

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

-----X
UNITED STATES OF AMERICA :
 :
versus : Criminal Action Numbers
 :
MICHAEL BASILLAS, : 2017-CF2-1334
SETH CADMAN, : 2017-CF2-1172
ANTHONY FELICE, : 2017-CF2-1163
CASEY WEBBER, : 2017-CF2-1156
Defendants. :
-----X

Washington, D.C.
Thursday, May 24, 2018

The above-entitled action came on for a Jury
Trial before the Honorable KIMBERLEY S. KNOWLES, Associate
Judge, in courtroom number 203, commencing at 9:56 a.m.

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IT REPRESENTS TESTIMONY AND PROCEEDINGS OF
THE CASE AS RECORDED.

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P R O C E E D I N G S

MS. KERKHOFF: Jennifer Kerkhoff for the United States.

MR. QURESHI: Good morning, Your Honor. Rizwan Qureshi for the United States.

MR. JACOBSON: Good morning, Your Honor. Billy Jacobson for Mr. Basillas, who is present, along with my colleagues Will Heidepriem-Baird, Rich Gallena, Nate Ingraham, and Caitlin Garrigan-Nass.

MR. SCHRAGER: Good morning, Your Honor. Seth Schrager on behalf of Mr. Cadman.

MR. RIST: Good morning, Your Honor. Matthew Rist for Mr. Anthony Felice, who is present.

MS. DOWNS: Good morning. April Downs on behalf of Casey Webber, who is present.

THE COURT: Good morning to everyone.

I was trying to start a little early, but I was reading the filings that were submitted late last night. So I thought it was more important for me to read them than to meet the 9:45 timeframe that I gave you.

Give me a second as I get in the computer, please.

(Pause.)

THE COURT: All right. I guess, we make -- since we're starting the trial immediately, no cell phones

1 or electronics are permitted in the courtroom. Please
2 turn them off, not just on silent or vibrate. Turn them
3 off and store them away, please. If they're seen, they
4 could be confiscated or you could be asked to leave the
5 courtroom since that is the rule.

6 Okay. I did have -- I got filings from
7 everyone, I believe.

8 MR. SCHRAGER: Your Honor, we're joining the --
9 you don't have any from -- on behalf of Mr. Cadman.

10 THE COURT: I got a different filing from Mr.
11 Schrager.

12 MR. SCHRAGER: Right. But I was -- that's a
13 separate issue, but we're asking to join Mr. Jacobson and
14 Mr. Rist, the filings from last night, Your Honor.

15 THE COURT: Okay.

16 MS. KERKHOFF: And, Your Honor, the government
17 has an update, if I could provide that when the Court's
18 ready.

19 THE COURT: Can you give me a second?

20 MS. KERKHOFF: Sure thing.

21 THE COURT: I don't know. The computer isn't
22 working. Sorry.

23 (Pause.)

24 MS. DOWNS: On behalf of Mr. Webber, I did not
25 do it in writing, I'll join Mr. Basillas' motion from last

1 night. I filed my -- our own separate motion concerning
2 co-conspirator statements for Mr. Webber.

3 THE COURT: All right. I don't know what's
4 taking the computer so long so I'm sure the court reporter
5 will take care of me and e-mail me something later.

6 MS. KERKHOFF: Thank you, Your Honor.

7 THE COURT: So why don't you start? Go ahead
8 with your update, Ms. Kerkhoff.

9 MS. KERKHOFF: Yes, Your Honor.

10 Yesterday, during the hearing for the June 4th
11 group, Judge Morin -- the government's understanding was
12 Judge Morin asked the government to obtain additional
13 information. And our understanding was, of course, that,
14 as he stated, the statement itself about the upper
15 echelons was not in and of itself admissible, but to
16 better understand the basis for that statement, to do that
17 investigation.

18 So while we were in trial yesterday, the
19 government took steps to try to identify and determine the
20 individual who recorded. And law enforcement was able to
21 speak with that person last night and was asked
22 specifically, "Do you recall June 8th and being at the
23 meeting?"

24 "Yes."

25 "Do you recall, when you left, you walked away

1 and made a phone call?"

2 The individual, whose first name is Matt, stated
3 that, yes, he recalled that. He doesn't recall which
4 person he spoke to in the call, but it was someone else
5 who was with, I guess, the operation or the group he was
6 with.

7 Detective asked could he explain what he meant
8 by the statement. And what Matt stated is that he came
9 into the investigation, as he called it, with a
10 presupposition, a belief that the overall DisruptJ20 group
11 was being directed or backed by a higher up, that there
12 was a, you know, somebody supporting the group as a whole,
13 that, in conversations with the individuals there in his
14 presence at June 8th, he did not see that anyone there was
15 aware of a backer, if you will, or who the backer was,
16 that the lack of awareness about the upper echelons was
17 not about any of the events, but about whether or not
18 individuals were being directed or supported. He stated
19 that he later learned, as part of his investigation, that
20 there was no higher up backer. This was a group of
21 horizontally-structured, separate groups that had come
22 together under an umbrella organization for the kind of
23 j20 organizing events.

24 So what the government would note is that that
25 actually is entirely consistent with the statements made

1 by Dylan Petrohilos and others both on January 6th in the
2 podcast and even at this meeting where they make
3 references to the false belief that they are being backed
4 by George Soros, and they keep saying, "Hey, Soros, we're
5 waiting for our check," that the individual Matt stated
6 that he came into that with a belief that this group was
7 being directed or funded or supported in some manner by a
8 higher up. He stated that had nothing to do with the
9 events being planned here, but it was really about was
10 there someone directing the overall group about the
11 variety of events.

12 So that is the information we have, and I wanted
13 to update the Court because we had been asked to do that
14 by Judge Morin and we got that information last night.

15 THE COURT: Okay. Well, I'm going to move
16 backwards a little, take a step backwards before we move
17 forward.

18 So this case is in a different posture than many
19 cases in that the trial judge hasn't made many of the
20 pretrial rulings or the discovery rulings. Specifically,
21 Judge Leibovitz governed much of the discovery process and
22 Chief Judge Morin has ruled on many of the pretrial
23 matters in this group, and that's what I'm concerned with,
24 it's this group.

25 Obviously, there's -- yesterday, we learned

1 about this statement from -- on the fourth video, which is
2 how folks have been calling it, about the upper echelon of
3 IWW. And, at the same time that we were discussing it
4 here, Judge Morin was having a hearing in a separate trial
5 group in a pretrial or a trial readiness hearing, I think
6 it was, and Judge Morin made certain findings.

7 I have to make my own findings, and I did hear
8 argument from the parties yesterday. I also now have
9 further argument. I do have, and just so the record is
10 clear, I did review the motion by Mr. Felice, the renewed
11 motion for Mr. Webber and Mr. Webber filed a motion
12 yesterday, and the motion to dismiss, on the alternative,
13 mistrial from Mr. Basillas, which is also being joined by
14 several of the parties.

15 So all of the arguments -- for my purposes, all
16 of the arguments are being joined by counsel. So I'm
17 addressing all of you. All of the arguments -- for my
18 purposes, all of the arguments made by each counsel apply
19 to each defendant. Mr. Webber is in a slightly different
20 posture where he may have other arguments, but I attribute
21 all arguments to all four defense counsel.

22 So based on what I've heard so far -- well, let
23 me think.

24 Based on what I've heard so far, I do think that
25 there was a *Brady* -- which is what I said yesterday, but I

1 need to make clear that this is my ruling -- that there's
2 a *Brady* and a Rule 16 violation. The government, I
3 understand, was ordered to turn over the unedited version
4 of the Veritas videos. And, in the discussions, when the
5 unedited version was ordered to be turned over, the only
6 part that was talked about that was edited was the very
7 beginning and the face of the person recording and perhaps
8 the undercover, the officer, Adelmeyer. I believe that
9 was also part of it, but not this -- the end.

10 So the defense was not directed to the end of
11 these unedited versions specifically, and I did -- I also
12 want to say for the record, so I do have the government's
13 opposition and they also -- I watched the videos that were
14 shared that -- I don't know. It's my first time on USAfX
15 or whatever that is. So I watched the two videos that
16 were shared in the group, which were -- which was the
17 interview. It looks like it was two parts of the same
18 interview at the end of the day of that January 8th
19 meeting. So I did review that as well.

20 And, at the very end, somewhere around the
21 12-and-a-half-minute mark is where the person recording
22 the interview and the conversation stops. That person
23 leaves. It's black and there's only audio, and that's
24 when he made the statement that's at issue right now. So
25 government had an obligation to direct the defense to that

1 statement.

2 So I do find that there was a Rule 16 and a
3 *Brady* violation. The question is what do I do about it?
4 What are the sanctions, if any, that I should impose under
5 these circumstances? And, again, the facts were that the
6 government -- Ms. Kerkhoff represented that she did not
7 know about this last statement until the 22nd when it was
8 brought to her attention and she thought that the video
9 was over kind of when, I guess, he zips up his jacket and
10 so, I guess, that's covering up the camera. And then you
11 hear a phone call. And she, Ms. Kerkhoff, stopped
12 watching at that point and she did not know about this
13 statement before it was brought to her attention on the
14 22nd, May 22nd of this year. And I do -- and I don't
15 think -- and if anybody is challenging that, I don't think
16 there's a challenge to Ms. Kerkhoff's representations. I
17 accept her representations.

18 MR. JACOBSON: Your Honor, I do think we have
19 something to say briefly about that.

20 THE COURT: Sure. I know in the motion -- in
21 your motion, I know you indicated something about what Mr.
22 Baset said in court yesterday. So if you want to be heard
23 on that, I'll absolutely hear you on that.

24 MR. JACOBSON: Yeah. We, obviously, don't know
25 what Ms. Kerkhoff or Mr. Qureshi knew. We don't know what

1 Mr. Baset knew. All we know is what Ms. Kerkhoff said
2 yesterday, which we would tend to credit, but we also know
3 that Mr. Baset said something in court yesterday in front
4 of Judge Morin that appears to contradict that. So we
5 don't know, honestly, what to make of that, but wanted to
6 bring it to your attention.

7 MS. KERKHOFF: And I can clarify, as Mr. Baset
8 was only on the case within the last month so he was not
9 aware.

10 What I attempted to explain to Mr. Baset and I
11 could explain to counsel, when we first uploaded the
12 videos, I made them into an MP4 because it's an easier
13 format for all counsel to view, typically, off computers.
14 So I took the movie and uploaded it as an MP4. I did not
15 realize, in doing that, because I thought the video was
16 ending with the zip up and the walking of the jacket, that
17 I had cut anything off other than the very end of the
18 video. That is what I uploaded.

19 So I -- when Mr. Baset was saying Ms. Kerkhoff
20 did not -- I was not aware of the statement. We uploaded
21 it without trying to make it in an easily accessible or
22 viewable format, in exactly as we had it, on April the
23 12th. I think that the representations were consistent
24 with I was not aware that I had myself -- we had edited
25 that last part out, which is why I didn't represent that.

1 I had created an MP4 to allow counsel, back in March of
2 last year, to view it.

3 So that is the clarification I make. And I do
4 affirm and stand as an officer of the court, I was unaware
5 of the statement or I would have discussed it, certainly,
6 with Judge Morin. And as I -- my e-mails to counsel
7 pointed out, I specifically did direct them to a number of
8 videos. I wouldn't have left this -- I don't see why I
9 would have left this out.

10 So I make those representations. Mr. Baset was
11 representing what he understood from me, as I was in court
12 here and could not be over there.

13 MR. JACOBSON: Your Honor, just one brief point
14 on that. I don't doubt Ms. Kerkhoff's word; however,
15 yesterday, when we first brought this up, there was some
16 doubt cast, or maybe that's not saying it the right way,
17 but there was some blame accorded, I think is fair to say,
18 that this video -- all of this video four, not just parts,
19 what I've been calling part two of video four, but part
20 one of video four, too, was not known to us. Even though
21 it was produced, it was not known to us, as I said
22 yesterday. And so that's why we've alleged that the *Brady*
23 violation applies to that entire video, parts one and two.
24 And the fact that Ms. Kerkhoff didn't know about part two
25 before the 22nd lends a lot of credence and credibility

1 and sort of further highlights the *Brady* violation in
2 that -- based on the fact that we didn't know about either
3 parts one or part two if the government didn't know about
4 part two itself until May 22nd. Does that make sense? I
5 maybe didn't articulate that fully, clearly.

6 MS. KERKHOFF: And so this is the concern that I
7 had in the Basillas motion, is that I don't believe, and
8 certainly Judge Morin hasn't found, that the statements
9 made and what they're citing to as the statements made by
10 Mr. Hessler were themselves *Brady*. In fact, Mr. Hessler's
11 attorney argued in prior hearings, all publicly, that
12 those were inculpatory statements, that they were
13 prejudicial, and they did not want them in trial. The
14 government highlighted them as it related to Mr. Hessler
15 and Mr. Petrohilos.

16 The government provided to counsel the planning
17 meeting videos one, two, three, and four more than a year
18 ago, put them in a folder titled Planning Meeting Videos,
19 and put them up there. I think it is a bit disingenuous
20 for Mr. Jacobson to sit here and say I didn't direct him
21 to the planning meeting videos and where counsel for Mr.
22 Hessler has stated that it is his interpretation that the
23 portion involving Mr. Hessler is prejudicial and
24 inculpatory and should not come into trial. And that has
25 been fully litigated. And the government did direct Mr.

1 Hessler's counsel and Mr. Dalto's counsel to those videos
2 specifically, as they involve statements of their client,
3 that those have been made available and the government
4 does believe it did direct counsel to the planning meeting
5 videos as a whole and does not view that Mr. Hessler's
6 statements are in any way *Brady* as it relates to Mr.
7 Basillas or anyone else other than potentially Mr.
8 Hessler, who was aware of them.

9 MR. JACOBSON: So I'm trying to credit Ms.
10 Kerkhoff's statement and she's turning around and calling
11 me disingenuous. So I don't know what Your Honor wants to
12 do with that.

13 What I am affirming as an officer of the court
14 is that I was not aware, despite the thousands of hours
15 and thousands of pro bono hours that my firm has put into
16 the defense of Mr. Basillas, I personally, nor anyone on
17 my trial team, was aware of video number four. We were
18 not aware of parts one or part two, and we do consider
19 them to be *Brady*.

20 THE COURT: And video -- just so I'm clear,
21 video number four starts at what point?

22 MR. JACOBSON: It starts in the middle of the
23 interview of Mr. Dalto.

24 THE COURT: Okay.

25 MS. KERKHOFF: So it's the second video.

1 THE COURT: Okay. So it's the second video that
2 I saw yesterday that was uploaded yesterday?

3 MS. KERKHOFF: Correct.

4 THE COURT: Okay.

5 MS. KERKHOFF: That video was produced with the
6 exception of the very last portion where he's -- after he
7 zips up the coat and leaves, that's where -- that's where
8 we -- I'd created the MP4 to put up, that very last part.
9 But the interview with Mr. Dalto, the interview with Mr.
10 Hessler, all of that was produced more than a year ago and
11 titled Planning Meeting Video Number Four.

12 MR. JACOBSON: We're not disputing that, Your
13 Honor.

14 THE COURT: I'm sorry. Sorry. I'm behind
15 y'all.

16 MR. JACOBSON: Okay.

17 THE COURT: So what you did not have, Mr.
18 Jacobson, was -- you just -- you had the videos. You were
19 not directed to the statement at the end of the video.

20 MR. JACOBSON: We did not have part two of that
21 video. So what I'm calling video number four.

22 THE COURT: Uh-huh.

23 MR. JACOBSON: If we can stick with that
24 terminology, we did not have part two of that video until
25 April 12th.

1 MR. RIST: That's correct.

2 MR. JACOBSON: No one in this case had that.

3 MR. RIST: That's right.

4 MR. JACOBSON: We did have part one, as Ms.
5 Kerkhoff said. We've had part one for a long time.

6 THE COURT: The very beginning, uh-huh.

7 MR. JACOBSON: Yes. We did never -- we never
8 reviewed that video and that's on us. That's what I said
9 yesterday. It was one of 3,000 videos or so produced to
10 the defense. We think it's *Brady*. It was never
11 highlighted as *Brady*, and that's an additional *Brady*
12 violation that was not before Judge Morin yesterday.

13 MR. RIST: Your Honor, if I just may add one
14 thing. April 12th was less than five weeks prior to our
15 trial date. I think that the fact that it's less than
16 five weeks is important in light of the findings in *Terry*
17 *Johnson v. United States* where a sanction was -- where
18 Court of Appeals found that the trial court was erroneous
19 in not granting a *Brady* sanction where a exculpatory
20 statement was turned over five weeks prior to trial.

21 Here, we have a statement that's turned over in
22 thousands of other videos four-and-a-half weeks prior to
23 trial, and that -- neither the government nor defense
24 counsel becomes aware of the exculpatory statement until
25 after the jury is seated, after the government has

1 authenticated the video through a police officer. They've
2 bolstered this video by bringing in Officer Adelmeyer and
3 saying that it is accurate. That previously, in first
4 trial, November 17th, Detective Pemberton stated that no
5 edits were made to this video at all, and that's -- I find
6 that to be a disingenuous statement.

7 I'd ask that there be -- that, at some point, we
8 bring up an argument about a *Lewis* target against
9 Detective Pemberton before he --

10 THE COURT: Okay. Can we stay focused here?

11 MR. RIST: Yes.

12 THE COURT: Because I haven't even gotten
13 through my -- I mean, now you're talking about a whole
14 other --

15 MR. RIST: All right. So fair enough, Your
16 Honor. Four-and-a-half weeks prior is when video four was
17 provided. And the inculpatory statement was not made
18 known to defense until after a jury is seated.

19 THE COURT: So where I stopped and asked for
20 clarification and provided Mr. Jacobson and now Mr. Rist
21 is where I was making -- I already found that it was
22 *Brady*.

23 MR. RIST: Sure.

24 THE COURT: I already said that.

25 MR. RIST: Yes, Your Honor.

1 THE COURT: Made my own independent finding that
2 it was a *Brady* and Rule 16 violation. The issue was where
3 I invited further argument, correction, whatever the case
4 may be, was as to, basically, the government's intent,
5 whether it's bad faith, whether it's gross negligence,
6 whether it's mere negligence. That's where I invited --

7 MR. RIST: Yes.

8 THE COURT: -- because I said --

9 MR. RIST: Very well.

10 THE COURT: -- that Ms. Kerkhoff -- what her
11 representations were about the end of this video.

12 So based on the evidence in the case, the
13 practice, as you -- as everybody has highlighted, the
14 amount of videos is quite voluminous. That doesn't mean
15 that the government doesn't have an obligation to -- they
16 can't just turn it over, say here's all 3,000 videos, you
17 find your *Brady*. Obviously, that's not appropriate and
18 that's not what the government has done in this case.

19 Because of the high volume, the government was
20 required to point out where there was any *Brady*, potential
21 *Brady*, and bring it to the defense attention. I think the
22 government has been, in light of the amount of evidence
23 that has been produced in this case, the government has
24 been diligent in terms of doing -- turning over evidence,
25 pointing to the different portions. They had an

1 obligation in this case and other cases where they had to
2 do the designation of the evidence and what are you
3 actually planning on showing. That's not something that's
4 normally required in a trial, but because of the high
5 volume of evidence in this case, that's something that the
6 government met those obligations. And I state that
7 because I do consider that in making my finding as to
8 whether this was an intentional violation, whether there
9 was bad faith, whether there was gross negligence, and I
10 think the government fell prey to the exact issue that
11 they were trying to work through with the defense, which
12 is the high volume of evidence.

13 I credit Ms. Kerkhoff's representations on her
14 own behalf that she just thought the video was over and
15 did not watch it until the end and, therefore, was not
16 aware of these last statements. So that doesn't make it
17 not a *Brady* violation, but I do find that it is a mere
18 negligence as opposed to bad faith or gross negligence.

19 So now let's talk about what, if any, sanctions
20 I impose because I am finding that there are these
21 violations.

22 So, as I said, I read everybody's pleadings.
23 Let me just say, did anybody -- is there anything that
24 anybody did not say in their pleadings that you wish to
25 say now? And I'll give you that chance now if you wish to

1 be heard.

2 MS. DOWNS: Just briefly. April Downs for Mr.
3 Webber, Your Honor.

4 I will admit that I got some additional case law
5 and I just forwarded literally two minutes ago. It's
6 an --

7 THE COURT: To who?

8 MS. DOWNS: To the Court and counsel. And it's
9 a 1970s era case about severance when there is a gross
10 disparity on a conspiracy case, and I think that that is
11 true in this matter. I'll tell you the -- it's 1970s era.
12 It's *U.S. v. Mardian* in 546 F.2d 973.

13 So besides my motion to exclude co-conspirator
14 statements, I would move that we have to sever because of
15 the gross disparity of evidence. And I think I try to lay
16 out in my motion already, and so I don't want to belabor
17 it, that, understanding the rulings here, everything
18 that's happened, that it's all inadvertent, that's not our
19 issue. The concern is that this little snippet has way
20 more significance for Mr. Webber and --

21 THE COURT: Well --

22 MS. DOWNS: -- and so --

23 THE COURT: I apologize. I didn't mean to cut
24 you off. I thought you were done. So you can finish what
25 you were saying.

1 MS. DOWNS: So because that video is taken after
2 there is the watching the planning video with Mr.
3 Petrohilos speaking and then speaking to Mr. Dalto and
4 then Mr. Hessler, this is -- there's a connection there
5 with a union, the IWW, and that that hits right at where
6 the government is going with Mr. Webber because that's the
7 Listserv, the chat he's in. And so that directly connects
8 that meeting to the little -- the few little bits of
9 co-conspirator statement. And, for that reason, I'd
10 assert that we cannot have those statements come in, the
11 statement at the -- that was already given to the jury,
12 and that bell is rung, and any -- all the other statements
13 that were entered by Mr. Evans, Detective Evans yesterday.

14 THE COURT: Can I ask a question first --

15 MR. JACOBSON: Of course.

16 THE COURT: -- Mr. Jacobson?

17 On the IWW, is the only evidence about the IWW
18 this -- I don't remember if it's a group chat or a
19 Facebook post. Is that the only time that we've talked
20 about the IWW? I apologize, you know.

21 MS. KERKHOFF: So --

22 THE COURT: You all have been living with this
23 case for a year.

24 MS. KERKHOFF: Yes.

25 THE COURT: I'm keeping up with the jury.

1 MS. KERKHOFF: As it relates to the evidence in
2 this case, that is the mention of the IWW and it's mention
3 of IWW and GDC --

4 THE COURT: Right.

5 MS. KERKHOFF: -- is the reference.

6 THE COURT: Uh-huh.

7 MS. KERKHOFF: GDC was mentioned in the
8 planning -- in the video of the planning meeting because
9 Isaac Dalto states, "I'm a member of the GDC."

10 THE COURT: Right.

11 MS. KERKHOFF: So but there is no other
12 reference to the IWW being -- as a group, an organized
13 group, other than the backing of support. There are other
14 communications that are not part of this trial where there
15 are votes to say yes, we are going to be doing this, but
16 none of that has been presented to the jury. So it's just
17 these references that they're part of a group.

18 THE COURT: All right. So for this jury that's
19 before us, that's the only reference that they have about
20 the IWW? That's the only link that they have for the IWW?
21 Okay, that's what I wanted to know.

22 Mr. Jacobson, back to a question I had last
23 night.

24 MR. JACOBSON: Yeah, so just so -- I won't
25 repeat the -- what the arguments that are in the pleading

1 last night, but something new is -- that was not part of
2 the pleading last night was a response to the government's
3 speculation, I think it was, about what this upper echelon
4 statement meant that they put in their pleading last
5 night. And they -- I think it's fair to say it was
6 speculating that perhaps the upper echelon statement was a
7 reference to Project Veritas' upper echelon and not the
8 IWW's upper echelon and that the speaker believed that the
9 planners were not aware of being infiltrated by Project
10 Veritas and there was some reference to Officer
11 Adelmeyer's testimony and his testimony where supposedly
12 he said something about an infiltrator to the meeting
13 being kicked out of the meeting.

14 In the first instance, we don't know anything
15 about -- anything about Officer Adelmeyer testifying
16 anything remotely like that. We went over the transcript
17 several times last night. But perhaps more importantly is
18 the government now having had the law enforcement
19 resources to go talk to someone at Project Veritas, whose
20 name we still don't know, and try to figure this out,
21 which is commendable, of course, but now they have yet
22 another interpretation of what this statement might have
23 meant.

24 So the government speculates last night as to
25 what it might mean. The version that they come with this

1 morning, having spoke to the Project Veritas person -- I'm
2 sure they're doing that in good faith, but the version
3 that they come with this morning is yet another version of
4 what that upper echelon statement meant.

5 We, the defense, just not having the government
6 resources available to go out last night and find this
7 guy, whose name we don't even know, and just being able to
8 read the documents, the transcripts, and look at the
9 videos, have a third interpretation of what this means.

10 So it highlights for the Court the fact that we
11 don't know what this means. This is new to us. We don't
12 know what it means. We're supposed to be crossing the
13 final government witness today and presumably closing on
14 Tuesday without having had the opportunity to vet and
15 figure out what the statement means, what it means for our
16 trial strategy. We opened a week-and-a-half ago. Our
17 opening did not stress this conspiracy idea at all. We
18 did not attack the conspiracy very much at all in our
19 opening. I'm now thinking that we should have. If we
20 have an opportunity to try this case again, we probably
21 will. It's all we've been able to do since discovering
22 this evidence to figure out how to get it before Your
23 Honor in a cogent way. We have not had the opportunity to
24 think about what it means for our client and to try to
25 exculpate our clients and do our clients justice in this

1 case.

2 We've got speculations about what it means, but
3 what we need is facts, and we have not had the time.

4 That's why *Brady* is a trial right. Learning about *Brady*
5 material in the middle of trial necessitates, with all due
6 respect to Your Honor, if not a dismissal, a mistrial so
7 that we can get our act together, we can understand what
8 this means. I know it's a burden for the Court. I feel
9 bad for the ladies and gentlemen of the jury that maybe
10 we've wasted their time for the last two weeks. That's
11 awful, and I know Your Honor doesn't like that. We don't
12 like that. The D.C. government doesn't like that. But,
13 in this case, in order to do justice for these four
14 gentlemen, that's what needs to happen.

15 MR. RIST: Your Honor, I would also --

16 THE COURT: I'm listening.

17 MR. RIST: Okay.

18 THE COURT: Just because I'm not looking doesn't
19 mean I'm not listening.

20 MR. RIST: Yesterday, upon first caucusing of
21 the defense counsel, we came up with some preliminary
22 ideas of what would be perhaps sanctions to remedy this
23 *Brady* violation. The fourth was -- the very last one was
24 a playing of the video so that this statement can be heard
25 by the jury.

1 Your Honor, I would argue that that is our
2 fourth statement -- or our fourth choice. If Your Honor
3 will not dismiss this case or declare a mistrial, we would
4 ask for that. But I would note that that's going to be
5 wholly insufficient because there's no witness to
6 cross-examine to put that statement into context. We
7 couldn't even ask -- we don't even know who the speaker
8 is. We don't know who he's speaking to. The fact that
9 it's a member of Project Veritas is only based upon what
10 that unknown individual said to the detective. There's
11 been no representation by the government that they
12 independently investigated to see if Matt was speaking to
13 other members of the Project Veritas or to some other
14 group.

15 We don't have Matt to cross-examine. Simply
16 playing this video and this statement with no witness to
17 put in context or cross-examine is wholly insufficient for
18 the jury to understand what the entire statement means,
19 how it fits into the conspiracy charges.

20 So I would ask Your Honor to dismiss this case
21 with prejudice. In the alternative, declare a mistrial
22 because simply playing the video with nothing else will be
23 wholly insufficient for the jury to even understand what
24 it means. And what's left? It's left for the government
25 and the defense to simply speculate as to the meaning of

1 this statement, speculate as to who the identity of this
2 person is, and speculate as to who he was speaking to.

3 So the government wants to say that this was
4 simply about Project Veritas having individuals kicked out
5 of another meeting. Well, that's one innocuous
6 interpretation of that statement.

7 To the defense, it's clear that the maker of
8 that statement was involved in an active conspiracy
9 against the Anti-Capitalist march. The government
10 themselves has stated that, up until the marchers made it
11 to L Street, that anyone was free to come and go as they
12 pleased. The government has not attempted to identify,
13 for instance, who the throwers of the rocks at the BP,
14 which, from my understanding, is the first major
15 destruction of property. The government has not attempted
16 to identify every individual who threw a trashcan into the
17 middle of the 13th Street or newspaper dispenser into 13th
18 Street. The government itself acknowledges as impossible
19 to identify every person who cheered or incited that
20 group.

21 So without the opportunity to find out who Matt
22 is and who Matt was talking to, it is just as likely that
23 that statement is indicative of a conspiracy to infiltrate
24 the Anti-Capitalist Bloc and incite them into a riot. We
25 don't know. The innocuous version of the speculation as

1 to what that statement means is just as likely as the
2 nefarious interpretation of what that statement means.

3 And, for those reasons Your Honor, the only just
4 thing to do is to either dismiss this case or declare a
5 mistrial. The horse is long out of the barn and is in the
6 next county. It's been -- the --

7 THE COURT: Okay, Mr. Rist. It's 10:30.

8 MR. RIST: Yeah.

9 THE COURT: Just keep me with the facts, okay?
10 Keep me with the facts, please.

11 MR. SCHRAGER: Your Honor, I'm going to be real
12 brief.

13 Your Honor, part of this is when the government
14 decides to, basically, accept evidence from an
15 organization that's secretive, that has an agenda, has a
16 specific agenda and is not fully cooperating with the
17 government, because we have -- I mean, all the government
18 has is somebody named Matt. They haven't cooperated to
19 the extent of even identifying who it is that was there.
20 And if we look at the trial without that, then we have
21 just Officer Adelmeyer, who is a witness here who -- you
22 know, as opposed to all that that came in, Your Honor.
23 And Officer Adelmeyer, basically, report -- gave a report
24 of seven lines, and that's what he got out of the meeting
25 to his superiors, but -- and it's a huge, huge difference.

1 And, you know, we're also sort of just sort of trying to
2 figure this out. And as I -- you know, as counsel has
3 said, in the middle of trial to figure all this out with
4 different stories, you know, and we're still dealing with
5 Project Veritas, who, you know, honestly, I don't
6 understand how the government or the United States, how
7 the government of the District of Columbia can accept --
8 blindly accept evidence from a organization like Project
9 Veritas when they won't explain who was there, they won't
10 cooperate, they're not coming into court, they're
11 basically hiding behind their little shield like the
12 Wizard of Oz, and that's sort of what we're dealing with
13 here Your Honor.

14 They've accepted that evidence, but they also --
15 another point is they've never turned over the original,
16 which makes it totally -- by not turning over the
17 original, it can't be, you know, it can't be analyzed as
18 far as to see whether it was doctored at all, the video.
19 So I would just -- that's all I would add, Your Honor.

20 THE COURT: Okay.

21 I actually have a question for the government.

22 MS. KERKHOFF: Yes, Your Honor.

23 THE COURT: What is your argument about the
24 conspiracy? Specifically, what are you going to be
25 arguing to this jury was the conspiracy? The conspiracy

1 to do what and when? I know it's charged as of January
2 20th.

3 MS. KERKHOFF: Correct.

4 THE COURT: So just tell me. Obviously --

5 MS. KERKHOFF: What my argument is --

6 THE COURT: -- I'm not asking you to give me
7 your closing argument, but what is --

8 MS. KERKHOFF: I've already given it once.

9 The argument as to the charged conduct in this
10 case that the jury is voting on is that, on January 20th
11 of 2017, each of these four defendants did, in fact,
12 engage in a riot and they agreed with others to do so,
13 that their conduct and the purpose, and as I argued at the
14 first trial, that we have a group of individuals who
15 collect. And if you don't think there's an agreement by
16 the way that they're dressed and by their masks and if you
17 don't find that each individual, each of these four
18 defendants, at that moment, agreed to riot, then as the
19 group moves south, there is destruction of property
20 occurring that's loud, that's visible, that's audible,
21 that at least by the time of the Starbucks, we have not
22 only a clear riot, but their continued participation
23 continuing through to 12th and L says, "I'm in."

24 THE COURT: Okay.

25 MS. KERKHOFF: That's exactly what I argued in

1 the first trial.

2 I think counsel is conflating that we're trying
3 to argue the conspiracy for purposes of the statements.
4 And what we noted in our pleadings was, at a minimum,
5 there was a conspiracy to engage in a violation of
6 1321(c), which was to blockade. That can be a separate
7 basis to admit statements. The government is arguing the
8 charged conduct in this case.

9 The statements themselves go to that there is
10 evidence in this case that this was not spontaneous. This
11 was not -- this was planned. Now, you, ladies and
12 gentlemen, have to decide did the defendant agree to do
13 this and at what point, for purposes of Pinkerton theory,
14 did they say I'm in?

15 The Court will note that the indictment itself
16 does not charge the destruction of property further up the
17 street, even at the limo, unless the person actively did
18 it. The whole point -- and I've said this to multiple
19 counsel in discovery meetings -- is that the conspiracy
20 says that, at a minimum, for each of these defendants, by
21 the time we hit the Starbucks, they're saying they're
22 aware, they're conscious, they know what's going on, and
23 they're saying, "I'm in."

24 THE COURT: Okay, thank you.

25 MR. JACOBSON: Judge, if I may.

1 THE COURT: Yes, sir.

2 MR. JACOBSON: Ms. Kerkhoff just limited -- to
3 my ears, Ms. Kerkhoff just limited the conspiracy to
4 beginning on January 20th, which is clearly not what the
5 government's theory is and it's not what she argued in her
6 opening statement.

7 In her opening statement, she said, "At the
8 planning meetings you're going to hear the discussions
9 about this very event. We'll provide the route. You
10 choose what direction you're going to take. We create the
11 environment. You bring it about. Wear all black. Make
12 sure you bring other clothes."

13 THE COURT: Mr. Jacobson.

14 MR. JACOBSON: Sorry.

15 "Make sure you wear other clothes to change into
16 when we reabsorb in the family-friendly Festival of
17 Resistance. Oh, and no breaking windows at the
18 family-friendly Festival of Resistance," and it goes on,
19 Your Honor. These were all Ms. Kerkhoff's statements in
20 opening about the planning event.

21 So -- and the -- Ms. Kerkhoff can't have it both
22 ways. She can't charge a conspiracy and thereby get in
23 all of the planning meeting statements against these
24 defendants, which the jury will consider for all purposes,
25 not just for the conspiracy, and then, to my ears, say

1 that the conspiracy didn't begin until January 20th.

2 There's, of course, a gigantic difference
3 between conspiring to do something and do something.
4 These defendants might have been -- charging the
5 defendants with the substantive offense of inciting a riot
6 is one thing. That happened on January 20th. Charging
7 the defendants with conspiring to riot and including the
8 pre-January 20th events and planning meeting as part of
9 that conspiracy is where we have the problem here.

10 THE COURT: But I will say that I went back to
11 look at the indictment to see what the date was that the
12 government charged. I know that there's been, obviously,
13 discussions pretrial as to when the conspiracy began such
14 that the government would know what they -- what evidence
15 they would allow -- be allowed to admit. I think --

16 Tell them we'll be with them shortly.

17 So I think -- I believe Judge Morin's ruling was
18 perhaps as early as January the 6th, but that -- I haven't
19 heard anything about January the 6th in this trial. So
20 I'm not going there.

21 MR. JACOBSON: For this trial, it's the 8th,
22 Your Honor.

23 THE COURT: Yes.

24 MR. JACOBSON: His ruling.

25 THE COURT: But I thought his ruling was for the

1 6th, but that the government --

2 MR. JACOBSON: No, not for this trial group.

3 MR. SCHRAGER: Your Honor, could I approach with
4 an emergency request very quickly?

5 THE COURT: Okay.

6 (Bench conference.)

7 MR. SCHRAGER: I'm sorry. My client desperately
8 has to go to the bathroom he informed me so --

9 THE COURT: Go, but we're not -- we're going to
10 keep moving.

11 MR. SCHRAGER: Okay.

12 (Open court.)

13 MS. KERKHOFF: Your Honor, we'd initially talked
14 about the 6th. The government decided not to include
15 that. I would note that, in my pleadings, I argued a
16 1321(c) disorderly conduct conspiracy, and that was
17 discussed at length both with Judge Leibovitz and it was
18 discussed with Judge Morin, whose findings was that there
19 was a conspiracy to engage in a disorderly or.

20 THE COURT: Uh-huh.

21 MS. KERKHOFF: So and the government -- this was
22 discussed with Judge Leibovitz as well and, in my
23 closings, what conspiracy are you arguing? I said I'm
24 arguing the charged count.

25 THE COURT: I mean, so it is the charged -- the

1 charged count is January 20th. My understanding of all of
2 the discussions about whether it's January 6th or January
3 8th -- and for this purpose and for this trial, the
4 earliest date that we've heard about any kind of
5 information relating to a conspiracy is January 8th and
6 the planning meeting and the -- I don't know -- Facebook
7 posts or texts or group chat, whatever the appropriate
8 phrase is.

9 So what I have to do, the starting point -- and
10 I have to keep myself focused on what I'm looking at and
11 the -- what I'm looking at is is there still -- is there
12 an issue with the conspiracy? Is there still a charge?
13 Does this new evidence, this evidence that I just found
14 was a Rule 16 and a *Brady* violation, does that affect
15 Judge Morin's ruling of that conspiracy such that the
16 co-conspirator statements shouldn't be coming in, such
17 that a mistrial should be granted, such that the trial
18 should be dismissed, the cases should be dismissed. And
19 Judge Morin made very specific findings in May. May 9th,
20 I believe, was the date of his findings.

21 MR. JACOBSON: That's correct, Judge.

22 THE COURT: Let me look back at that.

23 And his findings relating to this case was
24 that -- I just want to read some of it.

25 Well, first -- well, I'm not going to go back

1 and read all of his rulings.

2 His ruling was by many different things and he
3 cited back to Judge Leibovitz's earlier finding about the
4 conspiracy. But the combination of things, of the folks
5 dressed alike, the folks walking in unison, he based his
6 existence of the conspiracy based on those several factors
7 and, therefore, found that the co-conspirator statements
8 could be admitted.

9 The question now is, with this new statement
10 that we have just learned of, does that now undermine the
11 conspiracy finding such that these things are not
12 admissible?

13 I can't find that they are -- this one statement
14 at the end of this video is sufficient to undermine the
15 conspiracy and, therefore, say that these statements,
16 these co-conspirator statements, are no longer admissible.
17 There were several factors that Judge Morin pointed to;
18 the group walking together, the chants, some were
19 performing destructive acts, and this wasn't just a
20 spontaneous assembly of folks.

21 The government has charged January 20th as the
22 date of the conspiracy and agreement doesn't have to be
23 explicit. It doesn't have to be people sitting down and
24 talking and agreeing to do certain things. It could be
25 inferred from the facts and the circumstances of what's

1 happening. I can't find that that statement undermines
2 the conspiracy to the point that we don't continue with
3 the trial.

4 What I will do is I'll continue to listen,
5 see -- because we're in the middle of trial, as everybody
6 has pointed to. I will continue to listen and hear what
7 other facts come in, what other circumstances there are to
8 determine whether a mistrial or dismissal is appropriate.

9 So I'm not denying it, not granting it, I'm
10 deferring on it, but I am going to allow -- the case will
11 continue forward.

12 And I'll also say the IWW, another factor, and
13 specifically talking about Mr. Webber's case, because he's
14 a member of the IWW and he's on this Listserv -- I'm
15 sorry, this group chat, I still believe that Judge Morin's
16 initial ruling about the existence of the conspiracy is
17 still sufficient for the case to go forward with Mr.
18 Webber, even though he has this particular connection to
19 the IWW and then there's this comment about the IWW. At
20 some point, I think the evidence still establishes that
21 somewhere around January 8th, there is this agreement, at
22 a minimum, for disorderly conduct. And the conspiracy
23 still existed and the jury has a right to hear the
24 continued statement.

25 So if the defense wishes to introduce that

1 statement, they can. If the defense wishes to introduce
2 that statement with some kind of an instruction or
3 stipulation, I will hear you on that. And I don't think
4 the government should be permitted to argue their take on
5 what that statement means. Understanding that they now
6 have done some investigation and got some of what it
7 means, at this point, I think it's a question of fact for
8 the jury, for the jury to listen to it and decide whether
9 that makes them think that there wasn't an agreement at
10 all. And the defense can argue that, but it's a question
11 of fact that I don't think I should take away from the
12 jury by granting a mistrial or a dismissal at this level.

13 Ms. Downs raised recently this morning and cited
14 to a case, which, of course, I haven't looked at since she
15 just cited it, but I will take a look at it. But,
16 obviously, I'm familiar with case law in terms of
17 severance and the disparity of evidence and we want to
18 make sure that the jury can keep straight the evidence,
19 that they're not just going to pile in Mr. Webber with
20 everyone -- with the other defendants, if there's a
21 disparity of the evidence.

22 I'll look at the case law that Ms. Downs cited
23 to, but I don't think that there is a fear of that in
24 light of the very specific -- the video evidence that's
25 being presented in this case and the very specific --

1 well, here, identifications that are going to be -- that
2 are projected to be presented in this case. I don't have
3 a fear that the jury is just going to lump him in because
4 each individual defendant, it's not just them acting --
5 the four of them acting together. They are going to be
6 identified as to what each of them did. So I'm not -- I
7 don't have a concern about this disparate evidence and
8 there being a severance issue. But I will read the case
9 that Ms. Downs cited to and see if I change my mind.

10 Yes, Mr. Schrager?

11 MR. SCHRAGER: Your Honor, as to identification,
12 Judge Leibovitz's ruling was that the detective cannot
13 make identifications.

14 THE COURT: Oh, he's not making -- I'm saying
15 it's the identification evidence. He's not going to make
16 an identification.

17 MR. SCHRAGER: Right. I just wanted to make
18 sure the Court's aware, since the Court's coming in at the
19 last minute of --

20 THE COURT: Oh.

21 MR. SCHRAGER: -- Judge Leibovitz's ruling on
22 that issue, Your Honor.

23 THE COURT: Oh, absolutely.

24 MR. SCHRAGER: Okay, thank you.

25 THE COURT: That's one that I am very aware of.

1 It's he's going to be -- my understanding, and anybody
2 correct me if I'm wrong, my understanding is that he is
3 going to be pointing out certain things in the video,
4 which the jury -- I mean, I think that was the
5 government's opening, which the jury can then make their
6 decision about the identification.

7 MS. KERKHOFF: Correct, Your Honor. And the
8 government actually admitted through different officers
9 the processing videos. The government will be admitting
10 through the detective the boards that we provided. We
11 will also be admitting the board of Mr. Basillas and Mr.
12 Valencia together, but won't be admitting that at the time
13 or doing Mr. Basillas. We'll simply admit that board at
14 the very end, which shows what we believe to be a change
15 of clothes, but the detective will not be arguing that and
16 he will not be making anybody's name. I will not be
17 referring to names. We will be consistent with the prior
18 ruling.

19 THE COURT: Yeah.

20 MR. RIST: Your Honor?

21 THE COURT: Yeah. I was -- thank you, Mr.
22 Schrager. I appreciate you bringing that to my attention,
23 but I was clear on. So if I wasn't clear in my statement,
24 the identification evidence, not his IDs.

25 MR. SCHRAGER: I assumed that you did, but I

1 just wanted to make sure.

2 THE COURT: Yup. I appreciate that.

3 MR. SCHRAGER: Just while we're here, very
4 quickly, we would oppose just the board itself. I have no
5 further argument on that, but I would assert for the
6 record, Your Honor, that, basically, by putting a bunch of
7 pictures together of somebody in a crowd, that that
8 becomes an identification in itself, Your Honor.

9 THE COURT: But each -- let me ask a question.

10 Are those boards, are those the ones where I see
11 exhibit -- are they pictures from certain exhibits?

12 MS. KERKHOFF: Yes, Your Honor. So the way we
13 did it last time, and as I advised counsel, we have boards
14 like these that show the individual in the riot itself.
15 This is Government's 803A with the pictures. We cut off
16 the processing part. And what, consistent with Judge
17 Leibovitz's rulings, the government will admit at the
18 conclusion of its evidence the combined portion, but will
19 not be doing that through the detective. And that will
20 just be presented to the jury for them to compare the
21 processing stuff. But what is coming in through the
22 detective are images of an individual during the riot.
23 And so this is the images.

24 THE COURT: And those -- I see each of these
25 have exhibit numbers. So each of these have been admitted

1 into evidence?

2 MS. KERKHOFF: Correct. And the video
3 compilation is also filled out the same way. And these
4 were provided to counsel weeks ago.

5 THE COURT: Yes, Mr. Schrager?

6 MR. SCHRAGER: So, just to be clear, I don't
7 know if it's clear for the transcript.

8 So the detective won't be testifying as to
9 necessarily putting them together, but just presenting
10 those videos?

11 MS. KERKHOFF: The detective will be talking
12 about the videos and about features that are visible on
13 them. He will not be identifying it as a person or
14 connecting it to the processing videos of the person, of
15 each defendant.

16 THE COURT: All right.

17 MR. RIST: Your Honor, if I can make one more
18 request?

19 Based upon Your Honor's ruling in terms of
20 deferring the decision on whether or not this case should
21 be dismissed or should have a mistrial, Your Honor, I'd
22 ask that the Court order the government to make Matt
23 available for a criminal deposition. I believe that
24 there -- that exceptional circumstances do exist in this
25 case.

1 THE COURT: Okay.

2 MR. RIST: It is in the interest of justice to
3 do so. We don't even know who this person is.

4 THE COURT: Mr. Rist, can you look at me? It
5 makes me --

6 MR. RIST: I'm sorry.

7 THE COURT: When you're looking out at the
8 audience, it makes me think you're --

9 MR. RIST: I'm thinking off the top of my head,
10 Your Honor. I'm sorry. So when I'm looking you in the
11 face, I get confused, I can't keep my train of thought,
12 but I'll try my best. I get a little bit nervous. Excuse
13 me.

14 But I think that it is -- that exceptional
15 circumstances do exist in this case and it is in the
16 interest of justice for the government to have to
17 provide -- to produce Matt for a criminal deposition.
18 There are no prior recorded statements that have been
19 turned over to the defense. So if he were to be called as
20 a witness, it seems he would be our witness and we
21 wouldn't get any *Jencks* because he would be our witness.

22 So it seems to me that, in light of the fact
23 that we would be left having to call this Matt, having to
24 identify him and subpoena him, and he is an adverse
25 witness, there is no *Jencks* because he would be ours, it

1 seems to me that, in these exceptional circumstances, the
2 government should be ordered to make Matt available for
3 criminal deposition. I'll make myself available on
4 Monday. I'm not going anywhere this weekend.

5 THE COURT: I'm sorry. I really -- it's -- we
6 are 20 minutes late to the jury. This is an issue that
7 can't be resolved. I'm not cutting off the issue, but I'm
8 saying it's not an issue that we can resolve that needs to
9 be resolved right now. So I'd rather get back to the
10 jury. We've had them waiting. We did a lot of stop and
11 go yesterday. We let them go early. We had them waiting.
12 I'd prefer to get rolling.

13 MS. KERKHOFF: Yes, Your Honor.

14 MS. DOWNS: I'll make my additional argument at
15 the next --

16 MS. KERKHOFF: Thank you.

17 MS. DOWNS: -- opportunity.

18 THE COURT: And I look forward to it, Ms. Downs.
19 All right, can we get the jury?

20 MS. KERKHOFF: Can I get the witness?

21 THE COURT: Yes, please.

22 MS. KERKHOFF: Thank you.

23 THE COURT: And I will say some -- it's
24 Pemberton; right?

25 MS. KERKHOFF: Yes.

1 THE COURT: So I will say that we're going to
2 resume with Detective Pemberton.

3 (Pause.)

4 THE COURT: Oh, Mr. Qureshi.

5 MR. QURESHI: Yes, Your Honor? Thank you.

6 (Pause.)

7 (Jury is present at 10:52 a.m.)

8 THE COURT: Good morning, ladies and gentlemen,
9 you can have a seat.

10 Counsel, gentlemen, audience, you may all have a
11 seat.

12 We are ready to resume the testimony. And,
13 ladies and gentlemen, I told you, because of scheduling
14 issues, we had to interrupt Detective Pemberton. He is
15 ready to resume his direct examination.

16 Thereupon,

17 GREGGORY PEMBERTON,
18 Having been called as a witness on behalf of the
19 Government and having been first duly sworn by the
20 Courtroom Clerk, was examined and testified as follows:

21 (Time noted: 10:52 a.m.)

22 THE WITNESS: Good morning, Your Honor.

23 THE COURT: Good morning, sir.

24 DIRECT EXAMINATION ON BEHALF OF THE GOVERNMENT

25 BY MS. KERKHOFF:

1 Q. Good morning, Detective Pemberton.

2 A. Good morning.

3 Q. So when we picked up yesterday, we had just
4 watched Government's Exhibit 101; correct?

5 A. Yes.

6 Q. I'd like to turn your attention to a couple of
7 photographs.

8 MS. KERKHOFF: The first, showing defense
9 counsel what's been marked for identification as
10 Government's Exhibits 37 and 42.

11 Q. Detective Pemberton, as part of your
12 investigation, did you assist and observe in the
13 photographing and laying out of certain items of evidence
14 that were collected from defendants in this case?

15 A. Yes, I did.

16 Q. Okay. And Government's Exhibit No. 37, what is
17 that a photograph of?

18 A. This is a photograph of evidence that was seized
19 from Defendant Michael Basillas.

20 Q. Okay. And does that fairly and accurately
21 depict the items that were seized? And when you say
22 seized, what do you mean by seized?

23 A. Those items were -- excuse me.

24 Those items were taken from that person at the
25 time of arrest and placed in evidence.

1 Q. And you say placed in evidence. What happens to
2 items placed in prisoner property?

3 A. Items that are placed in prisoner's property can
4 be collected by the defendant once they return to the
5 precinct where they were processed.

6 Q. And Government's Exhibit 42?

7 A. These are items that were seized from defendant
8 Casey Webber.

9 Q. And these photographs fairly and accurately
10 depict the items that were seized as evidence from
11 Defendants Webber and Defendant Basillas?

12 A. That's correct.

13 MS. KERKHOFF: At this time, the government
14 offers into evidence Government's Exhibit 37 and 42.

15 MR. JACOBSON: No objection.

16 MR. SCHRAGER: No objection, Your Honor.

17 MR. RIST: No objection.

18 MS. DOWNS: No objection.

19 THE COURT: They will be received.

20 (Government's Exhibit Numbers
21 37 & 42 admitted into evidence.)

22 BY MS. KERKHOFF:

23 Q. Detective Pemberton, I'd also direct your
24 attention to what we're calling kind of a on-scene arrest
25 photograph. Was that process done for every defendant who

1 was arrested and charged in connection with this case?

2 A. Almost every defendant.

3 Q. Okay. And when you say almost every defendant,
4 what do you mean?

5 A. The juveniles were not -- photographs were not
6 taken of the juveniles. There's different processing
7 procedure for them. I believe there was five juveniles.

8 Q. And --

9 A. And there was one individual that was injured
10 with a sprained ankle and was transported to the hospital,
11 and we were not able to take an arrest photo of that
12 individual.

13 Q. Okay. So for the other individuals -- and when
14 we say field arrests, is this a photo taken on scene at
15 the time of processing with a whiteboard identifying each
16 individual and photographed with an officer standing next
17 to them?

18 A. Yes, it is.

19 Q. Have you had an opportunity to review
20 Government's Exhibit 500 through 717 in this case?

21 A. Yes.

22 Q. And do these fairly and accurately represent the
23 on-scene arrest photos for the defendants in this case?

24 A. Yes, they do.

25 MS. KERKHOFF: At this time, the government

1 would offer into evidence Government's Exhibit 500 to 717
2 and note that Exhibits 516, 533, 563, 698, and 802 are
3 already admitted.

4 MR. JACOBSON: No objection.

5 MR. RIST: No objection, Your Honor.

6 MR. SCHRAGER: No objection, Your Honor.

7 THE COURT: All right, they'll be received.

8 (Government's Exhibit Numbers

9 500 - 717 admitted into evidence.)

10 BY MS. KERKHOFF:

11 Q. Now, Detective Pemberton, you testified
12 yesterday that you watched a considerable amount of video.

13 A. Yes.

14 Q. Is that correct?

15 A. Yes.

16 Q. And, in the course of watching that video, what
17 kinds of things were you looking for?

18 A. First of all, I wanted to establish the
19 chronology of what happened and then try to locate
20 everywhere that there --

21 MR. SCHRAGER: Objection.

22 Oh, I'm sorry, Your Honor. I misspoke. I
23 mis -- sorry -- understood the officer.

24 THE COURT: Okay.

25 Q. Okay.

1 A. Try to understand the chronology of how it
2 evolved, what the route was, what the timing was, when and
3 where things occurred, but, additionally, to try to figure
4 out exactly what each individual, their participation was
5 and at what point they were participating and what level
6 of participation they were engaging at.

7 Q. Okay. And I'm not asking -- and I'm just asking
8 generally speaking.

9 What kinds of things were you looking for when
10 you were looking at individuals within the group?

11 A. We look at any given individual. You're looking
12 at the type of clothing, the colors of clothing, the --
13 whether or not they had anything adhered to them,
14 backpacks, water bottles, shoelaces.

15 Then it came down to things like height, weight,
16 stature, their gait, how they ran, how they walked, what
17 their posture was, was there any consistencies in their
18 general demeanor, those were the type of things that I was
19 looking for.

20 Q. And, in looking for this, you said you watched
21 videos over and over again; is that correct?

22 A. Yes, that's correct.

23 Q. Frame by frame at times?

24 A. Yes.

25 Q. All right. So I'm going to first direct your

1 attention to Government's Exhibit No. 803A, B, and C.

2 (Pause.)

3 Q. And, Detective, I'm going to show you what's
4 been marked for identification as Government's Exhibit
5 803A; do you recognize what that is?

6 A. Yes, I do.

7 Q. Okay. And ask you to come take a look at 803B.
8 It's probably easier if you just come around here.

9 Do you recognize what that is?

10 A. Yes, I do.

11 Q. And, finally, 803C, do you recognize what that
12 is?

13 A. Yes, I do.

14 THE COURT: Just for the record, Ms. Kerkhoff,
15 those were all previously shown to counsel.

16 MS. KERKHOFF: Previously shown to counsel,
17 previously produced to counsel.

18 MR. RIST: Your Honor, I have an objection. If
19 we can approach.

20 (Bench conference.)

21 THE COURT: Yes.

22 MR. RIST: Your Honor, in the government's
23 amended designation of evidence, there is no 803C.
24 There's two 803Ds, but an 803C does not exist. So I would
25 just wonder what --

1 MS. KERKHOFF: Then I would apologize if I had a
2 typo on the D. The boards themselves were produced. I --
3 they were produced as -- if that is the objection, I don't
4 know what to say other than I apologize for making a typo.
5 We produced the boards.

6 MR. RIST: Just --

7 MR. JACOBSON: Go ahead.

8 MR. RIST: Just ask to get the opportunity in
9 terms of which D, which board stands for which one.

10 MS. KERKHOFF: So, just to be clear, 803A, 803B,
11 and 803C are the three boards for Defendant Basillas where
12 he is in the riot. 803D, we already admitted, is the
13 processing board. 803E is the board with he and Mr.
14 Valencia after detention. And that is how it was
15 produced.

16 MR. JACOBSON: I actually don't have an
17 objection. I just want to take one look at them
18 physically here in the courtroom --

19 THE COURT: Absolutely, that's fine.

20 MR. JACOBSON: -- before we admit it.

21 THE COURT: Sure.

22 MR. SCHRAGER: And, Your Honor, I just -- I
23 haven't seen the actual exhibit.

24 THE COURT: You want to look at it, too? Have
25 at it.

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(Open court.)

THE COURT: Counsel, let me know when you're done if you need to come back up, okay?

MR. JACOBSON: Thank you, Judge.

(Pause.)

MR. JACOBSON: No objection on behalf of Mr. Basillas, Your Honor.

(Pause.)

MR. SCHRAGER: Nothing other than my previous objection, Your Honor.

MR. RIST: No further objection, Your Honor.

THE COURT: Ms. Downs?

MS. DOWNS: No objection, Your Honor.

THE COURT: All right, they'll be received.

(Government's Exhibit Numbers

803A, 803B, 803C admitted into evidence.)

MS. KERKHOFF: Thank you, Your Honor.

803A, 803B, and 803C.

Q. So, Detective Pemberton, starting -- and just to be clear, these are large boards. You can stay there for one second.

These are large boards; correct?

A. Yes.

Q. That have photographs on them?

A. Yes.

1 Q. Okay.

2 MS. KERKHOFF: And, for the first one, 803A,
3 publishing to the jury.

4 Q. And can you just generally, for the record,
5 describe what is depicted and what each of the numbers and
6 references --

7 MR. SCHRAGER: Your Honor, if I could move
8 around to where I could see --

9 THE COURT: Move to wherever you need to.

10 MR. SCHRAGER: -- what the Detective's talking
11 about.

12 BY THE WITNESS:

13 A. Sure. These photographs are mostly stillshots
14 of videos of exhibits that have already been admitted.
15 Some of them are actual photos that have already been
16 admitted.

17 MR. RIST: Objection as to whether or not
18 they've been admitted in evidence. This witness isn't
19 here --

20 THE COURT: Thank you, Mr. Rist. Sustained.

21 MR. RIST: Motion to strike.

22 BY THE WITNESS:

23 A. So they're laid out chronologically. And,
24 underneath the photos, it will show you a number and then
25 a general location. For example, one says Logan Circle.

1 That refers to that image, Exhibit 141. That's where that
2 image was captured. And then it progresses
3 chronologically through the route and it will tell you
4 where it is.

5 For example, number 6 says the 1100 block of
6 13th Street. It shows you these three still frames that
7 were captured from this video, which is Exhibit 116, and
8 all of the images have the exhibit number where you can
9 find the original video or the original photograph.

10 Q. All right. And, just looking at Government's
11 803A, we see a number of colored arrows depicted.

12 A. Yes.

13 Q. And can you tell us what each colored arrow is
14 pointing to, generally?

15 A. Sure. There is a green arrow that's pointing to
16 a black hat. There is a yellow arrow that is pointing to
17 a light-colored or white zipper at the front of the hoodie
18 or jacket. There is orange arrows that are pointing to
19 what appear to be silver or metal tips on the strings of
20 the hoodie. There is a white arrow that is pointing to
21 the gloves. And the red arrow there is pointing to black
22 shoes.

23 Q. Okay. And Government's Exhibit 803A shows a
24 location at 13th and K Street and then again in the 1300
25 block of I Street; correct?

1 A. Yes.

2 Q. And now I want to show you Government's Exhibit
3 803B. And, in terms of the location, the route, does this
4 pick up at the end of 803A?

5 A. It does. Chronologically, this will follow.
6 Area 11 moves on to 12, 13, 14 through 18 on this board.
7 And those are all, again, chronologically taken from
8 these -- the exhibits that are listed at the bottom or at
9 the top of the photo.

10 Q. And the colored arrows, are they reflecting or
11 pointing to the same features that were shown on 803A?

12 A. Yes.

13 Q. Okay. And then, finally -- and the jury will
14 have these in the back -- showing you 803C. And, again,
15 does this pick up at what location?

16 A. It does. This is what is labeled 19 here. It's
17 in front of the Crown Plaza Hotel. It goes on through 24,
18 which is at 12th and L, and that's -- all of these
19 exhibits are taken from the exhibit that's listed inside
20 the actual photograph.

21 Q. And the arrows, again, referring to the same
22 features?

23 A. Yes, that's correct.

24 Q. All right. Now, did you assist in preparing
25 these boards?

1 A. Yes, I did.

2 Q. Okay. And did you also assist in preparing a
3 video compilation for the videos that were used and the
4 locations used in Government's Exhibit 803A, 803B, and
5 803C?

6 A. Yes, I did.

7 Q. Okay.

8 MR. SCHRAGER: If I can move out of the
9 government's territory, Your Honor.

10 MS. KERKHOFF: It's okay.

11 MR. SCHRAGER: I don't want to get charged with
12 trespassing, Your Honor.

13 BY MS. KERKHOFF:

14 Q. I'm going to direct your attention to
15 Government's Exhibit No. 200. Is that a video compilation
16 that you prepared using videos that you captured still
17 images from 803A through 803C?

18 A. That's correct.

19 MS. KERKHOFF: At this time, the government will
20 offer into evidence Government's Exhibit No. 200.

21 MR. JACOBSON: No objection.

22 MS. DOWNS: No objection.

23 THE COURT: All right, it will be received.

24 (Government's Exhibit Number
25 200 admitted into evidence.)

1 MR. SCHRAGER: Your Honor, I would just note my
2 earlier objection. I would also make an objection to all
3 of these videos --

4 THE COURT: They all --

5 MR. SCHRAGER: -- for the same reasons, Your
6 Honor.

7 THE COURT: Yes, sir. Over objection.

8 BY MS. KERKHOFF:

9 Q. All right. So before Mr. Qureshi hits play, can
10 you just generally explain to us what we're looking at at
11 the start of Government's Exhibit No. 200?

12 A. Sure. So this is Exhibit No. 200. It is a
13 compilation of the following exhibits that are listed on
14 the bottom of that title screen. The way the compilation
15 works is it will show you a title screen. At that title
16 screen, there will be the exhibit number and the timestamp
17 from which that video that you're about to watch starts.
18 So, should you want to go back and look at that entire
19 exhibit, it will direct you to that exhibit in its
20 entirety.

21 The exhibit will then play in regular speed with
22 no stops or pauses or anything. And then there will be
23 another title screen that will explain it's the same
24 exhibit and it will say slow motion or highlights and then
25 the same clip will play again and it will sort of focus in

1 on certain aspects of that clip.

2 MS. KERKHOFF: If we could go ahead and start to
3 play.

4 (Playing video recording.)

5 MS. KERKHOFF: I'm going to ask Mr. Qureshi to
6 back up for just one second.

7 Q. And I want to direct your attention to one part
8 on this video.

9 (Playing video recording.)

10 Q. And I've stopped at 7:13. You see that,
11 Detective Pemberton?

12 A. Yes, I do.

13 Q. I'd like to direct your attention to the
14 individual in the middle of the screen looking at the
15 left -- just above the left knee of the pant. You observe
16 that?

17 A. Yes.

18 Q. For the record, what do you observe?

19 A. Looks like an insignia or some kind of logo.

20 MS. KERKHOFF: If you could go ahead and
21 continue.

22 (Playing video recording.)

23 Q. And, Detective, I've paused for a moment at
24 11:38. And, previously, you discussed features that
25 you -- that were marked with arrows on the board, 803A,

1 803B, and 803C. Do you see some of those features here in
2 the photograph?

3 A. Yes.

4 Q. And, specifically, with respect to the strings,
5 the hoodie strings?

6 A. Yes, you could see the individual on the left
7 side of the screen has black hoodie strings with, to me,
8 what appears to be metal tips.

9 Q. Thank you.

10 And this also shows gloves, the zipper, and the
11 features of the hat and the way the mask is worn; correct?

12 A. That's correct.

13 Q. All right.

14 MS. KERKHOFF: If we could continue.

15 (Playing video recording.)

16 BY MS. KERKHOFF:

17 Q. Now, Detective, in addition to assisting and
18 preparing a compilations, did you also assist in preparing
19 a PowerPoint presentation which showed the location for
20 each of those video clips and embedded the clip inside so
21 that the location could be determined with the video clip?

22 A. Yes.

23 Q. All right.

24 MS. KERKHOFF: So I'm going to, at this point,
25 offer to admit Government's Exhibit No. 200A, which is the

1 PowerPoint that relates to Government's Exhibit 200.

2 MR. JACOBSON: No objection.

3 MR. RIST: No objection, Your Honor.

4 THE COURT: All right.

5 MS. DOWNS: None for Mr. Webber.

6 THE COURT: Hearing no objection, it will be
7 admitted.

8 (Government's Exhibit Number
9 200A admitted into evidence.)

10 MS. KERKHOFF: And we'll display that.

11 (Pause.)

12 BY MS. KERKHOFF:

13 Q. And, Detective, on Government's Exhibit 200A,
14 can you just orient us to what we're looking at and how
15 the PowerPoint is set up?

16 A. Sure. This is the first slide of the PowerPoint
17 and it's a map overview of the area of Logan Circle down
18 to Franklin Square.

19 Q. And is that the same map that -- I'll show it to
20 you -- has previously been admitted as Government's
21 Exhibit 801?

22 A. Yes.

23 Q. Okay.

24 MS. KERKHOFF: And then if I have Mr. Qureshi
25 just press play for me. Advance to the next slide.

1 Q. Can you describe what it is we're looking at
2 here?

3 A. So these images of a person there show all of
4 the locations in which those clips were recorded. So,
5 geographically, you can see exactly where those films or
6 video clips came from.

7 MS. KERKHOFF: And then if Mr. Qureshi wants to
8 advance one more.

9 Q. Is this just a zoomed in going through each
10 section of the slide?

11 A. That's right. The larger sections will be
12 zoomed in from an inset so you can see more clear where
13 exactly the clips were filmed.

14 MS. KERKHOFF: Mr. Qureshi, can you advance one
15 more frame?

16 And if Mr. Qureshi advances another one, just
17 kind of for an example. One more.

18 Q. And what -- we just have some red icons
19 displaying as 1, 2, and 3. What are those displaying?

20 A. So that will show the -- where the --
21 orientation of where the video was filmed from. So
22 there's sort of a faded cone there. That's sort of the
23 direction that the camera was facing at the beginning of
24 that filming.

25 Q. Okay. And, if a juror wanted to use

1 Government's Exhibit 200, if Mr. Qureshi could use the
2 mouse and scroll over to the video clip and click on it --
3 and hold on one second, Mr. Qureshi. Don't get too
4 excited. There is some sort of error message that says
5 it's important to make sure you know this is trustworthy,
6 are you sure you want to open it; is that correct?

7 A. Yes. So when you click the icon of the video
8 camera, the video clip, the individual clip, will actually
9 play. You will get this error message. The error
10 message --

11 MR. JACOBSON: Your Honor, could we approach?

12 THE COURT: Sure.

13 MR. JACOBSON: I'm sorry, Detective.

14 THE COURT: Can you step down, please,
15 Detective?

16 THE WITNESS: Sure.

17 (Bench conference.)

18 MR. JACOBSON: I don't think this is the
19 appropriate time, certainly not through a witness, to
20 direct the jury how to look at evidence during -- while
21 they're in the back. I'm not even sure I'm okay with sort
22 of the interactive version of the evidence. It's kind of
23 a new one to me, but I certainly don't think it's through
24 this witness that the jurors should be instructed.

25 MS. KERKHOFF: Thank you.

1 Counsel has had this exhibit so the interactive
2 nature of this exhibit has been known to him.

3 What the government would note is that we could
4 certainly show the jury by playing this exhibit over and
5 over, which is just the clips. What I intend to do, as I
6 did in the first trial, is walk them through how the
7 PowerPoint is set up, the videos admitted, and then they
8 can go back to show them how to utilize it rather than
9 repeating, effectively, what we did at a map.

10 Counsel has had this and the detective said he
11 assisted in preparing this. So how it is set up, I think,
12 it is relevant to aid in their deliberations. I'm not
13 telling them how they are to view the evidence, I'm simply
14 showing them how to access it.

15 THE COURT: Is there anything further?

16 MR. JACOBSON: No, you've got my objection.

17 THE COURT: Okay. Overruled.

18 MS. KERKHOFF: Okay.

19 THE COURT: I'm sorry.

20 (Open court.)

21 THE COURT: Can both counsel come back? I
22 apologize to you.

23 (Bench conference.)

24 THE COURT: And the reason for the objection --
25 I just wanted to make a full record -- is that this

1 witness testified that he actually helped to create the
2 exhibit so he has some knowledge. If he hadn't worked on
3 the exhibit itself, I don't think it would be appropriate
4 to come in through this witness, but because he actually
5 dealt with it, and we're not going to be showing it to the
6 jury again, I think it's better. So thank you.

7 MR. JACOBSON: If I may, Your Honor.

8 THE COURT: Sure.

9 MR. JACOBSON: I don't have an objection to the
10 authenticity of the exhibits that are contained in. I
11 have an objection to two things:

12 First -- I honestly need to think about this a
13 little bit and I probably should have thought about it
14 before right now. Ms. Kerkhoff is right. But I may have
15 an objection that I'll reserve as to the interactive
16 nature of the evidence.

17 But, for now, I don't think it's at all
18 appropriate for a government witness to be instructing the
19 jury of anything having to do with how they should view
20 the evidence. I think it's argument. I think it's either
21 argument -- well, excuse me.

22 It is argument and it is also the province of
23 the Court, not for a government witness.

24 THE COURT: Okay.

25 MS. KERKHOFF: Okay.

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(Open court.)

THE COURT: Thank you.

BY MS. KERKHOFF:

Q. All right, Detective, so can you continue. So it looks like a error message, but you hit okay?

A. It's just sort of a warning message, but yeah, once you hit the okay, the video will play.

MS. KERKHOFF: Hit okay, Mr. Qureshi, just to show.

Q. And does the PowerPoint you assisted in creating then play the clip that -- from that location?

A. Yes, it does.

Q. Okay. And so these were all the clips from Government's Exhibit 200; right?

A. That's correct, laid out geographically on a map.

Q. All right. And, in terms of how it's laid out geographically, you testified, I believe it was yesterday, that you had been to the locations, you were familiar with the landmarks; is that correct?

A. Yes.

Q. And how did that assist you when you were preparing the location for each of these?

A. Well, I knew where each video was filmed after not only having watched them dozens of times, but also,

1 have gone to the location and sort of looked at exactly
2 where those films occurred and where those people would
3 have been standing when they filmed them. So I was
4 familiar with all the locations.

5 MS. KERKHOFF: Okay. I'll just ask Mr. Qureshi
6 to hit the space bar to advance the PowerPoint just for
7 purposes -- one more time. If you can continue, again,
8 Mr. Qureshi. Thank you.

9 Q. All right. And so what we're viewing on the
10 screen is each slide of the PowerPoint that would show
11 where the video is; correct?

12 A. That's correct.

13 Q. All right. Now, having just watched all of
14 those videos, we will just admit this and it will go back
15 to the jury, okay?

16 A. Sounds good.

17 Q. All right. So now I want to direct your
18 attention --

19 THE COURT: Yes.

20 Ladies and gentlemen, let's take a break.
21 Please be back in the jury room ready to go at -- you can
22 stay there for a second just, Detective Pemberton.

23 THE WITNESS: No problem, Your Honor.

24 THE COURT: Be back in the jury room at
25 12 o'clock. We'll try to get you back in here just a

1 minute or two after that, okay?

2 Thank you. Leave your notebooks in your chairs.

3 (Pause.)

4 (Jury not present at 11:47 a.m.)

5 THE COURT: Thank you, Detective Pemberton.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: Thank you, sir.

8 All right, everybody, let's be ready to go so
9 that we can start at 12, all right?

10 (Recess taken at 11:47 a.m. - 11:59 a.m.)

11 THE COURTROOM CLERK: Your Honor, recalling in
12 the jury trial calendar: United States versus --

13 MS. DOWNS: Mr. Webber is going out to alert.

14 (Pause.)

15 THE COURTROOM CLERK: United States versus
16 Michael Basillas, case 2017 CF2 1334; codefendant United
17 States versus Seth Cadman, case 2017 CF2 1172; codefendant
18 with United States versus Anthony Felice, case 2017 CF2
19 11163; codefendant United States versus Casey Webber, case
20 2017 CF2 1156.

21 THE COURT: All right, do you want to go get the
22 jury.

23 MS. KERKHOFF: Can I get the witness?

24 THE COURT: Yes, please.

25 (Pause.)

1 (Jury is present at 12:02 p.m.)

2 THE COURT: All right, good afternoon, everyone.
3 You can have a seat. We're ready to resume.

4 Detective. You're still under oath, sir.

5 THE WITNESS: Yes, Your Honor.

6 BY MS. KERKHOFF:

7 Q. Detective Pemberton, I'm going to direct your
8 attention to what's been marked as Government's Exhibit
9 807A; do you recognize 807A?

10 A. Yes.

11 Q. What is it?

12 A. That is a board that has images and stillshots
13 that are collected from various exhibits.

14 Q. And did you assist in preparing this?

15 A. Yes, I did.

16 MS. KERKHOFF: At this time, the government
17 offers into evidence Government's Exhibit 807A.

18 MR. JACOBSON: No objection.

19 THE COURT: I'm sorry, I didn't hear.

20 MR. JACOBSON: No objection.

21 THE COURT: Oh.

22 MR. RIST: Your Honor, may I look at the board
23 before?

24 THE COURT: Of course.

25 MR. RIST: Thank you.

1 (Pause.)

2 BY MS. KERKHOFF:

3 Q. Government's Exhibit 807A --

4 THE COURT: So there's no objection?

5 MR. RIST: There's no objection, Your Honor.

6 THE COURT: All right. It will be received.

7 (Government's Exhibit Number
8 807A admitted into evidence.)

9 BY MS. KERKHOFF:

10 Q. And does 807A reflect a series of images as well
11 as the exhibits in the same fashion that 803A, B, and C
12 did?

13 A. Yes.

14 Q. Okay. And we also see a number of highlighted
15 arrows here?

16 A. Yes. So there's a yellow arrow that's pointing
17 to a motorcycle helmet. There is a green arrow that's
18 pointing to a Dos Equis bottle. There's a red arrow
19 pointing to a pair of boots. There's an orange arrow
20 pointing to what looks like tape wrapped around someone's
21 legs. And I believe there is a gray arrow here pointing
22 to the lining of a person's hooded jacket. And then there
23 is a black and white striped arrow pointing to the area
24 just above the elbow on someone's jacket that has a sort
25 of horizontal striped pattern.

1 Q. And do these images also show location
2 information?

3 A. Yes.

4 Q. All right. And did you assist in preparing a
5 video compilation that contains these images or the videos
6 from those images as well as the video from an additional
7 image, Government's Exhibit 201?

8 A. Yes.

9 Q. Okay.

10 MS. KERKHOFF: At this time, the government
11 would offer into evidence Government's Exhibit 201.

12 THE COURT: Any objection?

13 MR. RIST: Court's indulgence.

14 MR. SCHRAGER: The same objection to all these
15 exhibits without argument, Your Honor.

16 THE COURT: Okay. Any further objections I
17 should ask then?

18 MR. JACOBSON: Not from me, Your Honor.

19 MS. DOWNS: Nothing additional for Mr. Webber.

20 MR. RIST: I would just, Your Honor, join Mr.
21 Schrager's objection.

22 THE COURT: All right.

23 MR. RIST: Without further argument.

24 THE COURT: Over objection, they'll be admitted.

25 (Government's Exhibit Number

1 201 admitted into evidence.)

2 MS. KERKHOFF: Okay. If we could pull up the

3 front screen now, Mr. Qureshi.

4 MR. QURESHI: Sure.

5 (Pause.)

6 BY MS. KERKHOFF:

7 Q. All right. So Government's Exhibit 201 is set

8 up is the same format as Government's Exhibit 200?

9 A. Yes.

10 Q. I want to ask you one question: In the middle

11 there, it says an Exhibit 123; correct?

12 A. Yes, it does.

13 Q. Okay. And, the images contained in 123, are

14 they captured on this board or they contained in just the

15 video compilation?

16 A. They are only contained in the video

17 compilation. They are not on this board.

18 Q. Okay. We can -- I just want to go to

19 Government's Exhibit 201.

20 MS. KERKHOFF: If you could play.

21 (Playing video recording.)

22 Q. Detective Pemberton, we just watched

23 Government's Exhibit 201. Did you also assist in

24 preparing another PowerPoint presentation that corresponds

25 with Government's Exhibit 201? That is, 201A, which

1 reflects the location of each clip as well as advance the
2 clip from the PowerPoint?

3 A. Yes.

4 MS. KERKHOFF: At this time, the government
5 would offer into evidence Government's Exhibit 201A.

6 THE COURT: Any objection?

7 MR. RIST: Your Honor, I'll simply rest on the
8 earlier objections I made previously in this trial.

9 THE COURT: All right.

10 Anything else?

11 All right. Hearing no other objections, it will
12 be admitted over objection.

13 (Government's Exhibit Number
14 201A admitted into evidence.)

15 MS. KERKHOFF: Play.

16 (Playing video recording.)

17 Q. And, Detective, just to orient the jury,
18 Government's Exhibit 201A begins with what?

19 A. Overhead map of the area between Logan Circle
20 and Franklin Square.

21 Q. Okay.

22 MS. KERKHOFF: And, Mr. Qureshi, just advance
23 through, please.

24 Q. And is this Government's Exhibit 201A set up in
25 the exact same format as Government's Exhibit 200A?

1 A. Yes, it is.

2 Q. Just corresponds with Government's 201; right?

3 A. That's correct.

4 Q. All right. And, again, the jury will have this
5 in the back.

6 And, in terms of identifying the locations of
7 each of the clips and where they were placed on the map,
8 how did you do that?

9 A. Once I had identified where that piece of
10 footage was filmed and I could confirm that, I was able to
11 then embed those images on top of the map geographically.

12 Q. Okay.

13 MS. KERKHOFF: All right, thank you, Mr.
14 Qureshi.

15 Q. Moving on to Government's Exhibit No. 805A.

16 Detective Pemberton, did you assist in preparing
17 Government's Exhibit No. 805A?

18 A. Yes, I did.

19 Q. And what is 80 -- I'm sorry, what is 805A?

20 A. It is a collection of photos and still images
21 that were captured from other video exhibits.

22 MS. KERKHOFF: At this time, the government
23 would offer into evidence Government's Exhibit 805A.

24 THE COURT: Any objection?

25 MR. SCHRAGER: We have a continuing objection,

1 Your Honor.

2 THE COURT: Any further objection?

3 MR. JACOBSON: No, Your Honor.

4 MR. SCHRAGER: No, Your Honor.

5 THE COURT: It will be received over objection.

6 (Government's Exhibit Number
7 805A admitted into evidence.)

8 BY MS. KERKHOFF:

9 Q. And, to orient the jury, Government's Exhibit
10 805A, is it set up in the same manner as the other
11 exhibits we just looked at, the board?

12 A. Yes, it is.

13 Q. Okay. With identification of the underlying
14 exhibit in each?

15 A. That's right. The exhibit number is located
16 within the image. And, also, where those images
17 geographically were taken is located underneath that set
18 of images.

19 Q. Okay. And if you could just identify for the
20 record the colored arrows and what they're pointing to?

21 A. There is a yellow arrow that's pointing to a
22 loosely fitted black knit cap. And there is a blue arrow
23 that is pointing to shoes.

24 Q. Okay, thank you.

25 And did you also assist in preparing a video

1 compilation of certain images from the riot that is
2 related to Government's Exhibit 805A?

3 A. Yes.

4 MR. RIST: Objection as to the form of the
5 question, Your Honor.

6 THE COURT: Overruled.

7 MR. RIST: Your Honor, can I make a --

8 THE COURT: Sure.

9 MR. RIST: -- record? Thank you.

10 (Bench conference.)

11 MR. RIST: At this time, it isn't yet argument,
12 and for the government to refer to the incident as a riot
13 is making a legal conclusion and asking for the -- and
14 then having a legal conclusion bolstered by this witness.
15 It's not argument, Your Honor, so I would ask that that
16 last question be struck and the government rephrase the --

17 THE COURT: You want me to highlight it by
18 striking that for the record?

19 MR. RIST: Well, yeah.

20 THE COURT: Or would you prefer me to ask Ms.
21 Kerkhoff not to refer to it as a riot?

22 MS. KERKHOFF: I apologize that I did that. I
23 didn't even realize I had.

24 MR. RIST: I think that the second option would
25 be best.

1 THE COURT: Okay.

2 MS. KERKHOFF: Okay.

3 MR. RIST: Thank you.

4 MS. KERKHOFF: Thank you.

5 (Open court.)

6 THE COURT: Thank you. Government will rephrase
7 their question.

8 MS. KERKHOFF: Thank you.

9 BY MS. KERKHOFF:

10 Q. And so Government's Exhibit 801A, does that
11 correspond with Exhibit 204, a video compilation?

12 A. Yes.

13 Q. All right.

14 MS. KERKHOFF: And at this time, the government
15 offers into evidence Government's Exhibit 204.

16 THE COURT: Any further objections?

17 MR. SCHRAGER: No further objection, Your Honor.

18 THE COURT: All right. Hearing no further
19 objection, it will be admitted over objection.

20 (Government's Exhibit Number
21 204 admitted into evidence.)

22 BY MS. KERKHOFF:

23 Q. And, looking at Government's Exhibit 204, again,
24 Detective Pemberton, is this set up in the same format or
25 a different format as the previous video compilations

1 we've watched?

2 A. Same format.

3 Q. All right.

4 MS. KERKHOFF: If we could go ahead and start
5 playing.

6 (Playing video recording.)

7 Q. And, Detective Pemberton, I stopped it at 1:38.
8 Directing your attention to the right pants pocket of the
9 individual depicted on Government's Exhibit No. 204, what,
10 if anything, can you observe in the right pants pocket?

11 A. Looks like the white lining on the inside of the
12 pocket.

13 Q. Okay.

14 (Playing video recording.)

15 Q. And I've stopped it, again, at Government's
16 Exhibit 1 -- at 1:45 in.

17 Directing your attention to the wrist area of
18 the right hand, what color do you observe between the
19 jacket and the glove?

20 A. Red.

21 Q. Thank you.

22 (Playing video recording.)

23 Q. And, Detective, did you also assist in preparing
24 a PowerPoint presentation that identified the location of
25 each clip contained in Government's Exhibit 204 as well as

1 embedded the clip in the PowerPoint?

2 A. Yes.

3 MS. KERKHOFF: At this time, the government
4 would offer into evidence Government's Exhibit 204A.

5 THE COURT: Any further objections?

6 MR. SCHRAGER: No, Your Honor.

7 MR. JACOBSON: No, Your Honor.

8 THE COURT: All right. Hearing no further
9 objection, it will be admitted over objection.

10 (Government's Exhibit Number
11 204A admitted into evidence.)

12 BY MS. KERKHOFF:

13 Q. Again, Government's Exhibit 204A, the first
14 screen is the same map; correct?

15 A. Yes, same map as the last one.

16 Q. Okay. And the areas depicted depict certain
17 locations; correct?

18 A. That's correct.

19 MS. KERKHOFF: And, Mr. Qureshi, just advance it
20 one more.

21 (Playing video recording.)

22 Q. All right. And so this PowerPoint presentation
23 is set up in the same format and is accessed in the same
24 way?

25 A. Yes.

1 Q. All right. And that will go back to the jury.
2 I'd like to direct your attention to
3 Government's Exhibit 808A.

4 Do you recognize Government's Exhibit 808A?

5 A. Yes.

6 Q. Okay. What is 808A?

7 A. It's a compilation of still images from other
8 exhibits.

9 Q. Okay.

10 MS. KERKHOFF: At this time, the government
11 would offer into evidence Government's Exhibit 808A.

12 THE COURT: Any further objections from any
13 counsel?

14 MR. RIST: Nothing further, Your Honor.

15 MR. JACOBSON: No, Your Honor.

16 MS. DOWNS: No.

17 THE COURT: It will be received over objection.

18 (Government's Exhibit Number
19 808A admitted into evidence.)

20 BY MS. KERKHOFF:

21 Q. And, just for the record, if you could identify
22 Government's Exhibit 808A, what is it we're looking at?

23 A. Again, these are still images from other video
24 exhibits. In the upper portion, you could see the exhibit
25 number that the original video came from. And, below it,

1 you can see the area of the city that the video was
2 filmed.

3 Q. And did you also assist in preparing a video
4 compilation that contains the underlying exhibits from
5 Government's Exhibit 808A?

6 A. Yes.

7 MS. KERKHOFF: At this time, the government
8 would offer into evidence Government's Exhibit 205.

9 THE COURT: Any further objection?

10 MS. DOWNS: No, Your Honor.

11 MR. JACOBSON: No, Judge.

12 THE COURT: All right. It will be received over
13 objection.

14 (Government's Exhibit Number
15 205 admitted into evidence.)

16 BY MS. KERKHOFF:

17 Q. And, looking at Government's Exhibit 205,
18 Detective, is this video set up in the same format as the
19 prior video compilations we've watched?

20 A. Yes.

21 Q. All right.

22 MS. KERKHOFF: You can go ahead and play.

23 (Playing video recording.)

24 BY MS. KERKHOFF:

25 Q. And finally, Detective, did you assist in

1 preparing a PowerPoint that contained the clips as well as
2 the locations of each clip that relates to Government's
3 Exhibit 205?

4 A. Yes, I did.

5 MS. KERKHOFF: At this time, the government
6 would offer into evidence Government's Exhibit 205A.

7 THE COURT: Any further objections?

8 MS. DOWNS: No objection, Your Honor. Or same
9 as before.

10 THE COURT: Okay. It will be -- hearing no
11 further objection, it will be admitted over objection.

12 (Government's Exhibit Number
13 205A admitted into evidence.)

14 MS. KERKHOFF: And 205A.

15 (Playing video recording.)

16 BY MS. KERKHOFF:

17 Q. Again, is this PowerPoint set up in the same
18 format as the prior PowerPoints?

19 A. Yes, individual clips overlaid geographically on
20 a map of the area.

21 Q. Okay. And the jury will have that in the back.

22 And, finally, we're going to direct your
23 attention to Government's 803E.

24 Do you recognize Government's 803E?

25 A. Yes, I do.

1 Q. What is Government's 803E?

2 A. It is a compilation of photos and stillshots
3 from various exhibits.

4 Q. And various exhibits taken after the group was
5 detained at 12th and L?

6 A. Yes, they're all taken after the group was
7 detained.

8 Q. Okay. And it also contains two field arrest
9 photos; correct?

10 A. Correct.

11 MS. KERKHOFF: At this time, the government
12 offers into evidence Government's Exhibit 803E.

13 MR. RIST: No further objection, Your Honor.

14 MS. DOWNS: None for Mr. Webber.

15 MR. SCHRAGER: No further objection.

16 MR. JACOBSON: No objection.

17 THE COURT: It will be admitted over objection.

18 (Government's Exhibit Number
19 803E admitted into evidence.)

20 BY MS. KERKHOFF:

21 Q. And just orienting the ladies and gentlemen of
22 the jury, Government's Exhibit 803E, does it also contain
23 an identification of which exhibit each of these photos
24 came from?

25 A. Yes, in the upper portion of the image, it shows

1 the original exhibits.

2 Q. All right. And, in terms of the two on-scene
3 arrest photographs, whose on-scene arrest photographs are
4 depicted in Government's Exhibit 503E?

5 A. Exhibit 516 in the upper left is Defendant
6 Michael Basillas. And Exhibit 698 is Defendant Christian
7 Valencia.

8 Q. Okay, thank you.

9 Detective, you testified yesterday that, as part
10 of your investigation, you attempted to gather as much
11 video evidence as you could; do you recall that?

12 A. Yes.

13 Q. Okay. And, during the course of your
14 investigation, did it come to your attention that there
15 was some video recording of a meeting on January 8, 2017?

16 A. Yes.

17 Q. And how did that come to your attention?

18 A. I found a video on YouTube that showed clips and
19 images of what appeared to be a meeting regarding the
20 discussion of this event.

21 Q. And did it appear to be just a portion of it or
22 all of it?

23 A. It was small portions and clips of what appeared
24 to be a meeting.

25 Q. In edited form or unedited form?

1 A. It was edited.

2 Q. Did your investigation reveal where that video
3 came from?

4 A. Yes.

5 Q. Where was that?

6 A. A group called Project Veritas.

7 Q. Okay. And, prior to that point, had you
8 interacted with Project Veritas?

9 A. No.

10 Q. Okay. So what did you do after you observed
11 those clips?

12 A. I found a contact number for Project Veritas and
13 called them.

14 Q. Why?

15 A. Because I wanted to see if they would provide me
16 the unedited and full-length versions of whatever that
17 recording was.

18 Q. And did you receive recordings from Project
19 Veritas?

20 A. I did.

21 Q. Did you watch them?

22 A. Yes.

23 Q. Okay. And did they arrive in segmented
24 portions?

25 A. Yes.

1 Q. Okay. Were there timestamps and counter stamps
2 on it?

3 A. Yes.

4 Q. Okay. And, when you watched the video, did you
5 observe anyone you recognized from MPD?

6 A. I did.

7 Q. Who?

8 A. I observed Officer Adelmeyer.

9 Q. On the video?

10 A. Yes.

11 Q. At that -- prior to that moment of watching the
12 videos, were you aware that Officer Adelmeyer had been
13 present for a meeting on January 8th?

14 A. No, I had no idea.

15 Q. So after you observed Officer Adelmeyer in the
16 video, what did you do?

17 A. I contacted Officer Adelmeyer, asked him to come
18 in and watch the video.

19 Q. For what purpose?

20 A. One, to confirm that that was, in fact, him.
21 And, two, to corroborate the events that took place at
22 that meeting.

23 Q. And did you also take other steps in this case
24 to obtain video from sources through -- that you
25 identified on social media?

1 A. Yes.

2 Q. Okay. Do you know somebody by the name of
3 Michael Cali?

4 A. Yes.

5 Q. Who's Michael Cali?

6 A. He appears to be an independent journalist or
7 maybe a student journalist, I'm not sure, but he had
8 posted quite a bit of video that he had taken during the
9 event, and I've reached out to him multiple times and
10 never heard back.

11 Q. Okay. Were you -- did you contact other
12 individuals who posted on their social media and posted
13 video of the events?

14 A. Yeah, dozens.

15 Q. Okay. Did you receive responses from all of
16 them?

17 A. No.

18 Q. Did you receive responses from some of them?

19 A. Yes.

20 Q. And what was your purpose in contacting people
21 to obtain information when you saw a video on an open
22 source?

23 A. To try to obtain unedited, raw footage from the
24 event.

25 MS. KERKHOFF: No further questions.

1 THE COURT: Can I have counsel at the bench,
2 please?

3 (Bench conference.)

4 THE COURT: Okay. So what time is it? It's a
5 few minutes to 1. Do we have -- I don't know, Mr.
6 Schrager filed a motion.

7 Was that -- did you file that motion because it
8 was objected to by the government?

9 MR. SCHRAGER: No, it was just -- I'm sorry.

10 THE COURT: Did you just break my stuff?

11 (Pause.)

12 MR. SCHRAGER: It's just a proffer of -- it's
13 just a proffer. It's not a motion, actually. No argument
14 there, it's just a proffer. Just trying to straighten out
15 what Ms. Kerkhoff had argued about yesterday. I think we
16 both realized that we were -- didn't have it quite right;
17 so...

18 THE COURT: Okay.

19 MR. SCHRAGER: And the document I was seeking is
20 in there; so...

21 THE COURT: So is there -- so do we need to
22 resolve that before cross-examination?

23 MR. SCHRAGER: I think before cross by me
24 because I think it's been delegated to me to handle it.

25 THE COURT: Okay.

1 MR. SCHRAGER: I also have the problem with my
2 computer. I left the cord home so I've got sort of
3 limited on the battery. So I'm not sure -- I'd kind of
4 like to go toward the end just because of that. And
5 maybe, if we go into Monday, then at least I'd have my
6 computer available.

7 THE COURT: Monday?

8 MR. SCHRAGER: I mean, Tuesday, I'm sorry. If
9 it doesn't work out, then I'll --

10 THE COURT: No, it's today. We can't delay. We
11 can't delay cross.

12 MR. SCHRAGER: We still need to determine what
13 would be admissible.

14 MS. KERKHOFF: So I think we could do that
15 either before we went to lunch or after, if Mr. Schrager
16 does not go first, that's fine.

17 THE COURT: I'm about to -- so I wanted to know
18 what we needed to resolve. So what I'll do is I'll excuse
19 them for lunch and have them come back at 2:30, which will
20 give us 20 minutes to resolve and still be able to have an
21 hour for lunch, okay?

22 MS. KERKHOFF: Okay.

23 MS. DOWNS: You don't want to hear any more of
24 my motion in between before the cross?

25 THE COURT: No.

1 MS. DOWNS: Okay.

2 THE COURT: No, I don't think it --

3 MS. DOWNS: Okay. After the cross, I want to
4 renew my motion --

5 THE COURT: Okay.

6 MS. DOWNS: -- on the co-conspirator statements.

7 THE COURT: That's fine.

8 MS. DOWNS: I thought before cross. Okay.

9 Later today.

10 THE COURT: Okay, thank you.

11 (Open court.)

12 THE COURT: Detective Pemberton, I'm going to
13 actually excuse you for the lunch hour first. I'm going
14 to excuse you first. Please be in the jury room -- not in
15 the jury room, in the witness room, at -- can you be there
16 at 2:25 for me, please?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: Thank you, sir.

19 Ladies and gentlemen, I'm going to excuse you
20 for lunch now. Please be in the jury room at 2:30. We're
21 going to try to have you in here at 2:30, okay? Have a
22 good lunch. Yes, 2:30, thank you.

23 (Pause.)

24 (Jury not present at 12:49 p.m.)

25 THE COURT: Okay. Everyone can have a seat.

1 All right. We'll talk about the cross of
2 Detective Pemberton, but what I understand, Ms. Downs,
3 you're asking about your renewed motion for what?

4 MS. DOWNS: To exclude co-conspirator statements
5 from the case of Mr. Webber.

6 THE COURT: Okay. Well, I thought I addressed
7 everybody's motion this morning before we brought the jury
8 in. So is it a renewal of your renewed motion?

9 MS. DOWNS: It is, and I thought the
10 significance of it right now is now the Court has the
11 government's direct of Detective Pemberton, and I think
12 that gives the Court a full picture of the nature of the
13 alleged contribution, so to speak, to a conspiracy on
14 January 20th, the limited times and places that Mr. Webber
15 is seen. It's not until Franklin Square, and then the
16 next two times on their map are the 1300 block -- in other
17 words, one short block before the arrest at 12th and L.

18 So extremely limited duration that they're
19 showing him physically there, no actions, and to show a
20 connection to the conspiracy, the Court knows, under
21 *Butler*, that they have to show a preponderance, they need
22 to show his connection here beyond just mere presence.
23 And the standard is fairly exacting, and they haven't met
24 that standard of his connection to this so-called
25 conspiracy by the physical evidence presented here in

1 their case-in-chief through Detective Pemberton.

2 THE COURT: Okay.

3 Ms. Kerkhoff, would you like to respond?

4 MS. KERKHOFF: Just briefly, Your Honor.

5 I think Ms. Downs may be conflating two
6 conspiracies. The first is the conspiracy to engage in
7 the disorderly, which was the basis for the admission of
8 co-conspirator statements, and a number of pieces of
9 evidence were presented for purposes of that to include
10 Officer Adelmeyer's testimony that the defendant was
11 present for at least one of the three meetings he
12 discussed.

13 We also know from his text messages -- from text
14 message communications that he was at least a participant
15 in a group chat where this was discussed. His own text
16 message communications state that, while the jury didn't
17 hear this *Akins* issue, Logan Circle anarchy were his
18 plans. We also have conduct the night before with respect
19 to the black bloc. And I would finally note, as it
20 relates to the charged conspiracy, that consistent with
21 what Judge Leibovitz found when ruling on similar motions
22 for -- at the MJOA, which was that the duration, the
23 movement, the totality of circumstances, the dressing in
24 the clothes, the duration, the movement, the choices that
25 were made to continue with this when it was clear there

1 were police attempting to disburse, when the breaking was
2 clear, all of that went as conduct showing -- sufficient
3 to show that the government had met its burden for
4 purposes of MJOA standards on the conspiracy to riot
5 charge. So I think we're conflating two. So those are my
6 arguments.

7 MS. DOWNS: Well, of course, the standard's much
8 higher than MJOA to bring in co-conspirator statements.

9 THE COURT: But it's a preponderance of the
10 evidence about the existence of the conspiracy. Quite
11 honestly, I understand your renewed -- I understand you
12 renewing the motion at this point after the presentation
13 of the government's evidence relating to -- excuse me --
14 the identification, not there not being an ID, but the
15 identification of Mr. Webber and what he's done throughout
16 this event, but I don't think that it's changed -- I know
17 it hasn't changed my calculus and my view that there was,
18 in fact, still a conspiracy for the same reasons that I
19 articulated earlier.

20 I know you also filed a motion to sever, orally
21 filed a motion to sever, but because he is not pictured in
22 as many clips as the other defendants here does not mean
23 that he's not part of the conspiracy. I do think that
24 there's still sufficient evidence to show, by a
25 preponderance of the evidence, that Mr. Webber was a part

1 of the conspiracy and, therefore, that the co-conspirator
2 statements are admissible. So I deny the renewed renewed
3 motion at this time.

4 Excuse me.

5 MR. RIST: Your Honor?

6 THE COURT: Yes.

7 MR. RIST: On a different issue, I would ask, at
8 this time, that the government -- that the defense be
9 given an opportunity, as the June 4th trial -- Judge
10 Morin --

11 THE COURT: I'm sorry. I need to get to -- if
12 you're about to talk about the Veritas video.

13 MR. RIST: Yes.

14 THE COURT: I want to talk about -- I broke for
15 two things.

16 MR. RIST: Very well.

17 THE COURT: I want to talk about
18 cross-examination of Detective Pemberton. And, if we have
19 enough time, we can talk about your issue as well. But I
20 do want to hash that out so that everybody has it before
21 we go into the lunch break and we know what the parameters
22 are of what cross-examination is.

23 Where is there a dispute in terms of the
24 cross-examination of Detective Pemberton.

25 MR. SCHRAGER: I need to approach the bench.

1 THE COURT: Sure.

2 (Bench conference.)

3 THE COURT: Give me just a second, Mr. Schrager,
4 to pull up your motion.

5 MR. SCHRAGER: Oh, no rush.

6 (Pause.)

7 MR. SCHRAGER: Again, it's just a proffer, it
8 wasn't meant as an argument.

9 THE COURT: Uh-huh. So, I mean, I guess what do
10 you plan on cross-examining him on?

11 MR. SCHRAGER: Item 14 in there summarizes --
12 the rest of it is just a summary of sort of what had
13 happened. As best as I could figure it out without going
14 through -- what I did is I threw away my notes last night
15 and tried to get back to it piece by piece.

16 Number 14 summarizes what we're trying to get
17 in. The details of what happened is up to 14. It shows
18 sort of the process that was there.

19 THE COURT: Okay.

20 MR. SCHRAGER: I think the Court needs to --
21 needs the rest of it just as far as --

22 THE COURT: I read the whole thing.

23 MR. SCHRAGER: Oh, okay. I'm sorry.

24 THE COURT: I read it before.

25 MR. SCHRAGER: I didn't know that. I'm sorry,

1 Your Honor.

2 THE COURT: I did read it. I read it this
3 morning before I came out, which is where the highlights
4 come in.

5 I guess the question that I have --

6 MR. SCHRAGER: Uh-huh.

7 THE COURT: -- some of the things it appears
8 that you want to cross on are things that were not
9 sustained. I don't --

10 What's the government's position?

11 MS. KERKHOFF: Well, the government's position
12 is that with respect to -- I just want to be clear. IAD
13 recommended a false statement. That was not a sustained
14 finding by DRB so -- as it relates to the 2008 DUI.

15 The government's concern is that Mr. Schrager is
16 trying to advance this as some sort of corruption bias
17 from an officer who was off duty at the time and ascribing
18 a corruption bias for an individual who was not in the
19 capacity acting as an officer pursuing an investigation.
20 So I -- that is where I am making my objection.

21 If it were -- I don't think a DUI standing alone
22 is objectionable. This is ten years ago. So I'm trying
23 to understand what would be the parameters for that
24 incident because that was not -- there's no false
25 allegation. I don't think an off-duty officer can be

1 tagged with corruption bias, it's not a proceeding, and
2 that's my argument.

3 THE COURT: Yeah, go ahead, I'll hear you, Mr.
4 Schrager.

5 MR. SCHRAGER: Yeah. First of all, yeah, he was
6 carrying his firearm. That's one of the things that was
7 sustained. While, yeah, it was found that he was
8 intoxicated, actually, by Judge Demeo, or he was impaired.

9 I think we, you know, we come down to *Longus* as
10 far as extrinsic evidence being admissible. If you go as
11 far as the one finding that wasn't -- you know, that
12 wasn't upheld or wasn't sustained was as far as
13 truthfulness as to whether he was intoxicated, but that
14 issue -- and we have -- we have -- basically, we have the
15 finding at the trial that he was impaired. We also have
16 the -- yeah, the fact that, from what I understand, a
17 witness didn't show up is part of why they would get that
18 far. But, then again, his explanation was that he didn't
19 recall whether he was drinking that night and he may have
20 had one Miller Lite. Well, that's Miller Lite. And that
21 was, you know, clearly -- that was clearly not up -- you
22 know, it is clear that that's not true.

23 So, you know, pursuant to *Longus*, I would submit
24 that it's relevant. And I think it goes to the *Smith* case
25 that, you know, Ms. Kerkhoff has been citing several

1 times. It's the most recent case, but it says that
2 corruption bias -- I think it's on page 17.

3 Corruption bias can be merely an individual's
4 willingness to give false testimony or a willingness to
5 obstruct discovery of the truth.

6 I think whether he's on duty or not --

7 THE COURT: I mean, I think that's the language.

8 MR. SCHRAGER: Right.

9 THE COURT: That's the language in all of the
10 cases.

11 MR. SCHRAGER: Right. And, whether he's on duty
12 or not, it goes to bias, Your Honor. And it doesn't have
13 to be necessarily -- it's not limited to actions. What it
14 is is limited to actions taken when someone has a uniform
15 on. Or even as listed as on duty. But it also goes --
16 it's a matter of the bias. The bias is still there.

17 The other part of it is, also, that he then, you
18 know, received compensation. Now, the fraud allegation
19 was not withheld. I'm not trying to get into that as part
20 of being fraud or the details of making a fraud. Just the
21 only thing I would put in there as far as the fact that he
22 received compensation for going to his DUI case. But I
23 think it all goes to show, you know, it's a matter of not
24 necessarily playing by the rules.

25 THE COURT: I didn't understand the last thing

1 you said.

2 MR. SCHRAGER: Not necessarily playing by the
3 rules, Your Honor. Yeah, and not necessarily allowing the
4 truth out. And I think, one of the findings, you know,
5 one of the findings that they -- that, you know, one of
6 the -- one of the -- Court's indulgence.

7 One of the findings that the Board did was
8 conduct unbecoming an officer based on his refusal to take
9 a breathalyzer or the standard, you know, the field tests
10 so -- and the Board found that. They found it being
11 conduct unbecoming an officer, Your Honor, and that was
12 sustained.

13 So I think, you know, all that stuff, I think,
14 it almost makes the package sort of how he was trying to
15 dodge here, Your Honor. He was also uncooperative -- not
16 cooperative in discussing it with his superior officer
17 because Lieutenant Long, at that point, was his superior.
18 He was uncooperative even talking about the incident with
19 her and how the accident happened, Your Honor.

20 So I would submit that it all should come in
21 and, basically, we can put extrinsic evidence in pursuant
22 to *Longus*, Your Honor.

23 MS. KERKHOFF: So the government's position is
24 that the Shawn Smith, actually, does speak to some of this
25 because half of Mr. Schrager's arguments is well, I think

1 there are's some inconsistencies within the internal
2 documents, and I think *Smith* does speak to that where it
3 says this isn't a finding of veracity.

4 So what his point is that, an off-duty officer,
5 who has certain rights, but because he's police officer,
6 he must be corrupt because, while off duty, he made
7 certain choices. And the government's position is that
8 this isn't corruption bias by an officer. He's seeking to
9 tag him, and his whole argument was he doesn't like to
10 play by the rules and that's what we want to show. That
11 seems to be propensity evidence, and so that is my problem
12 with the argument.

13 I think if counsel tailored the question to an
14 actual either veracity issue or some other issue in the
15 case, that perhaps we could get somewhere, but right now,
16 he wants to argue propensity, and that is my problem with
17 how he's framing this.

18 If he wants to argue that he has a sustained
19 finding against him for submitting a time sheet, that he
20 was both handling a personal court matter and also
21 papering a case and he had three hours, that, to me, I
22 think, is appropriate. Although, there was no sustained
23 finding of false statements, I think that that is,
24 certainly, closer to a, you know, type of examination, but
25 to sit here and say you had a DUI and you didn't do a

1 breathalyzer and you -- I don't understand the point of
2 that line of cross-examination for an off-duty officer ten
3 years ago. That's what I'm trying to understand.

4 MR. SCHRAGER: Your Honor, somebody's on the
5 force, I mean, I've heard it described as a 24-hour job
6 and assess. Especially as far as -- and these were
7 findings. As far as refusing the field tests and refusing
8 the breathalyzers, that is a sustained finding of the
9 Board, Your Honor, as conduct unbecoming an officer, Your
10 Honor. But it also shows a elusiveness of trying to not,
11 you know, basically, get at the truth as to whether he was
12 intoxicated or not, Your Honor.

13 The ruling of *Smith*, basically, hinges on a
14 difference between the Gerstein -- you know, a small
15 difference, you know, from the Gerstein. And it
16 doesn't -- you know, and the Court ruled that that, you
17 know, it wasn't anything significant, but I think with
18 this, we do have a finding that he was not, you know,
19 going by the rules, three basically -- and it was found by
20 the police that he was in violation of his conduct
21 unbecoming an officer. So I would submit that an officer
22 come in and, you know, that, you know, his conduct in the
23 incident.

24 Your Honor, I'm not looking to go far into it.
25 I would ask the questions as to the, you know, the

1 findings. And that would be, you know, where I would
2 probably go with it, Your Honor.

3 THE COURT: So the conduct unbecoming an officer
4 was because failure to submit to the breathalyzer?

5 MR. SCHRAGER: Yes.

6 THE COURT: And having his gun on him while
7 under the influence or while drinking?

8 MR. SCHRAGER: It was failure to submit to any
9 of the tests, breathalyzer, SFST.

10 Also, he cited as mitigation in his response the
11 fact that he was cooperative, and it was found -- and I
12 Internal Affairs just found that he was not cooperative,
13 and that was -- it's a --

14 MS. KERKHOFF: That goes to penalty. That's not
15 a finding.

16 THE COURT: I'm sorry, I didn't hear what you
17 said. Who found that he was not cooperative?

18 MR. SCHRAGER: He maintained with Internal
19 Affairs that he was cooperative, and they found he wasn't
20 cooperative because of the very, you know because of the
21 very thing of not cooperating with, you know, with
22 testing, Your Honor.

23 THE COURT: All right. I think
24 cross-examination on the compensation while appearing on
25 his own court case is, clearly, appropriate. For my

1 purposes, I think it's appropriate.

2 It's a bit of a stretch, I think, to say that
3 this is corruption bias with a witness who's testifying
4 about evidence, in essence, evidence, admitted evidence,
5 and 75 percent of his testimony, if not more, was pointing
6 out things. How the defense wishes to argue bias,
7 obviously, bias is all relevant. I'm trying to see --

8 (Pause.)

9 MS. KERKHOFF: The sustained charges? Would it
10 help to have -- I don't know if the Court has the
11 sustained charges. This is the DRB sustained charges.

12 MR. SCHRAGER: And it has -- that's clearly
13 spelled out.

14 THE COURT: Thank you.

15 MS. KERKHOFF: So IAD made a recommendation
16 before, but DRB made those findings.

17 THE COURT: DRB is kind of the appeal board?

18 MS. KERKHOFF: Yes.

19 THE COURT: Afterwards?

20 MS. KERKHOFF: Yes.

21 MR. SCHRAGER: And, just for the record, to make
22 it clear, I would be -- as far as the Internal Affairs
23 findings, I would ask to be getting in those, too.

24 THE COURT: You would ask for what?

25 MR. SCHRAGER: To be able to, you know, as far

1 as to be able to get that.

2 THE COURT: I don't think that's appropriate.
3 That's like a defendant getting convicted of a crime at
4 trial and then the appeals court overturns it and you say
5 that well one.

6 MR. SCHRAGER: It is appealed. There was a --
7 there was a Rule 17 appeal to a -- because, at the time,
8 Judge Demeo was a magistrate judge. So it was an appeal,
9 which went to Judge Weisberg in sort of a partial brief
10 because Mr. Brown, Ron Brown had it. He filed it saying
11 that he hadn't been paid by Officer Pemberton to go ahead
12 and do it, but to preserve his rights, he was filing it.

13 MS. KERKHOFF: But that's an appeal of the DUI
14 conviction.

15 THE COURT: Yeah, no, no.

16 MR. SCHRAGER: Right. I didn't mean the -- I'm
17 just explaining to the Court, if that's something the
18 Court --

19 THE COURT: I was just making an analogy --

20 MR. SCHRAGER: Oh, okay, I'm sorry.

21 THE COURT: -- where the final finding was not
22 the four things that IAD found, but three things. And so,
23 the three final findings are, I think, what's relevant,
24 not the four findings of IAD. Those are the only three
25 that are at issue for me because DRB didn't sustain --

1 that was the false statements?

2 MS. KERKHOFF: Correct.

3 THE COURT: So that will not be permitted,
4 asking about him making false statements because that was
5 not a sustained finding, so that cannot be inquired about.

6 All right.

7 MR. SCHRAGER: There are four mindings,
8 actually, made, you know, the Court can --

9 THE COURT: That's what I said.

10 MR. SCHRAGER: By the Disciplinary Board, too.
11 A little different.

12 MS. KERKHOFF: Yes.

13 THE COURT: Okay. Well, let me read it, please.
14 (Pause.)

15 THE COURT: Okay. I will allow only the
16 sustained findings by the DRB. I'll allow you to get into
17 it, but minimally. The fact that there was a conduct
18 unbecoming that was sustained for drinking an alcoholic
19 beverage and being under the influence -- whatever the
20 findings are. I'm not going to read them all into the
21 record right now.

22 For the record, I am looking at the government's
23 PPMS report for Detective Pemberton, and I'm looking
24 specifically at page 4 of 6, which bleeds into page 5.

25 So I will allow the cross-examination on it, but

1 it has to be the specific findings. And, as I said, and
2 also the finding about -- because there is a -- I don't
3 mean untruthfulness to the idea that you're getting paid
4 while you're in court for a personal matter, that I'll
5 also allow cross-examination on, but you have to limit
6 your cross-examination on the DUI to the findings made by
7 the DRB board, not IAD.

8 MR. SCHRAGER: All right. And, as far as the
9 disciplinary findings or the basis for this, I can then --
10 that is listed on the report, I can ask about that?

11 THE COURT: The -- I don't -- this is not --
12 Let me see.

13 I think it is appropriate. Can you, please,
14 explain to me how this is corruption bias? What is that
15 argument, how this is corruption bias?

16 MR. SCHRAGER: Well, Your Honor, it's a matter
17 of trying to -- of showing you, you know, hiding the
18 truth, Your Honor, basically. But I think if I just give
19 the -- I mean, I can give the findings with virtually
20 nothing.

21 THE COURT: I don't think this is a corruption
22 bias instance where you get to get into all of the
23 extrinsic evidence. I will allow cross-examination on the
24 findings, but not the details of it because I don't see
25 how this is corruption bias.

1 MR. SCHRAGER: As far as the conduct unbecoming
2 an officer, the refusal to take the SF -- I mean, just the
3 reasons given in the PPMS, basically.

4 THE COURT: Yes.

5 MR. SCHRAGER: Okay.

6 THE COURT: Okay. Anything else from anyone?

7 MR. SCHRAGER: No. Thank you.

8 MS. KERKHOFF: Thank you.

9 (Open court.)

10 THE COURT: All right, we have a few minutes.

11 MR. RIST: Your Honor, I would ask that defense
12 be allowed -- the cross-examination of Detective Pemberton
13 be continued in this matter until after the defense has
14 had an opportunity to depose the individual the government
15 referred to as Matt.

16 I would note, Your Honor, that, as far as the
17 defense is concerned, because the government has only
18 referred to this individual by his first name, it's an
19 ongoing *Brady* violation. We still have not had the
20 opportunity to independently investigate Matt what -- at
21 all.

22 Detective Pemberton stated under direct -- under
23 oath on direct that he reached out to Project Veritas and
24 he received the videos from Project Veritas. Until we
25 hear the -- from Matt in terms of the form in which they

1 were turned over, if they were, indeed, turned over in
2 segments, until we hear all of the -- have a more fulsome
3 understanding of Matt's interaction with the MPD,
4 specifically, Detective Pemberton, it is highly
5 prejudicial to make the defense go forward with a
6 cross-examination. We really can't, when there's been a
7 *Brady* violation, without having -- knowing who the
8 individual was.

9 So I would say, Your Honor, that these are
10 exceptional circumstances in light of the fact that this
11 *Brady* violation only became apparent as of the 22nd of
12 May. And, again, the defense has had no opportunity to
13 investigate the *Brady* violation at all and the source of
14 the actual video.

15 Detective Pemberton has stated that he's the one
16 that reached out to Project Veritas and received the video
17 from Project Veritas. He's assuming that that was a
18 Project Veritas individual. We don't know the
19 investigation that he conducted in order to make that
20 determination besides just calling out. Matt could have
21 been a member of a different conspiracy to bring down the
22 anti-capitalist march.

23 So we are being -- it is highly prejudicial for
24 us to go forward and have to cross Detective Pemberton
25 without a more fulsome explanation of how the *Brady*

1 violation occurred. And, again, the source of the actual
2 video.

3 We would ask that, under Rule 15, that the
4 government be ordered to produce Matt and that we -- that
5 we, the defense, get the opportunity to depose him under
6 oath before we go forward with any cross-examination of
7 Detective Pemberton.

8 MR. SCHRAGER: And, Your Honor, I would just add
9 that Judge Morin is actually looking into having this
10 investigated as far as sort of what went wrong. And, at
11 this point, we won't know until Wednesday as to that. I
12 understand we're in trial, but we would ask to find out
13 what the answer is before we put Detective Pemberton --
14 finish with Detective Pemberton, finish the trial, and
15 then it's going to be too late, Your Honor.

16 THE COURT: Well, I understand that, and I guess
17 I've spent the first 10, 15 minutes talking about how,
18 although that this case is very unique to many cases in
19 this courthouse in that the trial judge is not necessarily
20 the one presiding over the pretrial matters, but now we
21 are in trial. So what's happening with Judge Morin, Chief
22 Judge Morin, for whom I have great respect, what's
23 happening with Chief -- what's happening in his cases is
24 not instructive of what's happening here. We're in a
25 different posture right now.

1 And so I'm not -- I have to make my own
2 independent judgments about the evidence and how we go
3 forward. So I'm not going to, at this point, delay the
4 case until Chief Judge Morin gets more information about
5 his cases, which aren't scheduled for another couple of
6 weeks. I have -- we are in trial. Jury sworn. So I have
7 to make decisions, which I've started to do, I have to
8 make decisions as to what the state of the evidence is
9 now, where we are, what the -- what's missing, what has --
10 not missing and move forward now. I'm not going to delay
11 this case until Judge Morin, in his own cases, or in those
12 separate cases, which I believe are scheduled for June,
13 makes -- gets a proffer from the government or more
14 information.

15 So, as to delaying the trial, for that purpose,
16 I'm not going to do that and I don't think it would be
17 appropriate because counsel who are present here are not
18 present in the case before Judge Morin. So I can't just
19 adopt -- we can't go between the two.

20 As for delaying the cross-examination of
21 Detective Pemberton, what I heard from -- I'm going to
22 hear from the government, but I just want to put something
23 out there, which is what I heard from Detective Pemberton,
24 as it relates to Project Veritas, was one -- from what I
25 remember, was one sentence, which was he -- or maybe two.

1 He reached out to Project Veritas when he saw it on the
2 website and he got this video. He didn't talk about --
3 the majority of his testimony had to do with other videos
4 that are in evidence in the case.

5 So delaying this trial, my first instinct,
6 although I'm going to hear from the government and then
7 again from Mr. Rist, who's raising his hand, my first
8 instinct, it is not necessary to delay cross-examination
9 of Detective Pemberton for that purpose, but let me hear
10 from the government, since I heard from Mr. Rist and other
11 counsel first, and then I'll let them respond.

12 MS. KERKHOFF: Yes. Just briefly, Your Honor.

13 I think, at this point, the defense is taking
14 the statement, the upper echelon statement, and then
15 saying now we know that Project Veritas was recording this
16 and how -- they have known that, Your Honor. They have --
17 this was addressed at the first trial. They were aware.
18 In fact, that was the basis for the motion to compel back
19 in the first trial group was how can we trust this? They
20 have a motive and bias. And that's what Mr. Rist is
21 arguing. Well now that they have this motive and bias.

22 The question is on the statement and what was
23 the basis for that speaker's statement. So, one, I think,
24 at this point, we're trying to piggyback and say now we
25 have to explore that there might be some bias here.

1 With respect to Detective Pemberton's statement,
2 he stated he contacted Project Veritas to receive from
3 them the videos. I can represent that that was not the
4 person who recorded it. We contacted a representative
5 from there and said do you have videos and can you provide
6 it?

7 After Judge Morin, yesterday, ordered the
8 government to inquire, Detective Pemberton reached back
9 out to the person and said I would really need to speak
10 with whomever the person is and can you identify them and
11 can I be directed to them?

12 So he hasn't talked about that so his testimony
13 is what happened a year ago, which is that he obtained the
14 videos and that he saw Officer Adelmeyer and asked Officer
15 Adelmeyer to look for it. That is where we are.

16 So I think we're now starting to piggyback in
17 this the person recording it may have wanted to bring down
18 this group. That's going to be a line of cross that they
19 stated days ago they were going to make here. Okay. And
20 we said, sure, Detective Pemberton's the one that
21 contacted them. Feel free to explore that. That's
22 different than the statement.

23 And so, I think, at this point, it's just an
24 attempt to kind of piggyback and jump off that, and the
25 government does object to not moving forward with this

1 trial, and that's our position.

2 THE COURT: Yes, Mr. Rist.

3 MR. RIST: Your Honor, I think there's one
4 important detail that's being left out in this analysis,
5 and that's that Detective Pemberton stated that what was
6 found on YouTube was an edited version of the video. Then
7 he stated that he received an unedited version from
8 Project Veritas. How do we know? How do we know? We do
9 not know.

10 Moreover, the fact that it's now -- that he
11 received the video from an individual that did not
12 actually take it, how do we know that the video that was
13 given to the person that gave it to Detective Pemberton
14 hadn't already been edited?

15 So the fact that -- and the government is the
16 one that brought that out. What he saw on YouTube was
17 edited. What he received from Project Veritas was
18 unedited. And that is just simply being taken as fact
19 without any opportunity to actually investigate to see if
20 that is truly the case. And we don't -- and unless we get
21 the opportunity to depose Matt, the only person who gets
22 to say that is Detective Pemberton. We don't have any
23 opportunity to try to prove otherwise.

24 THE COURT: Well, aren't you going to ask -- I
25 would presume that you're going to ask him, "Well, you

1 don't know if this is the unedited version?"

2 MR. RIST: Well, he stated that -- he stated
3 already on direct that it is -- that he received the
4 unedited version.

5 MS. KERKHOFF: I believe --

6 MR. RIST: That's already in evidence.

7 MS. KERKHOFF: I believe what he stated is he
8 requested the unedited version and he received videos and
9 he asked Officer Adelmeyer to review them for accuracy.

10 What occurred at the first trial, which counsel
11 references repeatedly, is that it was in segments, that
12 there is a timestamp break, which is why I brought that
13 out, that the whole motion to compel and the whole
14 argument that was had months ago when we litigated this
15 issue was -- that was the very same argument in front of
16 Judge Morin where they said how do we know it hasn't been
17 edited?

18 We argued, that's weight, not admissibility, we
19 have Officer Adelmeyer, but the jury, they can make those
20 points through Detective Pemberton. You don't know. You
21 didn't receive a copy. You know this group has motives.
22 And so that was actually an entire line of
23 cross-examination at the first trial and was the basis for
24 the motion to compel.

25 On top of that, during that motion to compel,

1 the Court ruled the government has to produce what's in
2 its possession. If you have and want it, go subpoena the
3 third-party. You all know who they are, go subpoena them.
4 And so the point that -- this is where I think we're
5 starting to piggyback off of a very different issue than
6 what the Court's Rule 16 and *Brady* issue is, that well
7 what do we know about the video, generally? That has
8 been -- that is not a new issue here.

9 So Detective Pemberton, I believe, stated he
10 requested the unedited video and he received video from
11 them. And I expect they will cross and say you don't
12 know, it's provided in segments, there's actually a couple
13 second breaks, those are all points and lines of
14 cross-examination.

15 MR. RIST: Your Honor, I -- go ahead.

16 MS. DOWNS: I just briefly wanted to join what
17 Mr. Rist had indicated, and I wanted to point out a couple
18 of facts.

19 The Court saw the video. This person does give
20 a name. It's a false name. A Shawn Garrity. So we
21 investigated that. But so we were stymied. And now
22 they're saying we have this -- well, I guessed it was a
23 false name, but --

24 THE COURT: And I'm addressing it to you right
25 now, Ms. Downs, because you're standing, but anybody can

1 answer this question, which is how is this different from
2 what you knew before?

3 MS. DOWNS: Well, for us, it's significantly
4 different because they are referencing the comment about
5 upper echelon, but I think it's very significant in that
6 little segment that's added on, there's a strong
7 implication there's other people in the meeting. He's
8 looking for the other people. Where are you guys?
9 They're recollecting after they leave this meeting. So
10 there's additional individuals with a different vantage
11 point, and we don't know what those individuals said, if
12 they videoed something. And to say that we could go there
13 with a fake name and try to get somebody -- some
14 information out of an organization that's already falsely
15 represented itself, that's, I think, pressing the point.

16 MR. RIST: Your Honor, we still don't know the
17 individual to serve a subpoena to in terms of who actually
18 made the video. So when the government says that you knew
19 the source of this video and you could subpoena them at
20 any time, that's not correct. I mean, that's not correct
21 at all. We don't know. We just have a first name.

22 And, again, the fact that the government has
23 only provided a first name, I bring up, again, this is an
24 ongoing *Brady* violation that is yet to be cured.

25 THE COURT: Okay.

1 MR. RIST: And, therefore, again, we deserve the
2 right to get the name of the individual and have that
3 person brought in for a deposition.

4 THE COURT: Okay. Well, right now, I'm talking
5 about whether cross-examination -- and I understand they
6 go together, but I'm talking about whether I'm going to
7 delay the cross-examination of Detective Pemberton at this
8 time.

9 Based on the information that I have, at this
10 time, I am not going to delay his cross-examination. This
11 was the evidence that is -- that I have characterized as a
12 *Brady* and Rule 16 violation is, let's say, maximum of
13 three minutes of this video with that -- with two or three
14 statements made on it, which I do not see -- I do feel
15 like the arguments are conflated because now we're talking
16 about what Detective Pemberton -- how he got the video and
17 what did he know about it. All of that you can
18 cross-examine and all of that was things that were known
19 to you before these last three minutes of that video
20 became known to everyone on May 22nd. I don't believe
21 that there's a need to delay cross-examination.

22 Government, do you have the name of the witness?
23 Not the witness, the person who did the recording, and is
24 that person cooperative?

25 MS. KERKHOFF: I believe the -- I don't know the

1 person's last name. I believe the detective has the last
2 name and a phone number.

3 In terms of whether he's cooperative or not, I
4 can ask the detective to try to reach out to him today. I
5 haven't had a chance to speak to him because we've been
6 here. So I can inquire over lunch as to whether or not we
7 can -- whether it's arrange a call or a meeting at our
8 office, something to allow counsel to ask this individual
9 for purposes of investigation.

10 I would also note that the statement itself is
11 not admissible for the truth as it goes to his opinion.
12 So I understand that the Court may say, to provide
13 context, and that's fine, but what we're talking about is
14 the basis for that opinion and investigate.

15 So I -- as I told the Court, we took steps last
16 night, and I will take them and continue to take them over
17 the lunch break and provide the Court with an update.

18 THE COURT: Okay.

19 So I am going to ask that Ms. Kerkhoff and Mr.
20 Qureshi do that. Obviously, Detective Pemberton's on the
21 stand, but this is an issue in trying to resolve the *Brady*
22 and Rule 16 issue. So I do ask that you get whatever
23 information we can about that particular witness Matt,
24 whatever his name is, all right?

25 MS. KERKHOFF: Thank you.

1 THE COURT: All right, thank you.

2 We're going to start up at 2:30. So please be
3 here at 2:25. Thank you.

4 (Luncheon recess taken at 1:27 p.m.)

5 AFTERNOON SESSION

6 (Time noted: 2:30 p.m.)

7 THE COURTROOM CLERK: Now recalling from jury
8 trial calendar: United States versus Seth Cadman, case
9 2017 CF2 1156; codefendant with United States versus
10 Anthony Felice, case 2017 CF2 1163; codefendant United
11 States versus Seth Cadman, case 2017 CF2 1172; codefendant
12 United States versus Michael Basillas, case 2017 CF2 1334.

13 MR. RIST: Good afternoon, Your Honor. Matthew
14 Rist on behalf of Anthony Felice.

15 MR. SCHRAGER: Good afternoon, Your Honor. Seth
16 Schrager on behalf of Seth Cadman.

17 MS. DOWNS: April Downs on behalf of Mr. Webber.

18 THE COURT: All counsel for Mr. Basillas are
19 present as well.

20 Yes.

21 And government's present as well.

22 MS. KERKHOFF: Jennifer Kerkhoff and Rizwan
23 Qureshi for the United States.

24 THE COURT: Okay. So, as I was about to walk
25 out of chambers, I got a phone call from a juror, which is

1 why I started walking a little slower.

2 Juror 895, who appears to be the juror in seat
3 number two, said that he was going to be seven minutes
4 late, no more than ten. Something tells me he's looking
5 at his Waze.

6 So, with that, we're going to have -- so,
7 obviously, they'll knock when they're all here, but he
8 gave us the head's up that he was running late, and that
9 was literally a minute before I got here.

10 So what else should we talk about? Let's talk
11 about the juror.

12 MS. DOWNS: Oh, number 15.

13 THE COURT: Yes, juror in seat number 15.

14 Personally, I am inclined to, if the defense
15 wants to keep her, to not even inquire of her, but to let
16 her know that, because she did not disclose to us this
17 trip, we can't delay the trial for her, unfortunately.

18 Is that what counsel want me to do?

19 MR. RIST: Your Honor, there's a split of
20 opinion amongst the defense counsel, unfortunately. I
21 believe that Mr. Jacobson, and I know for myself, I'm
22 inclined to keep juror number 15. Ms. Downs is concerned
23 that she may feel rushed in her deliberations and that may
24 affect her deliberations. So I don't want to speak for Ms.
25 Downs. All I can say is there's a split opinion amongst

1 the counsel here.

2 MR. SCHRAGER: And, again, I'll defer to the
3 Court, Your Honor.

4 THE COURT: All right.

5 MS. DOWNS: I have one more thing. I don't want
6 to ruin the woman's trip. I mean, she should have told
7 us, but --

8 THE COURT: The other thing -- and I think we
9 took off the table -- or I did. It's not an option for me
10 that we delay the trial, that's -- which is what she's
11 asking us to do.

12 MS. DOWNS: Right.

13 THE COURT: So the question is do we excuse her
14 or do we require her to remain?

15 I guess the other option is -- and the
16 government said yesterday they also have concerns that she
17 would be -- hold it against anybody, rush during
18 deliberations or hold it against anybody.

19 The other option that I guess I would put out
20 there is telling her, since there's a split of opinion
21 amongst the defense, saying, you know what, because -- we
22 can't -- we cannot delay the trial. So you could either
23 be excused or you'll have to remain. So that if she says
24 she wants to remain, then she won't hold it against
25 anybody because that will be her decision.

1 MR. SCHRAGER: I would --

2 THE COURT: That's just another option I'm
3 putting out there for counsel.

4 MR. SCHRAGER: I would object to laying that at
5 the feet of the defense, Your Honor.

6 THE COURT: Laying it at the feet of the
7 defense.

8 MS. DOWNS: She didn't say that.

9 MR. SCHRAGER: Oh, I thought you said that -- I
10 thought you were going to tell the juror that.

11 MS. DOWNS: No, no.

12 THE COURT: What?

13 MR. SCHRAGER: Sorry, Your Honor.

14 THE COURT: You thought I said what? Oh, my
15 goodness.

16 MR. SCHRAGER: I thought you would say there was
17 a difference of opinion by the defense.

18 THE COURT: No, I'm saying that to you.

19 MR. SCHRAGER: Oh, I'm sorry, Your Honor.

20 THE COURT: I wouldn't say that to her. Oh, my
21 goodness. That's Judging 101.

22 MR. SCHRAGER: No objection, Your Honor.

23 THE COURT: I would just say to her -- I'm
24 saying --

25 MR. SCHRAGER: I understand.

1 THE COURT: -- to you, because there is a split
2 amongst the defense, I would say to her we cannot
3 excuse -- we cannot delay the trial for your trip, but we
4 can give you -- so you either have to participate
5 throughout the whole -- throughout the whole trial or you
6 can be excused now.

7 So that we're on the same page, how do the
8 parties feel about that? I'll start with the government.

9 MS. KERKHOFF: Government does not object.

10 MS. DOWNS: For Mr. Webber, we do not object.

11 MR. JACOBSON: I would just note that a mistrial
12 would cure this whole problem, Your Honor.

13 THE COURT: Thank you.

14 MR. JACOBSON: That was a joke.

15 THE COURT: Appreciate that.

16 MR. JACOBSON: You're welcome.

17 Consistent with my view that I think she should
18 stay and fulfill her service, I would prefer the Court not
19 do that.

20 MR. SCHRAGER: And I'll defer, again, Your
21 Honor.

22 THE COURT: Mr. Rist, what did you say?

23 MR. RIST: Your Honor, on this one, I will defer
24 to the Court. On this one, I'll defer to the Court in
25 terms of what you want to say.

1 THE COURT: I understand, Mr. Rist. You have
2 yet to defer to the Court so I understand.

3 MR. RIST: First time for everything, Your
4 Honor.

5 THE COURT: I understand that, on this one,
6 you're going to defer to the Court.

7 MR. RIST: Yes, Your Honor.

8 THE COURT: Well, I'm going to give her that
9 option.

10 MR. RIST: Very well.

11 THE COURT: Because three defense counsel either
12 agree or defer to the Court and the government has no
13 objection. So I'm going to give her that option. I'll
14 write the note.

15 Actually, I don't know if I'll write a note or
16 if I'll give her the option to come in and tell us what
17 she wants to do so we can excuse her for the weekend. Or
18 she can think about it and come back on Monday and we'll
19 know where we are.

20 I guess I -- that's what I would propose, is
21 that we let her know that that's the option that we're
22 giving to her. So if she wishes to be excused, she can
23 notify my chambers of that by voice mail on Monday and she
24 can think about it over the weekend because that's not
25 going to put us in any different position. But, as long

1 as she lets us know -- leave a message for us by Monday so
2 that when we come in on Tuesday, we'll know if we have to
3 use an alternate.

4 Is that okay?

5 Again, I try not to put them on the spot right
6 here for all of us to look at them and speak to them. So
7 all right. So that's what I'll --

8 MR. RIST: Your Honor?

9 THE COURT: Yes.

10 MR. RIST: On a different -- very quickly on a
11 different point.

12 THE COURT: So let me just make sure I get --

13 MR. RIST: Yeah.

14 THE COURT: So we're all -- I'm going to write
15 that note. I'll read the note before I send it back so
16 that you know exactly, everybody can agree with the
17 wording of it. And then I'll tell her that she has until
18 Monday to decide for herself. We'll give her that option.

19 And I think, in the note, I'll say because --
20 I'll soften it a little bit. Because she didn't tell us
21 about this conflict before, we, unfortunately, cannot
22 delay the trial, however, blah, blah, blah.

23 Mr. Rist.

24 MR. RIST: Your Honor, now that the government
25 has published the boards to the jury of the defendants,

1 they include the arrest -- field arrest photographs. I'd
2 ask that the -- that instruction 1.201(b) that deals with
3 photographs that are, clearly, arrest photographs, and
4 that's for photographs -- this is while the trial is going
5 forward, I'd ask that 1.201(b) be read to the jury.

6 THE COURT: Okay.

7 All right, the jury's here. Let me find it.

8 (Pause.)

9 MR. RIST: Your Honor, and I can pass it up
10 if --

11 THE COURT: Oh, I have my book.

12 MR. RIST: Very well.

13 THE COURT: Thank you.

14 (Pause.)

15 THE COURT: All right. I'm going to say --
16 instead of saying, "In determining the accuracy of the
17 witness's identification," of any identification?

18 MR. RIST: Your Honor, I didn't hear what you
19 said.

20 THE COURT: In the second paragraph --

21 MR. RIST: Yes.

22 THE COURT: -- there's bracketed language --

23 MR. RIST: Yes.

24 THE COURT: -- that says, "The accuracy of the
25 witness's identification," there is no witness

1 identification.

2 MR. RIST: That's right.

3 THE COURT: So I would change that to say, "Any
4 identification and for no other purpose."

5 MR. RIST: Thank you, Your Honor. I think
6 that's appropriate.

7 THE COURT: You must not consider these
8 gentlemen's -- the defendants' prior arrest as any
9 evidence of his guilt.

10 Okay, then that is what I will do. I'll give
11 that instruction, unless there's any objection.

12 Okay.

13 MS. KERKHOFF: No objection.

14 THE COURT: Is there -- have all of the -- have
15 all the exhibits -- well, I'll leave it at that.

16 MS. KERKHOFF: In terms of exhibits, the
17 government will be, after Detective Pemberton is off the
18 stand, seeking to admit four exhibits which are the
19 combined boards. But we had previously, as we did in the
20 first trial, did not admit that through any witness, but
21 admitted them at the conclusion of our case so that we
22 could use them for the jury.

23 THE COURT: I think there was one exhibit that
24 is not -- has not been completely authenticated. It's
25 admitted, but it was subject to further authentication.

1 MR. RIST: That's correct.

2 THE COURT: I don't remember which exhibit.
3 It's one of the boards with the picture in it has like a
4 bottle of something.

5 MS. KERKHOFF: Correct, Your Honor.

6 THE COURT: Maalox or something.

7 MS. KERKHOFF: That, subject to the
8 authentication of that one, Detective Pemberton, today,
9 got in a bottom picture of that exhibit. So that was the
10 only picture that was not identified. He has put that
11 picture in; so...

12 THE COURT: Oh, he put it in through a different
13 exhibit?

14 MS. KERKHOFF: So if I could just show the
15 Court.

16 THE COURT: Yes, thank you. So that I
17 understand.

18 MS. DOWNS: What are you talking about?

19 MS. KERKHOFF: Yup, I'll show you.

20 (Pause.)

21 MS. KERKHOFF: It was Officer Geiger. And the
22 objection was to subject to further foundation. Detective
23 Pemberton put in Exhibit 42.

24 THE COURT: Okay.

25 MS. KERKHOFF: Which was the only portion that

1 had not --

2 THE COURT: That was not --

3 MS. DOWNS: I thought it was the -- I thought
4 the other officer did.

5 MS. KERKHOFF: No, Geiger put in everything up.

6 THE COURT: He did not -- so what is this
7 exhibit that we're looking at, please?

8 MS. KERKHOFF: This is 808B. These are the
9 photographs, what we called the processing photographs for
10 Defendant Casey Webber.

11 Officer Geiger put in this exhibit, subject to
12 further foundation, and admitted through him 702, 740,
13 742, and 741. He said he could not speak to what was
14 recovered.

15 Detective Pemberton just put in Government's
16 Exhibit 42, which the government believes laid the
17 foundation because this was subject to further foundation,
18 and this is Government's Exhibit 42.

19 MS. DOWNS: Actually, I'm sorry.

20 At the time we brought that forward -- I would
21 object -- I know it's a little late now -- because I don't
22 believe he knows that that was recovered from Mr. Webber.

23 THE COURT: And that's what he said. Well --

24 MS. KERKHOFF: No, Detective Pemberton stated
25 that he was present when all of the photographs -- when

1 the property that was seized as evidence was laid out, and
2 he testified, with no objection, that this photograph,
3 Exhibit 42, fairly and accurately depicts property
4 recovered and seized from Defendant Webber. That was
5 admitted with no objection.

6 MS. DOWNS: Okay. But -- okay. He did not see
7 it recovered. He only saw it photographed, and he's
8 basing that on some other hearsay statement that somebody
9 said was recovered from Mr. Webber.

10 MS. KERKHOFF: Well --

11 THE COURT: Is that a question?

12 MS. DOWNS: Yes.

13 MS. KERKHOFF: He observed all the property.
14 This was with his bag. So if you want to ask him if that
15 defendant's bag with his identification and all of this
16 was put in a bag and it was marked Defendant Webber and
17 you can see the bag on the processing video, if you want
18 to ask that, but I -- we've admitted the exhibit with no
19 objection; so...

20 MS. DOWNS: I misspoke. I would object. And I
21 would assert, even though it -- even if it's been shown to
22 the jury already, that we don't have good information that
23 that, in fact, came from Mr. Webber. And, in fact, the
24 government had the processing officer and chose not to
25 bring it in through the person who actually opened it, the

1 bag, and looked.

2 MS. KERKHOFF: No, Detective Pemberton opened
3 the bag and looked.

4 MS. DOWNS: Again, later, a second time.

5 THE COURT: Okay.

6 MS. KERKHOFF: Correct. The government's
7 position is this goes to weight, not admissibility.

8 THE COURT: I'm sorry.

9 MS. DOWNS: When Mr. Webber was standing
10 there --

11 THE COURT: I'm sorry. Y'all are both going
12 back and forth. And the court reporter has been very good
13 to us so we have to be kind to her, and that back and
14 forth is not going to work.

15 It will be -- it was already admitted into
16 evidence. So this board -- I'm just double checking. I
17 just want to double check my notes because I,
18 unfortunately, left my exhibit list in chambers this
19 morning so I missed a few.

20 But, as long -- if it was admitted into
21 evidence, Government's Exhibit No. 42, then the board --
22 it was admitted earlier subject to authentication.

23 I understand now that Ms. Downs is objecting to
24 No. 42 coming in, but the Court is ruling that that goes
25 to weight, not admissibility, because it's the chain of

1 custody.

2 Okay. So let's bring in Detective Pemberton.

3 MS. KERKHOFF: Yes, Your Honor.

4 THE COURT: And get the jury.

5 (Pause.)

6 (Jury is present at 2:46 p.m.)

7 THE COURT: All right, good afternoon, ladies
8 and gentlemen.

9 Counsel, everyone can have a seat.

10 We're ready.

11 Detective Pemberton, you can retake the stand,
12 sir. As a reminder, you are still under oath.

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: And cross-examination.

15 MR. JACOBSON: Yes, thank you, Your Honor.

16 CROSS-EXAMINATION ON BEHALF OF DEFENDANT BASILLAS

17 BY MR. JACOBSON:

18 Q. Good afternoon, Detective Pemberton.

19 A. Good afternoon, Mr. Jacobson.

20 Q. How are you?

21 A. Fine.

22 Q. So let's start with your role in the case, if we
23 could.

24 A. Sure.

25 Q. You were not in downtown D.C. during the time of

1 the protest; is that correct?

2 A. Yes, sir.

3 Q. So you didn't observe the protest firsthand?

4 A. Correct.

5 Q. You've been the lead detective on the case since
6 the following day, since January 21, 2017?

7 A. Yes.

8 Q. And am I right that this is the only case you've
9 been working since that time?

10 A. Yes.

11 Q. And you've devoted, I think, 40 to 60 hours a
12 week to the case; is that fair?

13 A. I think that's fair.

14 Q. And is this the first time in your career that
15 you've devoted 17, what is 17 months to one single case?

16 A. Yes.

17 Q. Have you ever spent more time on a case than
18 this one, in fact?

19 A. No.

20 Q. Is it fair to say that you consider yourself
21 part of the trial team here today?

22 A. I'm assisting the prosecution.

23 Q. Yeah. Your office is in the United States --
24 you -- pardon me.

25 Your desk is at the U.S. Attorney's Office;

1 right?

2 A. I have a desk there, yes.

3 Q. Is that where you spend most of your week, if
4 not all, of your week these days?

5 A. Yes.

6 Q. And you've been coming to court every day during
7 this trial; is that fair?

8 A. Yes.

9 Q. And you've even been kind enough to help the
10 prosecutors bring in their files and their bags and so
11 forth at times; right?

12 A. Sure.

13 Q. Now, let's change gears, talk about the size of
14 the protest.

15 Is it fair to say that there were about 500
16 protesters that first gathered in Logan Circle?

17 A. Yes.

18 Q. And would you agree that, out of those 500, it
19 was a small minority that did property damage?

20 MS. KERKHOFF: Objection as to the basis for his
21 knowledge.

22 THE COURT: Do you want to approach?

23 MR. JACOBSON: Okay.

24 THE COURT: Thank you.

25 (Bench conference.)

1 MR. JACOBSON: The detective testified on direct
2 that he's watched these videos for hundreds of hours. So
3 I think he's got plenty of basis of knowledge.

4 MS. KERKHOFF: I think that this borders into
5 his identification of individuals doing property damage
6 because it is asking him to quantify and identify who are
7 the ones in numbers which different individuals are doing
8 the property damage.

9 I'm just highlighting that because that's
10 exactly what he was not allowed to do, and I think that it
11 would open the door to that issue.

12 MR. JACOBSON: Yeah, I thought about that, and I
13 don't think answering this question opens that door. I
14 think if he can quantify the number of people who he saw
15 doing damage, not the number of different people, the
16 number -- I didn't ask that. The number of people doing
17 damage. I can try to rephrase the question.

18 THE COURT: Okay. I think that's his -- are you
19 planning on going any further than that because --

20 MR. JACOBSON: No.

21 THE COURT: -- other than that -- okay.

22 All right.

23 MS. KERKHOFF: Okay.

24 (Open court.)

25 THE COURT: Thank you.

1 MR. JACOBSON: So, Judge, can I have the court
2 reporter read back that question?

3 (Record read back by the Court Reporter.)

4 BY THE WITNESS:

5 A. If I had to put a number on it, it's maybe 20
6 percent.

7 Q. 20 percent of the 500?

8 A. Yes.

9 Q. So 100 people?

10 A. That sounds right.

11 Q. Okay. So let's go on what -- I can't speak for
12 my co-counsel, but what may be our last tour of the
13 protest route to answer that question for the jury, if we
14 can, okay?

15 A. Okay.

16 Q. So I'll use -- I'll refer to -- just so that we
17 can sort of keep track of where we are on the protest
18 route, I'll use Government's Exhibit 801, with my
19 apologies to people in the gallery who I'm now -- they
20 feel like they're at Fenway Park in obstructed-view
21 seating.

22 So, Detective, you'd agree that -- oh, pardon
23 me.

24 MR. JACOBSON: Let's go to when the protesters
25 are coming out of Logan Circle. And, Will, please pull up

1 Exhibit 101, Government's Exhibit 101, at minute 3 to
2 3:12.

3 (Playing video recording.)

4 MR. JACOBSON: And, thank you.

5 BY MR. JACOBSON:

6 Q. So, Detective, I know that there was -- pardon
7 me.

8 We've heard testimony in this case previously
9 that there was some graffiti in Logan Circle; correct?

10 A. Yes.

11 Q. Other than that, is it fair to say that, as the
12 protesters are leaving Logan Circle in the first few
13 minutes of the protest, there's been no violence yet?

14 A. What do you mean by violence?

15 Q. Well, whatever you would consider violence.

16 A. I mean --

17 Q. Well, let me withdraw that question.

18 Has there been any property damage, other than
19 the defacing of the Logan Circle statue, at this point in
20 time?

21 A. Yes.

22 Q. And what was that?

23 A. Police car. The hood of a police car was spray
24 painted.

25 Q. Oh, okay. Well, thank you for reminding me of

1 that. And where was that?

2 A. It's actually in this exhibit. Probably back
3 about two minutes.

4 Q. Okay. So before getting to this point walking
5 down 13th Street?

6 A. Yes, an individual walks to a police car and
7 spray paints the hood.

8 Q. Okay. So there's one person who spray painted
9 the hood?

10 A. Yes.

11 Q. Okay, thank you.

12 So now we're going to -- as we're traveling down
13 13th Street from Logan Circle, we're going to approach the
14 BP gas station; right?

15 A. Yes, sir.

16 Q. Okay. And, you know what, I should say this:
17 All along the protest route, am I right that people are
18 pulling newspaper stands into the street?

19 A. Yes, that's fair to say.

20 Q. It happens a fair amount of times; correct?

21 A. Almost every intersection, yeah.

22 Q. Okay.

23 A. I think, yeah.

24 Q. And some other signs that are portable from
25 buildings are thrown into the street as well?

1 A. That's also correct.

2 Q. Okay. So if I could, when I'm talking about
3 property damage and violence, if we can sort of stipulate
4 that that has happened, that happens throughout the route;
5 right?

6 A. Okay.

7 Q. And I'm talking more about -- well, everything
8 but that; right? So damage to cars, damage to buildings,
9 everything else that the government has introduced
10 evidence about; is that fair?

11 A. Sure.

12 Q. Okay. So as we're approaching the BP gas
13 station.

14 MR. JACOBSON: Will, let's look at Exhibit 101,
15 minute 4:30 to 4:56.

16 (Playing video recording.)

17 MR. JACOBSON: Okay, thank you.

18 BY MR. JACOBSON:

19 Q. So, Detective, is it fair to say that there are
20 one to three people doing damage at the BP?

21 A. I think it's more than three, but maybe no more
22 than five.

23 Q. Doing actual damage to the BP?

24 A. I mean, it appears to be about three to five
25 people underneath -- inside the property of the BP.

1 Q. Right, but how many would you estimate actually
2 did any damage?

3 MS. KERKHOFF: Objection as to his basis of
4 knowledge.

5 THE COURT: Sustained.

6 Q. Detective, how many times have you watched the
7 videos of people passing BP?

8 A. Dozens of times, I'm sure.

9 Q. Okay. So do you feel confident to tell me how
10 many people did damage at the BP?

11 A. No.

12 Q. Okay.

13 A. Other than the estimate I just gave.

14 Q. Okay. No, no, no. If you didn't establish
15 this, that's fine.

16 So, now, going past the BP, I think the next
17 storefront we get to is the Au Bon Pain continuing down
18 13th Street; right? Can you see that okay?

19 A. Yes, I can see it.

20 Q. Okay. So the next storefront is the Au Bon
21 Pain?

22 A. I mean, there's other stores between there, but,
23 yes, I think.

24 Q. Right. The next storefront on Government's
25 Exhibit 801, which I believe is indicating where there was

1 some damage, is the Au Bon Pain?

2 A. That's correct, yes.

3 Q. Okay.

4 MR. JACOBSON: So, Will, let's look at Exhibit
5 101 at minute 7:11 to 7:38.

6 (Playing video recording.)

7 Q. Okay. So, Detective, we saw one person damaging
8 the Au Bon Pain window; is that right?

9 A. Yes.

10 Q. And we saw two people attacking that poor
11 parking meter?

12 A. That's correct.

13 Q. Okay. So, now, as we continue along the route,
14 we get to Maddy's Tap Room -- trying to orient myself
15 here -- which is the corner of K and 13th; am I right
16 about that?

17 A. 13th and L, actually. It's just south of the Au
18 Bon Pain.

19 Q. Oh, sorry, thank you. 13th and L, that's right.

20 A. Right there, yes, sir.

21 Q. Okay. So just past the Au Bon Pain?

22 A. That's correct.

23 Q. Okay.

24 MR. JACOBSON: So, Will, let's look at Exhibit
25 101 at minute 7:39 to 8:25.

1 (Playing video recording.)

2 Q. I think we're going to now see a view of the
3 same thing.

4 (Playing video recording.)

5 Q. Okay. And, Detective, is it fair to say that
6 there were about four people doing damage to the Maddy's
7 Tap Room window?

8 A. Yes.

9 Q. Okay. And then next up at Exhibit 101, I think
10 we're going to come to a bus stop; do you remember a bus
11 stop, damage being done to a bus stop?

12 A. Yeah, there was --

13 Q. Bus shelter?

14 A. Well, there was a couple of them, but yes.

15 Q. Okay. Well, I'm going to pull up one, but if I
16 miss any as we're going through this, feel free to let me
17 know.

18 A. Sure.

19 MR. JACOBSON: Exhibit 101, Will, at 10:24.

20 (Playing video recording.)

21 Q. Okay. And there we just saw one person throwing
22 something at that bus shelter; right?

23 A. Yeah, occupied bus shelter, yes.

24 Q. Okay. And, now, next we get to the limo.
25 Continuing down 13th Street, we get to the limousine on

1 the corner of 13th and K; right?

2 A. Yeah, it's directly across from this bus
3 shelter, actually.

4 Q. Directly across from the bus shelter?

5 A. Yeah.

6 Q. Okay.

7 A. I believe, looking at this exhibit that's still
8 up, it's on the left. It would be on the left side of the
9 street.

10 Q. Got it. That's helpful. Thank you.

11 MR. JACOBSON: So, Will, let's look at Exhibit
12 101 at 10:40 to 10:57.

13 (Playing video recording.)

14 Q. Okay. So, Detective, is it fair to say that
15 there's about six people doing damage to that limo?

16 A. I think that's fair.

17 Q. Okay. And then after we -- pardon me, ladies
18 and gentlemen.

19 After we get past the limousine, we go -- let's
20 see -- we follow the route down 13th Street; right?
21 That's where the protest route goes, down 13th Street?

22 A. Well, it comes south through Franklin Square
23 following that blue arrow.

24 Q. I'm sorry. Exactly right.

25 A. Goes south.

1 Q. So east on K Street?

2 A. Well, that's west. You're pointing west.

3 Q. Right, thank you.

4 West on K Street through Franklin Square?

5 A. Correct.

6 Q. Right? And, is it fair to say, Detective, that
7 as the protesters got -- went east on K Street and went
8 through Franklin Square, there was no damage to
9 storefronts on K Street, in this component part of K
10 Street, or in Franklin Square?

11 A. That's correct.

12 Q. Okay. And then the protesters get to I Street;
13 right?

14 A. Yes, sir.

15 Q. And they head east on I Street?

16 A. That's correct.

17 Q. And we don't encounter any damage to storefronts
18 until we get to the corner of 13th and I; is that right?

19 A. Yes.

20 Q. Okay. And that's where -- the corner of 13th
21 and I is where we run into the Starbucks, the Bank of
22 America, and the Atrium Cafe; right?

23 A. Yes, sir.

24 Q. Okay. So let's look at the Starbucks and the
25 Bank of America, if we could?

1 MR. JACOBSON: Will, please play 101 at 14:52 to
2 15:45.

3 (Playing video recording.)

4 MR. JACOBSON: Okay, I think that's good.

5 Q. And let's, also, look at the same area,
6 Detective.

7 MR. JACOBSON: Exhibit 101 at 16:13 to 16:24.

8 (Playing video recording.)

9 Q. So, Detective, is it fair to say that there's
10 about ten people doing damage to the Starbucks and the
11 Bank of America?

12 A. No, I think it's more than that. I think it's
13 probably 15 or more.

14 Q. 15 or more?

15 A. Yes.

16 Q. Well, all right. Well, I guess the jury will
17 have this video. They can see for themselves. I won't go
18 back.

19 Next comes Atrium Cafe as the crowd is heading
20 down I Street; correct?

21 A. East, yes, sir.

22 Q. East on I Street, thank you. I've always been
23 directionally challenged.

24 A. No problem.

25 Q. So the Atrium Cafe.

1 MR. JACOBSON: Let's look at Exhibit 101 at
2 17:02 to 17:16, please.

3 (Playing video recording.)

4 Q. And, Detective, there were about five people
5 doing damage to the Atrium Cafe; is that right?

6 A. I actually counted four, yeah.

7 Q. That you for the correction.

8 And, as both with regards to the Starbucks, the
9 Bank of America, and the Atrium Cafe, as these people,
10 whether it's, you know, 10 or 15 through the
11 Starbucks/Bank of America, four going past the Atrium
12 Cafe, the other hundreds of people are just walking down I
13 Street; is that fair?

14 A. They're walking past, yes.

15 Q. Okay. And now, next, we get -- let's follow the
16 protest route again. If you continue to help me with my
17 east and west, that would be awesome.

18 A. Sure.

19 Q. We're going down -- so we've passed through I
20 Street. We've passed down I Street. We're now going
21 south on 12th Street?

22 A. Yes, sir.

23 Q. Right?

24 A. That's correct.

25 Q. And then the protesters went south -- east on

1 New York Avenue?

2 A. Well, that blue line that turns green, they move
3 northeast on New York Avenue until 11th Street. But the
4 police form a line there and they're turned back around.
5 And that's when they move south, which is what -- where
6 the line turns into a green arrow.

7 Q. Okay, got it. And then they get to the
8 McDonald's?

9 A. Yes, sir.

10 Q. Okay. So let's look at the McDonald's, which is
11 Exhibit 101 at 21:34 to 22.

12 (Playing video recording.)

13 Q. So, Detective, is it fair to estimate that there
14 were about three people doing damage to that McDonald's?

15 A. I counted five.

16 Q. Counted five?

17 A. Yes.

18 Q. Let's see it one more time.

19 A. Sure.

20 MR. JACOBSON: Will, can you back that up?

21 (Playing video recording.)

22 Q. So what do you think, Detective, three, four,
23 five?

24 A. It's five.

25 Q. Looks like five to you, okay.

1 Now, after the McDonald's, the protesters head
2 north a little bit on 13th Street; right?

3 A. Yes, sir.

4 Q. And then they go back through Franklin Square
5 Park?

6 A. That's correct.

7 Q. Right? And then they head north on 14th Street?

8 A. Yes, sir.

9 Q. Right? And they get to the corner of 14th and K
10 where we've got the Crown Plaza?

11 A. Yes, sir.

12 Q. Okay. And so let's look at the Crown Plaza.
13 We're almost done.

14 MR. JACOBSON: Let's go to Exhibit 101 at 24:58
15 to 28:06.

16 Q. I think we're going to see two views of the
17 Crown Plaza.

18 (Playing video recording.)

19 MR. SCHERTLER: Okay, I think that's good, Will.

20 Q. So, Detective, sorry for the length of that.

21 So we saw one person doing damage with a hammer;
22 right?

23 A. In the second clip, yes.

24 Q. Right. And then we saw another person sort of
25 trying to kick in the window and stumbling and not doing a

1 very good job of it, but two people, at least, attempting
2 to do damage at the Crown Plaza; is that fair?

3 A. Yeah, I mean, there's somebody using a hammer in
4 the first clip, too, but in the Hamilton's window. And
5 someone throws a rock and a bottle.

6 Q. Yeah. So, with the rock being thrown, was there
7 any damage done to that?

8 A. No, not that was reported to me.

9 Q. Okay. And you saw a person with the hammer in
10 the first clip?

11 A. Yes.

12 Q. Okay. Can you point that out for us?

13 A. Yeah, if we could watch it, again.

14 MR. JACOBSON: Yeah, can you go back to the
15 first clip, Will? So it's 24:58.

16 Q. Detective, just holler when you see that,
17 please.

18 (Playing video recording.)

19 A. Can you pause it?

20 Q. Yeah.

21 A. An individual just ran in between that red taxi
22 cab and that black sedan from the street onto the
23 sidewalk. He's now -- the person is now sort of in the
24 crowd of people on the upper left corner of the screen.
25 The Hamilton's window is right there, and Hamilton's

1 window is broken at this very time, which you can see in
2 Exhibit 137.

3 If you continue to play this clip, that same
4 individual will now run from that location in the upper
5 left corner of the screen. You can see an individual with
6 sort of a white shirt or something around their face, from
7 this area, back out into the street. That individual will
8 be holding a hammer in their left hand.

9 Q. Okay. So, by your count, are we talking about
10 two people or three people doing damage to the Crown
11 Plaza?

12 A. Are you asking me to say that the person --

13 Q. I'm not --

14 A. -- is the same?

15 Q. -- in fact.

16 MR. JACOBSON: Maybe we should approach real
17 quick.

18 (Bench conference.)

19 MR. JACOBSON: So I'm just trying to -- I,
20 certainly, I didn't open the door. The detective possibly
21 opened the door by saying the same person, which was not
22 the question that I asked.

23 THE COURT: Uh-huh.

24 MR. JACOBSON: So I'll just move on.

25 THE COURT: Okay.

1 MR. JACOBSON: But I don't consider a door
2 opened.

3 MS. KERKHOFF: I just think continuing to ask
4 him about this is --

5 MR. JACOBSON: I'm going to move on.

6 MS. KERKHOFF: -- getting very risky.

7 MR. JACOBSON: I'm going to moving on.

8 MS. KERKHOFF: And we've been doing this a
9 while.

10 THE COURT: Yeah.

11 (Open court.)

12 THE COURT: Thank you, sir.

13 BY MR. JACOBSON:

14 Q. Okay, Detective, thank you. Our tour is now
15 over. We could all get off the tour bus.

16 A. Yes, sir.

17 Q. So let me switch gears and ask you about the
18 police line charge.

19 A. Okay.

20 Q. Okay? We've heard a lot about the police line
21 charge, and just to reorient the jury, am I correct in
22 remembering that there was a police Line at 12th and L and
23 there was a police line at 13th and L?

24 A. The second line is not at 13th Street. It's
25 halfway up the block. There's an alley that runs between

1 12th and 13th and they're sort of parallel to that alley.
2 So they have half of the block closed off, the east half.

3 Q. Okay. And, at about 10:52 a.m. or
4 thereabouts -- do I have the time of the line charge
5 correct?

6 A. Yes, that's correct.

7 Q. Okay. At least some portion of the protesters
8 rushes the police line at 12th and L; right?

9 A. Yes, sir.

10 Q. And is it fair to say that about 70 protesters
11 broke through that line and got away?

12 A. Yes, I think that's actually right.

13 Q. Okay. And is it also fair to say that, even
14 following that initial burst of 70 people getting away,
15 because of the chaos of that moment, there were some other
16 protesters who were just -- who just left?

17 A. Yeah, I think that's correct.

18 Q. And that includes people who might have been
19 able to quickly change clothes and get away?

20 A. I mean, I have to speculate, but yes, people got
21 away at that point.

22 Q. Okay.

23 A. I'll agree with that.

24 Q. Do you remember testifying in an earlier
25 proceeding related to this protest about people quickly

1 changing clothes and getting away at that point or would
2 you like me to try to refresh your recollection?

3 A. Well, yes. I mean, I guess I'm -- my question
4 is whether or not you're talking about after there was
5 detainment or whether it was sort of during the chaos.

6 Q. Yeah, no, that's fair. I'm talking about during
7 the chaos.

8 A. Yes, there were people that were able to change
9 clothes and get away.

10 Q. Okay. And the people who got away, likely,
11 included people who were doing at least some of the
12 damage; right?

13 MS. KERKHOFF: Objection, Your Honor.

14 THE COURT: Sustained.

15 MR. JACOBSON: Could we approach?

16 THE COURT: Sure.

17 (Bench conference.)

18 MR. JACOBSON: The detective has previously
19 testified to exactly this point, Your Honor.

20 MS. KERKHOFF: But it doesn't make it a proper
21 question.

22 MR. JACOBSON: What's not proper about the
23 question?

24 THE COURT: It sounds as kind of speculation as
25 to whether he -- because if some of the people would have

1 gotten away.

2 MS. KERKHOFF: He can talk about the people he
3 has been able to identify, because he has identified
4 several people and the damage they did, but I thought Mr.
5 Jacobson didn't want him to do that and I instructed him
6 not to do that. So he's trying to tread this line between
7 I don't want you to identify my client or anyone close,
8 but I'd like you to identify other people, and that's my
9 concern here.

10 He can, based on what he believes to be an
11 appropriate identification, say, for example, the person
12 with the pink mask who throws the chairs at Officer
13 Chatman is part of that line charge and we can see that
14 person hurdle a bike and get away, but he's not allowed to
15 testify about ID. So I'm trying to understand how it's
16 objectionable on one hand, but not on the other.

17 MR. JACOBSON: Because he is aware that
18 people -- without getting into who the people are, he's
19 aware that people who did damage got away. Why is that
20 not proper?

21 MS. KERKHOFF: That requires an identification
22 that they are the ones that did the damage.

23 MR. JACOBSON: No, it doesn't.

24 THE COURT: Why doesn't it?

25 MR. JACOBSON: Because he doesn't know who they

1 are. They got away. He's reviewed the videos hundreds of
2 times and he's tracked people and he's seen people who
3 he's, presumably, I don't know, but this is how he
4 testified in the November trial, that people who did
5 damage likely got away.

6 MS. KERKHOFF: So the government would then say,
7 if they go down this road, then I think it would be fair
8 for him to say that the person that he observed doing
9 damage, for example, on Government's Exhibit 200, did not
10 get away, based on his observations, which would be
11 Defendant Basillas. The jury can reach the conclusion
12 about the identity of that person, but just as the
13 government can't say, "That person didn't get away,
14 correct," that's the -- that's where we are bordering into
15 an identification.

16 MR. JACOBSON: Your Honor, the government didn't
17 raise this objection in the first trial.

18 THE COURT: Well, as I've been saying, as I've
19 been saying over and over, this is a different set of
20 defendants, different -- you know, obviously, some things
21 stood by, but I've been making independent rulings.

22 MR. JACOBSON: Uh-huh.

23 THE COURT: I do think the question that you've
24 asked requires him to speculate as to whether people got
25 away. Your point is that he's been able to track some of

1 these people and none of these people match up with the
2 arrest photos so that he can make the conclusion. I think
3 that's getting into ID, which he's not allowed to do,
4 which was ordered before Judge Leibovitz previously in
5 proceedings before this case. So he's not allowed to make
6 an identification. So I don't think he should do it on
7 either end.

8 MR. JACOBSON: Okay. Thank you.

9 (Open court.)

10 THE COURT: Thank you, sir.

11 BY MR. JACOBSON:

12 Q. Okay. Detective, is it fair to say that by the
13 time -- well, pardon me. Let me back up.

14 After the police line charge, the remaining
15 protesters were contained in what we've been calling a
16 kettle; right?

17 A. Yes.

18 Q. And is it fair to say that, between the time
19 that the march -- that the protest, pardon me, started at
20 Logan Circle with about 500 people and the group was --
21 the remaining group of protesters were detained at the
22 corner of 12th and L, that about 250 people had left the
23 protest?

24 A. At the time it's detained, everyone is detained.

25 Q. Yes.

1 A. At that point? Yes, I think that's probably
2 fair.

3 Q. Okay. Switch gears again. Talk about some
4 evidence that was seized.

5 A. Sure.

6 Q. Okay? So you observed video of the arrest of my
7 client, Michael Basillas; correct?

8 A. Yes, sir, I have.

9 Q. Okay.

10 MR. JACOBSON: Will, can we go to Exhibit 1550?

11 Q. So that's a fair representation of the -- part
12 of, at least, part of the arrest process of Mr. Basillas;
13 correct?

14 A. Part of it, yes.

15 Q. Excuse me, of Michael Basillas.

16 And Michael Basillas, in this photo, he's
17 wearing a hat?

18 A. Yes.

19 Q. Right? And the hat has a pin in it?

20 A. Here it does, yes.

21 Q. Yeah. And it looks like a star is in the hat;
22 is that right?

23 A. I think that's correct.

24 Q. I mean, pardon me, the pin is a star?

25 A. The pin is a star, yes. I understood you.

1 Q. And the police seized that hat and that hat was
2 made part of the evidence of this case; right?

3 A. Correct.

4 Q. Okay. And the police also seized a black
5 T-shirt from Michael Basillas; right?

6 A. Yes, sir.

7 Q. And a cell phone?

8 A. Yes, sir.

9 Q. Okay. Nothing else was processed as evidence in
10 this case --

11 A. No, not --

12 Q. -- for Michael Basillas?

13 A. Not that I'm aware of.

14 Q. Okay. No weapons of any kind?

15 A. No.

16 Q. No face covering?

17 A. No, sir.

18 Q. Okay. Let's talk about the videos that you've
19 spent probably more time than you would have liked
20 watching in preparation for this proceeding.

21 You retrieved those videos from many different
22 sources; right?

23 A. That's correct.

24 Q. From websites?

25 A. Yes.

1 Q. Facebook sites?

2 A. I believe so, yes.

3 Q. The phones of some of those that were arrested?

4 A. That's correct.

5 Q. Okay. And you also procured at least some of
6 the videos from what might be fairly considered right-wing
7 organizations; right?

8 A. I think that's fair to say, yeah.

9 Q. Okay. So, for example, Exhibit 147, which
10 includes video from various sites along the protest route,
11 are you familiar with that video?

12 A. Yes.

13 Q. That comes from something called the Media
14 Research Center?

15 A. Yes.

16 Q. Okay. And are you aware that the Media Research
17 Center's mission statement says that it is to expose and
18 neutralize the propaganda arm of the left, the national
19 news media?

20 A. I mean, I am now, yes.

21 Q. Okay. Meaning before you walked in this
22 courtroom, you were aware of that? Before my question you
23 were aware of that?

24 A. I've been asked that question before. I didn't
25 know the first time, but I do now.

1 Q. You do now?

2 A. Yes.

3 Q. Okay. And do you also know that the MRC, as
4 I'll call it, prominently posts endorsements on its
5 website from Rush Limbaugh and Sean Hannity?

6 A. I'm really not familiar with it, but I do
7 understand that there are right leaning or right
8 centered -- I'm not sure how to phrase it, but yes, I
9 understand.

10 Q. Okay. And you retrieved what is now Exhibit 147
11 from the MRC headquarters?

12 A. Yes.

13 Q. You went out to their headquarters at Reston,
14 Virginia to procure that?

15 A. Yes.

16 Q. Okay. And let me ask you about Government's
17 Exhibit 104; are you familiar with that exhibit? I'll
18 remind you, that is the January 8th meeting in the
19 basement of a church that we watched a few days ago?

20 A. Yes, sir.

21 Q. Okay. And it lasted about a half an hour, and
22 just to remind the jury, the jurors had a transcript so
23 that they could guide their -- you weren't in the
24 courtroom, of course, but you understand that the jurors
25 had a transcript so that they could guide -- help their

1 understanding of the video?

2 A. Yes.

3 Q. Okay. And that video was procured from a
4 organization called Project Veritas; is that right?

5 A. Yes, that's correct.

6 Q. Okay. And who at Project Veritas provided that
7 to you?

8 A. I don't remember the individual's name. He came
9 to the Seventh District and dropped it off.

10 Q. Did you -- pardon me.

11 And you didn't get a name?

12 A. At the time, he probably told me his name, but I
13 don't know his name at this time.

14 Q. Okay. You didn't write that name down anywhere?

15 A. No.

16 Q. Okay. Did you meet that person at the Seventh
17 District?

18 A. Yes, he came to the station.

19 Q. Okay. Did you talk to him?

20 A. I did, yes.

21 Q. Did you ask him the circumstances of him making
22 that recording?

23 A. He was not the maker of the recording, he just
24 provided me with a hard drive.

25 Q. Okay. Did he tell you who made the recording?

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A. No.

Q. He didn't give you a name?

A. No.

Q. Did you ask?

A. No.

Q. You didn't ask him who made the recording?

A. I did not.

Q. Have you had the opportunity to talk to the founder of Project Veritas, a guy named James O'Keefe?

A. No, I've never spoken with him.

Q. Okay. Are you familiar with who he is?

A. Yes.

Q. Okay. And are you aware, Detective, that Project Veritas -- between the election of Donald Trump and the inauguration on January 20th, are you aware that Project Veritas had a self-professed mission to expose members of j20?

A. I mean, I think I learned that when I saw the videos that they posted, which is how I learned about the exhibits that you're speaking of, but, yeah, I think that that's something that was said on the -- on the videos that they actually posted.

Q. Right. But you became aware of it after January 20th?

A. Yes.

1 Q. But you're aware that, prior to January 20th,
2 they had this self-professed mission to expose j20?

3 A. I'm aware of that, yes.

4 Q. Okay. And you're aware that there was many
5 posts by Project Veritas on social media that were, to put
6 it mildly, very critical of j20; is that right?

7 A. Yes.

8 Q. And it included -- some of these posts included
9 the names of j20 members on social media?

10 A. Well, they put the names of people that they had
11 filmed undercover on the videos themselves. So yes.

12 Q. Okay. And are you aware that they were also
13 putting out tweets and other messages naming other members
14 of the j20 and criticizing them?

15 A. I believe so.

16 Q. Are you aware that Project Veritas has a
17 practice of sending its operatives, as it calls them, to
18 infiltrate liberal organizations like Planned Parenthood?

19 A. Yes, I'm aware of that.

20 Q. Are you aware that they did the same thing with
21 the Hillary Clinton campaign?

22 A. No, I'm not familiar with that.

23 Q. You're not -- you didn't see media reports of
24 that?

25 A. I'm not recalling that, no.

1 Q. Okay. Are you aware that one of the members --
2 in fact, I think it was the founder of Project Veritas --
3 was arrested for infiltrating the office of a democratic
4 senator?

5 A. I think I am aware of that, yes.

6 Q. Okay. And, Detective, how many members of
7 Project Veritas, to your knowledge, were at the January
8 8th planning meeting?

9 A. Just the one that I -- that's all I'm aware of.

10 Q. You're only aware of one person from Project
11 Veritas who was at that January 8th planning meeting?

12 A. Yes.

13 Q. Not two?

14 A. I'm not aware of a second person, no.

15 Q. And how many members of Project Veritas were at
16 the protest that day on January 20?

17 A. I have no idea if they were or weren't.

18 Q. You don't know either way?

19 A. I don't know either way.

20 Q. Did you ever ask anyone from Project Veritas
21 about that?

22 A. I did not.

23 Q. Okay. Pardon me.

24 (Pause.)

25 BY MR. JACOBSON:

1 Q. Okay. So let's talk about some of the reasons
2 for the protest, Detective.

3 Would you agree that the protesters had many
4 different issues that they appeared to be concerned with?

5 MS. KERKHOFF: Objection.

6 THE COURT: Sustained.

7 Q. Detective, you've watched these videos hundreds
8 of times?

9 A. Yes.

10 Q. You've seen signs that they were carrying during
11 the protest?

12 A. Yes.

13 Q. You've heard chants that the protesters were
14 making during the protest?

15 A. Yes, sir.

16 Q. Is it fair to say that some of those signs and
17 some of those chants were advocating in favor of the Black
18 Lives Matter movement?

19 A. Yes, yes.

20 Q. And is it fair to say that some of those signs
21 were expressing pro-immigrant sentiments?

22 A. I believe so, yes.

23 Q. And some were expressing -- I can't speak
24 today -- expressing pro-feminist sentiments?

25 A. I believe so. I can't remember a specific one,

1 but that -- I think that's a fair representation.

2 Q. Okay. And pro-LGBTQ rights?

3 A. Yes.

4 Q. And are you aware, Detective, that left-wing
5 protesters sometimes face violence from right-wing
6 protesters?

7 A. There's certainly been some incidents of that,
8 yes.

9 Q. And they're sometimes targeted -- left-wing
10 protesters are sometimes targeted not only for violence
11 but also for harassment?

12 MS. KERKHOFF: Objection. As to relevance.

13 THE COURT: Sustained.

14 Q. Detective, would you agree that the threat of
15 violence by right-wing protesters might be one reason why
16 left-wing protesters might wear face coverings during a
17 protest?

18 MS. KERKHOFF: Objection.

19 THE COURT: Sustained.

20 MR. JACOBSON: Your Honor, may we approach?

21 THE COURT: Sure.

22 (Bench conference.)

23 MR. JACOBSON: What's the basis of the
24 objection?

25 MS. KERKHOFF: This is asking lay opinion and

1 it's not -- it's not even the basis of the --

2 MR. JACOBSON: He's the --

3 MS. KERKHOFF: Correct, but he's asking a lay
4 opinion to agree that that might be a reason. I mean,
5 I -- this is not proper through, certainly, this witness.

6 THE COURT: Do you want to respond?

7 MR. JACOBSON: He's the lead detective on this
8 case. He's been doing investigation and background
9 research on this case for quite some time. He knows that
10 he -- he testified that they are sometimes targeted for
11 violence. So it only stands to reason and it's common
12 sense that if they are sometimes targeted for violence by
13 right-wingers, that they cover their faces.

14 MS. KERKHOFF: Which is argument, Your Honor,
15 it's not testimony.

16 MR. JACOBSON: I'm asking if he knows.

17 THE COURT: But you're asking if that could be
18 one of the reasons --

19 MR. JACOBSON: Can I ask him if he's aware?

20 THE COURT: Go ahead.

21 Mr. Rist is here.

22 Do you want to say something?

23 MR. RIST: No, I just wanted to listen in in
24 case I need to, that's all.

25 THE COURT: Oh, okay.

1 That just seems so --

2 MS. KERKHOFF: It also gets into the motives for
3 individuals, and I just think it's not connected to
4 anything and it's asking a lay opinion for people's
5 motivations and reasons. If they want to argue their
6 client was motivated for that reason, they have to find
7 another way to put that in.

8 MR. JACOBSON: Your Honor, the government has
9 made a lot about how people were wearing masks on that day
10 and they -- I think they claim that the reason people were
11 wearing masks and they have argued that the reason people
12 are wearing masks were so that they could not be
13 identified by the police. And I'm simply saying that
14 there might be another reason why they don't want to be
15 identified.

16 MS. KERKHOFF: Which is argument.

17 MR. JACOBSON: Which is exculpatory. Yeah, but
18 you've already made that same argument.

19 MS. KERKHOFF: And the government's point is
20 that I haven't asked the detective if people covered their
21 masks so that police couldn't find them. I've simply
22 pointed out that they have face coverings. It's argument.

23 MR. RIST: The government did state on opening
24 that we'll see the covering that individuals get in
25 wearing a mask. And so I think that that was -- in

1 opening, she argued this very thing.

2 And, moreover, because this detective is
3 familiar with the exposure of right-wing protesters online
4 and is aware that there is left-wing protesters being
5 attacked by right-wing protesters and has testified to
6 such, I think that it is a fair question.

7 THE COURT: I think it's --

8 MR. RIST: It's part of the investigation.

9 THE COURT: You talked about what Ms. Kerkhoff's
10 opening was. The opening isn't evidence, and it does seem
11 like argument. I think it's a fair point, but I don't
12 know if it's appropriate through this particular witness.

13 Don't shake your head, Mr. Jacobson.

14 MR. JACOBSON: Sorry.

15 THE COURT: It's okay.

16 MR. RIST: Your Honor.

17 THE COURT: I'm not offended by it.

18 MR. RIST: Your Honor, may the defense ask this
19 witness, due to his investigation online, is he familiar
20 with the practice of doxing?

21 MS. KERKHOFF: I don't think he wants the answer
22 to that, given that the detective and I have been doxed in
23 this case. I don't know that you want to open that door.
24 We've already opened the door --

25 MR. JACOBSON: I'll withdraw the question.

1 MS. KERKHOFF: Excuse me.

2 And I would just note they've already -- okay.

3 (Open court.)

4 THE COURT: Thank you.

5 BY MR. JACOBSON:

6 Q. Detective, you're a member of the Metropolitan
7 Police Department police union; correct?

8 A. Yes.

9 Q. And you've sat on the union board since 2014?

10 A. Yes.

11 Q. About how many officers does the union
12 represent?

13 A. 3,606.

14 Q. And so what percentage of the MPD police force
15 is that, approximately?

16 A. Well, there's only 3,800 officers; so...

17 Q. Okay. So the vast majority?

18 A. Yes.

19 Q. Okay. And so, obviously, your representation
20 would include representation of many of the officers who
21 were on duty during the inauguration protest; correct?

22 A. Everyone sergeant and below, yes.

23 Q. Okay. And it would also include officers
24 currently who are the -- who are currently the subject of
25 civil suits based on their conduct --

1 MS. KERKHOFF: Objection.

2 Q. -- during the inauguration protest; correct?

3 THE COURT: I'm sorry, I couldn't hear. I heard
4 an objection.

5 MS. KERKHOFF: Objection.

6 THE COURT: What is your question, again?

7 MR. JACOBSON: Your Honor, I asked whether the
8 detective's representation of officers included officers
9 that were currently being named in civil suits based on
10 their actions toward protesters during the inauguration
11 protest.

12 THE COURT: Sustained.

13 BY MR. JACOBSON:

14 Q. Detective, you're active on Twitter; is that
15 right?

16 A. Yes.

17 Q. And your handle on Twitter is @G-Pem?

18 A. That's actually underscore.

19 Q. Oh, sorry, G_Pem?

20 A. Yes.

21 Q. Thank you. I'm not myself active on Twitter.

22 And a handle is like the e-mail address
23 equivalent?

24 A. Sure.

25 Q. Okay. And sometimes you tweet your own

1 messages?

2 A. Yes.

3 Q. Right? As one does on Twitter. And sometimes
4 you like other people's tweets?

5 A. Yes.

6 MS. KERKHOFF: Objection, Your Honor. May I
7 approach before we go further?

8 THE COURT: Sure.

9 MS. KERKHOFF: Thank you.

10 (Bench conference.)

11 MS. KERKHOFF: I'm surprised that counsel is
12 raising Twitter posts without having consulted with the
13 Court first or, certainly, having provided anything
14 because I think we're going into personal tweets that the
15 Court hasn't had an opportunity to rule the scope of what
16 he's putting in.

17 MR. JACOBSON: I'm not aware of an obligation.
18 Do I have an obligation?

19 THE COURT: Well, for the record, I don't want
20 to hear something coming out that -- I mean, we --

21 MR. JACOBSON: Not about his personal life. I
22 would -- I'm not doing that.

23 MS. KERKHOFF: But we already put out about a
24 lawsuit that wasn't cleared with the Court.

25 MR. JACOBSON: That's not personal life. And if

1 I'm transgressing on some rules that I'm not aware of,
2 Your Honor.

3 THE COURT: It's not a rule, but we've been --
4 everything has kind of been cleared for weeks and weeks
5 and weeks, at this point.

6 So what kind of Twitter -- what are we --

7 MR. JACOBSON: Twitter messages that are
8 directly critical of the types of things that these folks
9 were protesting. Black Lives -- protesting in favor of.
10 Black Lives Matter is one example. That's probably the
11 most prominent example. And there are a handful of
12 others. Goes to bias against these protesters, Your
13 Honor.

14 THE COURT: Okay, Ms. --

15 MS. KERKHOFF: I haven't seen what he's going to
16 put up and I just want to -- I just -- I'm just trying
17 to -- I do think that we -- that the reason this should be
18 precleared is that I think that it can border on --
19 there's a line. And I just haven't seen what Mr. Jacobson
20 is going to do. He hasn't proffered it to the Court even
21 ex parte. So I'm just concerned about something coming
22 out that is objectionable and that the Court would not
23 permit. That's my only -- that's my issue. So I'd just
24 like a proffer.

25 MR. JACOBSON: Can we take a short break,

1 perhaps, and I'll show you the -- I'll show Ms. Kerkhoff.

2 MS. KERKHOFF: Is it anything that wasn't
3 introduced at the last trial? Because --

4 MR. JACOBSON: It's nothing that is a different
5 subject matter that was introduced at the last trial. I
6 can't swear that it's not -- that they're the same exact
7 tweets.

8 MS. KERKHOFF: And the government's concern is
9 that each tweet was reviewed by Judge Leibovitz.

10 MR. JACOBSON: I was not aware of that.

11 MS. KERKHOFF: It was discussed in the
12 transcript at length. She discussed every single tweet in
13 advance and ruled on it. I mean --

14 MR. JACOBSON: Oh, I was aware of that. I'm
15 sorry.

16 MS. KERKHOFF: Yeah.

17 MR. JACOBSON: I apologize.

18 MS. KERKHOFF: It is in the transcript.

19 MR. JACOBSON: Yup, it is.

20 THE COURT: So --

21 MR. JACOBSON: Short break?

22 THE COURT: Yeah. If there's nothing else that
23 you -- how long have we been in here? They've only been
24 in here --

25 MS. KERKHOFF: They've only been in here an

1 hour.

2 THE COURT: -- not even an hour.

3 Is there any way that you could circle back to
4 it? I mean, I'm not trying to mess you up.

5 MR. JACOBSON: Yeah, yeah, yeah. Can I look
6 real quick?

7 THE COURT: Sure.

8 (Pause.)

9 (Open court.)

10 THE COURT: Just give us a moment.

11 Do you need to come back?

12 MR. JACOBSON: Please.

13 (Bench conference.)

14 MR. JACOBSON: Yeah, my entire last line of
15 questioning is in this regard.

16 THE COURT: So this is it. So let's take a
17 break at this point.

18 MS. KERKHOFF: Okay.

19 THE COURT: We're going to take a early
20 afternoon break.

21 MS. KERKHOFF: All right, thank you.

22 THE COURT: Thanks.

23 (Open court.)

24 THE COURT: Detective Pemberton, don't come up.
25 We're going to take an early afternoon break.

1 Be in the jury room, ladies and gentlemen, at 10
2 minutes to 4. 10 minutes to 4, okay? Am I saying it
3 right? Yeah, 10 minutes to 4. Leave your notebooks in
4 your chairs.

5 (Pause.)

6 (Jury not present at 3:35 p.m.)

7 THE COURT: Okay. Thank you, Detective
8 Pemberton.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: All right. So parties can share the
11 information. And then, when you come back, let me know if
12 there's any dispute.

13 MR. JACOBSON: Thank you, Judge.

14 (Pause.)

15 MR. SCHRAGER: When does the Court want to
16 reconvene the parties, Your Honor?

17 THE COURT: Five minutes to.

18 MR. SCHRAGER: I'm sorry, five minutes to?

19 THE COURT: I mean, 45. 3:45, please.

20 MR. SCHRAGER: Thank you, Judge. I try to stay
21 out of trouble, Your Honor.

22 (Recess taken at 3:35 p.m. - 3:45 p.m.)

23 THE COURT: Your Honor, recalling from your jury
24 trial calendar: United States versus Michael Basillas,
25 2017 CF2 1334; codefendant United States versus Seth

1 Cadman, case 2017 CF2 1172; codefendant United States
2 versus Anthony Felice, case 2017 CF2 1163; codefendant
3 United States versus Casey Webber, case 2017 CF2 1156.

4 MR. SCHRAGER: I'm going to get my client, Your
5 Honor.

6 THE COURT: Oh, there. I was looking for Mr.
7 Schrager.

8 (Pause.)

9 THE COURT: All right, all parties previously
10 present are present again.

11 All right. Did you have a chance to look at
12 some of the --

13 MS. KERKHOFF: Yes, Your Honor.

14 THE COURT: -- documents?

15 MS. KERKHOFF: And if we could approach?

16 THE COURT: Sure.

17 MS. KERKHOFF: The government is objecting
18 without conceding that it's even a proper line of
19 cross-examination. The government is objecting to two
20 specific tweets they want to put in.

21 THE COURT: Okay.

22 (Bench conference.)

23 MS. KERKHOFF: These are the tweets that appear
24 to have been liked by Detective Pemberton.

25 THE COURT: Oh.

1 MS. KERKHOFF: They're just liked like a --
2 yeah, I'm not on Twitter, though. Tweet what I always
3 call them.

4 (Pause.)

5 THE COURT: Oh, I guess I should read it into
6 the record.

7 MS. KERKHOFF: Uh-huh.

8 THE COURT: So there's one tweet: "Wonder if
9 MoCo," which stands for Montgomery County, "kids ditching
10 school today to protest will be reprimanded. Shouldn't
11 the precious snowflakes be taught actions have
12 consequences." That's one. And so he liked that?

13 MR. JACOBSON: Yes.

14 MS. KERKHOFF: I can't tell, but it looks like
15 he did, yes.

16 THE COURT: All three of us may be in the same
17 electronic phase.

18 Then the next one is -- let me see.

19 (Pause.)

20 THE COURT: Okay. This is part of it? This top
21 one is part of it?

22 MR. JACOBSON: Yeah, that's the start and then
23 this is the response to it.

24 THE COURT: Okay.

25 MS. KERKHOFF: This is the part he liked. He

1 did not state he liked this tweet. He responded to liking
2 this tweet.

3 MR. JACOBSON: No, no, no, sorry. This is his
4 own tweet. At least I think it is. We can ask him.

5 MS. KERKHOFF: It's not his tweet. It says one
6 like. The tweet is from someone else called When Will
7 They Wake Up? This tweet is from Ron O'Donnell. This is
8 the response. He liked it. This is not his tweet.

9 MR. JACOBSON: Yeah. Is this one --

10 THE COURT: Why don't y'all talk about it so
11 that the court reporter --

12 MR. JACOBSON: Okay.

13 THE COURT: Just this part.

14 MR. JACOBSON: Yes.

15 THE COURT: And then so the court reporter --
16 it's too hard for her to transcribe that.

17 (Pause.)

18 MR. JACOBSON: I was looking at the wrong one.
19 Sorry.

20 So, yes, this is one that he liked.

21 MS. KERKHOFF: He liked the bottom tweet.

22 THE COURT: Okay. So the tweet is, "I was
23 taught to respect the law. I complied. If they would
24 have done the same, they would have been fine."

25 And that is in response -- and he liked that,

1 which is in response saying, "So you're saying seven
2 juries in different jurisdictions all got it wrong or
3 maybe just not the verdict you were hoping for regardless
4 of facts."

5 MS. KERKHOFF: The government's position about
6 this is that --

7 MR. JACOBSON: Well, pardon me.

8 Your Honor, it's in response to the very top.

9 THE COURT: Okay. And that's what I'm --

10 MR. JACOBSON: Yeah.

11 MS. KERKHOFF: The government's position is
12 it's, I think, intending to sort of inflame the jury by
13 trying to refer to four individuals who were killed, but
14 his response and his like is not necessarily tying it to
15 yes, they should have been killed, but --

16 MR. JACOBSON: Oh, of course, I wouldn't do
17 that.

18 MS. KERKHOFF: Excuse me, sir.

19 MR. JACOBSON: Sorry.

20 MS. KERKHOFF: But to the fact that what the
21 verdicts were, whether the verdicts would have been guilty
22 or not guilty, and I think it's just too ambiguous and
23 it's not tied to this protestor issue. I mean, I just
24 think it's seeking to inflame the jury and try to -- I'm
25 trying to understand its relevance here.

1 THE COURT: So just so that the record is a
2 little fuller, that same tweet that says, "So you're
3 saying seven juries in different jurisdictions all got it
4 wrong or maybe just not the verdict you were hoping for,"
5 and then some -- Shomari Stone, who is on the news, what
6 does that mean? He liked it?

7 MS. KERKHOFF: That means he's -- I have no
8 idea. Oh, he's verified. He's a verified tweeter.

9 THE COURT: Okay. So Shomari Stone then writes
10 underneath seven names. Philando Castille, North
11 Carolina; Sandra Bland, North Carolina; Eric -- actually,
12 it says NC. Actually, it's not North Carolina, it's NC.

13 MS. KERKHOFF: Yeah.

14 THE COURT: Sorry, my bad.

15 Philando Castille, NC; Sandra Bland, NC; Eric
16 Garner equals NC; Mike Brown equals NC.

17 MS. KERKHOFF: I'm speculating to say he may
18 have meant NG for not guilty for the verdicts, but again,
19 that's the problem with this, is that it's not really
20 clear how we're tying this to anything --

21 MR. JACOBSON: I don't think --

22 MS. KERKHOFF: -- that is relevant.

23 MR. JACOBSON: Pardon me.

24 I don't think these people were ever tried at
25 all --

1 THE COURT: Yeah.

2 MR. JACOBSON: -- because they were killed. So
3 the point of it is is that these are people who were
4 killed by police and who became emblems of the Black Lives
5 Matter movement, which we've heard testimony about was the
6 subject of this protest. He is liking -- and then he
7 makes that -- likes that comment.

8 THE COURT: So he likes the comment afterwards
9 that says, "I was taught to respect the law. I complied.
10 If they would have done the same, they would have been
11 fine."

12 MS. KERKHOFF: And, Your Honor, the government
13 has not objected to other direct comments that he's made
14 about Black Lives Matter. I think that is just so far
15 removed and it's unclear. I just think it's too
16 prejudicial. We have not objected if he wants to put in
17 tweets that they believe show that he is anti-Black Lives
18 Matter. I'm not objecting to those. I am objecting to
19 this because I don't think it's clear what it means and I
20 think it is, at most, simply to tie it to four people who
21 were killed by police. I think it's prejudicial.

22 THE COURT: I do think it's prejudicial. I
23 don't think it's particularly clear what exactly he's
24 liking about it. And so I do think it's more prejudicial
25 than probative. He didn't write it and he's liking a

1 comment that responds to the first tweet that lists four
2 people who were killed by police and not -- and the
3 jury -- I think, and all four, at least some of them,
4 there was -- the jury didn't return a -- Grand Jury didn't
5 return an indictment.

6 MS. KERKHOFF: Correct.

7 THE COURT: So that the people weren't
8 prosecuted.

9 MS. KERKHOFF: Right.

10 THE COURT: So...

11 MS. KERKHOFF: And, again, I'm not objecting to
12 the inquiry that he's making more directly about Detective
13 Pemberton and Black Lives Matter, but I think this is just
14 too far.

15 THE COURT: I think that one is too prejudicial.
16 More prejudicial than probative.

17 Now, as for the first one, "Wonder if MoCo kids
18 ditching school today to protest would be reprimanded.
19 Shouldn't the precious snowflakes be taught actions have
20 consequences?"

21 MS. KERKHOFF: This is a re-tweet. I just don't
22 understand the relevance on November 14th. It's not tied
23 to a specific issue. It's --

24 MR. JACOBSON: Well, I can ask questions that
25 may establish the issue because my understanding is that

1 around that time people were protesting the election of
2 Donald Trump, and he -- and Detective Pemberton is
3 re-tweeting this statement about MoCo kids being punished
4 for protesting. So it's directly relevant to this case
5 where we're dealing with the punishment to protesters and
6 his potential bias against protesters.

7 MR. RIST: Your Honor, I think it's akin to the
8 T-shirt that Officer Chatman brought to court. It's,
9 again, the idea of having to teach young people a lesson.
10 That's what this is. The fact that he re-tweeted it is
11 showing that he approves of it. He's spreading --

12 THE COURT: What are you doing up here, Mr.
13 Rist?

14 MR. JACOBSON: For the record, I like my
15 argument better.

16 MR. RIST: I'm sorry.

17 MS. KERKHOFF: So did I.

18 THE COURT: I'm going to allow it. And I say
19 that because I was about to allow it.

20 MR. RIST: Okay.

21 THE COURT: So that one will be allowed.

22 MR. JACOBSON: Thank you.

23 MS. KERKHOFF: Thank you, Your Honor.

24 THE COURT: Let the record reflect I was -- that
25 was with a joking.

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(Open court.)

THE COURT: All right, let's get the jury in here.

In the meantime, I'm going to read the letter that I'm going to give to the juror.

MR. RIST: Your Honor.

THE COURT: And I have the instruction. When should -- when do you want me to give it? Should I go --

MR. RIST: Your Honor, I am of the thought that perhaps we ought to --

THE COURT: At the end?

MR. RIST: At the end. Because, right now, it would break things up. Could we just read the jury instruction at the end of the day today?

THE COURT: Sure.

MS. KERKHOFF: Okay.

THE COURT: That's fine.

MR. RIST: All right, thank you.

(Pause.)

(Jury is present at 3:57 p.m.)

THE COURT: All right, good afternoon, ladies and gentlemen.

Counsel, parties, can all have a seat.

Detective Pemberton, you can resume the stand. Remind you that you're still under oath.

1 THE WITNESS: Yes, Your Honor.

2 And, Mr. Jacobson, whenever you're ready.

3 MR. JACOBSON: Thank you, Judge.

4 BY MR. JACOBSON:

5 Q. So, Detective, when we broke, we were just
6 starting to discuss your activity on Twitter; right?

7 A. Yes, sir.

8 Q. Okay. And just -- I think I asked this, but I'm
9 honestly not sure.

10 When your Twitter account was public, it was
11 available, anyone who had a Twitter account could also see
12 what you were tweeting and what you were liking, what you
13 were re-tweeting; is that how it works?

14 A. I mean, I think that's the condition it's in
15 right now.

16 Q. Okay. And for a time, though, it was in private
17 mode?

18 A. Just for a brief time in November, yes.

19 Q. Okay. And, while it was in private mode, people
20 couldn't see what you were tweeting, liking, et cetera?

21 A. Unless they had already been following my
22 account.

23 Q. Oh. And, in that case, they could have seen
24 those things?

25 A. I believe so.

1 Q. Okay.

2 A. Yes.

3 Q. Okay. So let me ask you about a few of your
4 tweets.

5 Am I correct that on January 20th, you tweeted
6 the following:

7 "Incredibly inspiring," it says, "about," I
8 think it's, "amount of restraint being employed by
9 officers today. Ironical it's the same officers that get
10 accused of being violent."

11 A. Yes, I tweeted that.

12 Q. You tweeted that?

13 A. Yes, sir.

14 Q. Okay.

15 MR. JACOBSON: So, if we could, I would move
16 that tweet into evidence, Your Honor, having been
17 confirmed by the detective, and I'd ask that it be
18 published to the jury as Basillas Exhibit 213.

19 THE COURT: Any objection?

20 MS. KERKHOFF: No objection.

21 THE COURT: It will be received.

22 (Basillas Exhibit Number
23 213 admitted into evidence.)

24 Q. Now, Detective, since this tweet, to be fair,
25 since this tweet on January 20th, you've watched, as we've

1 heard, lots and lots of videotape regarding the events of
2 January 20th; right?

3 A. Yes.

4 Q. Is it still your belief that the D.C. police
5 showed incredibly inspiring amounts of restraint on that
6 day?

7 A. Yes.

8 Q. It is?

9 A. Yes.

10 Q. Okay. So let me just ask you about a few
11 exhibits then, Your Honor -- pardon me, Detective. Just
12 gave you a big promotion there. Congratulations.

13 A. Not sure if I'm ready.

14 MR. JACOBSON: So let me ask Will to pull up
15 Exhibit 154I from 9:49 to 10:10.

16 (Playing video recording.)

17 Q. So, Detective, do you believe that officer who
18 said, "You stay right fucking there, bitch," was showing
19 an incredible amount of restraint?

20 MS. KERKHOFF: Objection as to his opinion.

21 THE COURT: Sustained.

22 Q. Okay. Let me --

23 MR. JACOBSON: Will, can you pull up Exhibit
24 154K?

25 MS. KERKHOFF: Objection. If --

1 THE COURT: Do we need to talk up here?

2 MS. KERKHOFF: Yeah.

3 THE COURT: Okay. Thank you.

4 (Bench conference.)

5 MS. KERKHOFF: So I have a couple of objections,
6 which it just sounds like we're going to play clips and
7 ask his opinion about the clips, and I'm a little unclear
8 as to how his lay opinion on those points as to other
9 officers is relevant when the videos will speak for
10 themselves.

11 The second point I'm raising is that I do think
12 now this has opened the door. He was asked overall on
13 January 20th. I believe his response fairly represents
14 the totality of events, which he's testified before, which
15 include a subsequent riot which officers were injured. I
16 don't think we can separate that and say government's not
17 allowed to talk about that, but we're allowed to show
18 selective clips from just the morning. This is my
19 concern.

20 MR. JACOBSON: If these defendants were charged
21 with that later event, then it might be relevant, but if
22 they're not charged with it, it's insanely prejudicial to
23 introduce evidence about it.

24 I'm introducing --

25 MS. KERKHOFF: But that wasn't his question.

1 MR. JACOBSON: If I can finish, please.

2 I'm seeking to introduce these videos or get his
3 testimony about these videos to show his bias against the
4 protesters to show that, even though the police are acting
5 violently towards the protesters, he finds it incredibly
6 inspiring, their restraint.

7 MS. KERKHOFF: And the government --

8 MR. JACOBSON: And, Your Honor, if I can, the
9 amount of constriction on our ability to cross-examine
10 Detective Pemberton right now for the past hour is quite
11 alarming to me, I feel I need to state for the record. I
12 feel that every one of the lines of questioning that I've
13 tried to pursue and have been blocked from pursuing has
14 been completely fair to show Officer -- excuse me --
15 Detective Pemberton's bias, and I feel like we're really
16 being constrained and our hands are being cuffed behind
17 our back here.

18 THE COURT: Okay.

19 MS. KERKHOFF: So the tweet itself that he
20 referenced, the government's concern -- and I believe that
21 there's evidence in the transcript to have put him on
22 notice of this -- the timing of that tweet corresponded
23 with officers being injured in the area of 12th and K
24 Streets. And, prior to working on this, that is -- so I
25 do think that, by referencing that tweet -- and we flagged

1 this issue previously so it lays in the transcripts -- we
2 now are in the totality of conduct that day.

3 The government's concern is simply they're
4 simply showing him video and saying so you agree with
5 that, you agree with that, you agree with that. His
6 response was overall, and I'm just trying to understand
7 what it is we're doing here and how his opinion has become
8 relevant when the videos speak for themselves.

9 THE COURT: So, well, I also have to -- since I
10 feel like I was under attack just now with my rulings.

11 MR. JACOBSON: I'm just making a record, Your
12 Honor.

13 THE COURT: I understand that, and I didn't take
14 it personally.

15 MR. JACOBSON: Thank you.

16 THE COURT: So, I mean, it's your record.

17 With my rulings, I feel like some of the cross
18 has been -- I think that some of the lines of cross are
19 completely appropriate, but the manner in which you're
20 going about trying to do it is not. So I'm -- I think
21 it's fair. The tweet says that you believe -- this last
22 tweet is that, basically, the police showed restraint.
23 How many clips are you going to --

24 MR. JACOBSON: Four.

25 THE COURT: -- do today? I mean, we're not

1 asking him to get specific. Well, that's why I allowed
2 it, but I do think the government would be allowed to ask
3 more questions to be able to get as to what he actually he
4 meant by restraint and what he meant by why he said
5 whatever it is.

6 So I'll allow you to go through each of the
7 clips, but understanding that that is opening the door for
8 the government to ask him why he was talking about the
9 amount of restraint if you're going to look at clip by
10 clip.

11 MR. JACOBSON: Okay, thank you.

12 (Open court.)

13 THE COURT: Objection is overruled.

14 MR. JACOBSON: Pardon me.

15 BY MR. JACOBSON:

16 Q. Let me focus my questioning a little more.

17 When you tweeted out, "Incredibly inspiring
18 amount of restraint being employed by officers today,"
19 were you referring to the conduct of the officers during
20 the protest in question in this case or were you referring
21 more broadly to conduct of the officers during the day
22 with regard to other events or both?

23 A. It's the latter. And if you'd like me to
24 specify, I think that was sent out in the afternoon. I
25 was watching a news report. It was well before I had been

1 contacted by my lieutenant and I was watching the events
2 unfold on local news and I thought, from what I was
3 seeing, in that limited capacity, I thought that the
4 officers were doing an incredible job.

5 Q. Yeah.

6 A. And that's why I sent that out.

7 Q. And I appreciate that clarification. And what I
8 was trying to ask you about is whether, after having
9 reviewed the videos in this case, from the events from
10 Logan Circle back to 12th and L from 10 to 11 a.m. on
11 January 20, 2017, is it your view now that the officers
12 showed an incredible amount of restraint with regard to
13 those activities?

14 A. Well, considering that there was hundreds of
15 thousands of dollars in damage and a large group of people
16 wielding weapons marching through the street and over 300
17 people or 250 people, as you've said it, charged over a
18 line of police officers and their motorcycles and their
19 bicycles and one person reported an injury, and that was a
20 sprained ankle, I think that's remarkable.

21 Q. Okay. So after watching all of the -- let me
22 just go back to my question.

23 After watching all of the videos that you have
24 in this case, you feel that the way the MPD reacted to the
25 protest at issue in this trial, they showed an incredible

1 amount of restraint? Your answer is yes, and I understand
2 that, but I just want to make clear.

3 A. Well, it's a complex question. I don't know
4 that it's a yes or no answer. I mean, from a general
5 sense, yes, as I described previously in my testimony.

6 Any situation where there's force involved, can
7 you go back and look and see if people could have made
8 better decisions? Certainly. But, from a general
9 perspective, I think that, given the circumstances
10 involved, given the tumultuousness of it, I think it was a
11 remarkable job, yes.

12 Q. Okay. And fair to say that -- I take your
13 answer to mean that, in some instances, and I don't need
14 to go through details, I'm not going to ask you about
15 specific instances, but in some instances in the videos
16 that you watched with regard to this particular protest,
17 you think maybe officers could have handled things better?

18 A. I think, looking back at this, I think maybe
19 there's some decisions that could have been made better,
20 yes.

21 Q. Okay. Officer -- pardon me, Detective. Now I'm
22 giving you a demotion. I'm giving you a promotion.

23 A. That's all right.

24 Q. I have the power to do neither. I apologize.

25 A. I can survive with officer.

1 Q. We saw -- on the videos that we and the jury
2 have watched for the past two weeks, we saw lots pepper
3 spray being used by the police that day; right?

4 A. I think that's fair.

5 Q. Okay. It wasn't intended to be a controversial
6 question.

7 A. Yeah.

8 Q. Okay.

9 A. I think I can agree with you.

10 Q. Is it fair to say that, in your experience as a
11 detective at the MPD, first as an officer and then as a
12 detective, that people sometimes cover their faces to
13 avoid pepper spray?

14 A. Yes.

15 Q. Detective, back to Twitter, you sometimes push
16 back hard on people -- on Twitter on people who criticize
17 the police; is that right?

18 A. Yes.

19 Q. Okay. And do you remember tweeting that -- in
20 response to a tweet about law enforcement not engaging in
21 immigration enforcement, do you remember responding, "I
22 kind of feel like criminals should fear the police. Just
23 me, though."

24 A. I don't remember specifically, but that sounds
25 like something I might have said.

1 Q. It sounds like something you'd say?

2 A. Sure.

3 Q. Okay.

4 MR. JACOBSON: So let me ask Will to show just
5 the Detective Pemberton what's been marked as Basillas
6 214.

7 Q. And after you've had a chance to review that,
8 Detective Pemberton, can you tell me if that's a fair and
9 accurate representation of something that you tweeted?

10 A. Yes, it is.

11 Q. Okay, thank you.

12 MR. JACOBSON: I'd ask that it be moved into
13 evidence as Basillas 214.

14 MS. KERKHOFF: No objection.

15 THE COURT: It will be --

16 (Basillas Exhibit Number
17 214 admitted into evidence.)

18 MS. KERKHOFF: Just a clarification on date,
19 please.

20 MR. JACOBSON: And published to the jury,
21 please, Will. Thank you.

22 BY MR. JACOBSON:

23 Q. Now, Detective, you've also issued some tweets
24 criticizing the Black Lives Matter movement; correct?

25 A. On occasion, yes.

1 Q. In fact, you remember tweeting, "You know what I
2 haven't heard in a while? 'Police shootings of unarmed
3 black youth.' Did they run out of funding for their false
4 narrative?"

5 A. Yes.

6 Q. Did you tweet that?

7 A. Yes, sir.

8 Q. Okay.

9 MR. JACOBSON: So let me ask that Basillas
10 Exhibit 215 be put into evidence and published to the jury
11 barring any objection.

12 MS. KERKHOFF: No objection.

13 THE COURT: It will be received.

14 (Basillas Exhibit Number
15 215 admitted into evidence.)

16 THE COURT: I'm sorry, it was Basillas?

17 MR. JACOBSON: 215, ma'am.

18 THE COURT: Thank you. Didn't you just do 215?

19 MR. JACOBSON: I thought I did 214.

20 MS. DOWNS: I have 14.

21 THE COURT: Okay, I apologize. I got it wrong.

22 BY MR. JACOBSON:

23 Q. And, Detective, with regard to Black Lives
24 Matter, do you remember also tweeting, "I disagree with
25 Boston PPA on injunction to stop body-camera pilot

1 programs. BWCs have destroyed false narrative of BLM."

2 A. Oh, yeah.

3 Q. Do you remember tweeting that?

4 A. Yeah, that's true.

5 Q. Okay.

6 MR. JACOBSON: And so I'd ask that Basillas
7 Exhibit 216 be moved into evidence and published to the
8 jury.

9 MS. KERKHOFF: No objection.

10 THE COURT: It will be received.

11 (Basillas Exhibit Number
12 216 admitted into evidence.)

13 Q. And, Detective, in this tweet on Basillas 216,
14 BLM is Black Lives Matter; right?

15 A. Yes.

16 Q. And BWCs is body-worn cameras?

17 A. That's correct.

18 Q. Okay. Detective, now, sometimes, as we
19 established, rather than tweeting yourself, you like
20 tweets that are issued by other people; right?

21 A. Yes.

22 Q. Okay. And do you remember liking a tweet on
23 November 16th -- excuse me, on November 14, 2016 that
24 said, "Wonder if MoCo kids ditching school today to
25 protest will be reprimanded. Shouldn't the precious

1 snowflakes be taught actions have consequences." Do you
2 remember liking that tweet?

3 A. No, I don't remember that at all.

4 Q. No? Okay. Well, let me show you what's been
5 marked as Basillas Exhibit 217.

6 MR. JACOBSON: Just to Detective Pemberton,
7 please, Will, just for identification.

8 Q. Does that refresh your recollection at all or
9 no?

10 A. I mean, I follow this individual Brian Wilson,
11 but I don't remember this particular tweet.

12 Q. Okay, okay, that's fair.

13 Do you remember that Montgomery County students
14 and also D.C. students were protesting the election of
15 Donald Trump on November 14, 2016?

16 A. I think that sounds familiar.

17 Q. Okay. And do you remember thinking that they
18 should be punished for their protest?

19 A. I don't remember having -- rendering an opinion
20 on that. I'm just -- I don't recognize this. I don't
21 think I have an opinion about that.

22 Q. Okay. And you don't remember having that
23 opinion at the time?

24 A. No, I don't.

25 Q. Okay.

1 MR. JACOBSON: Okay, we'll put that one away,
2 Will.

3 Q. Okay. Lastly, Detective, do you remember
4 tweeting on July 8, 2017 -- pardon me.

5 Do you remember issuing a tweet on July 8, 2017
6 calling the ACLU out of touch clowns?

7 A. No.

8 Q. You don't remember that?

9 A. No.

10 Q. Okay. So let me show you what's been marked as
11 Basillas Exhibit 218?

12 MR. JACOBSON: Just to Detective Pemberton,
13 please, Will, for identification.

14 Q. Have you seen that detective?

15 A. Yes.

16 Q. Does that refresh your recollection as to
17 whether you tweeted that?

18 A. Yes, this is my tweet.

19 Q. Okay.

20 MR. JACOBSON: So I'd be asked that it moved
21 into evidence --

22 MS. KERKHOFF: No objection.

23 MR. JACOBSON: -- as Basillas 218 and published
24 to the jury.

25 MS. KERKHOFF: No objection.

1 THE COURT: It will be received.

2 (Basillas Exhibit Number
3 218 admitted into evidence.)

4 Q. Okay.

5 MR. JACOBSON: I've got no further questions.

6 Q. Thank you, Detective.

7 A. Thank you, sir.

8 THE COURT: Further cross?

9 CROSS-EXAMINATION ON BEHALF OF DEFENDANT FELICE

10 BY MR. RIST:

11 Q. Good afternoon, Detective Pemberton.

12 A. Good afternoon, Mr. Rist.

13 Q. Sir, you processed all the evidence that was
14 recovered from the corner of 12th and K?

15 A. No, I didn't.

16 Q. You didn't take pictures of all the evidence
17 that evening?

18 A. No, I wasn't there.

19 Q. I'm confused. Earlier, didn't -- weren't
20 pictures shown of various pieces of evidence and you
21 stated that you helped lay them out and take pictures that
22 evening?

23 A. Yes, I did.

24 Q. All right. So that's what I meant to say.

25 A. So that actually was not that evening, that was

1 at a later date that was taken.

2 Q. Later date, all right.

3 A. I don't think I testified that it was that
4 evening.

5 Q. Okay. Are you familiar with all the PD-81s --
6 what's a PD-81?

7 A. PD-81 is a property form. It's a form that we
8 use any time the police department comes into any
9 property, whether it's evidence or found property or
10 property that's abandoned or a vehicle that's stolen or
11 anything like that, any time we take any property into our
12 custody, we have to fill out a PD-81, which is a property
13 form.

14 Q. And that's used for all -- and every time
15 evidence is taken into police custody, a PD-81 form is
16 filled out; correct?

17 A. Yes, sir.

18 Q. No PD-81 was filled out for Mr. Felice in this
19 matter; correct?

20 A. No, I don't believe so.

21 Q. And no evidence was collected and stored by the
22 police in connection with Mr. Felice; correct?

23 A. That's also correct.

24 Q. Are you familiar with how many crowbars were
25 taken into evidence by the MPD as a result of incidents

1 that occurred at 12th and K?

2 A. I think it's just one. I'm not sure of those.

3 Q. You're not sure?

4 A. No.

5 Q. Okay. I don't have them here with me, but on
6 Tuesday, if I showed you two of them, would you be
7 surprised?

8 A. No, I would not be surprised if there was two.

9 Q. Okay. Thinking that there's just one, there's
10 nothing about that individual crowbar that stands out to
11 you?

12 A. I mean, I remember particularly a yellow
13 crowbar.

14 Q. Yellow crowbar?

15 A. Now that you're saying there's a second, I seem
16 to remember a second one, but it's vague to me. I'm not
17 sure.

18 Q. How many motorcycle helmets were taken into
19 evidence by the MPD that day?

20 A. None that I'm aware of.

21 Q. And, in your viewing of these thousands of hours
22 of video footage, how many motorcycle helmets did you see?

23 A. I want to say two, but there's one that seems
24 more like -- I don't know -- like a skiing helmet or
25 something. It was like a sort of a three-quarter helmet,

1 but it -- other than those two, no, I don't think I saw
2 any.

3 Q. Okay.

4 MR. RIST: Could we go to Government's 101? And
5 then let's go to 26:10 through 26:19.

6 Q. Okay, I want you to look when this is up on the
7 screen, Detective Pemberton. Do you see the two bicycles
8 right in the center of the screen?

9 A. Yes, sir, I do.

10 Q. Do you see just above the rear tire of the
11 closest of the bicycle, there's a gentleman wearing -- is
12 that that black, three-quarter helmet that you were
13 referring to?

14 A. No.

15 Q. Or is that something different?

16 A. That's actually a construction helmet that you
17 would see on a construction site.

18 Q. All right.

19 MR. RIST: So let's go to -- Court's indulgence
20 for just a moment.

21 (Pause.)

22 MR. RIST: I have no further questions.

23 Q. Thank you.

24 A. Thank you, sir.

25 THE COURT: Further cross?

1 MS. DOWNS: I'm going to impose on my counsel's
2 assistance. Actually, I hadn't asked you this before,
3 1540 at 12:40.

4 (Pause.)

5 CROSS-EXAMINATION ON BEHALF OF DEFENDANT WEBBER

6 BY MS. DOWNS:

7 Q. Good afternoon, Detective --

8 A. Good afternoon Ms. Downs.

9 Q. -- Pemberton.

10 Before I begin, let me ask you a couple of
11 questions about this last -- it is about 17 months now
12 since January 20, 2017?

13 A. I think about 16, 17, that sounds right.

14 Q. 16, 17. And, in this time, you have been
15 sitting over at the -- you have an office now at the U.S.
16 Attorney's; right? With video screens on it. A spot?

17 A. Yeah, I wouldn't call it an office.

18 Q. Okay. You have a corner?

19 A. Yes.

20 Q. A cubby?

21 A. Yes, that sounds more accurate, yes.

22 Q. A little five-foot square patch of territory?

23 A. Now you're getting there.

24 Q. Okay. And it has in it, I believe, I've heard
25 upwards maybe four, three or four video screens?

1 A. Yeah. At times, I'm working with four video
2 screens. One is actually sitting here now, but yes.

3 Q. Okay. One of them is here? Oh, this? The
4 laptop --

5 A. Yes.

6 Q. -- they're working off? Okay.

7 And, while you have been looking, you've started
8 out -- you had video cameras probably at the outset for
9 most of the police officers after January 20th or how long
10 afterwards did you get the -- what we call body-worn
11 cameras?

12 A. I had access to the body camera pretty quickly.

13 Q. Pretty quick.

14 And then you said you did searching on social
15 media; right?

16 A. Uh-huh. Yes, ma'am.

17 Q. So you just did general searches about the
18 inauguration and pulled up official news and unofficial
19 blogs; right?

20 A. That's correct.

21 Q. And Facebook posts?

22 A. Yeah, a whole myriad of things, yes.

23 Q. Okay. Now, when you did this, when you found a
24 video, would you print out the URL of that video or write
25 down the name of the contributor?

1 A. I normally downloaded that file from wherever I
2 was looking at it with the name of whatever the file it
3 was titled by whoever uploaded it.

4 Q. You downloaded it onto a hard drive?

5 A. Yes.

6 Q. Okay. And then so you just kept a hard drive
7 list there with the URL there?

8 A. I don't believe it had the URL. It just had the
9 name of the video.

10 Q. Okay. And to remember what you had just seen in
11 that video, you needed to write down, of course, what you
12 had seen? Like, if it's at the corner of -- say, if
13 it's -- it's at M and 13th, you would want to note you saw
14 something at M and 13th; right? So you had to note that
15 down; right?

16 A. No. I mean, in terms of downloading the
17 footage, I mean, that was one phase, was just trying to
18 find everything we could that captured anything related to
19 the event and just get it downloaded, get possession of
20 it.

21 Q. So --

22 A. So there wasn't really an analysis ongoing at
23 the same time.

24 Q. So after you've got a big bunch of videos in
25 that hard drive, you start going through it and you note

1 an incident of something being dragged into the street
2 somewhere and you want to go back and look at it again,
3 you have it written down, don't you, that URL and what
4 minute you saw that happen; correct?

5 A. Well, I can explain to you the process in which
6 I did that, but the answer is no.

7 Q. So you didn't write any of that down?

8 A. Yes, I did.

9 Q. You did write it down. Where did you write it?

10 A. So when I found sections of video that I thought
11 were probative or had something important to show, I
12 printed out screenshots of that image. And then, at the
13 bottom of that screenshot, I wrote down the name of the
14 video and the timestamp from which that screenshot came.
15 I then assembled those into folders for whatever I thought
16 was important.

17 Q. Okay. Now, you had a whole -- different kinds
18 of videos. I mentioned body-worn cameras; right?

19 A. Yes.

20 Q. There's also cameras from businesses all along,
21 both the Starbucks, the Bank of America, all those
22 different businesses. Did you yourself go out and see the
23 people at Starbucks and collect that video?

24 A. No.

25 Q. Did you have somebody else just bring it to you

1 and call them up and ask them to go get it or?

2 A. So, at the beginning stages of this
3 investigation, January, February, probably into March,
4 there were a number of detectives. I had over 10 or maybe
5 12 detectives just reviewing body-worn camera to try to
6 identify which sections were important. A lot of officers
7 had four or five, six hours of footage, most of which was
8 irrelevant. So we had to find the specific sections of
9 video that were important so we could go back and review
10 them.

11 I also had a team of detectives that were --
12 would go out and collect things, interview people, do
13 those kinds of things, and report back to me. Most of
14 what I was doing was sort of collating. I was more of a
15 clearinghouse of receiving that evidence.

16 Q. So when another officer would -- so you said,
17 say, one officer might have four or five hours of body
18 camera?

19 A. Yes.

20 Q. And you'd need to narrow it down to the time
21 period that was relevant for you?

22 A. That's correct.

23 Q. And a different detective or officer would do
24 that?

25 A. Yes.

1 Q. And then would he give it to you already
2 narrowed down or would he -- or would he just tell you
3 what sections were relevant?

4 A. So the body-worn camera gets uploaded to a
5 website called evidence.com, which is servers that house
6 all of our body-worn camera data. You can log on to that
7 website and call up whatever video you want to by officer,
8 by report number, by date and time.

9 Within that program, you can identify sections
10 of video that are important. You can also tag those
11 videos into markers and clips.

12 In addition to that, you can also put a footnote
13 on any video, whether the person's name with the location,
14 what have you, and all of those things then become
15 searchable at a later time. So it --

16 Q. So all the notes you took -- sorry to interrupt.
17 This is where I'm going.

18 You must have had some notes. This is 17
19 months, four video cameras. So you're saying maybe, if
20 you took notes, it would only be in reference to that
21 video on the hard drive, that's where you took notes?

22 A. If I had put markers on a video file?

23 Q. Right.

24 A. Yes.

25 Q. And you would note what's important in that

1 video for you or you think it is going to be important for
2 the government on that file; right?

3 A. Markers were placed on the videos as -- for
4 sections we thought were important.

5 Q. And the significance of the marker -- something
6 happened there. So let me back up.

7 You had 16 months of looking at videos, hundreds
8 of different videos from street cameras, commercial
9 businesses, body-worn cameras, and you personally didn't
10 write things down saying on this URL, on this YouTube, at
11 this point, at this minute, this happened; you never wrote
12 that down?

13 A. I just testified that I do, that I created
14 screenshots and I wrote at the bottom of that screenshot
15 what was -- what the name of the file was and the
16 timestamp. And, in the screenshot, you could see what was
17 happening. That was the process that we developed very
18 early on and that we have carried that out throughout
19 the -- as early -- as late as we can in this
20 investigation.

21 Q. I'm sorry. When you say wrote it down, you
22 physically printed out the screenshot and wrote on the
23 bottom?

24 A. That's right.

25 Q. And you notated on the bottom what was

1 significant and put it in a file?

2 A. The image itself was what was significant. What
3 was written on the bottom was the name of the video and
4 the timestamp at which that screenshot could be accessed.

5 Q. You say you put it in different files; right?
6 Did you file it according to various people arrested or
7 did you file it according to where you got the things?

8 A. I'm not sure.

9 Q. So when you say you took notes -- maybe we're
10 talking past each other because I -- you have not given us
11 any notes; right?

12 A. I have given you everything that I've written
13 down.

14 Q. Oh, okay. But that's all in evidence.com?

15 A. No, ma'am, I have given you what we called
16 composite scans, which is hundreds and hundreds and
17 hundreds of pages of PDFs of screenshots of which has my
18 handwriting on the bottom.

19 Q. Okay. And no other -- okay, let's go to a
20 different point.

21 Sometime after January 20th, you said you
22 discovered on YouTube some kind of planning video made by
23 a group called Veritas back on January 8th; right?

24 A. Yes, ma'am.

25 Q. You saw some little short clip?

1 A. I mean, it appeared to be some sort of expose
2 that they were promoting that they had uncovered
3 something.

4 Q. So you called up somebody and this person came
5 over to the police station and physically brought you
6 something?

7 A. So I called an individual that was associated
8 with Project Veritas who was located in New York. I told
9 him what I was looking for. He said he could provide it
10 to us.

11 He then had another individual call me, who was
12 apparently some sort of lawyer for the organization, who
13 lived in Alexandria, Virginia. I told him the address of
14 the station over the phone. He came to the station. He
15 delivered me a hard drive in person.

16 Q. So a lawyer who works at Veritas, for Project
17 Veritas -- and this person, did you physically meet him
18 hand -- when he handed you something?

19 A. Yes, he came to the lobby of the Seventh
20 District.

21 Q. And you said, at the time, he may have given you
22 his name, but you did not write that down either?

23 A. No, I didn't write it down.

24 Q. Now, when you got that -- oh, was it on a DVD, a
25 thumb drive, a hard drive?

1 A. It was a LaCie hard drive.

2 Q. A LaCie hard drive?

3 A. That was the brand, yeah.

4 Q. Okay. And when you got this, did you ask that
5 person who handed it to you who made this?

6 A. No, it didn't appear that individual had much
7 knowledge of it. He seemed like just a delivery guy who's
8 somebody that worked for the company that worked -- that
9 lived in the area and drove to the station to drop it off.

10 Q. Now, when you asked him -- okay.

11 And you don't know if that piece -- that LaCie
12 hard drive was mailed to him or if he downloaded something
13 to create it?

14 A. No, I don't know the answer to that.

15 Q. And the place that he got it from -- so you
16 didn't ask him, did you download this off your computer,
17 was it sent to you in a file?

18 A. No, I didn't ask him that.

19 Q. Well, every video, not just his, when you got
20 video, say, from Starbucks, did you write down the name of
21 the person at Starbucks who was the contact for that?

22 A. So, again, Ms. Downs, I didn't get the video of
23 the Starbucks. Other detectives went and did that.

24 Q. Okay. And when they handed it to you, they
25 didn't tell you who you could contact if it was corrupted

1 to get another one?

2 A. No, I mean, I guess they assumed that I would
3 come back to them. They were working in conjunction with
4 me.

5 Q. And you would have to remember in your head
6 which detective gave you the Starbucks to go back to the
7 right detective?

8 A. I mean, it wasn't that many detectives. It was
9 four or five.

10 Q. So you didn't write down names of anybody in the
11 businesses that gave you business videos; right?

12 A. I didn't collect it.

13 Q. So somebody else wrote these names down, you
14 believe?

15 A. I don't know. I don't know if they wrote down
16 or didn't write it down.

17 Q. Okay. Well, after watching these -- okay.

18 So you're saying all the -- when I'm looking for
19 handwritten notes on a spiral notebook apart from
20 what's on -- on screen prints, I'm not going to find that;
21 is that what you're saying?

22 A. So what I testified to before is that I would
23 write down just the time -- if I was watching a particular
24 video, I would write down the timestamp in which I found
25 something. 2:05, I would write that down. But I would

1 then print out a screenshot of that -- whatever was
2 happening at that time and I would go to the printer, get
3 it, and write all that information down at the bottom and
4 copy it over and transpose it to that document.

5 Q. Okay. So let me ask you: You've watched all
6 these hours and hours of video. If you look at an area
7 from a video that the government has produced -- I'm
8 looking at Government's Exhibit 1540, I think I said at 17
9 minutes.

10 (Pause.)

11 MS. DOWNS: Court's indulgence. Let me look to
12 make sure I'm at the right minute.

13 (Pause.)

14 BY MS. DOWNS:

15 Q. If you look at a screenshot, can you kind of
16 tell in the neighborhood where it is?

17 A. I can try.

18 MS. DOWNS: Let me inquire first. Government
19 1540, letter O, is not in evidence; right?

20 MS. KERKHOFF: Correct, it's not.

21 MS. DOWNS: Well, let -- can we have just the
22 detective identify it and see if he recognizes it?

23 (Pause.)

24 Q. Looking at --

25 MS. DOWNS: And how many minutes in are we,

1 Will? 12 minutes in.

2 Q. Do you recognize the intersection? Can you
3 recognize just from a screenshot?

4 A. Yes.

5 Q. What intersection is that?

6 A. Well, the intersection of 14th Street and L
7 would be directly behind this. This is looking eastbound
8 down L Street in the 1300 block.

9 Q. Okay. So it's in the 1300 block heading toward
10 12th Street?

11 A. Heading towards 13th. 1300 block towards 13th.

12 Q. Oh, okay.

13 A. Facing east.

14 Q. Okay. And have you -- do you know or have you
15 reviewed the video cameras for Police Officer Gamliel?

16 A. Yes.

17 Q. Okay. If you watched a minute of this, would
18 you be able to tell us if that's what it is?

19 A. I can tell you right now that's Officer
20 Gamliel's camera.

21 Q. Okay.

22 MS. DOWNS: Just silently for a few seconds if
23 you could play it. Pardon? Just for the detective.

24 (Playing video recording.)

25 MS. DOWNS: Okay. Pause.

1 Q. And is that then when -- toward the end when
2 Officer Gamliel is heading from -- is it from 14th Street
3 in the direction of 13th and then after that, presumably,
4 12th?

5 A. That's correct.

6 Q. So this is in the final two blocks?

7 A. Yes.

8 Q. Okay. Now, in that time period, before I -- we
9 go to it, this is in the last couple of blocks of the --
10 the whole route, as you've come to understand it; is that
11 right?

12 A. Say that again?

13 Q. This is the final two blocks before some
14 individuals are corralled at the intersection of 12th and
15 L; right?

16 A. Yes, ma'am, that's correct.

17 Q. So this is in the last five or ten minutes?

18 A. Yeah, that's correct.

19 Q. Before everybody's corralled?

20 A. Probably five minutes, that's about right.

21 Q. Last five minutes? All right.

22 And, in that time period, you watched many
23 videos. In that last two blocks, aren't the police moving
24 quite quickly and a larger group behind the protesters and
25 moving them in the direction of 12th and L?

1 A. Yeah, I think that's the point in which enough
2 officers were finally at that location to sort of corral
3 the group. Yeah, I think that's fair.

4 Q. So, in this video from Officer Gamliel, we'll
5 see officers moving them in the direction of 12th and L?

6 A. Yes.

7 Q. Okay.

8 MS. DOWNS: If we could -- I would move 1540
9 into evidence.

10 MS. KERKHOFF: No objection.

11 THE COURT: It will be received.

12 MS. DOWNS: If we could go ahead and publish it
13 and play about the next few minutes.

14 MS. KERKHOFF: This will be defense what?

15 MS. DOWNS: For Mr. Webber, it's number 2.

16 THE COURT: So this is defense what, Defense
17 Webber 2.

18 MS. DOWNS: Defense Webber number 2.

19 (Webber Exhibit Number
20 2 admitted into evidence.)

21 (Playing video recording.)

22 MS. DOWNS: Pause it a second.

23 Q. Did Officer Gamliel have something in his hands?

24 A. Looks like he's carrying a Mark-46.

25 Q. And what is that?

1 A. That's pepper spray canister, large size.

2 Q. Okay, and the large size.

3 And are you experienced or have you handled or
4 been trained in it?

5 A. No, I've never held one.

6 Q. Okay. But you've seen them handled; right?

7 A. Sure, yes.

8 Q. And they do shoot forward a fair distance;
9 right?

10 A. Yes.

11 Q. About from me to you or a little further?

12 A. I think that's fair, from me to you.

13 Q. Or a little further?

14 A. I mean, I think that's a good approximation.
15 That's the best that I can do.

16 Q. Okay.

17 MS. DOWNS: Bump it forward to about 51.

18 Do you have measurements in this courtroom? We
19 do not.

20 THE COURT: I don't. But, for the record, Ms.
21 Downs is stand -- I'm sorry, we're speaking over each
22 other. I apologize.

23 For the record, Ms. Downs is actually standing
24 at the podium here in courtroom 203.

25 So you can make whatever other records you want

1 to make.

2 BY MS. DOWNS:

3 Q. Is that about 20 feet?

4 A. Yes.

5 Q. 30.

6 A. I'd say 20 feet. That sounds right.

7 (Pause.)

8 MS. DOWNS: Actually, before you hit play.

9 Q. Detective, you've watched a lot of these. That
10 number up in the right-hand corner, that 15:49 or if we
11 put it up to 15:50, do you know what time that would have
12 been actually that morning on January -- what time would
13 that have been?

14 A. 10:49 a.m.

15 Q. Okay.

16 MS. DOWNS: Hit play there.

17 (Playing video recording.)

18 Q. Do you recognize where that alley is that he
19 just went by?

20 A. Yes.

21 Q. What block is that on?

22 A. So the street that we're looking at in this
23 paused frame right here that's running perpendicular,
24 that's L Street. That's the 1200 block of L Street. The
25 alley that would be sort of behind Officer Gamliel in this

1 shot here at 15:50 is the north/south alley that runs in
2 between 12th and 13th behind the elementary school that's
3 right there.

4 Q. So, at this point, we've started out, we were
5 just past 14th?

6 A. That's correct.

7 Q. When we first started. And now we're past 13th?

8 A. Yes, ma'am.

9 Q. Okay.

10 MS. DOWNS: Go ahead and hit play.

11 (Playing video recording.)

12 Q. I'm sorry, do you understand what he's saying?
13 Is he saying move out of the way?

14 A. I think he's saying move out the way, yeah.

15 Q. Okay.

16 MS. DOWNS: Go ahead and play.

17 (Playing video recording.)

18 MS. DOWNS: Pause it again.

19 Q. You've watched a lot of these. To your
20 understanding, on the other side of where all those
21 protesters are is where the line was formed by first by
22 the police officers and others; is that right?

23 A. Yes.

24 Q. Okay.

25 MS. DOWNS: Go ahead and hit play.

1 (Playing video recording.)

2 MS. DOWNS: Pause.

3 Q. I'm sorry, what did he say there?

4 A. That last thing he said?

5 Q. Yes.

6 A. I think he said, "I'm out."

7 Q. Oh, okay.

8 So, Officer Gamliel is -- you've watched a lot
9 of these. About how many officers -- he's wearing this --
10 the black with the helmet?

11 A. Yeah, just like this individual -- person in the
12 picture, yes.

13 Q. Okay. And there was a line of those officers
14 and they were moving from 14th past 13th down to -- toward
15 12th herding everybody in that direction; correct?

16 A. Well, some of the officers were dressed like the
17 ones in the back here with the --

18 Q. With the yellow?

19 A. -- yellow and black uniform jacket, yes.

20 Q. And do you know how many of the officers -- what
21 did you call that canister?

22 A. It's -- we refer to it as a Mark-46.

23 Q. And, actually, you see another officer with
24 another canister. What is that he has in his hand right
25 there on the screen?

1 A. I don't know the model number, but it is pepper
2 spray.

3 Q. And it's a smaller amount?

4 A. Yes.

5 Q. Okay. And when the --

6 MS. DOWNS: Go ahead and play just a few more
7 seconds.

8 (Playing video recording.)

9 MS. DOWNS: Pause.

10 Q. Now, in the course of this, the officers that
11 are wearing the helmet, does that provide them some
12 protection from the smoke in the air or just physical
13 protection?

14 A. What do you mean by smoke?

15 Q. Well, if there are any sting balls?

16 A. I mean, the --

17 Q. Well, does it provide any -- some protection
18 from the smoke in the air from sting balls?

19 A. I mean, I don't know that they really generate
20 that much smoke. I mean, that -- there's a puff of smoke
21 that comes out, but it dissipates quickly.

22 Q. What about from the spray in the air, does it --
23 it does provide some protection from the spray; right?

24 A. Probably some, yes.

25 Q. Okay.

1 MS. DOWNS: That's all on that. I'm going to go
2 to another exhibit.

3 THE COURT: Okay. Well, we're going to break
4 for the day.

5 MS. DOWNS: Another handful of exhibits.

6 THE COURT: So, actually, so I'm going to excuse
7 you, Detective Pemberton to be in the witness room at
8 10:25 on Tuesday.

9 THE WITNESS: Yes, ma'am.

10 THE COURT: Tuesday. Have a good weekend.

11 THE WITNESS: Thank you, Your Honor.

12 (Witness excused at 4:43 p.m.)

13 THE COURT: So, ladies and gentlemen, I have a
14 few things for you. I'm just going to wait for the
15 witness to walk out.

16 So, ladies and gentlemen, you've seen some
17 photographs. So I've admitted into evidence some arrest
18 photographs of the defendants, of each defendant, and that
19 was shown to the witnesses and admitted as evidence in
20 this case.

21 As I'm sure you're aware, arrest is not the same
22 thing as a conviction for a crime. Indeed, charges may be
23 dropped against arrested persons even before they are
24 brought into court, therefore, simply because the police
25 have a person's picture does not mean that he or she has

1 ever been convicted of a crime.

2 Now, the photographs were admitted into evidence
3 because -- I'm sorry, because viewing the actual
4 photographs shown to the witnesses may assist you in
5 determining the accuracy of any identification and for no
6 other reason. You may not consider the defendant's prior
7 arrests or arrests in this case as any evidence of his
8 guilt as to this or any other crime.

9 Furthermore, you must not speculate in any way
10 as to why he might have been arrested and what, if
11 anything, happened to the charge beyond that.

12 Now, the other thing that I want to tell you,
13 ladies and gentlemen, is that we are on schedule, the same
14 schedule that I gave you at the time of jury selection.
15 Once this case is completed and goes to you, we won't be
16 sitting on Fridays. So if -- we will deliberate on
17 Fridays so that we can maximize the amount of time that we
18 have. So if we're still in trial, you'll be excused on a
19 Friday. If we're not, if we've completed all of the
20 evidence, we will be sitting.

21 So, for the next Friday, which is June the 1st,
22 keep in your mind that you may actually, if we've gotten
23 the case to you, you may be required to be here. So just
24 for your scheduling purposes.

25 I'm going to see you on Tuesday morning at 10:30

1 in the jury room. Have a safe and good holiday weekend,
2 and we will see you on Tuesday.

3 (Pause.)

4 (Jury not present at 4:47 p.m.)

5 THE COURT: Okay. Quickly, a few housekeeping
6 matters. A few housekeeping matters. Everybody can have
7 a seat.

8 Letter for the juror in seat number 15. I asked
9 Mr. Morris to have her stand by for a moment.

10 So I wrote:

11 Dear Juror 272. I received your request to
12 delay the trial to be able to accommodate your trip.
13 Unfortunately, you did not -- you did not inform us of
14 this conflict during jury selection so the parties made
15 decisions based on your availability.

16 I cannot delay the trial to accommodate your
17 schedule. I do understand that this is an important trip
18 for you so I will give you the chance -- I will give you
19 the choice.

20 You can either, one, remain on the jury and
21 potentially miss your trip. Or, two, take your trip and
22 you will be excused from your continued jury service.

23 You can take the weekend to think about it.
24 Please contact my chambers, in parentheses, the number, by
25 Monday, May 28th, at 6 p.m. if you will not be here on

1 Tuesday. You can just leave a message.

2 In the event that you do not return, I do thank
3 you for your time and attention in this case.

4 Any further -- just as to the wording of the
5 letter, note?

6 MS. KERKHOFF: No objection.

7 MR. SCHRAGER: No objection, Your Honor.

8 THE COURT: Okay. All right.

9 MS. DOWNS: No objection.

10 MR. RIST: Not to the wording, Your Honor.

11 THE COURT: All right. So I'm going to give
12 that to her. And she has the number to call if she's not
13 going to be back and she can think about it over the
14 weekend.

15 Next, Officer Chatman. He's going to be here on
16 Tuesday.

17 MS. KERKHOFF: Yes, Your Honor.

18 THE COURT: Okay.

19 MS. KERKHOFF: I will confirm that with him
20 again today. We, I think, contacted him Tuesday or
21 Wednesday, yes.

22 THE COURT: And what was the result of the
23 inquiry about the person from Project Veritas.

24 MS. KERKHOFF: The videographer?

25 THE COURT: Yes.

1 MS. KERKHOFF: Whatever it is?

2 So Detective Pemberton was waiting to get a
3 response back. I had raised with him before the Court had
4 asked, because I had raised with him the possibility of
5 him having to make himself available, and he, at that
6 point, stated I need to talk to someone first and I will
7 call you back this afternoon. Unfortunately, Detective
8 Pemberton has been testifying here so I don't have an
9 answer.

10 We have a number for him. He has been
11 responsive when Detective Pemberton has called him. I
12 mean, in the two times that he's done that. So what the
13 government would note is that we are going to continue to
14 take steps to make this individual available.

15 What the government's position on this is, and
16 I'll let counsel and the Court think about it, is that we
17 do believe he should be made available for purposes of, as
18 Judge Morin said, kind of the investigative inquiry about
19 the basis. That -- I don't think this is a Rule 15
20 deposition.

21 THE COURT: Oh.

22 MS. KERKHOFF: Right. But the government's
23 concern is, given the level of emotion and accusations, is
24 that I think there has to be some control regarding the
25 inquiry and I think it will be appropriate for the Court

1 to effectively -- I don't want to say supervise, but be
2 present for the inquiry so that if the scope became
3 inappropriate. I don't think that's my place, but I'm not
4 certain that it's fair to a witness to enter an
5 environment that is incredibly charged. There have been a
6 number of -- there's been a lot of vitreal. There's also
7 been a lot of -- and counsel's referenced it and we've
8 referenced it before -- conduct in this case on multiple
9 sides regarding targeting individuals for harassment.

10 What I'm trying to come up with is a means by
11 which counsel can have the investigative inquiry. I mean,
12 normally, what I offer in this situation is to say witness
13 can have a choice. A typical case, I do. You have a
14 choice. Do you want me to give him your name and number
15 and contact you? Would you like to make yourself
16 available at our office and they can come talk to you?

17 I think that my concern about that is how
18 that -- A, I have real safety and security concerns for
19 how information could be misused. I'm not talking about
20 by counsel. But, also, in terms of the scope and
21 parameters. As we've seen today, the argument has now
22 said we're going to go from asking about this issue to now
23 discussing a whole host of issues.

24 So I am asking that the Court direct some form
25 of supervision of this -- what I'm calling discovery

1 process. I don't think it's a judicial proceeding, but I
2 think there have to be a neutral -- I don't think counsel
3 wants me sitting in the room.

4 THE COURT: Nor do I think that would be
5 appropriate.

6 MS. KERKHOFF: Right.

7 THE COURT: I'm not quite sure how appropriate
8 it is for me to be sitting in the room for their --

9 MS. KERKHOFF: My concern is the scope of the
10 inquiry. Given how charged some of the accusations and
11 comments have been today, I think that's a difficult
12 situation. You're asking me to try to get a witness and
13 bring him here for a kind of investigative discovery type
14 thing, which is not obligated, but to try to secure,
15 effectively, the cooperation for that.

16 I'm trying to figure out how to do that in a way
17 that counsel has a fair opportunity, but that the witness
18 has a fair opportunity as well, and that's what I'm just
19 trying to figure out. And it is a bit unusual in this
20 situation, given the pattern of conduct and some of the
21 history in this case and given how counsels' arguments
22 have become incredibly accusatory and emotional. I'm
23 concerned of simply providing name, phone number, or
24 saying feel free to have at him in a room.

25 THE COURT: Okay.

1 MS. KERKHOFF: And I will say, I've never talked
2 to this person so I don't know. But they do seem to be
3 nervous about the level of interest there might be outside
4 of defense counsel.

5 THE COURT: Okay. It's after 4:50. I just
6 e-mailed for permission to continue until 5. So please
7 focus whatever you want to say.

8 MR. SCHRAGER: Very quickly.

9 Are we talking about the person known as Matt?

10 MS. DOWNS: Yes.

11 THE COURT: Yeah.

12 MR. SCHRAGER: Yes, okay.

13 MR. JACOBSON: Judge, there has been a fair bit
14 of emotion in the courtroom. Constitutional violations
15 tend to engender that. We will have the weekend to all
16 calm down. We are all adults. We are all seasoned
17 lawyers who have investigated hundreds, if not thousands,
18 of witnesses. I think we can handle it.

19 We are subject, if I'm not mistaken, to a
20 protective order with regard to personal identifying
21 information of witnesses in this case. I don't think any
22 of us intend to let personal identification information
23 with anyone, excluding our clients, who I believe are also
24 subject to that protective order. I'm happy to be
25 corrected if I'm mistaken.

1 And so if Ms. Kerkhoff could do her best to have
2 Matt present, I'll volunteer my office on Monday. That
3 would be wonderful. I have a sneaking suspicion this
4 person won't show up without his own lawyer, which might
5 be great, help facilitate things, and would probably solve
6 the concerns that the government has.

7 But, in any event, I think we can all assure the
8 Court that we will act professionally and ask him
9 questions that are relevant to this case.

10 THE COURT: I'm not going to -- I mean, I
11 just -- I don't think it's appropriate for me to be
12 overseeing any interview by the defense in the
13 investigatory stages. There's a protective order in this
14 case, as you said. I don't know if that extends to
15 sharing the information because, again, there's another
16 proceeding going on with Judge Morin that I am not privy
17 to nor am I getting involved in. So I don't know what the
18 protective order says.

19 I don't know how you are able -- how and if you
20 are able to share that information with counsel in those
21 cases, but I think both sides need to get together and
22 make sure you are all of the same mind as to what your
23 limitations are. So, on Tuesday, when we come, I look
24 forward to hearing how it's all been worked out.

25 10 o'clock on Monday. I'm starting my

1 calendar -- I got somebody to cover my calendar today.
2 Not on Monday.

3 MR. RIST: Tuesday.

4 THE COURT: Excuse me, on Tuesday.

5 So I will see you 10 o'clock on Monday. I'm
6 starting my calendar early. Thank you.

7 MR. JACOBSON: Thank you, Judge.

8 THE COURTROOM CLERK: Mr. Cadman, Mr. Basillas,
9 Mr. Webber, Mr. Felice, you're due back in courtroom 203
10 on May 29, 2018, 10 a.m. Bear in mind, for your failure
11 to appear, a bench warrant could issue for your arrest.

12 (Proceedings were concluded at 4:56 p.m.)

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CERTIFICATE OF REPORTER

I, Stacey E. Raikes, RMR, CRR, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Jury Trial in the case of the UNITED STATES OF AMERICA versus MICHAEL BASILLAS, SETH CADMAN, ANTHONY FELICE, and CASEY WEBBER, Criminal Action Numbers 2017-CF2-1334, 2017-CF2-1172, 2017-CF2-1163, and 2017-CF2-1156, in said court on the 24th day of May, 2018.

I further certify that the foregoing 234 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 25th day of June, 2018.

A handwritten signature in black ink that reads "Stacey E. Raikes". The signature is written in a cursive style with a horizontal line underneath the name.

Stacey E. Raikes, RMR, CRR
Official Court Reporter