testified, Well, that's
20 not what ultimately happened. Right?

21 A. I did.

22 Q. Do you remember saying that?

23 And by that, did you mean that the Defendants did
24 not ultimately head back west after the food trucks?

25 A. That they did not end up back at the rally.

1 Q. Right. Or they just head west after they --

2 A. Well, they went to the food trucks and then they went
3 back towards the Capitol.

4 Q. And that's east, right?

5 A. Yes.

6 Q. And you also meant that after they were -- you know, on
7 their walk, they might have been pointing towards heading
8 back to the Washington Monument, but they actually ended up
9 inside the Capitol Building. Right?

10 A. Repeat the first thing you said. Sorry.

11 Q. So when I was pointing out all these images -- or some
12 images of individuals on the march pointing back towards the
13 Washington Monument, you said, But that's not what they
14 ended up doing. Right?

15 A. Yes.

16 Q. And by that, you meant they ended up going east into the
17 Capitol Building. Right?

18 A. Right. They didn't end up back at the Monument.

19 Q. They didn't end up back at the Monument.

20 And might have the decision been made to go east
21 towards the Capitol after they had been pointing about going
22 back to the rally -- pointing west?

23 A. I don't know at what point that decision was made.

24 Q. You do not?

25 A. No.

1 Q. Okay. And by that, you mean you did not know at what
2 point the decision was made to head to the Capitol?

3 A. So I do not know at what point it was made if they
4 were -- well, hold on.

5 Go back to your -- so two questions ago, you asked
6 me if they were going to go back to the Monument. Based off
7 what I viewed, they did not.

8 Q. Sorry. I didn't ask you whether they were going to --

9 A. Well, if they --

10 Q. -- go --

11 THE COURT REPORTER: I'm getting too much overlap,
12 counsel.

13 THE COURT: If I can just step in here again. If
14 I can just have the witness wait until the full question is
15 asked and then, counsel, wait until the full answer is given
16 before speaking, for the court reporter's sake.

17 BY MR. SMITH:

18 Q. So just to be clear, I wasn't asking you about what they
19 were gonna do. That would be asking you to testify about
20 their mindset. Okay?

21 I was asking you about where they were -- what
22 direction they were pointing in. Right?

23 A. Okay. Yes.

24 Q. And then when I asked you that question, you said -- you
25 testified that -- you said, But that's not where they ended

1 up, something to that effect. Right?

2 A. Uh-huh.

3 THE COURT REPORTER: Is that "yes"?

4 THE WITNESS: Yes.

5 BY MR. SMITH:

6 Q. And by that, you testified that you meant that they
7 ended up inside the Capitol Building. Right?

8 A. Ultimately, yes.

9 Q. Yes.

10 And as opposed to ending up at the Washington
11 Monument or the rally. Right?

12 A. Yes.

13 Q. So might the decision -- and I asked you, might the
14 decision have been made, or decisions have been made, to go
15 to the Capitol after the point in the video clips where I
16 showed you people pointing to the Washington Monument and
17 the Ellipse? And I think you testified you don't know.

18 A. That's correct.

19 Q. So your testimony is, you don't know when the marching
20 group made a decision to go towards the Capitol. Correct?

21 A. Yeah. Correct.

22 Q. Okay. So we were talking about some of the video clips
23 where Ethan Nordean and others suggested that they wanted to
24 take photo ops -- photos near the Capitol. Right?

25 A. Yes.

1 Q. And we went through a couple of those videos. There was
2 a video of Nordean near the Capitol saying, We can take
3 photos here on the grass. Right?

4 A. Yes.

5 Q. And there was a video clip of Joseph Biggs on the east
6 front of the Capitol saying, We're going to turn around and
7 do a photo here. Right?

8 A. Yes.

9 Q. And based on your review of the video evidence, that's,
10 in fact, what Defendants did when they reached the Capitol
11 grounds. Right?

12 A. Took a photograph; yes, they did.

13 Q. A series of photo ops. Right? Is that right?

14 A. I mean, they took a series of photographs on the east
15 side when they were there.

16 Q. Okay. So I'm going to bring up Nordean Exhibit 301 at
17 two hours and 16 seconds.

18 (Whereupon, segments of Defendant Nordean's
19 Exhibit No. 301 were published in open court.)

20 BY MR. SMITH:

21 Q. So, Agent, this appears to be -- well, let me just
22 circle a figure right here in yellow. Can you see that one?

23 A. I can.

24 Q. Is that Joseph Biggs?

25 A. It is.

1 Q. And does this appear to be the group at the moment when
2 they're on the east side of the Capitol?

3 A. Yes.

4 Q. Okay. So I'm going to let this -- do you see a
5 cameraman here that I circled in yellow?

6 A. Yes.

7 Q. I'm going to let this play.

8 (Whereupon, segments of Defendant Nordean's
9 Exhibit No. 301 were published in open court.)

10 BY MR. SMITH:

11 Q. Someone just said, "Get some pictures"? Let me just
12 start that again.

13 (Whereupon, segments of Defendant Nordean's
14 Exhibit No. 301 were published in open court.)

15 BY MR. SMITH:

16 Q. Did you hear someone say, "Let's get some good
17 pictures"?

18 A. I heard "Good pictures." Yes.

19 Q. Okay.

20 (Whereupon, segments of Defendant Nordean's
21 Exhibit No. 301 were published in open court.)

22 BY MR. SMITH:

23 Q. So you can hear some people chanting here. Right?

24 A. Yes.

25 Q. And it's a -- your understanding is it's a line of sort

1 of Proud Boy marchers who are just lined up behind where the
2 camera is here. Right?

3 A. There's a bunch of Proud Boys behind the line, yes. I
4 don't know that they're lined up. I think they're more
5 mulling around. But yes.

6 Q. And they're sort of -- you can see these camera people
7 lined up taking photos of them. Right?

8 A. I see a camera lined up taking photos. Yes.

9 Q. There's one right there and there's another right here.
10 So do you see both of those two?

11 A. Yes. I see one actively, and hers is pointed down. But
12 yes.

13 Q. So I'll just let this play and then ask you whether
14 they're posing for photos here.

15 (Whereupon, segments of Defendant Nordean's
16 Exhibit No. 301 were published in open court.)

17 BY MR. SMITH:

18 Q. I'm just going to draw a circle around that figure right
19 there with the army cap on.

20 Do you recognize that one?

21 A. I do. That's Zack Rehl.

22 Q. And at this moment, they appear to be chanting for the
23 cameras. Right?

24 A. They're chanting. I'm not sure if it's for the cameras
25 or not, but yes, they are chanting.

1 Q. And we pointed out two photographers, but there's
2 actually a third one right here with a video camera. Right?

3 A. Yes.

4 Q. Okay.

5 (Whereupon, segments of Defendant Nordean's
6 Exhibit No. 301 were published in open court.)

7 BY MR. SMITH:

8 Q. So I'm just going to draw a circle around another figure
9 right there. That's -- in yellow. That's Joseph Biggs.
10 Right?

11 A. It is.

12 Q. He's just standing here watching the group being
13 photographed. Right?

14 A. He was having a conversation prior to this. But in this
15 picture, it appears he is looking.

16 Q. Okay.

17 (Whereupon, segments of Defendant Nordean's
18 Exhibit No. 301 were published in open court.)

19 BY MR. SMITH:

20 Q. And there were many other moments like this near the
21 Capitol where the group stops and does photo ops. Right?

22 A. Yes.

23 Q. Okay. So I'm going to bring up the same exhibit at two
24 hours, 12 minutes and 24 seconds.

25 MR. SMITH: Permission to publish? Thank you,

1 Ms. Harris.

2 (Whereupon, segments of Defendant Nordean's
3 Exhibit No. 301 were published in open court.)

4 BY MR. SMITH:

5 Q. So there's two people on the foreground here, one with
6 the army hat I've circled in yellow, the other with a black
7 hat. That's Zack Rehl on the left?

8 A. Yes.

9 Q. And then Joseph Biggs on the right?

10 A. Yes.

11 Q. Okay. And then there's a group of people who appear to
12 be facing them over here. Right?

13 A. Yes.

14 Q. Those are photographers. Right?

15 A. They have cameras. Yes.

16 Q. Okay. So I'll let this play for a second.

17 (Whereupon, segments of Defendant Nordean's
18 Exhibit No. 301 were published in open court.)

19 BY MR. SMITH:

20 Q. Again, here in this image we have Travis Nugent. Right?

21 A. Yes.

22 Q. The one who's wearing the black gaiter?

23 A. Yes.

24 Q. Okay. And here in this image, the Defendants appear to
25 be posing for photographs again. Right?

1 A. They do.

2 Q. Okay. I'm going to draw just another circle right here
3 around someone with a backwards black baseball cap. Does
4 that appear to be Ethan Nordean to you?

5 A. It does.

6 Q. So when we were watching the marching video earlier on
7 the National Mall and where Nordean has -- Defendant Nordean
8 has a megaphone and he's addressing a group of people.
9 Right?

10 A. Yes.

11 Q. In that statement he said, We're going to head down to
12 the Capitol, hang out for a bit, and then head back to the
13 rally. Right?

14 A. Yes.

15 Q. And then we saw a series of statements from Mr. Nordean
16 and Mr. Biggs saying, We're going to take some photos at the
17 Capitol. Right?

18 A. Yes.

19 Q. And then what we've seen is they're taking photos at the
20 Capitol. Right?

21 A. Yes.

22 Q. Okay. So there were also -- besides moments when the
23 Defendants are taking photographs, there were long stretches
24 of time in which the Defendant group is being videotaped
25 deciding where to go on the march. Right?

1 A. I mean, they're -- yes. They're being photographed and
2 videoed. Yes.

3 Q. Well, they're being videotaped doing a specific thing.
4 That's what I'm asking about. They're being videotaped
5 deciding what they want to do. Right?

6 A. I don't know if they already knew what they wanted to do
7 or not. I don't know what they were thinking.

8 Q. Okay. So I'm going to go to Nordean Exhibit 316 and go
9 to two minutes and -- two minutes and 15 seconds. Well,
10 actually, I believe -- hang on. I'm bringing up Nordean
11 Exhibit 301. I apologize for that. This is at two hours
12 and 15 minutes to 17 minutes.

13 MR. SMITH: And permission to publish that.

14 (Whereupon, segments of Defendant Nordean's
15 Exhibit No. 301 were published in open court.)

16 BY MR. SMITH:

17 Q. You see Joseph Biggs here in the image that I've circled
18 in yellow?

19 A. Yes.

20 Q. And you see Ethan Nordean I circled in yellow?

21 A. Yes.

22 Q. And you see Zachary Rehl circled in yellow?

23 A. Yes.

24 Q. Okay. I'd ask you to just watch them for a minute here.

25 (Whereupon, segments of Defendant Nordean's

1 Exhibit No. 301 were published in open court.)

2 BY MR. SMITH:

3 Q. Is it your understanding that the Defendants here are
4 standing on the east side of the Capitol?

5 A. Yes.

6 Q. Okay.

7 (Whereupon, segments of Defendant Nordean's
8 Exhibit No. 301 were published in open court.)

9 BY MR. SMITH:

10 Q. Now, before they start pointing in a second here, I'm
11 going to just ask you to identify this person with the red
12 beard. Is that Charles Donohoe?

13 A. It is.

14 Q. So here we have -- Joseph Biggs is the one I've drawn a
15 yellow line next to. Right?

16 A. Yes.

17 Q. Charles Donohoe right there?

18 A. Yes.

19 Q. Ethan Nordean I've drawn a line next to?

20 A. Yes.

21 Q. And Zack Rehl I've drawn a line next to. Right?

22 A. Yes.

23 Q. Now let's just watch them for a minute.

24 (Whereupon, segments of Defendant Nordean's
25 Exhibit No. 301 were published in open court.)

1 BY MR. SMITH:

2 Q. Now, it looks like Mr. Biggs at this point, at two
3 hours, 15 minutes and 48 seconds, is pointing in one
4 direction and talking to the group. Right?

5 A. Yes.

6 Q. Let's keep watching.

7 (Whereupon, segments of Defendant Nordean's
8 Exhibit No. 301 were published in open court.)

9 BY MR. SMITH:

10 Q. Now, I've paused it here. And you see that the
11 Defendants appear to be pointing in separate directions.
12 Right?

13 A. So I think you paused it as he's lifting his hand up.

14 Q. Oh.

15 A. Biggs.

16 Q. We'll go back. But -- I'll play the video clip again.
17 But let's -- at this moment, at this freeze, we see -- I'm
18 drawing a yellow line next to Joseph Biggs's hand. Correct?

19 A. Yes.

20 Q. And he's pointing in one direction. Right?

21 A. Yes.

22 Q. Now, I've drawn a second yellow line next to Charles
23 Donohoe's hand. Right?

24 A. Yes.

25 Q. He's pointing in another direction. Right?

1 A. Yes.

2 Q. Okay. Let's keep watching.

3 (Whereupon, segments of Defendant Nordean's
4 Exhibit No. 301 were published in open court.)

5 BY MR. SMITH:

6 Q. Well, I think you indicated that Mr. Donohoe might not
7 have been using his hand to point. So let's look at that
8 again.

9 (Whereupon, segments of Defendant Nordean's
10 Exhibit No. 301 were published in open court.)

11 BY MR. SMITH:

12 Q. Just there, Donohoe appeared to be pointing in a third
13 direction behind him. Right?

14 A. Yes.

15 (Whereupon, segments of Defendant Nordean's
16 Exhibit No. 301 were published in open court.)

17 BY MR. SMITH:

18 Q. There's somebody pointing again in that direction. Who
19 is that?

20 A. Can you play it a little further? I think that's
21 Nugent, but I need --

22 Q. Yeah. I think that's Nugent as well. Thanks.

23 (Whereupon, segments of Defendant Nordean's
24 Exhibit No. 301 were published in open court.)

25

1 BY MR. SMITH:

2 Q. Then lastly, we just saw Mr. Biggs pointing in the
3 direction of the arrow I just drew. Correct?

4 A. Can you back it up a little bit?

5 Q. Sure.

6 (Whereupon, segments of Defendant Nordean's
7 Exhibit No. 301 were published in open court.)

8 BY MR. SMITH:

9 Q. Okay. I'm going to ask you to look where Mr. Biggs
10 points now after the -- Nugent appears to be pointing in the
11 direction of the arrow I just drew.

12 (Whereupon, segments of Defendant Nordean's
13 Exhibit No. 301 were published in open court.)

14 BY MR. SMITH:

15 Q. He appears to be pointing in that direction. Right?

16 A. Yes.

17 Q. So we have the Defendant figures here pointing in
18 various directions as they stand around talking to one
19 another. Right?

20 A. Yes.

21 Q. Okay.

22 (Whereupon, segments of Defendant Nordean's
23 Exhibit No. 301 were published in open court.)

24 BY MR. SMITH:

25 Q. Now, in this image, we have the Defendant Donohoe

1 pointing in another direction. Right?

2 A. Yes.

3 Q. Do they appear to be talking about where to go?

4 A. Yes. Which route they're going to take. Yes.

5 Q. Well --

6 A. Well, wherever they're going after this.

7 Q. "Route" is a loaded question. Right?

8 A. So which direction they're going to go.

9 Q. Okay. So they appear to you to be determining where to
10 go at this point?

11 A. Yes. Yes.

12 Q. And this is -- just so the jury is chronologically
13 oriented, this is when the Defendants are standing behind
14 the Capitol Building. Correct?

15 A. Correct.

16 Q. On the east side?

17 A. Yes.

18 Q. And then at this point they proceed towards the food
19 trucks on the west side on Constitution Avenue. Correct?

20 A. Yes. Can I show you?

21 Q. Sure.

22 A. It's easier. So they will have just taken the family
23 photo. The picture they just took was right here. And now
24 they're standing here deciding how they're going to get
25 back. Ultimately, they end up going this direction to the

1 food trucks.

2 Q. So maybe this is the last question. I think you just
3 testified that they're deciding where to go when they're
4 pointing. Correct?

5 A. Which route to take. Yes.

6 Q. So "route" assumes there's also a place they intend to
7 go. Correct?

8 MR. KENERSON: Objection to counsel testifying.

9 THE COURT: Sustained. Counsel should not
10 testify.

11 BY MR. SMITH:

12 Q. Does -- so does saying that the participants in this
13 video clip are determining which route to take, does that
14 imply they already know where they're heading?

15 A. If they're going to take the same way they took to get
16 to the east side or if they're going to go a different way.

17 Q. Now, how do you know -- is it based on your review of
18 evidence that indicates that they're just deciding which
19 route to take instead of where to go?

20 A. It's based off my review of video evidence. Yes.

21 Q. Which video clip would that be?

22 A. The Eddie Block film.

23 Q. What part of the Eddy Block film?

24 A. I don't know the specific moment or the specific number.

25 Q. Okay. So you're saying that -- do you have any other

1 basis of knowledge?

2 A. So Nicholas Quested film.

3 Q. Do you know which part of that?

4 A. I don't know, but it should be within the bulk that you
5 guys were provided.

6 Q. So your basis for saying that these people pointing in
7 different directions here are merely deciding on a route and
8 not where they're going to go at all is based on two video
9 clips that you can't specify?

10 A. Can you re-ask that question?

11 Q. So my question for you was: How do you know that these
12 figures in the video clip are not deciding where to go at
13 all, and that they're deciding which route they can take to
14 a place they've already decided to go? That was the
15 question. Okay?

16 And you said you know that they're deciding on a
17 route and not where to go at all based on your review of two
18 video clips. Right?

19 A. That's correct.

20 Q. And then when I asked you what specifically clips you
21 were referring to, you could not cite one. Right?

22 A. Because there's two. But because the Eddie Block film
23 is broken up in different segments, I don't know which
24 piece, like which number it is associated with the film.

25 There's also a comment that is made that says, Can we go the

1 same way we came, something to that extent.

2 Q. The same way we came? They came from the National Mall.
3 Correct?

4 A. Right. But when they crossed to the east side of the
5 Capitol. So they took New Jersey, and that's not the way
6 they took back.

7 Q. Okay. So you said that your basis of knowledge for this
8 was an Eddie Block clip. Right?

9 A. And Nicholas Quested.

10 Q. And Nicholas -- let's start with Eddie Block. Do you
11 remember what happens in the particular Eddie Block clip
12 you're thinking of?

13 A. They eventually end up proceeding to -- I think this is
14 First Street on the back side here, and take that down to
15 Constitution.

16 Q. So you're saying your basis for knowing that they're not
17 deciding where to go here but just deciding on a route is
18 that later they go to the place? Is that --

19 A. I'm not sure I'm understanding your question.

20 Q. So we just saw a video clip where people were pointing
21 in different directions. Right?

22 A. Right.

23 Q. And I asked you whether it appeared that they're
24 deciding where to go. Right?

25 A. Right.

1 Q. And you said, It appears that they're deciding on a
2 route. Right?

3 A. Right.

4 Q. Okay. So those people pointing in different directions
5 could have been deciding where to go at all or they could
6 have already had in mind a place they wanted to go and
7 they're just deciding how to get there. Do you know that
8 difference? Do you understand that distinction?

9 A. Yes.

10 Q. Okay. You're frowning at me. I just want to make
11 sure you --

12 A. Yeah. I think I understand what you're saying.

13 Q. And it seemed to me that your testimony was, No, they're
14 not deciding where to go at all when they are pointing in
15 different directions. They've already decided they want to
16 go somewhere. They're just debating how to do it. Was that
17 your testimony?

18 A. No. My testimony is they're deciding what route to
19 take, so which path they're going to take to get where they
20 want to get.

21 Q. And they had already -- you're saying, despite pointing
22 in different directions, they had already decided where they
23 wanted to get. Is that what you're saying?

24 A. No. Again, based off this specific clip you're asking
25 me about and them pointing in different directions, you

1 asked me why I believe or -- something to the extent of the
2 route. Right?

3 Q. No, I did not.

4 A. Well, you're -- okay.

5 Q. So you use the word "route."

6 A. I do.

7 Q. And that prompted a second question from me.

8 A. Uh-huh.

9 Q. Because I said there's a distinction between people
10 deciding spontaneously where they want to go at all and
11 people deciding that -- they've already decided they're
12 going to go someplace and they're just deciding how to get
13 there.

14 Do you understand that distinction?

15 A. Yes.

16 Q. Okay. In the second category, where people have decided
17 where they want to go, they're just deciding how to get
18 there, they would be debating a route, like you said.
19 Right?

20 A. Yes.

21 Q. Okay. In the alternative scenario, if they're deciding
22 where they want to go in the first place, that's not
23 deciding a route; that's deciding where to go. Right?

24 A. Sure.

25 Q. Okay. So my question for you was: What is the evidence

1 you have to indicate that they're deciding a route here when
2 they're pointing in different directions and not where to go
3 at all?

4 A. So the direction they're pointing in is the direction
5 they had came. So they came up New Jersey Avenue to the
6 east side of the Capitol. Based on them pointing and then
7 the discussion about something to the extent of, Do we go
8 the same way we came? No, we can't go that way. And again,
9 those aren't the exact words that they used, but it's
10 something to that extent. Then they ultimately take First
11 Street to Constitution.

12 Q. So what about what you just told me -- and do you
13 remember the two possibilities we identified about what
14 these people could be doing when they're pointing in
15 different directions? One possibility is they're deciding
16 where to go. Another possibility is they already know where
17 they want to go and they're just deciding how to get there.

18 What about the facts you just said show -- told me
19 about indicate that they had already decided in advance
20 where they are going to go at this point?

21 A. I'm not saying that they had already decided in advance
22 what their end goal was going to be, where they were going
23 to end up, but they are discussing which route they are
24 going to take to leave the east side of the Capitol.

25 Q. Okay. And the first part of your testimony right there

1 was that you do not -- you are not testifying that at this
2 point, when they're pointing in different directions, they
3 knew where they wanted to go at that point?

4 A. They ended up at the food trucks. Did they have that
5 discussion here? Somewhere else? I don't know --

6 Q. Okay.

7 A. -- the answer to that question.

8 Q. So they ended up at the food trucks, but you don't know
9 at this point, at this point in time in chronology, if they
10 had any idea of where they were going?

11 A. Not based off the video, no.

12 Q. Okay. So I'm going to go to Nordean Exhibit 316. This
13 is a clip outside the east front where we were just looking.
14 I'm going to go to 29 minutes.

15 MR. SMITH: Permission to publish.

16 (Whereupon, segments of Defendant Nordean's
17 Exhibit No. 316 were published in open court.)

18 BY MR. SMITH:

19 Q. So, Agent, we just -- a few video clips back, we saw a
20 video clip at this -- on this pavement leading up to the
21 east front of the Capitol. And we heard the Defendant
22 Joseph Biggs say, We're going to turn around and do a photo
23 in front of the Capitol.

24 Do you remember that?

25 A. I do.

1 Q. I'm going to play it here. I'm going to play the audio
2 here. I'm going to ask you to review what Mr. Nordean says
3 after someone approaches him and tells him that -- asks him
4 if the plan is to go pee on the Capitol lawn. Okay?

5 A. Yes.

6 (Whereupon, segments of Defendant Nordean's
7 Exhibit No. 316 were published in open court.)

8 BY MR. SMITH:

9 Q. Did you hear someone say, "What we're actually doing is
10 a protest"?

11 A. I did.

12 Q. Now, can you -- I'll ask you to just keep listening to
13 that voice.

14 (Whereupon, segments of Defendant Nordean's
15 Exhibit No. 316 were published in open court.)

16 BY MR. SMITH:

17 Q. Did you hear, "Piss on the lawn of the Capitol"?

18 A. I heard "Capitol."

19 Q. I'll go back a second.

20 (Whereupon, segments of Defendant Nordean's
21 Exhibit No. 316 were published in open court.)

22 BY MR. SMITH:

23 Q. Did you hear, "Piss on the lawn of the Capitol"?

24 A. Yes.

25 Q. And did you hear someone say "Nah" after?

1 A. No.

2 Q. I'll play that again.

3 (Whereupon, segments of Defendant Nordean's
4 Exhibit No. 316 were published in open court.)

5 BY MR. SMITH:

6 Q. Did you hear it that time?

7 A. I heard "Uh."

8 Q. We'll go back. I think it was "Nah," not "Uh."

9 MR. KENERSON: Objection to counsel testifying.

10 THE COURT: Sustained.

11 (Whereupon, segments of Defendant Nordean's
12 Exhibit No. 316 were published in open court.)

13 THE WITNESS: I still hear "Uh."

14 BY MR. SMITH:

15 Q. Okay. Was that Mr. Nordean's voice?

16 A. I don't know whose voice it was.

17 Q. Do you see -- at that moment in time or just a couple
18 beats before, do you see Mr. Nordean standing right here at
19 29 minutes and two seconds?

20 A. Yes.

21 Q. And we'll just play it through there.

22 (Whereupon, segments of Defendant Nordean's
23 Exhibit No. 316 were published in open court.)

24 BY MR. SMITH:

25 Q. Okay. I'm going to bring this one down.

1 So did there come a time on the march when the
2 group led a prayer in front of -- near the Capitol Building?

3 A. Yes.

4 Q. Okay. So I'm going to go to Nordean at 316 [sic] and 45
5 seconds.

6 THE COURT REPORTER: What's the exhibit number,
7 please?

8 MR. SMITH: It's Nordean 316. Let's play this
9 beginning at 39 seconds.

10 Permission to publish.

11 (Whereupon, segments of Defendant Nordean's
12 Exhibit No. 316 were published in open court.)

13 BY MR. SMITH:

14 Q. That voice that just said, "We're going inside," do you
15 recognize that as Pam Hemphill?

16 A. I do.

17 (Whereupon, segments of Defendant Nordean's
18 Exhibit No. 316 were published in open court.)

19 BY MR. SMITH:

20 Q. I'm going to pause it here and just draw a circle around
21 this figure right here, who's wearing a -- it looks like a
22 vest and black glasses.

23 Do you recognize that person?

24 A. He's in the marching group.

25 Q. Yes. Is that Billy Chrestman?

1 A. I believe so.

2 Q. And Billy Chrestman came from a group of Proud Boys from
3 Kansas City?

4 A. I believe so. I think his name is William Chrestman,
5 though.

6 Q. William?

7 A. William.

8 Q. He might go by Billy?

9 A. I'm not sure.

10 Q. Okay. And you're familiar with -- you're familiar with
11 the group of Proud Boys from Kansas City who came with the
12 marching group here?

13 A. I don't know if I'm familiar with the group of Kansas
14 City Proud Boys, but I do know he is from Kansas City.

15 Q. Okay. Thank you.

16 (Whereupon, segments of Defendant Nordean's
17 Exhibit No. 316 were published in open court.)

18 MR. SMITH: We can end the prayer here.

19 MR. KENERSON: For the record, could we have the
20 time stamp that ended?

21 MR. SMITH: That was at two minutes and 30 seconds
22 in Nordean Exhibit 316.

23 BY MR. SMITH:

24 Q. Now, there came a time at the food trucks you testified
25 about when Eddie Block rolled up to a group of the

1 Defendants and he might have said something like, "I don't
2 want to hear that."

3 Do you remember that?

4 A. I do.

5 Q. Okay. I'm going to go to Nordean Exhibit 301 at two
6 hours and 47 minutes. Well, I'll begin the -- the time
7 stamp is tricky, so I'll begin at two hours, 47 minutes and
8 20 seconds so we can watch Eddie Block rolling up to the
9 group here.

10 (Whereupon, segments of Defendant Nordean's
11 Exhibit No. 301 were published in open court.)

12 BY MR. SMITH:

13 Q. Now, Agent, this appears to be at the food trucks when
14 they're about to proceed on to the Peace Circle. Right?

15 A. This is before they proceed to the Peace Circle. This
16 is the break that they're taking from their actual march
17 around to -- before they go to the Peace Circle.

18 Q. And this is the last kind of stop on the way of their
19 march before they proceed to the Peace Circle?

20 A. Yes.

21 Q. Okay.

22 (Whereupon, segments of Defendant Nordean's
23 Exhibit No. 301 were published in open court.)

24 BY MR. SMITH:

25 Q. Did you hear someone say in the background -- they say,

1 "He's going to march" and something about "the beast"?

2 A. They want to keep him close to the beast. Yes.

3 Q. Keep him close to the beast.

4 And you testified about who you believe they were
5 referring to there. Right?

6 A. Yes; "the beast" being the presidential limousine.

7 Q. And they say he's going to march?

8 A. I'm assuming they're talking about Donald Trump.

9 Q. So it appears -- and is this Ethan Nordean I've circled
10 in yellow right here?

11 A. Yes.

12 Q. Does it appear to you, based on your review of the
13 evidence, that at this point the group of marchers standing
14 at the food trucks has just learned what they believe is
15 that the president will be marching towards the Capitol?

16 A. Yes. I believe that this was after -- during Trump's
17 speech when his first reference to the Capitol was made
18 about marching to the Capitol. I believe this was shortly
19 after that.

20 Q. So it appears to you that the group is first learning
21 about that supposed fact that the president will march
22 towards the Capitol --

23 MR. KENERSON: Objection to her view on what the
24 group is learning when.

25 THE COURT: Sustained as to the question.

1 BY MR. SMITH:

2 Q. Okay. Well, I can just go to the Government's exhibit.
3 There was a Government Exhibit 1000 -- Government's Exhibit
4 1000 at 18 minutes and 47 seconds. We'll put this up first.

5 THE COURT: Mr. Smith, is 1000 in evidence?

6 MR. SMITH: Yes, it is, your Honor. It's
7 Government's Exhibit 1000. It was played during the direct
8 testimony.

9 (Whereupon, segments of Government's Exhibit No.
10 1000 were published in open court.)

11 BY MR. SMITH:

12 Q. So first, before I play here, it looks like there's a
13 quote at the top on the screen here. I've drawn a yellow
14 line next to it. And it says, "They said he's gonna march.
15 They're gonna want to keep him close to the beast."

16 That was the statement we just heard?

17 A. Yes.

18 Q. I'll let this play for a second.

19 (Whereupon, segments of Government's Exhibit No.
20 1000 were published in open court.)

21 BY MR. SMITH:

22 Q. Now, it appears that in this clip right afterwards, near
23 the food trucks, looking towards the Capitol Building,
24 there's a motorcade that's driving by. Correct?

25 A. It appears to be. Yes.

1 Q. And it appears that the group of people standing at the
2 food trucks is looking at this motorcade. Right?

3 A. A person. I'm sure there's more, but based off this
4 video, this is one person's camera.

5 Q. This is Eddie Block's.

6 A. No. This is Zachary Rehl's.

7 Q. Oh, Zachary Rehl's.

8 Do you understand that -- let's listen to what he
9 says here. Let's go back one second.

10 (Whereupon, segments of Government's Exhibit No.
11 1000 were published in open court.)

12 BY MR. SMITH:

13 Q. Did you hear someone shout, "Donald fucking Trump"?

14 A. I heard -- I thought it said, "That's fucking Trump."

15 Q. Or "That's fucking Trump"?

16 A. Yes.

17 Q. So it appears that whoever is filming this believes that
18 that's a motorcade with the president. Correct?

19 MR. KENERSON: Objection to what that person
20 believes.

21 BY MR. SMITH:

22 Q. Or that person stated that that motorcade was the
23 president?

24 A. That person stated, "That's fucking Trump."

25 Q. And the camera is facing the motorcade we just saw.

1 Correct?

2 A. It is.

3 Q. To your knowledge, was that a motorcade with Donald
4 Trump in it?

5 A. Donald Trump is still speaking at this time.

6 Q. Right.

7 So it appears that the speaker believed that
8 Donald Trump was in a motorcade driving towards the Capitol?

9 MR. KENERSON: Objection to what the speaker
10 believed.

11 THE COURT: Sustained.

12 BY MR. SMITH:

13 Q. So this video clip showing a motorcade in the
14 Government's montage exhibit follows the clip in which there
15 was a quote showing someone -- they got -- he's going to be
16 marching towards the Capitol. They said he's gonna march.
17 They've gonna want to keep him close to the beast.

18 Right?

19 A. Yes.

20 Q. This is the Government's exhibit. Okay?

21 And a couple of minutes later, we see a video clip
22 that you said was filmed by Zachary Rehl saying, "Donald
23 fucking Trump," and pointing at a motorcade. Right?

24 A. Yes.

25 Q. Okay. Does it appear to you that the crowd at the food

1 trucks is prompted to walk towards the Capitol because they
2 believe Donald Trump was driving there in a motorcade?

3 MR. KENERSON: Objection to what prompted the
4 group -- her opinion as to what prompted the group to move
5 towards the Capitol.

6 THE COURT: The objection is sustained.

7 MR. SMITH: Your Honor, I'll just rephrase it
8 as --

9 BY MR. SMITH:

10 Q. Did any of your -- did your review of the footage from
11 the various streams we've been referring to of video footage
12 of the march, did they lead you to the understanding that
13 the crowd at the food trucks walked towards the Capitol
14 because they believed the president's motorcade was driving
15 towards the Capitol?

16 MR. KENERSON: Again, objection to her -- whatever
17 understanding she may have of why is not relevant.

18 MR. SMITH: The Government has asked her similar
19 questions, but just from the other perspective.

20 THE COURT: The witness can answer if she -- the
21 witness can answer the question.

22 THE WITNESS: I don't know.

23 BY MR. SMITH:

24 Q. Okay. Oh, there's one more point there.

25 So that motorcade we just saw in the video -- I

1 apologize, Ms. Harris; put that back up. That motorcade we
2 just saw in the video, there's a timestamp in the upper left
3 corner of the montage here. Correct?

4 A. Yes.

5 Q. And it says 12:36 p.m.?

6 A. Correct.

7 Q. Okay. And we're going to move on to the first barrier
8 breach. But that is -- to your knowledge, that's about
9 12:55 p.m.?

10 A. The first breach is about 12:53.

11 Q. 12:53.

12 So after we see this video clip of someone saying,
13 Donald -- "That's fucking Trump" and the motorcade passes,
14 the group then walks towards the Peace Circle. Correct?

15 A. I don't believe they march towards the Peace Circle
16 until about 12:50.

17 Q. Until about 12:50. Okay.

18 And where does it appear to you this motorcade is
19 heading?

20 A. Can you play the entire video?

21 Q. I will.

22 (Whereupon, segments of Government's Exhibit No.
23 1000 were published in open court.)

24 THE WITNESS: So they're on Constitution, but I
25 can't see, because the videographer pans away, as to where

1 it's going.

2 BY MR. SMITH:

3 Q. Are they on Constitution or are they on Louisiana?

4 A. Oh, I know this is Constitution. They're turning onto
5 Constitution.

6 Q. Is that Vice President Pence's motorcade going to pick
7 him up from the Capitol?

8 MR. KENERSON: Objection. Foundation.

9 MR. SMITH: If she knows.

10 THE COURT: The witness can answer if she knows.

11 THE WITNESS: I don't know.

12 BY MR. SMITH:

13 Q. Okay. I want to ask you about the first breach, and I
14 want to go to Nordean Exhibit 352. So we're going to be at
15 the Peace Circle, which is a little bit below the diagram
16 behind you. And I want to bring up Nordean Exhibit 352.

17 MR. SMITH: Permission to publish.

18 (Whereupon, segments of Defendant Nordean's
19 Exhibit No. 352 were published in open court.)

20 BY MR. SMITH:

21 Q. So does this scene appear to be the group of marchers
22 after they've reached the Peace Circle, the barriers outside
23 the Peace Circle?

24 A. It appears so.

25 Q. And there's a line of metal barriers up there with four

1 police officers standing behind them? I've drawn a yellow
2 line under it.

3 A. Yes.

4 Q. Okay. Now I'm going to move forward a little bit here.
5 It appears that -- okay. So here in this scene we've got
6 Joseph Biggs I've circled in yellow. Right?

7 A. Yes.

8 Q. We've got Zachary Rehl I've circled in yellow?

9 A. Yes.

10 Q. And we've got Shannon Rush I've circled in yellow?

11 A. Yes.

12 Q. Okay. And this figure right here in the foreground is
13 Nicholas Quested, the filmmaker.

14 A. Yes.

15 Q. Now, does it appear to you that this group of people is
16 standing about several rows back in the crowd here? I can
17 move forward a little bit just to show the scope of the
18 crowd.

19 A. I think they're still relatively fairly close.

20 Q. Okay. So I'll go to this. Can you see the front line
21 of the barriers here?

22 A. Yes.

23 Q. Can you see how I'm panning back to the Defendants here?

24 A. Uh-huh.

25 Q. Now, a few minutes later -- I'm going to go forward to

1 one minute and eight seconds. You can see -- can you see
2 how there's a lone figure who's walking towards the barriers
3 there?

4 A. Yes.

5 Q. He's wearing a red hat and a blue jacket?

6 A. Yes.

7 Q. Who is that?

8 A. Ryan Samsel.

9 THE COURT REPORTER: Can I get a spelling on the
10 last name?

11 THE WITNESS: It's Samsel. I don't know how it's
12 spelled.

13 MR. SMITH: S-A-M-S-E-L.

14 BY MR. SMITH:

15 Q. And he appears to be walking up towards the barriers
16 alone by himself at this point. Right?

17 A. I don't know who this guy is. But there's two of them.

18 Q. Yeah. That's a good point.

19 Well, besides the man in black, he appears to be
20 the first -- he appears to -- Samsel appears to leave the
21 crowd of people and walk towards the barriers. Correct?

22 A. Yes.

23 Q. Okay. Let's just see if he's -- I apologize. I'm
24 sorry.

25 (Whereupon, segments of Defendant Nordean's

1 Exhibit No. 352 were published in open court.)

2 BY MR. SMITH:

3 Q. This video clip shows that as Samsel is walking towards
4 the barriers, some people in the crowd begin to follow him.
5 Right?

6 A. Yes.

7 (Whereupon, segments of Defendant Nordean's
8 Exhibit No. 352 were published in open court.)

9 BY MR. SMITH:

10 Q. I'm going to bring that one down.

11 Now, in Government Exhibit 1001, which I'm going
12 to bring up at six minutes and five seconds, you testified
13 about Mr. Samsel, the man with the red hat, sort of having
14 a -- there's a video clip of him putting his arm around
15 Defendant Joseph Biggs. Right?

16 A. There is.

17 Q. Okay. So I'm going to go to Government's Exhibit 1001
18 at six minutes and five seconds. I'll play that here.

19 (Whereupon, segments of Government's Exhibit No.
20 1001 were published in open court.)

21 BY MR. SMITH:

22 Q. So on the screen we see in the upper left corner, it's
23 12:51 p.m. now. Correct?

24 A. Yes.

25 Q. So this is about -- this is a little less than 20

1 minutes after we saw the beast -- or what the Defendant Zack
2 Rehl said was Donald fucking Trump driving north -- excuse
3 me -- south on Louisiana towards Connecticut. Right?

4 A. Yes. It's approximately 25 minutes later.

5 Q. Okay. I'm going to play this for a second.

6 (Whereupon, segments of Government's Exhibit No.
7 1001 were published in open court.)

8 BY MR. SMITH:

9 Q. Now, the -- Samsel puts his arm around Joseph Biggs at
10 12:21. Correct?

11 A. He does.

12 Q. Now, this is before the scene we just watched where Ryan
13 Samsel is walking up towards the fence alone?

14 A. With the other guy. But yes.

15 Q. Yeah. With the other guy.

16 So this is before that, shortly before that?

17 A. Correct.

18 Q. And I think you testified that you don't know what --
19 well, first, you said that Samsel approaches Joe Biggs in
20 this. Correct?

21 A. Yes.

22 Q. And you testified that you don't know what they're
23 talking about. Right?

24 A. I do not.

25 Q. But then I think the Government asked you whether Joe

1 Biggs threw Samsel's arm off of him?

2 MR. KENERSON: Objection. Mischaracterizes.

3 BY MR. SMITH:

4 Q. Or whether he shrugged it off?

5 THE COURT: The witness may answer this question.

6 THE WITNESS: Correct; which he did not.

7 BY MR. SMITH:

8 Q. He did not shrug it off?

9 A. It does not appear so, not right here.

10 Q. Now, there were a couple of people in the crowd who
11 spoke to Ryan Samsel before he -- does Ryan -- strike that.

12 Does Ryan Samsel ultimately shake a barrier near
13 the Peace Circle in an effort to pull it down?

14 A. Yes.

15 Q. Okay. And --

16 THE COURT: I'm sorry. Mr. Smith, can you pause?
17 I just need all counsel to please not speak while Mr. Smith
18 is conducting his cross-examination.

19 You may proceed. Except for Mr. Smith. He may
20 speak.

21 MR. SMITH: I'm boring.

22 BY MR. SMITH:

23 Q. So there are figures who speak to Ryan Samsel before he
24 pulls down the fence, other than -- after the scene with Joe
25 Biggs. Correct?

1 A. I don't know.

2 Q. You don't know? You haven't seen any video clips?

3 A. I've watched video, but I haven't specifically honed in
4 on Ryan Samsel.

5 Q. So you're saying you haven't reviewed video clips with a
6 view to seeing whether Ryan Samsel spoke with anyone else
7 after Joe Biggs, before pulling down the fence?

8 A. From what I recall seeing from the video footage I've
9 reviewed is Ryan Samsel approaches Joe Biggs, puts his arm
10 around Joe Biggs and then proceeds to the row of barricades.

11 Q. So I'm going to go to Government Exhibit 427, which is
12 in evidence, at 45 seconds. 427 at 45 seconds. And this
13 should be -- okay.

14 MR. SMITH: Permission to publish that.

15 BY MR. SMITH:

16 Q. So this is a slightly different angle here, but we see,
17 again -- I'm drawing an arrow pointing at Ryan Samsel
18 walking towards this fence here. Correct?

19 A. Correct.

20 Q. And that's -- is this before or after he put his arm
21 around Joe Biggs?

22 A. This is after.

23 Q. Okay. I'm going to fast-forward a little bit to the
24 scene right up at the fence here. You see -- I'm going to
25 pause it here at 14 seconds. And we see here Ryan Samsel is

1 kind of staring at a police officer across the barrier?

2 A. Yes.

3 Q. Okay. And I'm going to go now to 45 seconds. I'm going
4 to go to 42 seconds and play it here.

5 This appears to be Ryan Samsel with the backwards
6 hat after he took his blue jacket off. Right?

7 A. Yes.

8 (Whereupon, segments of Government's Exhibit No.
9 427 were published in open court.)

10 BY MR. SMITH:

11 Q. There's someone else who walks up to Ryan Samsel at the
12 fence. Right?

13 A. Yes.

14 Q. Who is that?

15 A. I'd need to see a better face shot of this individual.
16 I'm not sure.

17 Q. You don't recognize the figure from the army fatigues in
18 the red hat?

19 A. No. I think it might be Ray Epps, but I'm not 100
20 percent certain.

21 Q. And he's -- so that figure that you called Ray Epps is
22 putting his arm around Samsel here at the fence. Right?

23 A. Yes.

24 Q. Let's just watch for a second here.

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

1 427 were published in open court.)

2 BY MR. SMITH:

3 Q. He appeared to be saying something in Samsel's ear.
4 Right?

5 A. Yes.

6 Q. Why did you know that was Ray Epps?

7 MR. KENERSON: Objection.

8 THE COURT: Sustained.

9 MR. SMITH: Your Honor, I'm asking her about
10 her -- the foundation for her saying that this was Ray Epps.
11 She identified the figure, so I'm just asking her what her
12 foundation is for saying that.

13 THE COURT: I'll hear you at sidebar.

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

16 THE COURT: She's already testified that she
17 reviewed these in connection with the prosecution and became
18 familiar with the individuals in them and with her
19 investigation.

20 What's the relevance of any further --

21 MR. SMITH: Your Honor, if she's reviewed the
22 evidence about Ray Epps, then she knows that he was
23 encouraging people to enter the Capitol Building the night
24 before. We have to ask that. If the Government is
25 suggesting that -- you know, if your Honor is concerned

1 about me suggesting this person is an informant, I'm not
2 going to do that. But this is -- but the Government played
3 evidence of Ryan Samsel putting his arm around Joseph Biggs.
4 We have to be able to show who the figure is that he's
5 speaking to here. She just said she has the foundation to
6 do that.

7 So I'm just asking her about who this person is.

8 THE COURT: Mr. Kenerson?

9 Well, it's more than -- it's more than who the
10 person is. You're going to elicit something -- I'm not
11 trying to say this is wrong; I'm just trying to clarify.
12 You want to elicit that he was telling people the night
13 before to storm the Capitol or words to that effect?

14 MR. SMITH: Not -- only if she knows, number one.

15 And, number two, it's obviously not offered for
16 its truth. The very fact that the person who was saying
17 it --

18 THE COURT: I understand.

19 Mr. Kenerson?

20 MR. KENERSON: I just don't see -- I don't see the
21 relevance one way or the other to what this individual was
22 saying last night. There's no -- nothing in evidence that
23 suggests anything. But Ryan Samsel knows what was said by
24 this person last night. This person's intent is not at
25 issue. He's made the point that he said something before he

1 shakes the fence. What he was saying on January 6th, what
2 he was saying the night before, has absolutely no bearing to
3 this trial.

4 MR. SMITH: Your Honor, the bearing is it gives --
5 it's indirect circumstantial evidence of what they may have
6 been discussing here. The Government's entire case is built
7 on circumstantial evidence. We're entitled to show that the
8 individual speaking, Ryan Samsel -- the key figure -- Ryan
9 Samsel is or was encouraging people to enter the Capitol at
10 different points in time. It gives context to what he may
11 be saying.

12 THE COURT: I can't -- I guess the question is --
13 Mr. Pattis, you have your hand up.

14 MR. PATTIS: Given the Government's tool theory
15 and the fact the so-called deals were activated by others,
16 if Mr. Epps is a toolbox activating this man and this is an
17 intervening cause. It seems it's directly relevant.

18 THE COURT: I don't know whether this person
19 also -- let me put it this way: Whatever the full panoply
20 of evidence about this person is in terms of, okay, they
21 said something afterwards, but if it's not for the truth and
22 there's more to the story, she's going to be able to go into
23 that.

24 MR. SMITH: But --

25 THE COURT: Mr. Kenerson?

1 MR. KENERSON: The other thing is I wanted to just
2 respond to what Mr. Pattis said: We have not proffered Ryan
3 Samsel under the tools theory at all.

4 THE COURT: I know. But I'm aware of that. I'm
5 aware of that. But the evidence was solicited suggesting
6 it's tool-ish conduct. Let's put it that way.

7 You may proceed, Mr. Smith.

8 MR. SMITH: Thank you.

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

11 MR. SMITH: I'll scroll backwards just a little
12 bit so we get an image of that.

13 (Whereupon, segments of Government's Exhibit No.
14 427 were published in open court.)

15 BY MR. SMITH:

16 Q. You testified this figure whispering in Samsel's ear was
17 Ray Epps. Correct?

18 A. That I believe that's Ray Epps, yes. I'm not 100
19 percent certain.

20 Q. Okay. And did you view the videotape of Ray Epps
21 encouraging people to enter the Capitol on the night of
22 January 5th, 2021?

23 A. What was your question?

24 Q. Did you view the video of Ray Epps encouraging people on
25 the night of January 5th, 2021, to storm the Capitol on

1 January 6th, 2021?

2 A. I did not.

3 Q. Okay. And do you know whether this figure, Ray Epps,
4 ultimately entered the Capitol grounds after this scene
5 here?

6 A. I believe he does, yes.

7 Q. Okay. Another question: Ryan Samsel, I've circled him
8 in yellow here.

9 A. Yes.

10 Q. He's not a Proud Boys member, to your knowledge.
11 Correct?

12 A. Not that I'm aware of.

13 Q. Ray Epps I've circled here. He's not a Proud Boys
14 member. Correct?

15 A. Not that I'm aware of.

16 Q. Okay. And let me just scroll back a little bit here so
17 we have figures -- other figures on the screen.

18 These people appear to be pulling the fence,
19 correct, at the Peace Circle?

20 A. Yes.

21 Q. Okay. Do you know who this figure is?

22 A. I do not.

23 Q. Do you have any reason to believe he may be a Proud Boy?

24 A. I do not.

25 Q. Do you know who this figure is?

1 A. I do not.

2 Q. Do you have any reason to believe he's a Proud Boy?

3 A. I do not.

4 Q. Do you have any reason to believe anyone on this screen
5 is a Proud Boy?

6 A. Not currently pictured.

7 Q. Let me go to another side. Do you have any reason to
8 believe any of these figures at the front line are Proud
9 Boys?

10 A. Not in this screen.

11 Q. Okay. This appears to be a group of about -- I don't
12 know -- maybe eight people facing off against -- confronting
13 a police officer on the other side of the fence. Right?

14 A. Yes.

15 Q. None of them are Proud Boys. Right?

16 A. Not in this shot.

17 Q. Okay. Here's another scene with two figures I've -- I'm
18 showing right here. One is a woman with a pink hat. Do you
19 see that?

20 A. I do.

21 Q. Is she a Proud Boy?

22 A. She is not.

23 Q. How about the one with the white and black hat here?

24 A. I can't say for certain without seeing the face.

25 Q. Okay. I'm going to pan over a little bit to the left

1 here.

2 So I think we've got one, two, three, four more
3 figures who are right at the front line here on the gate.

4 Do you know whether any of them are Proud Boys?

5 A. I do not.

6 Q. No reason to think they are. Right?

7 A. I don't know if they're Proud Boys.

8 Q. Okay. I'll bring that down.

9 So I'm going to bring up a scene you saw when the
10 Defendants walked towards that gate at Nordean Exhibit 301.
11 And this is at three hours and 17 seconds -- three hours and
12 17 minutes.

13 (Whereupon, segments of Defendant Nordean's
14 Exhibit No. 301 were published in open court.)

15 BY MR. SMITH:

16 Q. It's the same scene we were just watching, but a little
17 bit back in the crowd here. I'm going to begin it at three
18 hours, 17 minutes and 26 seconds in Nordean Exhibit 301.

19 (Whereupon, segments of Defendant Nordean's
20 Exhibit No. 301 were published in open court.)

21 BY MR. SMITH:

22 Q. Now, we can see -- I'm just going to draw a yellow line.
23 That appears to be the line of police officers that later
24 are confronted by people standing at the fence. Right?

25 A. Correct.

1 Q. So this appears to be in the moments right before we see
2 Ryan Samsel walking up towards the fence and others
3 following him. Right?

4 A. Yes.

5 Q. Okay.

6 (Whereupon, segments of Defendant Nordean's
7 Exhibit No. 301 were published in open court.)

8 BY MR. SMITH:

9 Q. So we have a line of the Defendants down here with the
10 yellow line. Correct?

11 A. Yes.

12 Q. And then we have a crowd of about -- how many people
13 would you say? Would you say there's maybe approximately 50
14 people here or more?

15 A. Sure. Yes.

16 Q. Okay. Do you know whether anyone in this circle that
17 I've -- anyone in this large circle I've drawn is a Proud
18 Boy member?

19 A. I do not. But this one's in the marching group. Well,
20 he meets them at the food trucks. Excuse me.

21 Q. So you drew a green circle?

22 A. Yes. He was included in your circle.

23 Q. Yep. He was -- that's Shannon Rush?

24 A. Yes.

25 Q. So apart from Shannon Rush -- I'll draw the circle

1 again. I'm trying to draw like, you know, the expressions
2 of this is middle ground -- there's foreground, middle
3 ground, background. There's a middle ground of about 50
4 here, right, or more?

5 A. Correct.

6 Q. And do you see any Proud Boys in the middle ground here
7 of this large group of people?

8 A. Not based off this angle, no.

9 Q. Okay. We'll just keep playing.

10 (Whereupon, segments of Defendant Nordean's
11 Exhibit No. 301 were published in open court.)

12 BY MR. SMITH:

13 Q. Now, the crowd starts moving towards the front line
14 there. Right?

15 A. Correct.

16 Q. And we have -- in the image here, we now have Joe Biggs
17 on the right, right here?

18 A. Yes.

19 Q. We have Zack Rehl?

20 A. Yes.

21 Q. We have Shannon Rush there?

22 A. Yes.

23 Q. And does this appear to be Ethan Nordean?

24 A. Yes.

25 Q. Let's just keep playing.

1 (Whereupon, segments of Defendant Nordean's
2 Exhibit No. 301 were published in open court.)

3 BY MR. SMITH:

4 Q. So right there you asked about Nordean raising his fists
5 there and saying "Ho." Correct?

6 A. Yes.

7 Q. And I think you testified that that indicates halt.
8 Correct?

9 A. Yes.

10 Q. So I'll just let that play again for a second.

11 (Whereupon, segments of Defendant Nordean's
12 Exhibit No. 301 were published in open court.)

13 BY MR. SMITH:

14 Q. This is another figure who then after Nordean raises his
15 fist, puts up a hand like this?

16 A. Yes.

17 Q. And who is that?

18 A. I believe it's Fonticoba.

19 Q. Okay. And he appears to be -- does he appear to be --
20 he puts up his hand after Nordean directed halt. Correct?

21 A. Correct.

22 Q. And I'm going to draw a circle around someone else.
23 That was someone you identified as Shannon Rush?

24 A. Yes.

25 Q. And he appears to turn around and face the camera after

1 the halt?

2 A. Yes.

3 Q. Okay.

4 (Whereupon, segments of Defendant Nordean's
5 Exhibit No. 301 were published in open court.)

6 BY MR. SMITH:

7 Q. So I think you were asked on direct again about
8 Mr. Nordean raising his fist and saying "halt" again?

9 A. He does. Yes.

10 Q. Sorry. Making the same halt gesture?

11 A. He does.

12 Q. Okay. At this point, the Government then asked you, did
13 he make the halt gesture a third time and a fourth time?
14 Right?

15 A. I don't recall.

16 Q. Do you recall him asking whether he -- at this point,
17 whether he stopped and left the scene or moved forward?

18 A. No. They moved forward.

19 Q. Okay. And do you know whether Mr. Nordean directed his
20 group to halt again?

21 A. I don't recall. You can play the video and we could
22 watch.

23 Q. So I think -- let me just draw another kind of circle
24 right here. We see another maybe -- would you say that's 50
25 to 75 people I've drawn a circle around?

1 A. Yes.

2 Q. Do you see any Proud Boys in there?

3 A. I do.

4 Q. Which one?

5 A. So as you were playing this video, a handful that were
6 in the marching group pushed forward. So if you back it up
7 some, I can show you. But this one is -- hold on. Let me
8 clear my monitor.

9 Q. Okay.

10 A. And then there's a few more that's ahead.

11 Q. A few more. Would you say that that circle I drew was
12 maybe about 50 to 75 people?

13 A. Approximately, yeah.

14 Q. Do you think that -- is it realistic that Mr. Nordean
15 can stop a crowd of 100 people by raising a fist?

16 A. He did it during the marching.

17 Q. No. So -- sorry. I'll clarify.

18 We agreed that there was a very large number of
19 people here who are not Proud Boys. Correct?

20 A. Correct.

21 Q. Do you have any -- did you see any evidence indicating
22 that Mr. Nordean's raising his fist has an influence on
23 people who are not Proud Boys and not in the marching group?

24 A. I have not.

25 Q. So you have no reason to think that Mr. Nordean has the

1 ability to stop this crowd of people from moving forward?

2 A. I don't know what Mr. Nordean's ability is.

3 Q. Nothing you've seen in evidence gives you any indication
4 to believe that Nordean raising his fist would stop a crowd
5 of 100 people?

6 A. No. But based off the marching group, it would stop
7 some of the Proud Boys who were in the marching group, which
8 it did.

9 Q. Okay. So then you testified -- this -- I think you
10 testified that when Mr. Nordean -- he gave orders to the
11 marching group. Right?

12 A. Orders as in?

13 Q. Orders.

14 A. Like to stop and go? Yes.

15 Q. Yeah. Okay.

16 And do you think they're intended to be followed
17 or just obeyed?

18 A. I'm sorry. One more time.

19 Q. He gave orders so that they would be followed by the
20 marching group. Right?

21 A. He gave orders, yes, as far as stop and go. Correct.

22 Q. So that the marching group would stop and go. Right?

23 A. I would assume so.

24 Q. Yes.

25 So would you assume that Mr. Nordean is raising

1 his fist to stop the marching group here?

2 A. I assume that Mr. Nordean is stopping -- or holding his
3 fist in the air for halt so his group can gather together
4 and then proceed forward as one.

5 Q. Okay. Thank you.

6 I'm going to bring up Nordean Exhibit -- or
7 Government Exhibit 492 and go to the scene where the fence
8 is pulled down. I'm going to bring it up at four minutes.

9 THE COURTROOM DEPUTY: Which 492?

10 MR. SMITH: 492G. I apologize.

11 THE COURTROOM DEPUTY: Thank you.

12 MR. SMITH: I'll go to four minutes.

13 (Whereupon, segments of Government's Exhibit No.
14 492G were published in open court.)

15 BY MR. SMITH:

16 Q. I'll stop right there.

17 Agent, do you remember testifying about this
18 scene?

19 A. I do.

20 Q. Okay. And I think the Government asked you about --
21 we're at the four-minute mark, which is where the Government
22 began asking you questions about this video. And you can
23 see I've drawn a yellow circle around Mr. Nordean, and it
24 looks like he's touching the fence there. Right?

25 A. Yes.

1 Q. Okay. I'll just play that for a second and then we'll
2 go backwards.

3 (Whereupon, segments of Government's Exhibit No.
4 492G were published in open court.)

5 BY MR. SMITH:

6 Q. It appears the fence comes down there. Right?

7 A. Correct.

8 Q. So let's just go back a few seconds. Go back to three
9 minutes and 26 seconds.

10 And do you see there's a photographer right there
11 who's holding a camera up above his head?

12 A. I do.

13 Q. I'm just going to ask you to watch him for the moment.

14 (Whereupon, segments of Government's Exhibit
15 No. 492G were published in open court.)

16 BY MR. SMITH:

17 Q. Now, at this point, there's someone who's wearing a
18 black-and-white gaiter and a black beanie. And you can see
19 him within the arms of the photographer?

20 A. I can.

21 Q. We'll just watch him for a second.

22 What does it appear he was doing just there?

23 A. He moves backwards.

24 Q. Okay. What do you think he's doing now that you've seen
25 the full clip?

1 A. I don't know what he's doing. I need a different angle.

2 Q. Okay. I'll just play -- I'll keep playing it.

3 (Whereupon, segments of Government's Exhibit No.
4 492G were published in open court.)

5 BY MR. SMITH:

6 Q. This time when he pulled backwards, did you see -- I'll
7 ask you to focus on a line here, this parallel I'm drawing
8 here, of people standing. You've got one person here;
9 you've got one person with a tan-colored beanie and
10 Mr. Nordean at the top. Right?

11 A. Yes.

12 Q. So I'm going to ask you to watch what happens to them
13 after the person with the black and white neck gaiter pulls
14 backwards. Okay?

15 (Whereupon, segments of Government's Exhibit No.
16 492G were published in open court.)

17 BY MR. SMITH:

18 Q. Do you see how they all get pulled back at the same
19 time, after the person in the middle of them rocks
20 backwards? I'll play that again.

21 (Whereupon, segments of Government's Exhibit No.
22 492G were published in open court.)

23 BY MR. SMITH:

24 Q. I'm looking in this circle here. Do you see how the
25 whole line shifts backwards?

1 A. Which would be consistent with pulling of the fence.

2 Q. It would be consistent with pulling the fence. But
3 let's see whether the person with the black neck gaiter
4 pulls backwards before they get pulled back backwards.

5 Okay?

6 A. Okay.

7 Q. Let's watch again.

8 (Whereupon, segments of Government's Exhibit No.
9 492G were published in open court.)

10 BY MR. SMITH:

11 Q. Now, watch whether this figure pulls the fence backwards
12 and then it prompts the line in front of them to fall back.

13 (Whereupon, segments of Government's Exhibit No.
14 492G were published in open court.)

15 BY MR. SMITH:

16 Q. Almost like they're pulled back by a string. Do you see
17 that?

18 A. Do you have a different angle of this individual's
19 hands? Because I can't see if he's holding onto the fence
20 or not.

21 Q. I don't. I don't. Do you know whether the Government
22 does?

23 MR. KENERSON: Objection.

24 MR. SMITH: That was not a rhetorical question.

25 THE COURT: Overruled.

1 MR. SMITH: I'll play that again for you.

2 BY MR. SMITH:

3 Q. So one thing I'll ask you to focus on right here is --
4 so we see this individual pulling backwards right now. And
5 do you see his hand is holding onto someone's shoulder right
6 there?

7 A. I think that might be Mark Bru's hand, because if you
8 back up a little bit, there's another Proud Boy next to him
9 who looks like he's holding onto someone's shoulder.

10 Q. Oh, are you saying that you've watched this segment?

11 A. I know where Mark Bru is. I've seen this video before,
12 yes.

13 Q. You've watched --

14 A. But I haven't paid specific -- no, not to that
15 individual.

16 Q. Okay. So we have the man with the black and white
17 gaiter rocking back and forwards. Right?

18 A. Yes.

19 Q. And it looks like one of his hands is on the shoulder of
20 somebody right there?

21 A. I don't know if that's his hand or not. I think it's
22 his hand.

23 Q. Okay. Let's watch it one more time.

24 (Whereupon, segments of Government's Exhibit No.
25 492G were published in open court.)

1 BY MR. SMITH:

2 Q. Do you notice this line of people at the fence rocking
3 backwards?

4 A. I see a line of people and I see them moving. Yes.

5 Q. Okay. Now, I'm going to bring up -- oh, you asked for a
6 different angle, so I will show a different angle. I am
7 going to bring up Government's Exhibit 445BX at one minute
8 and 13 seconds.

9 (Whereupon, segments of Government's Exhibit No.
10 445BX were published in open court.)

11 BY MR. SMITH:

12 Q. Can you see Nordean standing at the bottom of the steps
13 here in front of the fence? This time he's holding a can.

14 A. Yes.

15 Q. Okay. I'll move forward a little bit here.

16 (Whereupon, segments of Government's Exhibit No.
17 445BX were published in open court.)

18 BY MR. SMITH:

19 Q. This appears to be where Mr. Nordean was standing at the
20 fence in Government's Exhibit 492, which we were just
21 looking at, but this is a different angle?

22 A. Yes.

23 Q. Okay. I'll scroll forward a little bit here. And here
24 is one of the moments that's not frozen in the Government's
25 clip. Here at one minute and 13 seconds, we see, again,

1 Mr. Nordean standing in front of the fence and he's still
2 holding that can. Correct?

3 A. Uh-huh.

4 THE COURT REPORTER: Is that yes?

5 THE WITNESS: Yes.

6 BY MR. SMITH:

7 Q. Let's play it out from here.

8 (Whereupon, segments of Government's Exhibit No.
9 445BX were published in open court.)

10 BY MR. SMITH:

11 Q. I'm going to ask you to watch at one minute and 29
12 seconds how all of a sudden Mr. Nordean is jerked backwards.
13 Let's watch here.

14 (Whereupon, segments of Government's Exhibit No.
15 445BX were published in open court.)

16 BY MR. SMITH:

17 Q. Almost like he's pulled. Do you see that? Let's watch
18 that again.

19 (Whereupon, segments of Government's Exhibit No.
20 445BX were published in open court.)

21 BY MR. SMITH:

22 Q. Did you see that?

23 A. I see him going backwards, but I also know from
24 reviewing video footage, I believe at this point in time his
25 hand is on that fence.

1 Q. How do you know --

2 A. So he could be pulling.

3 Q. He could be? You don't know?

4 A. Not based off this video you're showing me.

5 Q. Right.

6 And by the other video footage you're seeing where
7 he's holding the fence, you're referring to the clip I
8 showed you in 492G at four minutes. Right?

9 A. I believe so. Yes.

10 Q. And do you remember how there was a clip I showed you
11 right about a few seconds before that where there's someone
12 who appears to be shaking back and then the line moves?
13 There's a line --

14 A. Somebody moves backwards or -- his body --

15 Q. He's rolling --

16 THE COURT: Please. Please. Could both counsel
17 and the witness not talk over each other.

18 BY MR. SMITH:

19 Q. And then after the person with the black neck gaiter
20 pulls back, do you see the kind of line at the front sort of
21 move back in unison like a wave? Do you remember that?

22 A. I see the line in front move. Yes.

23 Q. Okay. So I'm going to ask you whether that's the same
24 moment you're looking at right here. Okay?

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

1 445BX were published in open court.)

2 BY MR. SMITH:

3 Q. I'll let you watch it one more time and then we can move
4 on. We'll just play to the end here.

5 (Whereupon, segments of Government's Exhibit No.
6 445BX were published in open court.)

7 BY MR. SMITH:

8 Q. Does that look like the can he was holding?

9 A. It looks like a can. Yes.

10 Q. Was it a red can? You don't know if that's the same
11 can? We can go back.

12 (Whereupon, segments of Government's Exhibit No.
13 445BX were published in open court.)

14 BY MR. SMITH:

15 Q. There's a cleaner one. Is that red?

16 A. Red and white can.

17 Q. Okay. Now, at Government Exhibit 145X, we have the next
18 stage where the Government was asking you about what
19 Mr. Nordean did after he walks up that flight of stairs.
20 And the Government showed you this one, 145X.

21 THE COURT: Mr. Smith, if now is a good time to
22 pivot -- if you're pivoting from one set of videos to the
23 others, let me take a quick break to give the court reporter
24 a ten-minute break.

25 MR. SMITH: Sure.

1 THE COURT: Ladies and gentlemen, we'll just take
2 our afternoon break for the court reporter. We'll see you
3 all again in ten minutes.

4 (Whereupon, the jury exited the courtroom at 3:14
5 p.m. and the following proceedings were had:)

6 THE COURT: Everyone may be seated.

7 Agent, you may step down.

8 We'll be in recess for ten minutes.

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

11 THE COURTROOM DEPUTY: Jury panel.

12 (Whereupon, the jury entered the courtroom at 3:30
13 p.m. and the following proceedings were had:)

14 THE COURT: Mr. Smith, you may proceed.

15 MR. SMITH: Thank you, Your Honor.

16 Ms. Harris, I'm actually going to going to start
17 with -- I mentioned 145AX before the break, but I'm going to
18 start with Government's Exhibit 492E.

19 (Whereupon, segments of Government's Exhibit No.
20 492E were published in open court.)

21 BY MR. SMITH:

22 Q. So, Agent, we're just going to take one step back here
23 very briefly. And this appears to be a scene at the
24 initial -- the breach of the initial barrier at the Peace
25 Circle. Correct?

1 A. Yes.

2 Q. And one of the figures here at the initial breach is
3 this person I've circled in yellow with a black hat and
4 fatigue pants. Right?

5 A. Yes.

6 Q. Does that appear to be the figure William Chrestman that
7 we -- that I asked you to identify before on the march?

8 A. It does.

9 Q. Okay. And this appears to be the moment when the
10 barriers are sort of first coming down here because, as we
11 can see, that one fence is being pulled away in this shot.
12 Right?

13 A. It does.

14 Q. Okay. Now, I'm just going to go forward just a little
15 bit here in the Government exhibit. We can see some of the
16 people walking up the stairs here. Right?

17 A. We can.

18 Q. Okay.

19 (Whereupon, segments of Government's Exhibit No.
20 492E were published in open court.)

21 BY MR. SMITH:

22 Q. I want to ask you whether that is an informant who
23 is talking --

24 MR. KENERSON: Objection.

25 THE COURT: I'll hear from counsel at sidebar.

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

3 MR. SMITH: Judge, this is not -- we've already
4 laid the foundation for this. This is a case agent who's
5 testified she's reviewed the CHS reports in this case. I'm
6 allowed to ask her -- by the way, I don't intend to use his
7 legal name, but I intend to ask about evidence that the
8 Court already previewed and allowed the defense to admit --
9 I mean, to discuss in opening statements, the text message
10 about the present sense impression by the individual who, by
11 the way, picks up his phone at this moment.

12 THE COURT: Well, I'll just say this, Mr. Smith:
13 You know, whether it's -- I'm going to hear from
14 Mr. Kenerson. But as I stated in the beginning, the better
15 practice would have been just to front this so we could talk
16 about it ahead of time.

17 But, Mr. Kenerson, let me hear from you on this.

18 MR. KENERSON: I would also note the Court had
19 directed counsel to preclear questions relating to CHS
20 issues. This is squarely within that ruling. As -- I'd ask
21 Mr. Smith be admonished not to do anything like that again.

22 THE COURT: Mr. Smith --

23 MR. SMITH: Well, the --

24 THE COURT: Hold on, please.

25 Mr. Smith, I did ask -- it wasn't just the better

1 practice. I did ask everyone to front CHS questions so that
2 I can make sure they were appropriate. So do you
3 understand -- Mr. Smith, do you understand your obligation
4 in that regard?

5 MR. SMITH: Yes, Your Honor.

6 But can I explain why I did not even comprehend
7 that the Court would be including this witness? We -- we
8 had this witness's texts in opening arguments and, your
9 Honor, I -- when I asked this witness about whether she had
10 familiarized herself with the CHS reports, I thought that
11 was -- that's signaling my intent to ask her about whether
12 she has knowledge of this.

13 THE COURT: I don't want there to be any
14 confusion. If counsel are listening, if there is a CHS
15 issue, I want you to front it ahead of time so we can make
16 sure that -- make sure that -- so I have a chance to decide
17 outside the jury's presence.

18 Now, Mr. Kenerson, what's your objection?

19 MR. KENERSON: The objection is that there is --
20 there is no relevance to this witness's testimony to whether
21 this individual is a CHS.

22 And as we stated in our briefing on this topic, I
23 think that the only time that an individual becomes relevant
24 when an individual is a CHS is if and when that person takes
25 a stand in some way. The Court has not decided that

1 completely yet. But that is certainly our position.

2 The fact that this person is coming here, again,
3 we do not -- I think it's perfectly fine for Mr. Smith to
4 elucidate whatever he wants to about what this person is
5 doing, including the fact he's taking out his phone. But
6 what this person told his -- what this person told his
7 handler and the fact that he is a CHS is complete hearsay as
8 to this particular witness.

9 MR. SMITH: Your Honor, the Court has already
10 addressed -- what I'm startled by is the Court has already
11 addressed the specific text message at issue here. The
12 relevance is the handler texts -- or the informant texts his
13 handler right after the breach.

14 Proud Boys did not do it, nor inspire a herd
15 mentality. He does this right after crossing the barriers.

16 We litigated the present sense impression issue
17 before opening statements. That's why your Honor allowed us
18 to use the statement. It's one thing if the witness says
19 I've never reviewed -- I don't know anything about this CHS.
20 Okay. That's a foundation issue.

21 But, your Honor, to prevent the defense from even
22 asking the question and --

23 THE COURT: Mr. Kenerson?

24 MR. KENERSON: It's hearsay within hearsay as to
25 this witness. If he calls the handler, he can get it. If

1 he calls the CHS himself, he can --

2 MR. PATTIS: But --

3 THE COURT: Mr. Kenerson, when you say hearsay as
4 to this witness, if it's a present sense impression, why
5 isn't -- so let me just back up.

6 I think with regard to whether there were people
7 here in the crowd that were CHSs, I think I've already --
8 let me put it this way: I don't know why it's not fair game
9 to ask this question of whether this particular person was
10 or was not a CHS, particularly when we have this statement
11 that is relevant.

12 But why -- in other words, if there's a document
13 with a statement in it that's a present sense impression,
14 why isn't it fair game for this witness to answer that
15 question?

16 MR. KENERSON: The document itself is hearsay. It
17 was not reported to this witness.

18 Now, the FBI report of it was not authored by this
19 witness. It's someone else's statement.

20 The text message itself is what the Court ruled is
21 admissible. And this witness was not the sender nor the
22 recipient to that text message.

23 MR. SMITH: Your Honor, whether she's the sender
24 or recipient is not a hearsay question. Of course, we can
25 only show the text message through representations the

1 Government has sent us. The Government never argued that
2 there's a second layer of hearsay. It's the witness's text
3 itself. There is no other layer. If that --

4 THE COURT: The question is whether he can --
5 Mr. Smith can ask -- has a good-faith basis to ask the
6 question and this individual reported to their handler that
7 X, considering if it's a present sense impression. Why
8 isn't that a fair question?

9 MR. KENERSON: Because the only way she would know
10 what this person reported to the handler is from her reading
11 of a report, which she was not an author of. So it's
12 hearsay that was reported when -- to her. That's the second
13 layer of hearsay.

14 The first layer of hearsay, the Court has decided
15 it's a present sense impression from source to --

16 MR. SMITH: Your Honor, the --

17 THE COURT: Mr. Smith, let Mr. Kenerson finish his
18 point.

19 Continue, Mr. Kenerson.

20 MR. KENERSON: The second level of hearsay is the
21 report from a handler to this agent.

22 I understand that quite often the Government does
23 not object on situations like this. In this one, we are,
24 because we think the context of that is -- needs to be
25 brought out by whoever this is brought through, whether that

1 be the witness himself or whether that could be the
2 witness's handler. This agent, not having received the
3 text, knows nothing of the context.

4 THE COURT: Mr. Smith -- Mr. Kenerson, do we know
5 what her answer will be, whether she knows the answer to
6 this witness said A, B or C?

7 MR. KENERSON: I actually don't. I know she has
8 reviewed some of the reporting. I cannot remember if it
9 includes this.

10 MR. SMITH: Your Honor, may I have a word in
11 edgewise on Mr. Kenerson's point?

12 THE COURT: Yes.

13 MR. SMITH: Your Honor, it is of course not
14 hearsay that an image is captured from a screen.
15 Mr. Kenerson is saying there's a second layer. Here's the
16 exhibit, your Honor. It's a picture of Mr. -- of the CHS's
17 text. There isn't a second layer of hearsay because hearsay
18 is a statement offered to prove the truth of the matter
19 asserted. An image taken by the Government is not a layer
20 of hearsay.

21 THE COURT: You're missing Mr. Kenerson's point.
22 He's saying to the extent it's reflected in a
23 Government -- in a report, it would be --

24 MR. SMITH: It's not in a report, your Honor.
25 It's a direct --

1 THE COURT: I'm aware of that. It's both. It's
2 both, is my point.

3 So I mean, do you plan on showing her the text?

4 MR. SMITH: If she doesn't recall it, your Honor,
5 to refresh.

6 THE COURT: She may have never seen it and then
7 you're kind of stuck. Right?

8 MR. SMITH: Correct. But I have to have the
9 opportunity to ask her about this. This was already
10 admitted. The Government, they said this is a double
11 hearsay question because it's an image.

12 THE COURT: You're missing the point Mr. Kenerson
13 is making.

14 If you use the text itself, then no --

15 MR. SMITH: Not the report. We're not using the
16 report, your Honor.

17 THE COURT: I understand.

18 Mr. Pattis, I see your hand up.

19 MR. PATTIS: I don't know how much longer
20 Mr. Smith will be, but I expect I'll be on my feet before
21 the end of the day. And I -- I want to make sure my head is
22 straight on the topic of the CHSs.

23 MR. SMITH: I understood -- Mr. Pattis, can you
24 allow us to use the exhibit? Then we would wrap up.

25 MR. PATTIS: Should I wait until I --

1 THE COURT: I think you should wait.

2 MR. PATTIS: Thank you.

3 THE COURT: I'm trying to have mercy on Mr. Smith
4 here so he can proceed.

5 Look, I think -- Mr. Kenerson, I think he has a
6 good-faith basis to ask her if she knows whether this person
7 sent a text.

8 Now, Mr. Smith, I mean, I think in fairness,
9 you're going to have to ask the question, Do you know
10 whether he sent a text about this moment or something like
11 that? Without reading the text as part of the question.

12 Either she --

13 MR. SMITH: The concept of it. Not the literal --

14 THE COURT: About this moment or something like
15 that, not that says it was or was not organized. That bakes
16 the question into it so it's before the jury without even
17 knowing.

18 MR. SMITH: Okay. I can do it without that.

19 THE COURT: And we'll see what her answer is.

20 But I think this is fair game, Mr. Kenerson.

21 MR. SMITH: Thank you.

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

24 BY MR. SMITH:

25 Q. Agent, I apologize. I've drawn a yellow circle around a

1 figure here.

2 You testified that there was a group of people --
3 Proud Boys from Kansas City who came to the -- who were
4 along the march that day. Correct?

5 A. Yes.

6 Q. And without getting into names, you understand that one
7 of the people in that march was a confidential human source?

8 A. Yes.

9 Q. Okay. And I've drawn a circle around an individual
10 right here. I'm not going to use his legal name. That is
11 the individual who is the confidential human source with the
12 Kansas City Proud Boys?

13 A. Yes.

14 Q. Okay. And now it appears that this moment is a few --
15 you know, maybe call it ten seconds after the initial
16 breach. Right?

17 A. Yes.

18 Q. Okay. Now, I'm going to bring this down for a second.
19 And just so the jury -- we can orient the jury, a
20 confidential human source is managed by an agent -- I'm
21 talking about the general case, not the specific -- so a
22 confidential human source is managed by an agent at the FBI
23 called a handler. Correct?

24 A. Yes.

25 Q. And the handler, in managing a confidential human

1 source, will have sometimes have communications with them?

2 A. Yes.

3 Q. Okay. And have you -- you indicated that you had
4 reviewed some of the CHS reporting in this investigation?

5 A. Yes.

6 Q. So when you were reviewing that reporting, did you come
7 across a message that that individual, the CHS, sent to his
8 handler shortly after the first barrier breach?

9 A. No.

10 Q. Did you recall any messages sent to the handler from
11 that confidential human source?

12 A. I didn't review any communications with that specific
13 source.

14 Q. Did you review any reporting on that source's
15 communications with his handler on January 6th?

16 A. I did not.

17 Q. Okay. I'm going to go back to Government's Exhibit
18 145AX.

19 MR. SMITH: Permission to publish that.

20 (Whereupon, segments of Government's Exhibit No.
21 145AX were published in open court.)

22 BY MR. SMITH:

23 Q. Agent, you were asked on direct about -- this is a
24 little bit tricky to see colors here -- but you were asked
25 on direct about a confrontation between a man in a blue star

1 jacket and police officers near the inaugural platform.

2 Correct?

3 A. Correct.

4 Q. Okay. And this moment in time is after the group passes
5 two levels of barriers. Right?

6 A. Yes.

7 Q. And can you just, like, gesture behind you at the map
8 where we're looking at right here?

9 A. (Witness indicates.)

10 Q. Thank you.

11 So I'm just going to let this play for a second.
12 And I think what this clip showed was -- it pauses here --
13 it shows -- I think -- is that Mr. Nordean I've circled in
14 yellow? I'll play that back for a second here.

15 (Whereupon, segments of Government's Exhibit No.
16 145AX were published in open court.)

17 BY MR. SMITH:

18 Q. Do you see how there's two people kind of like hugging
19 and slapping hands there?

20 A. I do. This is --

21 Q. Is one of them -- go ahead.

22 A. I was going to say, this is Biggs and this is Nordean
23 and then Rehl right here. So Nordean, Biggs, Rehl.

24 Q. And I think the Government was asking you about this
25 figure who appears to be shouting at police officers. He's

1 wearing a blue jacket?

2 A. Yes.

3 Q. Okay. I'll just let the clip here play out.

4 (Whereupon, segments of Government's Exhibit No.
5 145AX were published in open court.)

6 BY MR. SMITH:

7 Q. So there's actually other clips that you've reviewed
8 that show Mr. Nordean's interactions at this moment with the
9 figure in the blue jacket. Right?

10 A. You're talking about this guy?

11 Q. Can you draw an arrow?

12 A. I did. You're talking about the blue and white jacket?

13 Q. Yes.

14 A. Yes.

15 Q. So in this scene we just see Mr. Nordean and Mr. Biggs
16 hugging and slapping hands. Right?

17 A. Yes.

18 Q. There are actually other video clips that show
19 Mr. Nordean's interactions with the wild figure in the blue
20 jacket. Right?

21 A. There are after this. But yes.

22 Q. Okay. Let me just bring up Nordean Exhibit 317. It's
23 at 12 seconds.

24 (Whereupon, segments of Defendant Nordean's
25 Exhibit No. 317 were published in open court.)

1 BY MR. SMITH:

2 Q. This is a closer shot than the one we were just looking
3 at. Right?

4 A. It is.

5 Q. So here we see -- do we see Mr. Nordean and Mr. Biggs
6 hugging?

7 A. We do.

8 Q. And that was a part of the faraway shot we just saw?

9 A. Yes.

10 Q. Okay. So we'll just let this play.

11 (Whereupon, segments of Defendant Nordean's
12 Exhibit No. 317 were published in open court.)

13 BY MR. SMITH:

14 Q. It appears Mr. Nordean is grabbing the man with the blue
15 jacket. Right?

16 A. Yes.

17 Q. After he pushed a police officer?

18 A. Yes.

19 Q. Okay. I'm going to bring that one down.

20 And there's another clip, actually, where after
21 Mr. Nordean stops the person -- pulls the person from --
22 after he pushes the police officer, he stands in between the
23 police officer and that figure in blue. Correct?

24 A. There is.

25 Q. Were you shown that on direct?

1 A. I don't recall.

2 Q. I'm going to bring up what's been marked as Nordean
3 Exhibit 317 and we're going to call it X, which is a
4 slightly longer version of Government's Exhibit 145AX. It's
5 a version of 145AX, but a little bit longer.

6 MR. SMITH: Permission to publish? This is the
7 same CCTV video that's in Government's Exhibit 145AX, but it
8 just continues for a few seconds longer.

9 MR. KENERSON: No objection.

10 THE COURT: It will be admitted and permission to
11 publish.

12 (Whereupon, Defendant Nordean's Exhibit No. 317X
13 was entered into evidence.)

14 (Whereupon, segments of Defendant Nordean's
15 Exhibit No. 317X were published in open court.)

16 BY MR. SMITH:

17 Q. Now, here -- I think we just saw at the beginning of
18 this clip Nordean and Biggs slapping hands. But this is
19 kind of a *Where's Waldo* scene here, so I'm just going to
20 orient you.

21 Do you see the person with the blue jacket there?

22 A. I do.

23 Q. And I think you might see Nordean right there?

24 A. Yes.

25 Q. Okay. I'll ask you to watch this.

1 (Whereupon, segments of Defendant Nordean's
2 Exhibit No. 317X were published in open court.)

3 BY MR. SMITH:

4 Q. You just saw that they kind of -- they hugged right
5 there?

6 A. I did.

7 Q. Okay. Now I'd ask you to watch what happens with this
8 individual in blue.

9 (Whereupon, segments of Defendant Nordean's
10 Exhibit No. 317X were published in open court.)

11 BY MR. SMITH:

12 Q. Did he push the police officer there?

13 A. He does, multiple times.

14 Q. Did you see Nordean walk in between them right there?
15 Let's go back.

16 (Whereupon, segments of Defendant Nordean's
17 Exhibit No. 317X were published in open court.)

18 BY MR. SMITH:

19 Q. Here, I think you can see Mr. Nordean grabbing the man
20 in blue. We saw that in the closer clip.

21 A. We did.

22 Q. Now I'd ask you to watch what he does after grabbing the
23 man.

24 (Whereupon, segments of Defendant Nordean's
25 Exhibit No. 317X were published in open court.)

1 BY MR. SMITH:

2 Q. Does he stand between the man in blue and the police
3 officer?

4 A. Yes.

5 Q. Okay. Does he appear to be preventing -- who was the
6 person with the blue jacket?

7 A. His name is Quaglin.

8 Q. Is he a Proud Boy?

9 A. He is; out of New Jersey.

10 Q. Okay. And does it appear that Mr. Nordean is standing
11 between Quaglin out of New Jersey and the police officer so
12 that he stops doing what he was doing?

13 A. I don't know why Mr. Nordean is standing where he's
14 standing. But he grabbed Quaglin, kind of moved him back.
15 Somebody else is now talking to Quaglin, and then at some
16 point Mr. Nordean will talk to Quaglin.

17 Q. And I think you testified that Mr. Nordean moves his
18 body in between the police officer and Quaglin. So we'll
19 watch that scene right here.

20 There's Quaglin right there. And there's Nordean
21 walking up to him and then he steps in between them.

22 Correct?

23 A. Yes.

24 Q. Okay. I'm going to bring up what was marked as -- I
25 think the Government asked you one question about Quaglin,

1 whether Mr. Nordean stopped Quaglin's misbehavior at every
2 point during the day.

3 Do you remember that question?

4 A. I don't. I don't recall.

5 Q. Do you recall a question about whether Mr. Nordean
6 stopped some of Quaglin's antics at various points?

7 A. I don't recall.

8 Q. So I'm going to bring up what's been marked as
9 Government's Exhibit 229. This is when Defendant Pezzola is
10 seen with a shield. And the Government highlighted
11 Mr. Nordean in that clip. It's Government's Exhibit 229X,
12 if we could publish that.

13 (Whereupon, segments of Government's Exhibit No.
14 229X were published in open court.)

15 BY MR. SMITH:

16 Q. I'm going to stop it right here.

17 Do you remember testifying about this video clip
18 where I think Defendant Pezzola may be seen taking a riot
19 shield?

20 A. I do.

21 Q. Is that him highlighted right there?

22 A. It is.

23 Q. Okay.

24 THE COURT: And this is 37 seconds in this
25 exhibit.

1 MR. SMITH: Thank you, your Honor. I'm going to
2 go forward a little bit.

3 (Whereupon, segments of Government's Exhibit No.
4 229X were published in open court.)

5 BY MR. SMITH:

6 Q. This is -- it looks like at 49 seconds -- this is where
7 it appears that the Defendant is taking the shield? I can
8 keep playing it here.

9 (Whereupon, segments of Government's Exhibit No.
10 229X were published in open court.)

11 BY MR. SMITH:

12 Q. I'm going to go backwards in this clip. I think later
13 in this clip there's a highlight over the figure I've drawn
14 a yellow circle over. Is that Nordean in the yellow circle?

15 A. It is.

16 Q. And you said that I think it's -- the Government has
17 represented that Mr. Pezzola is scuffling in that white
18 circle?

19 A. Yes.

20 Q. Okay. Do you have -- have you seen any evidence
21 indicating that Mr. Nordean was encouraging Mr. Pezzola's
22 behavior?

23 A. What do you mean by "encouraging"?

24 Q. Was he shouting something at him?

25 A. There was -- the whole crowd is shouting. I don't know

1 specifically if Nordean was saying anything.

2 Q. Do you know whether Nordean took any action at this
3 point to facilitate what Mr. Pezzola is doing over here?

4 A. Not that I'm aware of.

5 Q. Okay. So when you say not that you're aware of, you
6 mean you haven't seen it in evidence?

7 A. I haven't seen any video. Correct.

8 Q. Or any other -- have you seen --

9 A. Or any other.

10 Q. Okay. Thank you.

11 Now, I'm going to bring up what's been marked as
12 Government's Exhibit 261.

13 You testified about a number of individuals who
14 were in a marching group but are not Defendants in this
15 case. Right?

16 A. I did.

17 Q. One of them was named McDonald?

18 A. Yes.

19 Q. Okay. I'm bringing up Government's Exhibit 261.

20 Do you remember this? I'm going to play a little
21 bit of this clip to orient you.

22 (Whereupon, segments of Government's Exhibit
23 No. 261 were published in open court.)

24 BY MR. SMITH:

25 Q. Well, let me just ask you about one thing here. Do you

1 see this individual again?

2 A. I do.

3 Q. Was that someone that we saw talking to Ray -- or excuse
4 me -- to Ryan Samsel near the first barrier breach?

5 A. It was.

6 Q. Is that the same person?

7 A. Yes. I believe so.

8 Q. And now is he next to who you're going to identify as
9 McDonald, who was with the marching group?

10 A. Can you play the video? Because I think McDonald comes
11 in.

12 (Whereupon, segments of Government's Exhibit
13 No. 261 were published in open court.)

14 BY MR. SMITH:

15 Q. Do you know who this figure is, who's shouting very
16 aggressively?

17 A. I do not.

18 Q. You don't know if he has anything to do with the
19 marching group. Right?

20 A. I do not.

21 Q. Okay.

22 (Whereupon, segments of Government's Exhibit
23 No. 261 were published in open court.)

24 BY MR. SMITH:

25 Q. Do you see McDonald in this clip yet?

1 A. You had him. Hold on. I think he may be back a little.

2 (Whereupon, segments of Government's Exhibit
3 No. 261 were published in open court.)

4 THE WITNESS: Stop.

5 BY MR. SMITH:

6 Q. Okay. Now, I think later in this clip you testified
7 that he sprays something?

8 A. He does.

9 Q. Okay. Do you know where Nordean is right now?

10 A. I believe Nordean is still in the same area he was from
11 the last video.

12 Q. Why do you believe that?

13 A. Based off video footage.

14 Q. Which one?

15 A. So the dome cam from the Capitol.

16 Q. You mean the one that we were looking at where Quaglin
17 in the blue jacket and Nordean were standing near the front
18 line?

19 A. Yes.

20 Q. So can you point out where we're looking at right now on
21 the map behind you?

22 A. So the crowd is facing towards the officers. The
23 officers are on the lower west terrace facing this
24 direction.

25 THE COURT REPORTER: Can you say it again? The

1 lower what?

2 THE WITNESS: Lower west terrace. Officers were
3 facing north. The crowd is facing south.

4 BY MR. SMITH:

5 Q. And while you're still up there, if you don't mind, the
6 scene we saw from what you're calling the dome camera, where
7 Mr. Nordean grabs Quaglin, can you point out where that is?

8 A. (Witness indicates.)

9 Q. Are you sure about that?

10 A. In this area. Yes. They were here, where he grabbed
11 Quaglin, yes. This vicinity.

12 Q. Okay. So you didn't identify Mr. Nordean encouraging or
13 directing what this person McDonald is doing?

14 A. Not in this specific shot.

15 Q. In any other specific shot?

16 A. As they're leaving --

17 Q. Uh-huh.

18 A. -- the group -- well, Nordean --

19 Q. I'll get to that video. But yeah. Well, are you
20 referring to the video that's from a bird's-eye view of the
21 group leaving? Okay. We'll get to that.

22 But in this image, do you see anything there?

23 A. Not in this image.

24 Q. Okay. Do you know whether Mr. Nordean has ever met this
25 person, apart from January 6th, apart from being in the same

1 marching group?

2 A. I do not know.

3 Q. Okay. So you also showed -- I think 145CX may be the
4 video you're referring to. 145CX. We can go to 2:55. So
5 this is Government's Exhibit 145CX. It's at two minutes and
6 52 seconds. Let's move forward a little bit here.

7 (Whereupon, segments of Government's Exhibit
8 No. 145CX were published in open court.)

9 BY MR. SMITH:

10 Q. Agent, is this the video you're referring to where you
11 believe Mr. Nordean may have encouraged Mr. McDonald to do
12 something inappropriate?

13 A. It was after this, but this might be the video; or it
14 might be the one after.

15 Q. Okay. And that's based on what, now?

16 A. As they proceed to the back, to the lawn area,
17 Mr. Nordean kind of taps McDonald on the head and on the
18 shoulder. Again, what is said, I don't know.

19 MR. SMITH: Can I ask the Government which exhibit
20 that is?

21 MR. KENERSON: You're asking me?

22 MR. SMITH: Yes.

23 MR. KENERSON: I think it was the one you have up,
24 145CX.

25 MR. SMITH: Oh, okay. I think the agent said it

1 was a different clip.

2 BY MR. SMITH:

3 Q. Is this the clip, Agent?

4 A. Can you play it? Sorry.

5 Q. Yeah.

6 (Whereupon, segments of Government's Exhibit No.
7 145CX were published in open court.)

8 BY MR. SMITH:

9 Q. I think --

10 A. Oh, I was going to say, just keep letting it play.
11 You'll see what I'm talking about.

12 Q. Actually, I was asking you about -- so I think the bad
13 act you're referring to is when Mr. McDonald just threw
14 something there. Is that what you're referring to?

15 A. No. So as they proceed to the back, you'll see Nordean
16 gets behind Mr. McDonald and puts his hand on his head and
17 on his shoulder.

18 Q. So did you see how Mr. McDonald just threw something
19 there?

20 A. I did.

21 Q. Okay. Do you see Nordean -- I'm asking you, is that the
22 bad act that you're referring to? So when I ask you about
23 bad acts, I'm saying -- we've gone through a series of clips
24 among people you've called marching group members and they
25 do bad things, like throwing things or spraying things.

1 Right?

2 A. Correct.

3 Q. In this video clip, is that the bad act? I'll play that
4 again for you.

5 (Whereupon, segments of Government's Exhibit No.
6 145CX were published in open court.)

7 BY MR. SMITH:

8 Q. Did you see how -- was that McDonald that just threw
9 something?

10 A. It was.

11 Q. Is that the bad act in this clip that you were referring
12 to when I asked you whether you had evidence of Nordean
13 encouraging misbehavior?

14 A. So McDonald did two bad acts in this clip. But I was
15 referring, as they are leaving, which is right after this --

16 Q. Well, let's just --

17 A. I'm trying to answer your question.

18 Q. Well, let's start with that one.

19 A. Okay.

20 MR. KENERSON: Can she answer the question?

21 THE COURT: Counsel, she's in the middle of
22 answering your question.

23 MR. SMITH: So sometimes she jumps up. I'm going
24 to go one act at a time here.

25 BY MR. SMITH:

1 Q. Do you see Mr. Nordean encouraging that bad act?

2 A. Not at this specific moment.

3 Q. Okay. Now we're going to let it go forward and you can
4 explain what you meant.

5 (Whereupon, segments of Government's Exhibit No.
6 145CX were published in open court.)

7 THE WITNESS: Right there.

8 BY MR. SMITH:

9 Q. Okay. Can you point out what you're talking about?

10 A. So Mr. Nordean places his hand on top of Mr. McDonald's
11 head. And then as we continue to play this, you'll see more
12 motions from Nordean to McDonald.

13 Q. Okay. So he puts his hand on him. Okay.

14 (Whereupon, segments of Government's Exhibit No.
15 145CX were published in open court.)

16 BY MR. SMITH:

17 Q. So what did we see just there?

18 A. His hand on his head again.

19 Q. So I think you said there were two bad acts in this
20 clip.

21 A. So the one we had just witnessed, which would be the
22 pepper spraying -- or the spraying of the chemical irritant
23 towards the direction of the law enforcement officers.

24 Q. So just take -- so this is the exhibit we're -- we
25 watched an exhibit -- a closeup exhibit before at a scene

1 where it was right up next to the fence. Right?

2 A. Uh-huh.

3 THE COURT REPORTER: Is that "yes"?

4 THE WITNESS: Yes.

5 BY MR. SMITH:

6 Q. There was spraying in that video clip?

7 A. Correct.

8 Q. We didn't see Nordean in that clip. Right?

9 A. Correct.

10 Q. In this clip, you said the bad act was Mr. McDonald --
11 or was this throwing of the shoe or something, whatever that
12 is?

13 A. Correct.

14 Q. Okay. Now, you said that you didn't see Mr. Nordean
15 encouraging that. Right?

16 A. Not at this specific moment. Correct.

17 Q. Well, he can't encourage it after. Right?

18 A. You can say, like -- again, I don't know the words that
19 were exchanged between the two of them.

20 Q. Okay. So there's a difference between maybe celebrating
21 something and encouraging it. Right? Inducing it?

22 A. Sure. But celebrating can also be encouraging.

23 Q. Okay. So I'm referring to this act right here. We're
24 just going piece by piece. I know it's frustrating to go
25 piece by piece, but we're just -- so for this one, you're

1 not saying -- you're not identifying Mr. Nordean encouraging
2 that at the time he does it?

3 A. Correct.

4 Q. Okay. And to your knowledge, there isn't any bad act by
5 McDonald after that moment?

6 A. Not in this video.

7 Q. Right. And just in this video?

8 A. Correct.

9 Q. Okay.

10 MS. HERNANDEZ: What number was that?

11 MR. SMITH: That was 145CX.

12 BY MR. SMITH:

13 Q. Now I'm going to go to -- there's a video clip where
14 Charles Donohoe throws a water bottle. Correct?

15 A. There is.

16 Q. I'm going to go to Government's Exhibit 440AX. And I
17 think this is -- this clip is short enough that we don't
18 need to scroll much. I'm going to go forward a little bit
19 here.

20 Now, do you see how Mr. Donohoe is circled in
21 white there?

22 A. I do.

23 Q. Is he about to throw something?

24 A. He is.

25 Q. Okay. Let's just watch this.

1 (Whereupon, segments of Government's Exhibit No.
2 440AX were published in open court.)

3 BY MR. SMITH:

4 Q. Did he throw something at the police there?

5 A. Not yet.

6 Q. Oh.

7 (Whereupon, segments of Government's Exhibit No.
8 440AX were published in open court.)

9 BY MR. SMITH:

10 Q. That's Mr. Donohoe throwing a water bottle?

11 A. It is.

12 Q. Do you know where Mr. Nordean is in this scene?

13 A. He is already on the lawn with Biggs.

14 Q. He's on the lawn. Okay.

15 So can you point out where Mr. Donohoe is in this
16 clip on the map behind you?

17 A. This vicinity.

18 Q. And can you tell me what the lawn is that you're
19 referring to?

20 A. Down here.

21 Q. Okay. So have you seen any evidence indicating that
22 Mr. Nordean took an action to advance the throwing of the
23 water bottle?

24 A. No.

25 Q. Okay. Did there come a time in the investigation when

1 you learned why -- your understanding of why Mr. Donohoe
2 threw the water bottle?

3 MR. KENERSON: Objection. Hearsay.

4 THE COURT: Sustained.

5 BY MR. SMITH:

6 Q. Now, at Government's Exhibit 476X, we see I think what
7 you described as some of the Defendants in this case
8 entering the scaffolding. 476X. I'll bring that up.

9 (Whereupon, segments of Government's Exhibit
10 No. 476X were published in open court.)

11 BY MR. SMITH:

12 Q. And I'm just going to pause it right there where you can
13 see four figures circled in white.

14 Who is this one?

15 A. McDonald.

16 Q. And this one?

17 A. Biggs.

18 Q. This one?

19 A. Fonticoba.

20 Q. And this one?

21 A. Rush.

22 Q. Okay. Mr. Nordean is not entering the scaffolding with
23 those figures. Correct?

24 A. Correct.

25 Q. He does not enter through that scaffolding, to your

1 knowledge. Correct?

2 A. He does not.

3 Q. Let's just make sure that there isn't one more piece
4 there. Okay.

5 I'm going to go to Government's Exhibit 253, where
6 we see --

7 MR. PATTIS: The number again, please?

8 MR. SMITH: 253.

9 (Whereupon, segments of Government's Exhibit
10 No. 253 were published in open court.)

11 BY MR. SMITH:

12 Q. Now, do you remember testifying about a clip where --
13 I'm going to draw a circle around someone right here. Who
14 did you testify that that was, that I've drawn a circle
15 around?

16 A. Joseph Biggs.

17 Q. Okay. And I think you testified that this fence I've
18 drawn a yellow circle around was the -- you believe that's
19 the fence that -- at the scene where there was shaking of
20 the fence?

21 A. I'm sorry. Re-ask your question.

22 Q. Do you remember a few videos back we watched a video
23 clip of people shaking a fence near the inaugural platform?

24 A. Yes.

25 Q. And did you testify that this fence I've circled here

1 now is the same fence?

2 A. Not that I recall.

3 Q. Okay. So you don't -- do you know, based on your review
4 of the evidence, where this particular fence is that that
5 came from?

6 A. I don't know where it came from, no.

7 Q. Okay. You didn't testify that was -- were you asked a
8 question about whether this was similar to --

9 A. Possibly. I don't recall, but possibly.

10 Q. Okay. So when you were possibly asked whether it was
11 similar, you were answering that it looks similar in
12 appearance to the fence that was shaken?

13 A. Not to the fence earlier where we saw Mr. Nordean
14 grabbing. That's not similar to this one. This is similar
15 to the bike rack fences.

16 Q. Okay. So you do not identify this as the one that you
17 believe Mr. Nordean was -- brought down?

18 A. Correct.

19 Q. I'm just going to go forward just a couple seconds here.
20 And I believe you made an ID -- you made an identification
21 of Nordean somewhere in this clip, and I'm trying to
22 understand where.

23 (Whereupon, segments of Government's Exhibit No.
24 253 were published in open court.)

25 BY MR. SMITH:

1 Q. I'll keep moving through this a little bit here. Okay.
2 Right here.

3 Now, I've drawn a yellow circle around someone
4 with a backwards baseball cap and glasses. Right? Can you
5 see that one?

6 A. I do.

7 Q. Was that your identification of Nordean?

8 A. I don't know if it was this specific, like, picture, but
9 I'm fairly certain that is Nordean. If you want to continue
10 playing a little bit.

11 Q. I will. It's -- I'll warn you, it goes very fast, so
12 you have to --

13 (Whereupon, segments of Government's Exhibit
14 No. 253 were published in open court.)

15 BY MR. SMITH:

16 Q. Here. There's another image right there.

17 A. Right here?

18 Q. Right. So is this -- I just want to make sure this
19 is the -- you're making the ID based on these images? I'll
20 let it play.

21 (Whereupon, segments of Government's Exhibit No.
22 253 were published in open court.)

23 BY MR. SMITH:

24 Q. That was the identification. Right? I'll let it clean
25 playing.

1 A. I believe so. Yes.

2 Q. So it was just that image that we saw?

3 MR. KENERSON: Objection. Misstates.

4 MR. SMITH: She just said she believed so.

5 THE WITNESS: That's right.

6 THE COURT: Overruled.

7 BY MR. SMITH:

8 Q. So that is the image you're making the identification
9 based on?

10 A. Yes, along with both Rae, Fonticoba and McDonald all
11 being in the same area as well.

12 Q. Okay. Now, let's watch the moment when the fence is
13 being moved here.

14 (Whereupon, segments of Government's Exhibit
15 No. 253 were published in open court.)

16 BY MR. SMITH:

17 Q. And you see that some hands reach up to grab it right
18 here. And the hand grabbing the fence is wearing a black
19 glove. Can you see that?

20 A. Yes.

21 Q. Was Mr. Nordean wearing black gloves?

22 A. No.

23 Q. Okay. So he doesn't appear to be touching it. Right?

24 A. No.

25 Q. I'm going to go to Government's Exhibit 157X. I

1 apologize for bringing you back through all of the ones with
2 Nordean, but there's a lot of them. So 157X.

3 (Whereupon, segments of Government's Exhibit
4 No. 157X were published in open court.)

5 BY MR. SMITH:

6 Q. Do you remember testifying about Mr. Nordean walking up
7 a flight of stairs here?

8 A. I do.

9 Q. Okay. And this is at -- the time stamp on this was 2:24
10 p.m.?

11 A. Yes.

12 Q. And after Mr. Nordean walks up this flight of stairs, he
13 walks towards the upper west terrace door?

14 A. Correct.

15 Q. Okay. I'll bring that down.

16 And then you were shown another video clip of
17 Defendant Pezzola going up the stairs. Correct?

18 A. I think that one was before this one. But yes.

19 Q. Was it before?

20 A. Yes.

21 Q. Okay. I'll bring up what's been marked as Government's
22 Exhibit 155X.

23 (Whereupon, segments of Government's Exhibit
24 No. 155X were published in open court.)

25 BY MR. SMITH:

1 Q. Let's look at the time here. So that is Mr. Pezzola,
2 you testified, walking up the stairs. Correct?

3 A. Correct.

4 Q. And what time is that?

5 A. 2:10 p.m.

6 Q. And what was -- and that's about a 15-minute time
7 difference from when Mr. Nordean walked up the stairs?

8 A. Yes.

9 Q. Okay. So I'm just going to bring you -- wrapping up
10 here, I'm going to bring you inside the Rotunda. You
11 testified about a couple video scenes inside the Rotunda in
12 the Capitol Building?

13 A. Yes.

14 Q. Now, let me go to Government's Exhibit 181.

15 THE COURTROOM DEPUTY: Which number?

16 MR. SMITH: Government's Exhibit 181.

17 Actually, Government's Exhibit 256, which is right
18 after Mr. Nordean is entering the Rotunda here. I'm going
19 to go to -- let's see here -- 256. I'll publish that.

20 Thank you.

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

23 BY MR. SMITH:

24 Q. Agent, do you remember testifying about a -- drawing
25 Nordean here, and there's a woman circled in yellow as well

1 who appears to be yelling inside the Rotunda?

2 A. Yes.

3 Q. Now, this scene followed a scene where we saw from a
4 distance a POW MIA sign coming down in the Rotunda.

5 Correct?

6 A. It did.

7 Q. This is afterwards. Right?

8 A. It is.

9 Q. Okay. So I think you were -- from a distance, you were
10 drawing an arrow over a distant figure you thought was
11 Mr. Nordean next to the POW sign?

12 A. Correct.

13 Q. Okay. I'm going to let this play for a second and ask
14 you whether you see Mr. Nordean carrying a POW MIA sign.
15 Okay? Or flag.

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

18 BY MR. SMITH:

19 Q. Do you see him carrying it here?

20 A. No.

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

23 BY MR. SMITH:

24 Q. This is after. Right?

25 A. Correct.

1 Q. Okay. And then later on in this clip, we see
2 Mr. Nordean exiting the Rotunda?

3 A. Yes.

4 Q. Do you see him carrying it there?

5 A. No.

6 Q. This is the room where the sign came down. Correct?

7 A. Correct.

8 Q. Okay. And I think one last exhibit for you is
9 Government's Exhibit 461. There was a scene inside -- two
10 scenes inside the tunnel at the Capitol where there was
11 chaos between -- okay.

12 So I'm going to go to Government's Exhibit 461.
13 And I'm not going to show you the whole clip, but just ask
14 you some questions about it.

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

17 BY MR. SMITH:

18 Q. So -- wow. I think you were shown this clip of, like, a
19 push -- a kind of push and pull between the police officers
20 and the protesters in this tunnel?

21 A. Yes.

22 Q. And you were asked about this figure?

23 A. Yes.

24 Q. Who is that?

25 A. AJ Fischer.

1 Q. Do you know whether AJ Fischer has ever met Mr. Nordean
2 before January 6th?

3 A. I know he was in the MOSD chat group.

4 Q. Okay.

5 A. And I know he was at -- well, outside of that, no.

6 Q. So apart from those things, you don't know whether they
7 know each other at all?

8 A. There are a lot of events within the Proud Boys that
9 they attend. They may have met at one of those, but I don't
10 know for certain.

11 Q. Okay. And what time does this scene in the hall, when
12 people are pushing and pulling -- when does that happen,
13 roughly?

14 A. 3:16 p.m.

15 Q. 3:16. And I think you testified about when Mr. Nordean
16 left the Capitol Building?

17 A. When he exited, it was 3:13 p.m.

18 Q. And where did he exit?

19 A. The Columbus doors.

20 Q. Can you show me where that is?

21 A. On the east side. It's basically a mirror.

22 Q. Okay. And can you show us where the tunnel scene is
23 that we're looking at here?

24 A. It's on the west side.

25 Q. Okay. Different side of the building. Right?

1 A. Yes.

2 Q. So no physical possibility that Mr. Nordean is in this
3 tunnel?

4 A. No.

5 Q. No physical possibility that he's communicating with
6 this person right now?

7 A. I don't know for certain.

8 Q. Do you know that Mr. Nordean's phone was dead all of
9 January 6th?

10 A. I know it was turned off for a period of time or dead.
11 Yes. It was not working.

12 Q. It was not working.

13 And that was throughout the events of January 6th.
14 Correct?

15 A. Correct.

16 Q. So my question is: If they're not in the same physical
17 space, if they're in different ends of the building and
18 Mr. Nordean's phone is not working, do you have any
19 understanding of how they would be communicating with each
20 other at all?

21 A. He was with Paul Rae, and Paul Rae also knows AJ
22 Fischer. So there's a potential he -- maybe he used Paul
23 Rae's phone. Maybe Paul Rae reached out. But they were
24 together when they exited. So I can't say one way or the
25 other if he did have any contact or did not.

1 Q. So Paul Rae was in this -- you're saying Paul Rae was in
2 this tunnel?

3 A. No. Paul Rae and Mr. Nordean exited the building at
4 3:13 on the east side. And you're asking me if Nordean had
5 any contact with Fischer after exiting, because his phone
6 was not working.

7 Q. Right. So you said that may have happened?

8 A. Could have.

9 Q. Could.

10 Do you have any evidence that it did?

11 A. Not off the top of my head, but I do know some phone
12 calls were made.

13 Q. Okay.

14 A. But no. To answer your question, no.

15 Q. Okay. Thank you.

16 And the last exhibit was Government's Exhibit 481.
17 Well, let me just take one step back and ask you one more
18 question about the phone being dead or turned off that you
19 said.

20 I think you testified that that was throughout the
21 events at the Capitol on January 6th. Correct?

22 A. A portion of the day. Correct.

23 Q. Until -- it was off until well after he left the Capitol
24 Building. Correct?

25 A. Yes.

1 Q. So was there any physical possibility for Mr. Nordean to
2 be reviewing the Telegram chats on the day of January 6th
3 that you covered in your testimony?

4 A. Not from his phone. No.

5 Q. Okay. And I want to ask you about one more individual.
6 I'm going to go back to Government's Exhibit 301 -- excuse
7 me -- Nordean Exhibit 301 at three hours and six minutes and
8 six seconds. I'll bring this up.

9 (Whereupon, segments of Defendant Nordean's
10 Exhibit No. 301 were published in open court.)

11 MR. SMITH: Your Honor, may I have a conference
12 just before I ask one question?

13 THE COURT: Yes.

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

16 MR. SMITH: So, your Honor, I just want to ask
17 about one more CHS who's with the group on -- at the food
18 trucks. And this one is someone who, you know, could be --
19 could be a witness in this case. I don't know how your
20 Honor has ruled, but this may be a good time to ask your
21 Honor about that.

22 THE COURT: Well, actually, while you're in the
23 middle of your cross is not maybe the time to do that. But
24 what's the question you want to ask so I can resolve it?

25 MR. SMITH: So I want to ask about -- one of the

1 people on the scene right now is Mr. Lizardo. We want to
2 inquire about her. She actually -- I believe this witness
3 actually interviewed Mr. Lizardo. So there's -- this is not
4 the same scenario with the last CHS who the witness didn't
5 have much knowledge about. Lizardo was interviewed by her.
6 And so I was going to ask her questions about his
7 involvement in the march and what he was -- what he was
8 doing, not for his statements.

9 THE COURT: Mr. Kenerson?

10 MR. KENERSON: I think if it's limited to what
11 Mr. Lizardo was doing during the march, I think based on her
12 review of video, I think that's fair game.

13 What we would object to and I think is different
14 from this Mr. Lizardo and the other witness who the Court
15 ruled on previously in the cross-examination is that the
16 Court has not ruled on anything admissible about this
17 witness's testimony about his status or anything like this.
18 So we would object to anything that identifies him as a
19 source at this point.

20 MR. SMITH: We're not identifying him by name,
21 just that he's an informant and what his role was on the
22 march. His physical -- where he was, where he was on the
23 march, not like his name.

24 THE COURT: The question I think Mr. Kenerson is
25 going to say is: What relevance is that?

1 MR. SMITH: Because, your Honor, he was -- I mean,
2 the witness knows he was debriefed by his handlers after
3 January 6th. I'm not going to ask about what he said. But
4 this goes to -- the relevance of this is if he's -- he's in
5 the chats, your Honor. He's in MOSD -- excuse me. He's in
6 Boots on the Ground and MOSD. He is an informant at the
7 exact same time.

8 I don't know whether he was reporting on Proud
9 Boys at the same time that he was in MOSD and Boots on the
10 Ground. But, your Honor, the Government has already
11 acknowledged it's relevant that he was an informant because
12 questions could have been asked about what -- whether there
13 was a conspiracy beforehand based on his involvement in the
14 chat groups. And --

15 THE COURT: Right. What I ruled on the chat
16 groups was that, especially given the inferences that the
17 Government was asking -- was arguing that they could -- that
18 the jury could draw from the chats, that the fact that there
19 were within those chats some people who were CHSs was
20 relevant. And that's what you all elicited.

21 I think this is -- and then we had the question
22 this morning, which again, given what that person said, I
23 thought it was fair and within the scope; and as it turned
24 out, she didn't know anything about that text.

25 I guess the question here is, what is the

1 relevance as we sit here of this particular person and
2 whether they -- in the context of her testimony? Because
3 this person, I guess, he's in this particular thing, this
4 particular scene. But I don't --

5 MR. SMITH: He's a reporting agent who has a
6 handler who has reported to his handlers on what happened on
7 January 6th. He was along for the entire march.

8 The very fact he's not being called as a witness
9 by the Government independently has relevance. But we're
10 allowed -- I mean, we don't understand why we wouldn't be
11 allowed to show, Here's an informant; that he had a
12 reporting relationship; he was in MOSD and the Boots on the
13 Ground chats. He's with the group the entire time and he is
14 being paid by the Government, your Honor.

15 THE COURT: Well, Mr. Kenerson, what's your
16 response to that?

17 MR. KENERSON: I don't think that this is -- so,
18 one, he wasn't there the entire march.

19 But putting that aside, I think this is similar to
20 what the Court ruled with regard to the chats. So if he
21 wants to bring out, consistent with the Court's ruling, that
22 there were individuals in the march without naming who the
23 confidential human source that had a relationship with the
24 FBI, that's one thing. If he wants to out a specific
25 individual as having a reporting relationship with the FBI,

1 that's another thing entirely. I don't think that's
2 relevant, number one.

3 Number two, it's not relevant for him to say, Oh,
4 this person had a reporting relationship with the FBI and
5 the Government did not call him. That's completely
6 inappropriate for him to --

7 MR. SMITH: I wouldn't argue that. That's not
8 what I would argue, your Honor.

9 But we don't understand the distinction between
10 being allowed to show generally that someone in the chats is
11 an informant and showing it in a video. What is the
12 difference? We're not identifying this person by name. If
13 we're saying this person is a confidential human source,
14 they're with a group the entire way, we're not revealing any
15 sensitive information about this person at all. What would
16 be the premise of excluding this on privacy grounds or
17 whatever?

18 THE COURT: Relevance. Relevance grounds.

19 I mean, here's the question: I mean, are you
20 going to ask questions about whether the person reported
21 things back or anything like that?

22 MR. SMITH: Not the state -- the content, because
23 we agree that could be hearsay in some cases. But that he
24 had -- that he had -- the fact that he had meetings,
25 debriefings about what happened is relevant and the fact

1 that he was on the trip and in the chat groups beforehand.

2 Thank you, your Honor.

3 THE COURT: Here's what I'm going to say,
4 unfortunately: We finally hit the thing that you all have
5 been arguing -- we've been arguing about the whole time.
6 I'm going to send the jury home for the day half an hour
7 early. I'll hear from you and pick up tomorrow morning on
8 this, because I do think it's a nuanced question.

9 MR. SMITH: I'll skip it, judge. I'll leave the
10 question for other defense counsel to raise if they'd like
11 to.

12 THE COURT: Fine. We'll get to it one way or the
13 other.

14 MR. SMITH: I want to let them go.

15 THE COURT: Mr. Pattis, since we're on the phones
16 right now, can you -- if Mr. Smith is going to wrap up, can
17 you do half an hour without hitting this issue and then
18 we'll just deal with it tomorrow morning first thing?

19 MR. SMITH: Your Honor, I think I'm going to wrap
20 up in just about a minute to let some people get started, so
21 right now.

22 THE COURT: I see Mr. Pattis shaking his head.
23 Let's try to advance the ball as far as we can today without
24 hitting this.

25 MR. SMITH: I have one more question and I'll be

1 done. Thank you. Thank you.

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

4 BY MR. SMITH:

5 Q. We're just going to move on from that subject.

6 I'm going to bring up what's been marked as
7 Nordean Exhibit 109.

8 You testified on direct about some chats in what
9 was called the new MOSD Telegram chat. Correct?

10 A. Yes.

11 Q. Okay. And so I'm going to bring up a chat that's nearby
12 those chats. I'm going to bring up Nordean Exhibit 109.

13 THE COURTROOM DEPUTY: Mr. Smith, I have 109
14 identified, but never admitted.

15 MR. SMITH: Yes. I'm going to put it up first,
16 and then -- on .pdf page 137, so the Government can see it.
17 I think the Government has indicated it doesn't have a
18 problem with this exhibit. We'll just --

19 MR. KENERSON: For the record, our screen is
20 showing the ELMO, not the computer.

21 Thank you.

22 MR. SMITH: Permission to publish Nordean 109 at
23 .pdf page 137.

24 MS. HERNANDEZ: Sorry, Mr. Smith. We can't hear
25 you.

1 MR. SMITH: Nordean Exhibit 109 at .pdf Page 137.

2 MR. KENERSON: No objection from the Government.

3 THE COURT: 109. What page?

4 MR. SMITH: It's .pdf Page 137.

5 THE COURT: Without objection, you may publish.

6 THE COURT REPORTER: Just, is that admitted?

7 THE COURT: It's just permission to publish it for
8 now.

9 (Whereupon, segments of Defendant Nordean's
10 Exhibit No. 109 were published in open court.)

11 BY MR. SMITH:

12 Q. So this is a slightly different visual format than the
13 way that we looked at the new MOSD chats that you were
14 using.

15 But let me -- to correct for that, let me just
16 draw your attention to one thing. Do you see how these --
17 there are timestamps on these blue chats?

18 A. I do.

19 Q. Okay. And do you see how it says UTC-8?

20 A. I do.

21 Q. That is not Eastern time. Correct?

22 A. It depends whose phone you got this out of, but I don't
23 believe so, no.

24 Q. Okay. So if we're at UTC-8 and it says 1:39 p.m., I
25 think that's three hours behind Eastern time, so that would

1 be 4:38:09 p.m. Correct? The top text message I've drawn a
2 yellow line under, that says 1:38:09 p.m., UTC-8. And so
3 that would be 4:38 p.m. Eastern time, which I think is
4 UTC-5?

5 A. It's going to be dependent upon whose phone this
6 extraction came from. And then if that -- during that
7 extraction, if it was set to standard time or if they did it
8 based off the UTC minus eight time.

9 Q. Okay. So do you see how there's -- one of the chats --
10 one of the first chats is from Aaron of the Bloody East?

11 A. I do.

12 Q. And he says, what's the -- "I'm there in one hour.
13 What's the plan?"

14 A. I do.

15 Q. That was because Aaron of the Bloody East, Aaron
16 Wollkind, was not in Washington, D.C., at around 4:39 p.m.
17 Eastern time. Correct?

18 A. I know he arrived later. I don't know what time later.

19 Q. Okay. And so you see how Aaron of the Bloody East
20 follows up with, "If there is no plan, then let's say there
21 is no plan so people aren't looking to us for direction."

22 Right?

23 A. Yes.

24 Q. Then the next text is from someone named Yut Yut
25 Cowabunga. Agent, who is Yut Yut Cowabunga?

1 A. Charles Donohoe.

2 Q. Okay. And Charles Donohoe says, "There is no plan."
3 Right?

4 A. Correct.

5 Q. And then he says, "Zero plan." Right?

6 A. Correct.

7 Q. And there's a final text from someone named Noble Beard
8 the Immortal?

9 A. There is.

10 Q. Who is that?

11 A. Jeremy Bertino.

12 Q. Okay.

13 MR. SMITH: That is all of my questions, your
14 Honor. Thank you very much.

15 THE COURT: All right. Very well.

16 Counsel for Mr. Biggs. You have about 25 minutes
17 remaining today.

18 MR. PATTIS: How many hours and 25 minutes, Judge?

19 CROSS-EXAMINATION

20 BY MR. PATTIS:

21 Q. Good morning, Special Agent Miller. How are you?

22 A. Good afternoon. I'm good. How are you?

23 Q. Good afternoon. I've got a cold, and my sense of time
24 is off. If I cough, it's not you.

25 My name is Norm Pattis. I represent Joe Biggs

1 with Dan Hull.

2 I want to just get some basics from you. I was
3 trying to pay attention to your testimony last week, but I'm
4 not sure I got it right.

5 You joined the FBI in May of 2019?

6 A. Yes.

7 Q. And prior to that, you were a local law enforcement
8 officer in Florida for ten years. Correct?

9 A. I was a local law enforcement officer and then a state
10 agent with the Florida Department of Law Enforcement. Ten
11 years total. Yes.

12 Q. Upon joining the FBI, you went to Quantico for training?

13 A. I did.

14 Q. And that training lasts a number of months?

15 A. It does.

16 Q. It covers the basics of your responsibilities as a
17 special agent?

18 A. It does.

19 Q. Including an overview of the federal penal code?

20 A. It goes over violations, yes.

21 Q. So you know what you're looking for when you're out
22 investigating crimes, in effect. Correct?

23 A. It teaches you tactics; it teaches you, like,
24 interviewing techniques; it teaches you what to do as an
25 agent of the FBI.

1 Q. You're getting way head of me. The model penal code
2 doesn't do all that, right?

3 A. I'm sorry?

4 Q. The model penal code doesn't do all that, right?

5 A. I don't know that they went to the penal code in
6 specifics, though.

7 Q. You got an overview of what crimes you might be
8 investigating. Right?

9 A. Yes.

10 Q. You got an overview of the law of arrest. Correct?

11 A. Yes.

12 Q. The law of search and seizure?

13 A. Yes.

14 Q. How to use the various tools at your disposal, including
15 weapons. Correct?

16 A. Yes.

17 Q. And did you bring to the FBI any particular experience
18 in the handling and manipulation of digital data?

19 A. What do you mean?

20 Q. When you came to the FBI, had you previously had
21 experience in interpreting digital data?

22 A. I need an example.

23 Q. A digital photograph.

24 A. Like seeing what a digital photograph looks like? Yes.

25 Q. I'm going to take the answer to be no, that you didn't

1 have any training and experience in digital forensics. Fair
2 enough?

3 A. Oh, fair enough. Yes.

4 Q. So as an officer, you had, however, looked at pictures.
5 Correct?

6 A. Have I looked at pictures? Yes.

7 Q. Listened to recordings. Correct?

8 A. Yes.

9 Q. Done timelines. Correct?

10 A. Yes.

11 Q. A timeline is a fairly basic investigative technique.
12 Correct?

13 A. Yes.

14 Q. You get items and you want to locate them in relation to
15 one another, usually in chronological order. Correct?

16 A. Yes.

17 Q. Because in the universe you and I inhabit, time flows in
18 only one direction. Correct?

19 A. Yes.

20 Q. From past to present. Even with a head cold.

21 Now, in this case, I think you testified on
22 January 6th that you were on call. Correct?

23 A. I was on standby.

24 Q. January 6th of 2021, to be frank.

25 And you were on standby in the event that

1 something occurred. Correct?

2 A. Correct.

3 Q. So there was some sense within the FBI or -- withdrawn.

4 On that day, you realized that there was a
5 possibility you could be called in to work. Correct?

6 A. Yes.

7 Q. And you'd been briefed that that possibility arose
8 because there was going to be a counting of electoral
9 ballots in Washington that very day. Correct?

10 A. I wasn't given specifics. Just to be available.

11 Q. But you understood, from your sense of the world, that
12 this was a controversial -- it was likely to be a
13 controversial day in Washington?

14 A. I suppose.

15 Q. Protestors coming from around the country?

16 A. Yes.

17 Q. The president of the United States urging people to
18 "Stop the Steal," as he put it. Correct?

19 A. Yes.

20 Q. And you knew prior to that day that he would be speaking
21 at the Ellipse that day. Correct?

22 A. Correct.

23 Q. And you knew that there would be tens of thousands if
24 not hundreds of thousands of people on the National Mall
25 that day?

1 A. I knew there would be several people. Yes.

2 Q. Well, several people. There are more than several
3 people in this room right now. Right?

4 A. Yes.

5 Q. Okay. Lots and lots of people?

6 A. Yes.

7 Q. And there was a potential that things could go wrong.
8 Correct?

9 A. Yes.

10 Q. And hence, standby?

11 A. Yes.

12 Q. Were you given any other briefing in preparation for
13 potentially coming in on standby on January 6th, 2021?

14 A. No. But I was also -- I was in the office already.

15 Q. And prior to January 6th, 2021, did anyone give you
16 briefing about groups that might come to Washington, D.C.,
17 that day to register their protest?

18 A. Not that I'm aware of.

19 Q. Prior to January 6th, 2021, had you ever heard of the
20 Proud Boys?

21 A. Not that I'm aware of.

22 Q. The Oath Keepers?

23 A. Not that I'm aware of.

24 Q. Groyppers?

25 A. Not that I'm aware of.

1 Q. First Amendment Praetorians?

2 A. Not that I'm aware of.

3 Q. Three Percenters?

4 A. Briefly.

5 Q. Okay. So you'd heard of that group prior to
6 January 6th, 2021?

7 A. Yes.

8 Q. And did you understand when you were called in that day
9 that the first -- that the Three Percenters may or may not
10 have been involved in events on the Capitol?

11 A. Not initially.

12 Q. Okay. You were assigned -- well, withdrawn.

13 Since January 6th, 2021, you have been actively
14 involved in the investigation of events on that day.
15 Correct?

16 A. Correct.

17 Q. And I believe you told my colleague, Mr. Smith, that you
18 are one of seven case agents?

19 A. There's six of us.

20 Q. Six of you.

21 A. Yes.

22 Q. So it's you plus five, not you plus six. Okay.

23 And was work divvied up between the six of you
24 such that you have some responsibilities and others have
25 different responsibilities?

1 A. Yes.

2 Q. What was your responsibilities since January 6th, 2021,
3 in this investigation?

4 A. So it kind of changed as the information, like, came in
5 to us. As we would get information, it would be dependent
6 upon what it was and who was available as to who would
7 handle it --

8 Q. Okay.

9 A. -- handle whatever it may be.

10 I helped with issuing subpoenas, trying to obtain
11 additional information, so for any hotel records where the
12 Defendants may have stayed or anybody involved in the
13 investigation. Search warrants were done on cell phones and
14 the results were made available to us. I assisted in kind
15 of going through those cell phones to find evidence if there
16 was any.

17 Q. You told us last week, I believe, that you were going to
18 try to figure out how information coming in would be
19 sourced?

20 A. Oh, so that -- yes. But that's not pertaining to this
21 specific investigation. So that would be the initial
22 incidence of January 6th. So what happened -- when
23 January 6th happened, a command post was stood up. I was --
24 since I was on standby, or on call, I was placed into that
25 command post.

1 A bunch of information came to the FBI, leads and
2 basically tips from the public of individuals who possibly
3 were on Capitol grounds, who entered the Capitol, who were
4 involved in basically engaging with law enforcement. And
5 then from there, those leads would be sourced out, so
6 provided to individuals in the office to look into and get
7 more information.

8 Q. So the command post was where information came in.
9 Correct?

10 A. Yes.

11 Q. It was an overwhelming amount of information?

12 A. It was a ton of information, yes.

13 Q. You keep using that word, a "ton." You didn't weigh it.
14 There was just a lot of stuff coming in. You were
15 overwhelmed by it. Right?

16 A. Yes.

17 Q. And you had to have some rules of thumb about who to
18 give what -- who to give what information to. In other
19 words, how to source it out to make sure it was used rather
20 than wasted. Correct?

21 A. So kind of. We would provide that information to agents
22 in the field to follow up on.

23 Q. Okay. How many agents in the field were following up on
24 the information that came in on January 6th within that
25 first week?

1 A. So I can't give you a specific number, but all of the
2 Washington field office agents were called in.

3 Q. How many is that, roughly?

4 A. Oh, gosh. I want to say -- and I might be wrong -- but
5 maybe 500. Maybe 300 to 500.

6 Q. Let's freeze for a moment and go forward to the months
7 before this trial here that we're on right now.

8 At some point, you learned that you would be
9 required to testify in this case. Correct?

10 A. Correct.

11 Q. When did you learn that?

12 A. Maybe October, approximately, of --

13 Q. October of --

14 A. -- 2022.

15 Q. And at that point, what role did you have in the ongoing
16 investigation of events in January of 2021?

17 A. As far as this case?

18 Q. It's a broader question than that. If those
19 responsibilities include this case, I don't know if it
20 includes others. Let me just cut right to the chase.

21 This case involves members of a group known as the
22 Proud Boys. Correct?

23 A. Correct.

24 Q. There are also trials going on with respect to --

25 THE COURT REPORTER: Can you repeat that and slow

1 down a little bit for me, please?

2 MR. PATTIS: You warned me before today.

3 BY MR. PATTIS:

4 Q. There were other investigations going on involving other
5 individuals who were present on Capitol grounds on
6 January 6th, 2021. Correct?

7 A. Correct.

8 Q. Some unaffiliated with any group?

9 A. Correct.

10 Q. In fact, the overwhelming majority were just people who
11 were there whom the FBI has come to identify. Correct?

12 A. Re-ask your question.

13 Q. The overwhelming majority of people who were present on
14 the grounds and have come to law enforcement attention,
15 these are people unaffiliated with any group. Correct?

16 A. I can't comment on that because I don't know each
17 investigation.

18 Q. What investigations do you know about?

19 A. I know about the Proud Boys -- this investigation.

20 Q. Do you know about investigations of Oath Keepers?

21 A. I know there is an investigation of some individuals
22 associated with Oath Keepers.

23 Q. Have you been involved in those investigations?

24 A. I have not.

25 Q. Same question as to Groypers.

1 A. I have no idea about that.

2 Q. First Amendment Praetorians?

3 A. No idea.

4 Q. Three Percenter?

5 A. I know there's an investigation into some people
6 associated with that group, but I have not been involved in
7 it, no.

8 Q. Antifa?

9 A. I have not been involved in any investigation of Antifa,
10 no.

11 Q. Is there an investigation of Antifa that you're aware
12 of?

13 A. Not that I'm aware of.

14 Q. Okay. So is it fair to say, ma'am, that from the time
15 of January 6th, 2021, when you were at the command center,
16 until October of 2022, when you became aware of the fact
17 that you'd be testifying in this trial, your primary focus
18 was on the Proud Boys?

19 A. Not on the Proud Boys, but on individuals who were on
20 the ground on January 6th that were associated with the
21 Proud Boys, yes. But not the Proud Boys as a whole.

22 Q. What does that mean, to say "associated with the Proud
23 Boys"?

24 A. Members of the Proud Boys.

25 Q. Or?

1 A. Or friends and -- or I don't want to say friends, but
2 acquaintances.

3 Q. Or people in the marching group?

4 A. Sure.

5 Q. They didn't necessarily -- need not necessarily be
6 members. They might have been merely present in the group.
7 Correct?

8 A. Sure. An acquaintance.

9 Q. Now, in the time that you spent preparing to testify for
10 this case -- well, withdrawn. That's a bad question.

11 How many hours do you suspect that you've spent
12 reviewing videotapes in this case?

13 A. Probably 150 to 250, approximately.

14 Q. So three to five weeks?

15 A. Yes.

16 Q. Of realtime?

17 A. Of realtime.

18 Q. How many hours do you expect to -- suspect that you've
19 spent looking at photographs, independent of videos?

20 A. Probably at least a month.

21 Q. So that's in addition to the videos?

22 A. Yes.

23 Q. So it's somewhere between two to three months of time
24 looking at images. Correct?

25 A. Yes.

1 Q. How much time have you spent reading either text
2 messages or emails associated with this case?

3 A. So that would be collectively. And that would probably
4 be about -- I'd say probably about a month at least.

5 Q. So you've spent three to four months of your life
6 immersing yourself in what I'm going to refer to as digital
7 evidence, you know, written or printed communication between
8 participants you associate with the Proud Boys in this case.
9 Is that a fair statement?

10 A. Sure. Yes.

11 Q. At any point in your preparation or in your research on
12 this case, were you given a list of people to look at?

13 A. What do you mean by "list"?

14 Q. Well, here's a list of questions I want to ask you. My
15 wife gives me a list when I go to the grocery store. It
16 tells me what to look for. If I go on my own devices, I
17 might come home with all chips and pretzels.

18 A. I was not given a list. No.

19 Q. Did anybody ever share with you a grouping of names that
20 would be of interest to you?

21 A. Not that I'm aware of.

22 Q. And I don't mean to sound like a smart-aleck, but one of
23 the reasons people don't like lawyers is when you ask a
24 person a yes-or-no question and they say "Not that I'm aware
25 of," who else would that be but you?

1 A. Correct.

2 Q. So you don't -- you don't recall ever seeing a list?

3 A. I don't recall ever seeing a list.

4 Q. Who is Ray Epps?

5 A. He was an individual who was at the First Street breach
6 and on the Capitol grounds.

7 Q. When did you first learn his name?

8 A. As I watched the video footage. So once I saw the First
9 Street breach, I wanted to know who he was.

10 Q. And who told you who he was?

11 A. An individual on the case.

12 Q. What individual?

13 MR. KENERSON: Objection. Relevance.

14 MR. PATTIS: Judge, this goes to -- may we be
15 heard?

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

18 MR. PATTIS: I'm not salting the pond to get to
19 CHS materials based off the objection. I don't know if I've
20 stepped in it. And I really don't know. And I'm being
21 candid with you.

22 So I will ask around the perimeters of the
23 question. I don't know what Mr. Kenerson's objection is. I
24 mean to be sensitive to it.

25 THE COURT: I don't think -- Mr. Kenerson, what's

1 your objection?

2 MR. KENERSON: It's both. It's both relevance and
3 scope. I mean, who told her within the world/the FBI as to
4 who Ray Epps is, I don't know that who told her is relevant.

5 MR. SMITH: She's made -- excuse me.

6 MS. HERNANDEZ: Your Honor --

7 THE COURT: I'm sorry. Are you done,
8 Mr. Kenerson?

9 MR. KENERSON: Yes.

10 THE COURT: Mr. Pattis?

11 MR. PATTIS: I think that the nature of her
12 identification of individuals and the various items that
13 she's seen is of interest to the defense.

14 She, for example, has identified many members as
15 marching group members, but didn't know who they were. But
16 yet she knows who Ray Epps is. Epps is at the front lines
17 here and, you know, I think it is relevant, you know. And I
18 don't know where we go from here. I don't know the answer
19 to that question. I'm breaking the cardinal rule of
20 cross-examination. But I do think this is relevant, even if
21 only marginally.

22 THE COURT: I'm going to -- Mr. Pattis, I mean, I
23 don't think you've stepped in it for the reason you think
24 you might have stepped in it. But I don't really know
25 either.

1 But I think, look, the basis of her knowledge,
2 I'll give you a little bit of leeway to ask that question.
3 And then move on.

4 MR. SMITH: Yes, sir.

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

7 MR. PATTIS: May I proceed, Judge?

8 THE COURT: You may.

9 BY MR. PATTIS:

10 Q. Who gave you the identity of Ray Epps? In other words,
11 how did you come to associate a name with that face?

12 A. An analyst who had been working on the investigation
13 with us.

14 Q. Okay. Is that another case agent?

15 A. It's an analyst on the case. But yes. I mean, he
16 basically was a case agent.

17 Q. So I'm not -- I've never worked for the FBI. You said
18 there were six case agents. Are those distinct from
19 analysts?

20 A. They are.

21 Q. So you have six case agents and how many analysts?

22 A. We had one analyst assigned specifically to our team.

23 Q. Okay. And that would be the Proud Boys team or to the
24 J6 --

25 A. That would be to the investigation of these Defendants.

1 Q. Got it.

2 So that person told you, that's Ray Epps.

3 Ray Epps is not a Proud Boy. Correct?

4 A. Yes.

5 Q. I am correct that he is not a Proud Boy?

6 A. Not that I'm aware of.

7 Q. Who else would be aware of that? I mean, you're the
8 expert here.

9 A. Well, I didn't do the investigation into Ray Epps, so --
10 if there is an investigation into Ray Epps -- so I don't
11 know what information was obtained or wasn't obtained.

12 Q. He's standing right there whispering to somebody at the
13 front line and you don't know whether there was an
14 investigation into Ray Epps?

15 A. I did not do an investigation into Ray Epps.

16 Q. I know, but you said you didn't know whether there was
17 one. You don't know whether there was one, ma'am?

18 A. I don't know any details of it.

19 Q. There was one, wasn't there? Come on. You're under
20 oath.

21 A. I believe there was.

22 Q. And what was the conclusion of that?

23 MR. KENERSON: Objection. Relevance.

24 THE COURT: Sustained.

25

1 BY MR. PATTIS:

2 Q. Mr. Epps has never been arrested, has he?

3 A. I don't know.

4 MR. KENERSON: Objection. Relevance.

5 THE COURT: Sustained.

6 BY MR. PATTIS:

7 Q. Now, among the sources of information at your disposal
8 was the work of your colleagues, your other case agents.

9 Correct?

10 A. Correct.

11 Q. The analysts. Correct?

12 A. Correct.

13 Q. And you were also given access to a series of written
14 reports. Correct?

15 A. Correct.

16 Q. Is it fair to say more reports -- you couldn't even
17 begin to estimate the number of those reports?

18 A. Correct.

19 Q. If I were to tell you that about -- there have been
20 almost 20 terabytes of information generated about this
21 case, the Proud Boys case, the case involving these
22 individuals, would that sound about right to you?

23 A. I feel like it would be more than that. But yes.

24 Q. Does the expression "drinking from a firehose" come to
25 mind?

1 A. Yes.

2 Q. Have you ever felt that you were drowning in
3 information, there was so much of it?

4 A. I don't want to say I was drowning, but it's been a lot
5 of information coming in, yes.

6 Q. So you've had a chance to review videos that were taken
7 in part by closed-circuit television located at the Capitol
8 and various locations around the Capitol. Correct?

9 A. Correct.

10 Q. The body cameras of police officers. Correct?

11 A. Correct.

12 Q. Open-source videos. Correct?

13 A. Correct.

14 Q. And the FBI even made an appeal to the public to send
15 videos in if they had information that -- that members of
16 the public thought would be of interest. Correct?

17 A. Correct.

18 Q. And to this day, arrests are taking place based on
19 open-source videos coming in. Correct? This very day.

20 A. Correct.

21 Q. You also had an opportunity to review Parler messages.
22 Correct?

23 A. Correct.

24 Q. Telegram messages. Correct?

25 A. Correct.

1 Q. And you also had the opportunity to review other sources
2 of data within the custody and control of the FBI. Correct?

3 A. Correct.

4 MR. PATTIS: Judge, this would be a time to raise
5 an issue that you had earlier alerted us to.

6 THE COURT: All right.

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

9 THE COURT: Yes, Mr. Pattis.

10 MR. PATTIS: In an ideal world, the next question
11 would be: And those include reports. So-called
12 confidential human sources.

13 THE COURT: Well, you know, when Mr. Kenerson --
14 what would you have done to -- what would you have said --
15 would you have objected to that question?

16 MR. KENERSON: I mean, yes; just that question was
17 with no followup.

18 MR. PATTIS: I want to be able to see Mr. Kenerson
19 so he can evaluate my credibility. No. I'm sorry. Not as
20 to identifying information. Not without Court permission.
21 To the general --

22 MR. KENERSON: That question was asked by
23 Mr. Smith.

24 MR. PATTIS: And we had a sidebar.

25 THE COURT: Right. I think, Mr. Pattis, again,

1 it's 4:55 now. I'm inclined to just let them go and for us
2 to discuss this.

3 MR. PATTIS: Can I ask that one question since it
4 rounds out that topic?

5 THE COURT: Well, that's going to be the only
6 question you ask?

7 MR. PATTIS: Yes.

8 THE COURT: All right, sir. If it's not going to
9 be objected to, I don't see why you can't. Were you going
10 to move on to another topic?

11 MR. PATTIS: No. I'll quit and we can air it out.

12 THE COURT: All right. Very well.

13 MR. PATTIS: If that's all right.

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

16 BY MR. PATTIS:

17 Q. One final question for the day, but just for the day.

18 Among the reports that you were given access to
19 are reports from confidential human sources. Correct?

20 A. Not correct.

21 MR. PATTIS: We'll talk about that tomorrow.

22 THE COURT: Okay. Ladies and gentlemen, we're
23 going to break here for the day. We'll see you at 9:00
24 tomorrow.

25 As always, please avoid the media and any reports

1 about January 6th or this case in particular. No
2 independent investigation. And please don't discuss the
3 evidence with anyone.

4 We'll see you tomorrow.

5 (Whereupon, the jury exited the courtroom at 4:55
6 p.m. and the following proceedings were had:)

7 THE COURT: Everyone may be seated.

8 Agent, you may step down.

9 (Thereupon, the witness retired from the courtroom
10 and the following proceedings were had:)

11 THE COURT: All right. Before we just address
12 this issue, I have cleared the deck for Friday morning. So
13 with the actual -- actually, with the exception of
14 Mr. Pattis, we have a case -- one of your clients has a
15 status that morning. So we'll have to figure out how you
16 want to handle that. I think it's Mr. Shroyer.

17 MR. PATTIS: I thought it had been continued, but
18 I'll check my calendar. There's controls, obviously.

19 THE COURT: Well, we have it -- we have it on the
20 calendar for 10:30. But between now and then, if you want
21 to -- we will continue it if you all pick a day with the
22 Government, exclude time under the Speedy Trial Act, and
23 we'll continue that.

24 In any event, other than that, I think I've
25 cleared the decks for Friday morning to at least 12:00 or

1 12:30, so I wanted to let everyone know about that.

2 MS. HERNANDEZ: Your Honor, "clear the deck" means
3 we're here in front of you on Friday morning?

4 THE COURT: Correct.

5 MS. HERNANDEZ: Okay.

6 THE COURT: So for purposes of Judge Boasberg and
7 all the rest. Yes. Exactly.

8 So that's number one.

9 Number two, yes. So I feel like we're finally at
10 this issue.

11 First of all, I don't think -- does the
12 Government -- we're not discussing any particular person. I
13 think we can discuss conceptually the relevance of
14 information around the CHS topic in open court. Do you
15 agree?

16 MR. KENERSON: I think as long as we keep it to
17 generalities, I think that's right.

18 THE COURT: And if anyone feels we can't, that
19 there's a need to discuss it under seal, we can do that.

20 But, Mr. Pattis, why don't you just get at for me
21 the overall relevance -- I mean, I articulated why I thought
22 it was relevant -- in particular when we were talking about
23 the Telegram evidence of why I felt it was relevant that
24 there were people in there who are CHSs because -- in
25 particular because of the inferences the Government wanted

1 to try to draw from those messages. "Oh, look at this.
2 This is planning and in part -- this is information that,
3 you know, someone might have corrected someone else or
4 rebuked them." We've used that word.

5 But in any event, I think it is -- it would have
6 been a fair question for you all to put in the jury's mind.
7 "Well, goodness gracious, if this is all going on on these
8 Telegram chats and the FBI has a CHS in there, why didn't
9 they have more information about it," et cetera? So that's
10 kind of where we left things.

11 And there was no particular message that the
12 Government was relying on that involved a CHS that we ever
13 really teed this up with a particular -- with particulars.

14 Now we've got -- I mean, it's sort of like the
15 real world in some ways. It's an analog of that that we've
16 been thinking about, and the tools theory kind of in the
17 digital space and now in the real world space. And the
18 question is: To what extent is the CHS issue open with
19 regard to this agent's testimony? And how does she -- what
20 terrain she's covered?

21 So why don't I hear from you about what you think
22 on that subject, and I'll think about it overnight and we
23 will come back and I'll rule.

24 MR. PATTIS: Our argument is both better and worse
25 than it was initially.

1 It's worse in that there's no particular message
2 that I can say, Oh, this is the smoking gun from which the
3 inference can be drawn.

4 And at the time that I made that argument
5 initially, I suspected there might be. And I see now that
6 there appears not to be. So that cuts against our
7 arguments, and I mean to be candid with you about that.

8 In favor of our arguments, however, and I think
9 this tips the scale in our favor, is the nature of the
10 conspiracy and the nature of the tools evidence. As I
11 understand the Government's case, you know, Mr. Bertino
12 testified memorably that he was unaware of any explicit plan
13 or any explicit objective.

14 And we had argument and colloquy with the Court in
15 which it was asserted that there was an implicit or implied
16 conspiracy, that people would have known. And I believe
17 that Mr. Bertino basically said they would have known one
18 another's minds. It didn't need to be stated. And so
19 that's Chapter 1 in this tawdry tale.

20 Chapter 2 is, what is a tool? A tool is either a
21 normie, an affiliate or a member who perhaps didn't share
22 the implied understanding and was, quote-unquote,
23 "activated" somehow by leadership to act in unlawful ways or
24 perhaps knew or -- or shared the implicit understanding and
25 has been uncharged as a co-conspirator for whatever reasons

1 in the Government's discretion.

2 So what we're left with is the most attenuated,
3 inchoate crime imaginable: an implied conspiracy in which
4 unknowing tools are activated and they weren't done so
5 explicitly through taps on the shoulder or video or audio
6 signals, but they were done so because they should be able
7 to intuit one another's minds.

8 People who were present and knew the Proud Boys
9 and were embedded within them for purposes of reporting to
10 the Government on what was on the Proud Boys' mind would
11 presumably have been able to develop some spider sense, or
12 wherever we're dealing with here in this inchoate universe
13 that the Government has invited us to inhabit, and
14 presumably would have made some report. That is our theory.

15 And so the fact that they didn't suggest that the
16 Government is making a case up in a *post hoc ergo propter*
17 *hoc* way, an after-the-fact kind of way, justifying a
18 prosecution after horrible events and saying, Look at the
19 motive, look at the intent, look at the horrible things
20 these people said. Well, of course they must have done
21 this.

22 If others on the front line with them, others
23 sharing things with them, didn't see it, I think it's fair
24 for this jury to conclude it didn't happen and there was no
25 understanding, there was no activation.

1 And so -- and what's more -- and I want to be
2 careful not to open a door to sealed proceedings. Mr. Smith
3 reminds me of this. The Court may or may not have heard on
4 an *ex parte* basis whether a certain witness is going to
5 testify or not, and that witness's testimony would fall
6 squarely within this universe of factors.

7 But I would say with or without that witness, the
8 evidence is relevant. We believe that if the Government is
9 going to be given the ability to advance, as it has earned
10 through argument in this case, a highly speculative case, we
11 should be permitted to meet speculative inference with
12 speculative inference.

13 And if the case becomes a sort of semi-humorous
14 edition of *Mad Magazine*, *Spy vs. Spy*, well, that's the case
15 the Government chose to put on, and we want to put on the
16 counter-spies.

17 THE COURT: Okay. Mr. Kenerson.

18 MR. KENERSON: So I take Mr. Pattis's argument,
19 putting aside the merits of it for a second, to be kind of
20 an argument about relevance overall to some of this.

21 THE COURT: Right. And let me just interject
22 before you get cranked up, Mr. Kenerson. You know, it seems
23 to me he's making -- right. He's making a relevance
24 argument. There's a relevance argument that Mr. Pattis
25 articulated.

1 And then there's -- and maybe -- and you said push
2 it to the side. But then there's the question of: How?
3 How that relevance argument plays out in various contexts.
4 And that's honestly -- that's been -- in a way, that sums up
5 I think how I've tried to address this issue throughout our
6 proceedings, which is to say -- and that's the reason I've
7 ordered the parties to raise it ahead of time, because I
8 think it is tricky how it plays out in various contexts,
9 some of which we sort of bled into today that I think it's
10 fair, and others it might not be.

11 So anyway, I think maybe that's where you were
12 headed, Mr. Kenerson. But I think if you were, I agree.

13 MR. KENERSON: Yeah. That is exactly where I was
14 headed. And I was saying, you know, even if we assume for
15 the sake of this argument the relevance of what Mr. Pattis
16 has laid out, I don't see either on scope or on foundation
17 or on hearsay this witness being the proper one to ask the
18 questions.

19 THE COURT: Well, as far as scope goes, again, put
20 aside hearsay. Hearsay assumes a statement. So let's put
21 that aside.

22 And what was the last category?

23 MR. KENERSON: Foundation.

24 THE COURT: Foundation. Okay. She either
25 knows -- the witness knows or the witness does not know.

1 But if it's just a question of -- in terms of
2 scope, look, she's testified as to who's marching around and
3 who was doing what when and where that day.

4 I mean, if she knows, okay, this person on the
5 screen here is a CHS or is not, I think that's the sort of
6 threshold question. And it seems to me as to scope, that
7 does feel within the scope.

8 MR. KENERSON: I think that there's a
9 countervailing -- and we've, I think, made this argument and
10 I think the Court accepted it, though of course the Court
11 has a better memory than me on what the Court has ruled.

12 With respect to at least the Telegram, the Court
13 said essentially, you can elicit that there are members --
14 that there are members of this chat who are CHSs. Part of
15 the countervailing reason why the Court did not allow them
16 to ask the followup question, which is, "And this person's a
17 CHS," stem to do [sic] with the Government's countervailing
18 privacy concerns and so the CHS's countervailing privacy
19 concerns.

20 And so if the relevance through this witness is
21 that there were CHSs in the marching group, that I think is
22 a similar question to what the Court allowed on the Telegram
23 chats and is within kind of what the Court had allowed
24 previously.

25 To say this particular person is a CHS, though, I

1 think is a whole different --

2 THE COURT: Well, it is different.

3 But that's not my recollection of my ruling. No
4 one ever came -- I don't believe it was ever teed up, you
5 know, Here's a chat the Government introduced.

6 And other than things that were going on in the
7 background, in other words, Here's an exchange and one
8 Defendant said this and the other Defendant said that and
9 now this other person has chimed in. No one ever said that
10 person is a CHS, and so we want to bring that person out.

11 You know, and now you might say, Well, the
12 equivalent here would be if, you know, in none of the key
13 scenes the Government has put on in its case in chief is a
14 CHS sort of present. I mean, maybe with the exception of
15 the questions that Mr. Smith asked. That person is present
16 during a key, you know, scene, for lack of a better way to
17 put it, and then there were other reasons why that person
18 had -- there's -- a relevance argument is bolstered for
19 other reasons.

20 So I don't know that it's analogous, exactly. I
21 don't know that it's analogous, exactly.

22 But Mr. Pattis.

23 MR. PATTIS: I take Mr. Kenerson's point about
24 foundation. And it may be this witness doesn't give me
25 foundation to get into particulars. I was a little

1 surprised by her last answer, and I'll explore it a little
2 bit more. But I didn't feel that I could even make the
3 explorations, given the Court's earlier rulings.

4 So I certainly understand the foundation as to
5 particular names. And I don't believe that -- while we have
6 beliefs and good reasons to believe -- in fact, we know who
7 some of these people are -- I think I do have to have the
8 right function. And I suspect the Government can choose its
9 witnesses in such a way to deprive us of that foundation in
10 their case in chief, and then we'll get it in our own case.
11 But I want to have the right to try in a way that honors
12 your ruling.

13 THE COURT: Right. And I think if we all agree --
14 obviously, you have to have the foundation. And if you ask
15 the question -- which is kind of where Mr. Smith went
16 down -- went down that path. And if you have the
17 foundation -- you may ask a question. She may say, you
18 know -- she gave the answer she gave.

19 And if it all leads to nowhere with her, it does.
20 But that doesn't -- I mean, I've got to assume for the
21 moment she may get foundation for something.

22 MR. PATTIS: If I do, Judge, I'll pick up the
23 phone and make my proffer. But I think I have, you know.

24 THE COURT: You have. And that's why I want to
25 think about it overnight and try to have an answer so we

1 don't have to waste time tomorrow talking about this.

2 MR. KENERSON: One request I would make on that
3 point, and without getting into specifics on this record:
4 The Court I think has said, you know, maybe if there's
5 someone in key scenes, like what Mr. Smith asked. Maybe
6 not.

7 If there are specific people that they want to ask
8 about, I would ask that they identify those individuals not
9 on the record here, but either in an email to chambers or to
10 us, and we can -- if needed, we can argue it in a sealed
11 session or on the phone or whatever as to whether those
12 individuals actually are in key scenes.

13 THE COURT: Look, if we really want to tee this up
14 efficiently, that will be very helpful.

15 MR. PATTIS: I'm not sure I can.

16 THE COURT: If you don't have a specific person,
17 then you can't. Then you can't.

18 MR. PATTIS: The Government knows -- there are
19 two. One has been named in the course of sealed
20 proceedings, and this other fellow came up today. Judge, if
21 I come up with something, I will provide Mr. Kenerson with
22 notice of it. But as I sit here right now, I don't have a
23 list.

24 THE COURT: Fair enough. And --

25 MR. PATTIS: I mean, I do have a list. I have a

1 list the Government gave us, but that's highly sensitive,
2 subject to a supplemental protective order.

3 THE COURT: The point is, if you -- there are
4 those two people that are on the table right now. If
5 there's someone else that's out there -- if you don't have
6 an intention of eliciting anything on any other specific
7 person, then fine. But if you do, let the Government know
8 tonight so that we're not, again, kind of bumbling around
9 tomorrow.

10 MR. PATTIS: Yes, sir.

11 THE COURT: Ms. Hernández had her hand up first.

12 And let me just also say, when I was saying about
13 specific scenes, I think that's another way of just saying
14 relevance. Right?

15 Ms. Hernández.

16 MS. HERNANDEZ: Your Honor, I just object to the
17 whole process that is going on with the CHSS in this case
18 for some of the reasons that Mr. Pattis described.

19 We have these crowds. We don't know what the CHSS
20 look like. We have been able to identify some but not all.
21 For all we know, every single one of these pushes and crowds
22 and knocking over fences involves a CHS either instigating
23 or standing and watching.

24 The Government has been extremely stingy in
25 producing information. I've never been in a case where

1 we're about to end the case and we don't even know the names
2 of the FBI handlers. What is the secrecy? How is an FBI --
3 the name of an FBI agent, why is that being withheld from
4 us? We can't even call them up. We can't even subpoena
5 them to testify. And then when we try to cross-examine, we
6 can't because the person doesn't know. We don't know whom
7 to cross-examine.

8 Two, on the *Jencks* that we were arguing about for
9 the last two or three days, there was a reference to someone
10 whom we believe to be a CHS. But we're not even sure if
11 it's one of the people that was previously identified or not
12 identified, because all these people go by handles.

13 Danny Mac, that's still to come up when I think
14 Mr. -- FBI agent whatever his name is comes up because there
15 are Telegram messages from his -- from post-January 6th that
16 should come up.

17 And we know from some of the information in this
18 case that Danny Mac, at least with -- at least
19 contemporaneously Mr. Tarrio was complaining about his
20 aggressiveness on January -- on December 12th. We know from
21 some -- we see interviews of confidential informants which
22 appear to indicate that they're being questioned about Danny
23 Mac or other people. We're in the dark.

24 I believe it's a violation of the Sixth Amendment
25 in general, but particularly in this case for the reasons --

1 you know, for this tools theory, for this mob theory. We're
2 in the dark. I don't understand how we can be in the dark
3 three days from the end of the trial.

4 I just -- I find it -- the person that -- I don't
5 know if I'm allowed to identify him. But Mr. Quested -- the
6 Government brought out the identity of one of the CHSS in
7 the direct examination of Mr. Quested. And then -- but we
8 haven't been able to ask about him.

9 And then his name also appears in one of the
10 Telegram chats, but we haven't been able to ask him because
11 we don't have the correct witness on the stand. I don't
12 understand -- I'm at a loss as to where we are on this.

13 THE COURT: Look, Ms. Hernández, I don't think --
14 the question of -- I guess we just talked about relevance
15 and then the second issue of kind of how that plays out with
16 regard to a particular witness.

17 So it's not really that -- I mean, I think, you
18 know, the fact that you haven't been able to elicit a
19 particular piece of information during the Government's case
20 is not -- I mean, because either there hasn't been
21 foundation or it hasn't been relevant or it's been beyond
22 the scope is not that surprising. I mean, that happens all
23 the time. Right?

24 So that doesn't really say much about what you
25 might be able to do in your case.

1 But I do think the broader -- the other point that
2 you've raised that I think that I do -- that is concerning
3 to me is whether you have been -- I mean, how to put this?
4 The issue of CHSs was raised months ago. I ordered material
5 produced to the defense.

6 And I guess the question I have is, again, putting
7 aside what I've allowed you to do in front of the jury,
8 whether that information -- I mean, you have all of that
9 information. So all I'm trying to get at is, if you -- and
10 a lot of that information, as I recall --

11 MS. HERNANDEZ: Your Honor, I'm sorry. It's very
12 meager information. There's redactions. It's a few pages.
13 I just want the Court to understand, that's part of the
14 handicap.

15 THE COURT: But my point is to the extent
16 anyone -- let me put it this way: To the extent -- and as I
17 recall, the information indicates whether a particular
18 person was present at the Capitol that day.

19 And so I guess my point is, just taking it one
20 step at a time here, we've got this witness on the stand.
21 It seems to me that to the extent that person's testimony or
22 any of the video that person has been shown -- I mean, we're
23 discussing here the concept of whether it would be
24 appropriate for you to elicit from the witness, Hey, look at
25 that person. That person is a CHS.

1 I would think you have the information to be able
2 to -- at least you have the information that would have
3 allowed you to investigate who that person was and whether
4 that person's on the screen here.

5 MS. HERNANDEZ: No, we don't. I don't believe we
6 do. I mean, Danny Mac is someone that my client knew.

7 THE COURT: Ms. Hernández, we're trying to speak
8 about the issue in generalities. I don't know any other way
9 we can --

10 MS. HERNANDEZ: Sorry. I won't mention it.

11 THE COURT: I don't know how many different ways
12 we can say that.

13 MS. HERNANDEZ: I won't mention it. But that's
14 one person my client knew. And we have not been able -- we
15 know he was present on December 12th through multiple ways.
16 But we haven't been able to locate him in any of the videos.

17 There are other people -- there are other -- I
18 think I brought this issue up last week about the Kansas
19 City CHS. Some of the Defendants don't know who these
20 people are. And so we don't know when we're looking at
21 these videos of these mobs who they are. We don't. And
22 we're unable to identify them.

23 And the information we're getting from the
24 Government is very meager, insufficient, I believe, to --
25 the only reason we know the one person that -- the single

1 one that came out last year is because the Court found --
2 made a finding that Rovairo didn't apply in that case, but
3 we haven't had -- and so the information we got relevant to
4 him was extensive by comparison to the information we've
5 gotten about the others. I mean -- and maybe it's because
6 the Government had questioned him and all of that so we had
7 transcripts of those interviews.

8 We don't have that information with respect to the
9 others. I just want the Court to understand that. It is a
10 very frustrating situation.

11 And then the way the Government -- and I'm not
12 just saying in this case, but the way the United States
13 prosecutes cases these days, it's not the way they
14 prosecuted cases when I came up. They put on witnesses --
15 they very narrowly -- they narrow the scope of the direct
16 and then every other question -- you know, narrow it to the
17 point of, We're only going to talk about Telegram messages
18 from 4:00 on January 5th to midnight on -- so then they've
19 narrowed the scope to such an extent that it's impossible to
20 question -- to bring out.

21 And I do think this is all relevant. Every single
22 agent -- FBI agent that gets on the stand and talks about
23 some crowd and some mob and some tool and all this other
24 stuff should be subject to cross-examination on that
25 whole -- on that whole discussion of confidential human

1 sources in the middle of what the Government claims is a mob
2 encouraged, urged, instigated by our clients.

3 THE COURT: All right. What's the Government's
4 response to the notion that the defense does not have
5 information from which it can know whether any of the folks
6 we've litigated as CHSSs were or were not present there at
7 the Capitol that day and can't identify them?

8 MR. KENERSON: We provided the defense with the
9 information the Court has ordered us to provide the defense.
10 And we were operating, I think, under the same assumption
11 that the Court was, that that would be sufficient for them
12 to do what they -- whatever they needed to do with that
13 information.

14 I think with the exception of what came up during
15 the tools hearing and then the later request from
16 Ms. Hernández the next day, we've not had any requests from
17 Ms. Hernández along the lines of what she's articulating to
18 us right now. So this is the first at least that I am
19 hearing of some of these requests, anyway.

20 THE COURT: Okay. Well, look, I think on the
21 question of discovery then, I'll leave it to the parties to
22 have a discussion about that.

23 That's a separate issue from, again, the
24 question -- the threshold question here that any defense
25 counsel might want to ask of, you know, just take the most

1 obvious scenario, some of the marching video that, let's
2 say, the Government has introduced or marching or rushing
3 the Capitol, and there's someone there who the parties know
4 is a CHS, whether that person -- whether the defense can ask
5 that question and how far they can go after that. I think
6 that's the issue I'll think about overnight.

7 And then -- but on the discovery point, you know,
8 Ms. Hernández, let's put it this way: I think it behooves
9 the parties to discuss that and whether the Government --
10 whether there's more the Government needs to do on that
11 front.

12 Mr. Smith.

13 MR. SMITH: Judge, thank you.

14 I really don't mean to be a nudge, but I just want
15 to raise this because I think this morning the Government
16 said it would deliberate, and it's becoming increasingly
17 urgent because we have to fly -- potentially fly someone
18 from the West Coast on Friday.

19 THE COURT: Let's talk about that right now.

20 MR. SMITH: Okay.

21 THE COURT: So what's the Government's view of the
22 world on the request for the 20th? What's the Government's
23 view of the world on that? And I don't know whether it
24 plays a role one way or the other, the fact that we'll have
25 a half day on Friday.

1 MR. KENERSON: Right. And I think it may well be
2 obviated by the fact that we have -- in practicality, by the
3 fact that we have a half day on Friday, I think our view
4 generally is that, you know, it should not interfere with
5 the presentation of our case. That's the bottom-line view.
6 Given where we are, it may well be.

7 Again, I don't know. We have very little control
8 over the length of cross-examination for the rest of this
9 witness, for the one following or the one following that.
10 It may well be that by midday Friday or by midmorning on
11 Monday we are resting. We just don't know.

12 MR. SMITH: Your Honor, we have to make a
13 determination, basically. We asked last Monday, on March
14 6th, about it and then on the 8th. And it's not the Court's
15 fault. It's not the Government's fault. But just because
16 of the daily events, it just got -- kept getting pushed off.
17 And now we have to make a decision now because we have to
18 fly someone here for Monday or Friday.

19 So, your Honor, we would just ask for the grace to
20 present one witness for 30 to 45 minutes for essential
21 testimony, essential to the defense, anyway. And we think
22 the Court has authority to do that. And if we don't start
23 getting tickets now, we could potentially lose the witness.

24 MR. PATTIS: Biggs joins, Judge. This is a person
25 that we feel very strongly about.

1 THE COURT: You'll have an answer from me first
2 thing tomorrow. You're not -- the witness is under
3 subpoena. You're not going to lose him today until tomorrow
4 morning.

5 MR. SMITH: Just in case, your Honor, could we
6 have an order on the record that the witness is ordered to
7 appear at trial if they've been duly subpoenaed?

8 THE COURT: Well, yes. I'll just say, there's no
9 question that if the witness has been duly subpoenaed he'll
10 be ordered to testify in the defense case. Correct.

11 MR. SMITH: Okay.

12 THE COURT: Do you want me to say -- we don't know
13 whether that's the 20th or not. But yes. He'll be ordered
14 to comply with the subpoena --

15 MR. SMITH: Yes.

16 THE COURT: -- and be present for the defense
17 case.

18 MR. SMITH: Thank you, your Honor.

19 THE COURT: That having been said, I'll take up
20 your request and we'll talk about it tomorrow morning,
21 given -- you know, given the specifics of what you've
22 represented about his availability and the imposition that
23 it would have on him.

24 We'll see you all tomorrow morning at 9:00.

25 MR. KENERSON: One more issue. I'm so sorry.

1 It's just the next witness is Peter Dubrowski. We
2 sent an email I think to chambers and counsel over the lunch
3 break, and I think we previewed this last week. It's been
4 over a week now since we have provided the Telegram
5 exhibits. I would ask that the Court set a deadline for any
6 objections.

7 THE COURT: What -- given the volume -- you sent
8 that email today, I believe?

9 MR. KENERSON: We sent that email today. We
10 initially sent the exhibits about a week ago.

11 THE COURT: So here's what I would ask. I'll take
12 that up first thing tomorrow, too. And I will set a
13 deadline. But I just want the defense to at least be able
14 to look at the list, because you sent it today -- I know you
15 originally sent it earlier. You sent it today to be able to
16 say: Okay. What's a reasonable deadline for them to be
17 able to respond?

18 MR. JAUREGUI: Jauregui for Tarrio.

19 I saw additions in the email. Some new videos for
20 Dubrowski on the list. No? All right.

21 MR. KENERSON: Our understanding is no.

22 THE COURT: Well, all the more reason --

23 MS. HERNANDEZ: Your Honor, I'm sorry. I want to
24 just cite that well-known legal concept: We're drowning, as
25 the Court knows. I know the Court is drowning also. They

1 did send it last week, but we've been -- you know, as with
2 the Court, we've been dealing with all these other issues
3 every day.

4 THE COURT: That's why I'm not setting a deadline
5 right now. You'll have at least tonight to look at what
6 they've resent today and at least we can talk about what the
7 deadline will be tomorrow morning.

8 See you all at 9:00.

9 (Proceedings concluded.)

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CERTIFICATE

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

Dated this 13th day of March, 2023.

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

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