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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 7, 2021

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OFFICIAL COURT REPORTERS
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 *(San Antonio, Texas; April 7, 2021, at 9:00 a.m., in open*
2 *court.)*

3 THE COURT: The Court calls 18 civil 555, and all
4 related cause numbers in the consolidated action, Holcombe and
5 others versus the United States.

6 Before I announce for appearances, this is a first
7 for us, that we'll be broadcasting by Zoom to certain parties
8 because of the COVID pandemic. All counsel, parties,
9 witnesses, participants, and members of the public are
10 reminded that this is a formal proceeding, and that they
11 should behave at all times, as if they were present in the
12 courtroom. The standing order of the San Antonio Division of
13 the Western District of Texas on remote access to court
14 proceedings remains in effect.

15 Photography, recording, or streaming of this
16 proceeding, by any means, is strictly prohibited. Though this
17 proceeding is open to the public, technological restraints
18 require that members of the general public request access from
19 the courtroom deputy to participate remotely. Those granted
20 approval to participate remotely, must not forward the
21 electronic link to nonparticipating colleagues or persons, and
22 must not post the link on any public forum.

23 As with all proceedings, violations of these
24 instructions are subject to contempt proceedings.

25 Accordingly, please exercise proper decorum at all times.

1 With that, let me get appearances, please.

2 On behalf of the plaintiffs' group, who is lead
3 counsel?

4 MR. ALSAFFAR: Good morning, Your Honor. Jamal
5 Alsaffar for the plaintiffs.

6 THE COURT: Thank you. Would you like to introduce
7 who is at table?

8 MR. ALSAFFAR: I would, Your Honor. Jason Webster.

9 THE COURT: Thank you.

10 And for the government?

11 MR. STERN: Good morning, Your Honor. Paul Stern on
12 behalf of the United States.

13 THE COURT: And who do you have at table?

14 MR. STERN: With me, Jacquelyn Christilles, Jocelyn
15 Krieger, and Clayton Diedrichs.

16 THE COURT: Let's take care of some housekeeping
17 matters first. Thank you to all the parties for working
18 collaboratively on trying to organization the exhibits in this
19 very complex case. I received this morning, I think it was
20 filed late last night, the third amended trial exhibit list,
21 and that's the document I'm working from; is that correct?

22 MR. ALSAFFAR: I believe -- I believe that's correct,
23 Your Honor. Yes, we were going through -- it's the third
24 amended trial exhibit list.

25 THE COURT: Thank you. And the government agrees.

1 So with that, there are no objections to the joint
2 exhibits. Joint Exhibits Nos. 1 through 803 listed on that
3 third amended exhibit list are admitted.

4 (Joint Exhibits 1 through 803 received into evidence.)

5 THE COURT: There is a slight confusion, and it's the
6 Court's fault, with the plaintiff's exhibit list and the
7 government exhibit list. The copy I've been printed out with
8 has no objections whatsoever. If I go to the CM/ECF, though,
9 there is, and so I'm not sure how they've got script. I'm
10 going to have to reprint from the third amended that you-all
11 just filed and figure out what is unobjected to. And so I'll
12 make those rulings at the next break.

13 All parties have agreed to waive opening statements,
14 and we will have closing arguments at the end of this
15 liability phase, and so with that, I recognize the plaintiff's
16 first witness.

17 MR. ALSAFFAR: Your Honor, before we begin, I have
18 a -- I do have a list of unobjected to plaintiff's exhibits
19 that I would -- I would like to offer and I can give you that
20 right now, and then we can see if we can go through and manage
21 the rest of them, if that's okay, Your Honor.

22 THE COURT: That's fine. Are what do you believe is
23 unobjected to?

24 MR. ALSAFFAR: We would like to offer at this time
25 Plaintiffs' Exhibits 751.

1 THE COURT: Go slow. Hold on.

2 MR. ALSAFFAR: Yes, Your Honor.

3 THE COURT: 751, okay.

4 MR. ALSAFFAR: Plaintiffs' Exhibit 752.

5 THE COURT: Go ahead.

6 MR. ALSAFFAR: Plaintiffs' Exhibit 793.

7 THE COURT: Go ahead.

8 MR. ALSAFFAR: Plaintiffs' Exhibit 796A. And
9 Plaintiffs' Exhibit 800, which is the summary of key
10 documents, all of which are joint exhibits.

11 THE COURT: Any objections to 751, 752, 793, 796A?

12 MR. ALSAFFAR: Your Honor, on 796, that's A through
13 AA.

14 THE COURT: Oh. The whole series?

15 MR. ALSAFFAR: Yes, Your Honor. Those are the Form
16 95s.

17 THE COURT: The 796 series and then 800.

18 Any objections from the government?

19 MR. STERN: Your Honor, with regards to 751, there's
20 no objection.

21 THE COURT: That's admitted.

22 (Plaintiffs' Exhibit 751 received into evidence.)

23 MR. STERN: With regards to 752, there is no
24 objection.

25 THE COURT: That's admitted.

1 (Plaintiffs' 752 received into evidence.)

2 THE COURT: 793 is the next.

3 MR. STERN: With regards to 793, we do object because
4 these were given to us at a late date, well after discovery
5 had closed. We're not -- we're not familiar with how the
6 plaintiffs got -- obtained these and why they produced them so
7 late in discovery. We're willing to have that conversation,
8 but given the late date that these were produced, we couldn't
9 just simply acquiesce to their request.

10 With regards to 796, these are the SF95 Forms, and at
11 this stage of the trial we don't believe that they are
12 appropriate for -- as exhibits in this liability phase. While
13 we don't contest certain SF95s were submitted by certain
14 plaintiffs, we haven't gone through and checked the bona fides
15 of the substance of each of these SF95s.

16 So to the extent that they are trying to identify
17 each plaintiff having standing in this case, that's not an
18 issue for liability phase. That would be an issue for if we
19 get to a damages portion in this trial. With regards to 800,
20 we don't object to their key documents, insofar as they are
21 joint exhibits. Now, United States also has its binder of key
22 documents ready for Your Honor as well.

23 THE COURT: 800 is admitted.

24 (Plaintiffs' Exhibit 800 received into evidence.)

25 THE COURT: Your response to 793?

1 MR. ALSAFFAR: Your Honor, just so you know what
2 these are. This is actually the Texas Rangers Attorney
3 General file from that file that the government produced, and
4 it contains pictures of the home of Devin Kelley and Danielle
5 Kelley. And we were -- when we were scrubbing the file, it's
6 a 70,000-document file, the Texas Rangers references those
7 photos but; did not produce them.

8 We asked the government, do y'all have them. Y'all
9 are supposed to produce them as part of the file. They didn't
10 have them. So the Attorney General and Texas Rangers produced
11 them to us a couple weeks ago. The same day, we produced them
12 to the government.

13 THE COURT: So the government has seen them prior to
14 today?

15 MR. ALSAFFAR: Oh, yes, Your Honor. We pointed them
16 out and we have shown it to them.

17 THE COURT: 793 is admitted.

18 (Plaintiffs' Exhibit 793 received into evidence.)

19 THE COURT: The 796 series?

20 MR. ALSAFFAR: Your Honor, as far as the -- as far as
21 the 796 series, the Form 95s are in part -- there are two
22 parts to them. Of course, there is the jurisdictional part
23 and then the damages part, in terms of plaintiffs' addendum
24 clause, so it is related to the liability phase because it
25 deals with jurisdictional issues and standing. And the

1 government concedes that they don't object to that, so it
2 makes sense to admit them in the liability phase as well.

3 THE COURT: So this is a bench trial and not to a
4 jury, so I know how to make the distinction between the two
5 phases. The 796 series, 796A through AA are admitted.

6 (Plaintiffs' Exhibits 796A through AA received into
7 evidence.)

8 THE COURT: Anything else by housekeeping?

9 MR. STERN: Your Honor?

10 THE COURT: Yes.

11 MR. STERN: Obviously, we don't object to that
12 ruling. We just want to make sure for the record that we
13 reserve any right to contest anything contained within the SF
14 95s in the damages phase, if necessary.

15 THE COURT: You have that right.

16 MR. STERN: Thank you, sir.

17 THE COURT: Anything else by way of housekeeping?

18 MR. ALSAFFAR: One more thing, Your Honor, we wanted
19 to -- to move for the admission of the deposition transcripts
20 that have already been filed and that were reviewed by the --
21 by the Court. Those transcripts are Plaintiffs' Exhibit 87
22 through Plaintiffs' Exhibit 109 and 109A, the plaintiffs'
23 side. We would like to offer those now, Your Honor.

24 THE COURT: Any objections to 87 through 109A?

25 MR. STERN: No objection, insofar as the government

1 also offers its deposition designations, those participating
2 in trial through deposition, as well as its objections and
3 counter-designations to plaintiffs' designations.

4 THE COURT: With that, 87 and going forward through
5 109A are admitted.

6 (Plaintiffs' Exhibits 87 through 109A received into
7 evidence.)

8 THE COURT: We can either do it at another break or
9 we can do it before the government's case in chief, I'll admit
10 your numbers when we get to them.

11 MR. STERN: Your Honor --

12 THE COURT: Anything else by housekeeping?

13 MR. ALSAFFAR: No, Your Honor. We do have the -- you
14 requested the key document binder. We do have one for the
15 Court.

16 THE COURT: Thank you. I'll take that.

17 MR. ALSAFFAR: Your Honor, we also have the witness
18 exhibit binder. Can I offer that to you as well?

19 THE COURT: So the witness binder will just go there
20 at the witness stand.

21 MR. STERN: Government's as well, Your Honor?

22 THE COURT: Yes. Thank you.

23 Anything else by way of housekeeping?

24 MR. ALSAFFAR: No, Your Honor.

25 THE COURT: Mr. Stern?

1 MR. STERN: Just a very minor point and that is a lot
2 of documents and material were produced subject to protective
3 orders and confidentiality agreements in this case, and as a
4 result they were not redacted before being produced. I think
5 it's fair to say that both parties have worked very diligently
6 this week in trying to redact as much PII as possible. I
7 think we came to a meeting of the minds regarding the vast
8 majority of it. However, I just ask for the Court's patience.
9 Heaven forbid, we actually publish an exhibit that shows some
10 PII, we will try to take it down immediately, redact on the
11 fly. We just want to make sure you are aware of that, Your
12 Honor.

13 THE COURT: Thank you. So, yeah. If any exhibits
14 get shown that have PII, we will just go ahead and do it now,
15 and we will allow the exhibit to be shown. But when it comes
16 time to actually entering it into the court record, then I'll
17 allow redactions to be made even post-trial.

18 MR. STERN: Thank you, sir.

19 THE COURT: Anything else?

20 MR. ALSAFFAR: There is one more matter and it
21 relates to the government's summary exhibit that they just
22 handed the Court. There are documents in there that are
23 objectionable. Most of them are joint exhibits, and we do not
24 object to those. There are about 13 or 14 that are
25 objectionable, and I don't know since the Court -- since the

DANIELLE SMITH - DIRECT

1 government handed them to you now whether we should deal with
2 those now or...

3 THE COURT: So yeah, those are just -- the binders
4 are just assistance to the Court. I'm only going to review
5 what's actually been admitted into -- into this proceeding.

6 MR. ALSAFFAR: We have no more matters, Your Honor.

7 THE COURT: And with that, then your first witness.

8 MR. WEBSTER: Your Honor, plaintiff calls as our
9 first witness Danielle Smith.

10 (DANIELLE SMITH, having been duly sworn, testified as
11 follows:)

12 MR. WEBSTER: May I proceed, Your Honor?

13 THE COURT: Yes.

14 DIRECT EXAMINATION

15 BY MR. WEBSTER:

16 Q. Good morning, Ms. Smith.

17 Could you please introduce yourself to the judge?

18 A. Hi. My name is Danielle Smith.

19 Q. Ms. Smith my name is Jason Webster and we have met on a
20 couple of different occasions prior to your testimony here
21 today; is that correct?

22 A. Correct.

23 Q. And those two times were the times that we met in the
24 public library to discuss -- kind of informally -- to discuss
25 what you knew about this case and various issues, but then

1 there was also the time we met during your deposition; is that
2 correct?

3 A. Correct.

4 Q. And you kind of understand how this -- I have not talked
5 to you since your deposition; is that true?

6 A. True.

7 Q. And would you agree with me today that I'm going to be
8 asking you some tough questions, that if you need to take a
9 break at any time, will you let me know, and I'll be happy to
10 do so?

11 A. Yes.

12 Q. Now, I want to start, Danielle -- is it okay if I call you
13 Danielle?

14 A. Yes.

15 Q. I want to start, Danielle, with -- to talk about, kind of,
16 your childhood, so that the Court gets a sense, the judge gets
17 a sense of kind of the person -- who you are, and what you've
18 been through; is that okay?

19 A. Okay.

20 Q. And it's going to be very general; okay. First off,
21 Danielle, when is your birthday and how old are you as you sit
22 here today?

23 A. My birthday is February 12 of '95, and I am 26 years old.

24 Q. And where -- Danielle, where were you born?

25 A. San Antonio.

1 Q. And can you tell -- you know, can you tell the judge a
2 little bit about your childhood when you were with your birth
3 parents what happened?

4 A. They physically abused me and burned me.

5 Q. I've seen notes that you were burned about 80 percent of
6 your body; is that true?

7 A. Correct.

8 Q. And as a result of that abuse, what happened?

9 A. I got taken away from them, and I ended up getting a
10 settlement when I was 18.

11 Q. Okay. And when you were taken away from them, I would
12 assume that was through Child Protective Services?

13 A. Correct.

14 Q. And where were you placed after that?

15 A. I was placed into CPS.

16 Q. And about approximately how old were you when you were
17 placed in Child Protective Services?

18 A. Three.

19 Q. So when you were three -- when were you three, were you
20 placed in some foster homes?

21 A. Yes.

22 Q. About how many foster homes did you go to prior to being
23 adopted?

24 A. I think it was one, but it could have been more. I just
25 don't remember how many.

DANIELLE SMITH - DIRECT

1 Q. You were pretty young at that point in time; right?

2 A. Yes.

3 Q. Now, when you were -- you were eventually adopted; is that
4 true?

5 A. Correct.

6 Q. Who -- can you tell the judge, who adopted you?

7 A. Michelle Shields, and at the time she was married to Kurt
8 Brassfield.

9 Q. About what approximate age were you adopted by them,
10 Danielle?

11 A. I would have been four.

12 Q. Four years old?

13 A. Yes.

14 Q. And how long did you live with Michelle Brassfield at the
15 time and Kurt Brassfield?

16 A. Before they got divorced?

17 Q. Yes, ma'am.

18 A. I guess it would have been around when I was 9 or 10 years
19 old.

20 Q. And during that time, you had another bad experience with
21 Kurt Brassfield; is that true?

22 A. Yes.

23 Q. And just real -- just briefly, Mr. Brassfield sexually
24 abused you; correct?

25 A. Yes.

1 Q. And this went on for a period of years; true?

2 A. Yes.

3 Q. And, in fact, Mr. Brassfield is -- because of -- partly
4 because of your testimony is actually in prison for that; is
5 that true?

6 A. Yes, he got 50 years.

7 Q. Now, during that time, I think you testified also that --
8 or during that time, was Mr. Brassfield and Michelle divorced;
9 is that true?

10 A. Yes, they got divorced around nine or ten.

11 Q. And did you -- and he married someone else later?

12 A. Yes.

13 Q. And who did he marry?

14 A. Erin Higgins.

15 Q. And do you consider both Erin Higgins and Michelle to be
16 your mothers?

17 A. Yes.

18 Q. Did you become very close to Erin during those years?

19 A. Yes.

20 Q. Are you still close to her today?

21 A. Yes.

22 Q. Are you still close to your adopted mother, Ms. Shields?

23 A. Yes.

24 Q. Now, you -- during the time that you were living with

25 Mr. Brassfield, did you ever tell anyone about the abuse you

1 were suffering?

2 A. It wasn't until I was older when they were getting a
3 divorce.

4 Q. And you came out and told them -- who all did you come out
5 to at that point in time and tell about the abuse?

6 A. I told Michelle and I told the school.

7 Q. And what was their reaction to when you told them that.
8 First off, let's split it up. What was Michelle's reaction
9 when she told you that -- when you told her that?

10 A. She took me down to talk with the police.

11 Q. And how did the police treat you while you were there?

12 A. They said I was lying.

13 Q. And so they did not take your statements or what you had
14 accused him of as seriously; true?

15 A. True. She took me to two different police departments:
16 one in Cibolo and one in Wilson County.

17 Q. Was that pretty -- was that pretty upsetting to you that
18 they did not believe you?

19 A. Yes, they said I was just promiscuous.

20 Q. During the times -- so after that, what happened with your
21 relationship as it related to Kurt Brassfield, was he still
22 around?

23 A. Yes.

24 Q. And did -- even after you cried out, did the abuse
25 continue?

1 A. Yes.

2 Q. And how much longer did the abuse continue?

3 A. It continued a lot longer.

4 Q. And you had to testify in trial against Mr. Brassfield
5 about that abuse; correct?

6 A. Yes.

7 Q. And I think you stated earlier he was convicted as a
8 result of that; is that true?

9 A. Correct.

10 Q. Now, let's -- moving on for just a minute.

11 Let's talk about Devin Kelley. All right?

12 A. Okay.

13 Q. Where did you first meet Devin Kelley?

14 A. I met him when I was 13.

15 Q. And can you tell the Court a little bit about maybe where
16 y'all were at and what you were doing when you met him?

17 A. We were with mutual friends.

18 Q. And can you tell us about what happened during that
19 exchange?

20 A. He was 17 and I was 13, and he was just very -- I don't
21 know. Just pushed himself onto me.

22 Q. And when you say, "pushed himself onto you," he was -- he
23 tried to -- he called you a lot, texted you a lot?

24 What types of things did he do?

25 A. He'd call me constantly. Messaged constantly. Every time

1 I was visiting my mother Erin, he would try and hang out with
2 me.

3 Q. Okay. And how often would you see him? I think you said
4 you were approximately 13.

5 How often would you see him personally?

6 A. Every -- almost every weekend I was with Erin.

7 Q. And so did he live close to there?

8 A. He lived in New Braunfels.

9 Q. All right. Did he live in the same house that we're going
10 to talk about later that you lived in -- that they lived in
11 out of town, out in the country?

12 A. Yes.

13 Q. Okay. And so how would -- how would you -- when you
14 were -- when you would be Erin's house on the weekends, how
15 would you actually see -- would he come over? How would you
16 see him?

17 A. He would drive over, and I would have to go out and meet
18 him.

19 Q. How long did you -- did you talk to Devin or have a
20 relationship with Devin during that period of time?

21 A. Until he joined the military, and then it was a little bit
22 after the military. When he was in there, he would call and
23 tell me some stuff from when he was in the military.

24 Q. So he went off at some point, and joined the military, and
25 y'all kind of parted ways, although you did talk a little bit

1 while he was in the Air Force; is that true?

2 A. Yes.

3 Q. Now, you did have a sexual relationship with him at this
4 time; is that true?

5 A. Yes.

6 Q. And I think that you talked about you had gotten pretty
7 close to Devin during that period of time; is that correct?

8 A. Yes.

9 Q. And was Devin an outlet for you at that point?

10 A. Yes.

11 Q. Can you tell the Court why he was an outlet? What was
12 going on in the relationship?

13 A. I could just talk to him about stuff and tell him about
14 things in the home.

15 Q. And even at that point in time, did he know what was going
16 on with Kurt Brassfield?

17 A. He knew some of it.

18 Q. Did he know that Mr. Brassfield was inappropriate with
19 you?

20 A. Sometimes, yes.

21 Q. And while you may not have told him everything that had
22 gone on, but you did tell him some things, so he knew this as
23 early as when you were 13 years old; correct?

24 A. Yes.

25 Q. Now, Devin went off to the Air Force, and I believe -- did

1 he -- he tried to contact you a couple times while he was in
2 the Air Force; is that true?

3 A. Yes.

4 Q. And what types of things would Devin tell you while he was
5 in the Air Force?

6 A. That he was married and then that's when I told him I
7 didn't want to talk to him anymore and he kept calling and
8 calling and he was just saying how he thought his wife was
9 cheating on him.

10 Q. Did he ever -- did you ever know anything about -- about
11 his -- can you tell the Court what you knew about Devin's time
12 in the Air Force at any time?

13 A. That he said he just had a hard time.

14 Q. Okay. Did he ever tell you at any point in time while he
15 was in the Air Force and in jail that -- what he had been
16 convicted of?

17 A. No.

18 Q. Did he ever tell you that he had -- that he had been
19 convicted of any type of felony which would prohibit him from
20 owning a weapon?

21 A. No.

22 Q. When you were talking to Devin, did he tell you why he
23 would -- let me rephrase the question, I apologize.

24 When Devin would call you, he called you while he was
25 still working in the Air Force; is that true?

1 A. Yes, and when he was locked up in the brig.

2 Q. And so how often would he call you on a regular basis
3 during the week?

4 A. Whenever he got phone privileges when he was locked up.

5 Q. Was that a certain day of the week, or...

6 A. It ranged, but most of the time, I think it was on a
7 weekend.

8 Q. Okay. And so the — so while he was in the brig on
9 weekends, he would give you a call?

10 A. Yes.

11 Q. And what are the types of things y'all would talk about
12 during those conversations?

13 A. Oh, he would just ask how I was doing, and ask how he was
14 doing. There was nothing, you know, inappropriate.

15 Q. Okay. And you had told him that as long as he was
16 married, you did not want to see him; correct?

17 A. Correct.

18 Q. At some point in time, did he ever tell you during those
19 conversations why he was in the brig?

20 A. No. He said —

21 (Reporter Clarification.)

22 Q. Can you repeat the last answer, please?

23 A. He said he would tell me why he got locked up when he got
24 out.

25 Q. So that was a discussion y'all did not have during those

1 times?

2 A. Yes.

3 Q. Now, at some point in time, Mr. Kelley got out of the --
4 got out of the Air Force, along with the brig, and then he was
5 subsequently discharged from the Air Force; correct?

6 A. Yes.

7 Q. And how long was it before when he was discharged from the
8 Air Force to the time that you had heard from him?

9 A. I guess a couple months is when he came and saw me.

10 Q. And so when you say, "a couple months," did he call you
11 when he got out of jail?

12 A. When he wanted to come and see me.

13 Q. Okay. Was that the first time you had heard from him in a
14 while?

15 A. Yes.

16 Q. Okay. And when he -- and when came -- came -- tell the
17 Court about that.

18 What happened when he got out of -- when he got out of
19 jail and he came to see you? What happened next?

20 THE COURT: Let me stop you here. Can you give me a
21 date? About -- what time are we in now?

22 THE WITNESS: It would have been back when I was 18,
23 so I think 2013.

24 THE COURT: Thank you.

25

1 BY MR. WEBSTER:

2 Q. So around 2013, would have been the time that he would
3 have -- did he drive down to Colorado to see you?

4 A. No, I wasn't in Colorado.

5 Q. Oh, I'm sorry. Did he drive down from Colorado to see
6 you?

7 A. I don't think he was in Colorado when I was 18.

8 Q. Where was he living or residing at that time?

9 A. With his parents.

10 Q. So he -- at that point in time, Devin had moved back --
11 Devin Kelley had moved back home with his parents?

12 A. Yes.

13 Q. And tell us about the first time that you -- that you saw
14 him?

15 A. I said he looked old.

16 Q. And why did you tell him he looked old?

17 A. Because I remember him at 17, and he had a beard, so I
18 thought he looked old.

19 Q. Did he ask you out on a date at that point?

20 A. He did, but I didn't want to see him like that until a
21 couple months after.

22 Q. So when you say he came to see you, where was this at?

23 A. I was at Michelle's house.

24 Q. All right. And when you say, "Michelle," Michelle
25 Shields; correct?

1 A. Yes.

2 Q. All right. And so he came over to the house, and y'all
3 talked for -- how long do you think you talked for?

4 A. Oh, like 30 minutes.

5 Q. And then you told him he looked old?

6 A. Yeah.

7 Q. And he left at that point?

8 A. Yes.

9 Q. Did he continue to talk to you or call you during that
10 period of time?

11 A. Yes.

12 Q. And tell us what happened next.

13 Kind of give us a progression of what happened with your
14 relationship in 2013 with Mr. Kelley?

15 A. He wouldn't leave me alone, and, finally, I said yes, so
16 he can just stop calling me all the time.

17 Q. Was it almost impulsive calling what he was doing?

18 A. Yes. He would call and call and call.

19 MS. CHRISTILLES: Objection. Leading.

20 MR. STERN: I'll reask the question.

21 BY MR. WEBSTER:

22 Q. How would you characterize his calls during that period of
23 time?

24 A. Um, like stalkers.

25 Q. Did that give you some concerns?

1 A. I was 17, 18, I wasn't thinking.

2 Q. Okay. Were you flattered by his advances?

3 A. It was annoying.

4 Q. And so finally you agreed, and did y'all have a period of
5 time when you and Devin Kelley were dating?

6 A. Yes.

7 Q. And during that time that you were dating, kind of tell --
8 can you tell the Court how long you dated prior to when you
9 got married and the types of things and things that went on?

10 A. When him and I got together -- I guess we got married
11 April 4th of 2014. Before then, I was -- I don't know if we
12 got pregnant, and then I ended up losing my baby. So not
13 really much.

14 Q. Okay. Let's talk about that for a moment. So y'all were
15 married on April 4th of 2014; is that correct?

16 A. Correct.

17 Q. And you did not have a very good home life still at that
18 point in time; would you agree?

19 A. Yes.

20 Q. And so did Mr. Kelley kind of offer a solution to get out
21 of that home life at that point?

22 A. He just said, you know, he would take care of me and so...

23 Q. Okay. Now, when he -- during that period of time, when he
24 came to see you in 2013 and his marriage to you on April 4th,
25 2014, I think you stated that you became pregnant; is that

1 true?

2 A. Yes.

3 Q. Can you tell the Court what happened with regards to the
4 circumstances surrounding your pregnancy?

5 A. I lost my baby.

6 Q. And, Danielle, can you tell -- I know it's hard, but could
7 you please tell the judge why you lost your baby?

8 A. He kicked me in my stomach.

9 Q. Where did this happen at, Danielle?

10 A. At the Kelley's barndominium.

11 Q. Were you living there at the barndominium at the time
12 prior to your marriage?

13 A. Yes.

14 Q. When was the first time you suffered physical abuse at the
15 hands of Devin Kelley?

16 A. When he kicked me in my stomach and I lost my first baby
17 because he got mad at me.

18 Q. Now, I'd like to show you a picture from JEX0799-0012
19 that's already admitted into evidence. It's going to pop up
20 on your screen so you can see it.

21 A. Okay.

22 Q. Danielle, backing up for just a minute, when after you
23 started dating Devin Kelley, did you move into the
24 barndominium?

25 A. Around, I guess, Christmastime of 2013.

1 Q. And prior to moving into with him, you had not suffered
2 any type of abuse? He was still kind of courting you at that
3 point; would you agree?

4 A. Yes.

5 Q. And so when you moved into the barndominium, is this a
6 true and correct -- I mean, is this the barndominium y'all
7 were living in?

8 A. Yes, it was.

9 Q. And immediately upon when you began dating Devin Kelley,
10 did he seem very -- how would you characterize how he treated
11 you? Was he possessive? Did he -- what types of traits did
12 he exhibit?

13 A. At first, he wasn't -- he seemed normal until he got mad
14 and kicked me in my stomach and, you know, promised to never
15 do it again.

16 Q. And the Kelley property, so that the Court understands --
17 let's go to JEX793 that's been previously admitted, Your
18 Honor.

19 Can you see here on the map -- and you can go to the
20 second page. This is, like, the Kelley residence at 2825 FM
21 2722 in New Braunfels, Texas; is that correct?

22 A. Yes.

23 Q. And would you agree with me that it's a very isolated
24 area?

25 A. Yes, it is.

1 Q. And when I say that, meaning, there is not a lot --
2 there's not a lot of neighbors and there is not very many
3 houses around that area; is that true?

4 A. Correct.

5 Q. And who all lived out on the property in 2013, at
6 Christmas in 2013, when you moved in there?

7 A. His mom and dad and I think his sister because I think she
8 had like one more year of school.

9 Q. And so for a while, the sister lived there and then she
10 moved out and went off to college or school or something;
11 right?

12 A. Yes.

13 Q. And so if we go to the second page of this same exhibit
14 which is -- yeah, here we go. That's it. Can you tell us
15 here if we look at this, where was the barndominium that we
16 saw in the picture earlier?

17 A. It would be the top little square over -- that one. No.
18 Go down. Yes, that one.

19 Q. So this is where the barndominium would be?

20 A. Yes.

21 Q. And that's where you and Devin lived; correct?

22 A. Yes.

23 Q. If you screamed from the barndominium, going back to the
24 map, could the Kelley's hear you over at their house?

25 A. No.

1 Q. And the other building that you see to the right, the
2 larger building at the top, what is that?

3 A. That's the stables.

4 Q. And at any time, how often would you actually go into the
5 Kelley's residence, the main house there?

6 A. During that time, not often, unless it was for a family
7 dinner.

8 Q. So you were basically -- you were quartered off from the
9 area and not able -- you didn't frequently go to the Kelley's
10 house at any time during the time you were married to Devin
11 Kelley; is that true?

12 MS. CHRISTILLES: Objection. Mischaracterization.
13 She said she would go --

14 THE COURT: We have to wait for her answer. That's
15 overruled. Go ahead.

16 THE WITNESS: Yeah. I'd go for family dinners, and I
17 wasn't allowed to go without him.

18 BY MR. WEBSTER:

19 Q. Meaning, you didn't go over -- you weren't allowed to go
20 over and talk to Mr. and Mrs. Kelley unless you had his
21 permission?

22 A. Yes, he had to be present.

23 Q. And so what other types of things when you moved in -- did
24 Devin become very controlling?

25 A. Yes.

1 Q. Can you tell the Court in what ways Mr. Kelley became
2 controlling of you during that time?

3 A. After the marriage, he started getting to where I wasn't
4 allowed to have friends. He told me what to wear. How I
5 should wear it. I should wear makeup. I wasn't allowed to
6 look at people.

7 Q. Did he allow you to have social friends or go out on a
8 girls night?

9 A. No, I was forbidden.

10 Q. And did -- and would you agree with me, you really had no
11 social network of support; is that true?

12 A. Correct. He cut everybody off from me.

13 Q. And Devin as of the same -- Devin Kelley, the times that
14 you knew him from 2013 until -- until November 5th, he had no
15 close -- would you -- how would you characterize his social
16 network of friends?

17 A. They were very, very small.

18 Q. Okay.

19 A. To like maybe less than three.

20 Q. And did he talk to those friends very often?

21 A. Closer to the shooting, he had a friend named David that
22 we would go and see.

23 Q. Okay. But as in having -- he was not a very -- how would
24 you characterize his social characteristics? He was not a
25 very social person; was he?

1 A. No.

2 Q. And, in fact, he did not get along with others very well;
3 did he?

4 A. No, he didn't.

5 Q. Did he tell you -- can you tell the Court, how did
6 Devin -- how did Devin look, did he have any -- did he like to
7 deal with law enforcement?

8 A. No.

9 Q. Why?

10 A. He said that he was never going back to jail, that he
11 would die before he went to jail.

12 THE COURT: Counsel, let me interrupt here.

13 So I see that Colonel Younger is present, watching
14 these proceedings. The rule has been invoked.

15 Is Colonel Younger...

16 MR. ALSAFFAR: He's a retained plaintiffs' expert.

17 THE COURT: So he's been excused from the rule?

18 MR. ALSAFFAR: Yes, Your Honor.

19 THE COURT: Thank you. You may continue.

20 MR. WEBSTER: Thank you, Your Honor.

21 BY MR. WEBSTER:

22 Q. I need to go back for a minute. You said earlier, he
23 actually kicked you in the stomach, correct, and you lost your
24 baby?

25 A. Yes.

1 Q. And -- and tell the Court why you decided to stay at that
2 point?

3 A. I had nowhere to go and I was stuck.

4 MR. WEBSTER: Sorry, Your Honor. I had the page
5 marked and it must have fell off. One second.

6 BY MR. WEBSTER:

7 Q. Can you please go to JEX00799-0058. It's been previously
8 admitted, Your Honor.

9 Now, Miss -- this is a picture from inside -- from inside
10 the barndominium apartment. Do you recall that, ma'am?

11 A. Yes.

12 Q. I think you were talking about how he kicked you in the
13 stomach at that point in time.

14 Is this the area where that would have happened?

15 A. Yes.

16 Q. Can you tell the Court -- do you see here where you have
17 the Coca-Cola -- the Coca-Cola cardboard box here taped up
18 against the wall. Why is that there?

19 A. That was just -- there was a hole that nobody could fix.

20 Q. How did that hole get there?

21 A. This hole was always there, but he kicked another hole in
22 the kitchen. It was underneath the sink. There is -- after
23 we were married. He got mad at me because I was looking at
24 people and he said that I was a whore and he threw me down and
25 started kicked me and I moved.

1 Q. What types of abuse did you suffer at the hands of Devin
2 Kelley? Can you tell the Court what types of things he did to
3 you?

4 A. He would choke me and make me beg for my life. He would
5 pull me around by my hair. He would punch me; kick me in my
6 back. He would grab my face and throw me down. He would take
7 the butts of his guns and hit me and say that I was nothing to
8 him, and then he would force me to do things that I didn't
9 want to do.

10 Q. Did he threaten to kill you?

11 A. Yes, repeatedly.

12 Q. Did he threaten -- did he ever threaten to kill your
13 family?

14 A. Yes. He said if I ever left him, I would have to pay for
15 it. That the only way of leaving this marriage was one of us
16 was going to end up in a body bag.

17 Q. And this barndominium that you lived in, it was very, very
18 close quarters; correct?

19 A. Yes.

20 Q. And when we say that -- if we go to -- we'll start at
21 JEX0019 -- 799-0019, please.

22 Danielle, I know you haven't seen these, but these are
23 photos from the Texas Rangers right after this happened; okay?

24 A. Yeah.

25 Q. So this would have been your -- that would have been

1 y'all's bed here on the right; is that right?

2 A. Yes.

3 Q. And this is -- the carriage that you have here, that would
4 have been where you would have -- where your baby daughter was
5 staying at during the night; right?

6 A. Yes.

7 Q. And then you have the couch and you have the table there;
8 true?

9 A. Yes.

10 Q. And we can go to the next page, 0020. And here you can
11 see -- well, you can point out to us. This would have been
12 the baby bed on the left where your son Michael would have
13 slept; true?

14 A. Yes.

15 Q. And then you have a kitchen and a bathroom; is that
16 correct?

17 A. Yes.

18 Q. And kind of -- it looks like there was a little bit of
19 closet space. Was there a closet in here?

20 A. Yes. It was over by the bed. Like, up when you first
21 entered the doors, on that wall.

22 Q. Okay. So when you were -- when y'all moved into this
23 barndominium in 2013, y'all would -- this was the close
24 quarters that you were in. And so anytime that he was
25 slapping or kicking you or hitting you, were your kids able to

1 see that?

2 A. Yes.

3 Q. Now, going back for just a minute, y'all moved in there in
4 2013, but at times, you moved around, across -- back and forth
5 from Colorado; correct?

6 A. Yes.

7 Q. And can you tell the judge when -- in 2013, how long did
8 you live in this barndominium before you went off to Colorado?

9 A. We were in the barndominium until June when we went down
10 to Kingsville. I was in Kingsville for two months, and then
11 he took me from Kingsville to Colorado.

12 Q. During those times that you were in Kingsville and then
13 when you went to Colorado, were you still suffering abuse?

14 A. Yes.

15 Q. And it was still the same types of abuse that you have
16 described to the Court today?

17 A. Yes.

18 Q. All right. Now, during the time that you were married to
19 Devin, was he ever able to hold down a job?

20 A. No.

21 Q. And why could he not hold down a job?

22 A. Because he didn't want to and he forced me to go out and
23 do it.

24 Q. And he would force you to go to work?

25 A. Yes.

1 Q. I think you testified earlier that you -- you know, you
2 were abused by CPS, you actually got a settlement from CPS; is
3 that true?

4 A. Yes.

5 Q. And did you -- what did Devin do with your CPS money or
6 what we'll call the CPS settlement money?

7 A. He took ahold of it.

8 Q. And he refused to work during that time; is that correct?

9 A. Correct.

10 Q. How would you characterize your marriage, from the time
11 you got married in 2014 until the time of, say -- the time
12 that you moved, that you were in -- went to Kingsville and
13 then Colorado?

14 A. It was getting progressively worse with his abuse because
15 he would just slap you around. Then it got worse when he
16 isolated me a thousand miles away from everybody.

17 Q. Looking back, do you believe that he did that on purpose?

18 A. Yes. Because he knew I couldn't get away. I couldn't
19 drive because he forbid me to drive.

20 Q. And how many cars did y'all have?

21 A. We only had the Jeep.

22 Q. And tell us about your time -- what happened while you
23 were in Colorado? Tell us about your time there.

24 Where did you live and what went on while you were there?

25 A. We lived in an RV park. He was abusive. I wasn't allowed

1 to do anything. He got in trouble for hitting the dog.

2 Q. And what did he do to the dog?

3 A. I wasn't physically there. I was in the trailer, but from
4 the Court, they said that he beat the dog.

5 Q. So you had seen -- you had seen Devin being abusive to
6 animals; is that true?

7 A. Yes.

8 Q. Is that the first time you had ever seen him being abusive
9 to animals?

10 A. From that one dog, yes, until we got my wieneey dog.

11 Q. Was he abusive to your wieneey dog?

12 A. Yes.

13 Q. What did he -- what would he do to the wieneey dog?

14 A. He would throw her and kick her and say it was my fault,
15 and he would use her as a punishment against me.

16 Q. All right. So if you did something or said something he
17 didn't like, he would abuse your dog?

18 A. Yes.

19 Q. Now, when you went off -- when married him in 2014 or when
20 you moved in him with in 2013 into the barndominium, did Devin
21 have any guns at that point in time?

22 A. Yes.

23 Q. What did he have when you first got married?

24 A. A hand-held gun.

25 Q. Okay. And I would assume -- you are no firearms

1 specialist; correct?

2 A. No.

3 Q. And in fact, if I show you pictures of guns, you probably
4 wouldn't -- you don't know the difference in them between
5 maybe a handgun and rifle and those types; is that correct?

6 A. Well, I mean, I know a handgun is short, and you have it
7 in your hand, but other than that, I can't tell you make and
8 model. I can tell you the color.

9 Q. Okay. And when you say when y'all first got married, he
10 had one handgun, do you know what kind of gun or anything?

11 A. It was shiny on the top and black on the bottom.

12 Q. And what happened with that gun?

13 A. He didn't like it because he said it kept jamming.

14 Q. Was it a used gun?

15 A. Yes.

16 Q. Do you know where -- as you sit here today, do you know
17 where Devin got that gun?

18 A. He said he got it from a friend.

19 Q. And you said he didn't like it. Is it because it didn't
20 work well?

21 A. Yes.

22 Q. And since that gun didn't work well, he got rid of it?

23 A. Yes.

24 Q. What did he do with that gun?

25 A. I don't really remember. I think he threw it away.

1 Q. Okay. And so during that period of time while you were
2 there from -- moving in from 2013, up until you went to
3 Colorado, that was the only time he had that gun; is that
4 true?

5 A. Yes.

6 Q. Now, did he -- during this period of time, was he looking
7 at guns?

8 A. When we got in Colorado is when he started looking into
9 guns.

10 Q. And you say -- when you say, "looking at the guns," what
11 type of guns -- when you moved to Colorado in 2014; is that
12 correct?

13 A. Yes.

14 Q. What type of guns did y'all look at while you were there?

15 A. He looked at handguns.

16 Q. And did he eventually purchase a handgun?

17 A. Yes.

18 Q. And how did -- excuse me. Let me reask the question.

19 How did he purchase -- how did Devin Kelley purchase that
20 gun?

21 A. He went to a shop there and bought it brand new.

22 Q. And were you real happy with that at the time?

23 A. I didn't have a say in it.

24 Q. You didn't have a say in anything that he ever purchased
25 or anything that he ever did?

1 A. Correct. He had control of the money.

2 Q. When you -- if you wanted to call your parents during this
3 time or you wanted to call a friend, can you tell the Court
4 what he would require you to do?

5 A. I had to ask permission, and when he granted it, I had to
6 have it on speakerphone, and I was only allowed five minutes.

7 Q. And would he sit and listen to your conversations during
8 that time?

9 A. Yes. If I said something he didn't like, he would hang up
10 the phone.

11 Q. Was that true for the entire marriage?

12 A. Yes.

13 Q. Even up until the day of the shooting?

14 A. Yes.

15 Q. Now, during the time that -- when you knew Devin prior to
16 his time in the Air Force, do you recall him having any
17 interest in guns before joining the Air Force?

18 A. No.

19 Q. And when you -- when he got out of the Air Force, is
20 that -- and you moved to Colorado is when he first started
21 getting really into guns from what you recall; is that true?

22 A. Yes.

23 Q. Once he got the new gun that he purchased from the store
24 in Colorado, what type of things did he use the gun for and
25 what did he do to you with the gun?

1 A. He -- up there, I think he can, like, "open carry," is
2 what it's called. He carried it on him all the time.

3 Q. So when he would go out in the public and the rest, he
4 would carry a gun on his hip in a holster?

5 A. Yeah. I don't know what it's called, but, yeah, he had it
6 on him.

7 Q. And when he would -- and would he wear it on his hip?

8 A. Yes.

9 Q. And did he do that when he was at what I'll call the
10 Kelley compound?

11 A. Yes, he never left without the gun.

12 Q. So anywhere he went, he carried this gun, even when he was
13 in -- whether he was in Colorado or Texas, he had this gun on
14 him?

15 A. Yes.

16 Q. And I think that we talked about historically that Devin
17 Kelley owned a shotgun at one point in time.

18 Do you recall that?

19 A. Yes.

20 Q. Can you tell the Court what happened with the shotgun?

21 A. He bartered for it.

22 Q. When you say, "bartered for it," what did he do?

23 A. He got it from, you know, bartering and then he got rid of
24 it bartering.

25 Q. And so was that a used gun?

1 A. Yes.

2 Q. And did he like used guns?

3 A. No.

4 Q. Can you tell the Court why he did not like used guns?

5 A. He told me that the only reason why he likes brand new
6 ones is because they won't break.

7 Q. Did you ever see Devin Kelley during the time -- up until
8 the time -- up until the time of the shooting, did you ever
9 see him attempt to purchase, at any time, a gun from a private
10 individual?

11 A. No.

12 Q. He did not -- did he like to deal with private
13 individuals?

14 A. No. He only wanted to go to, like, the big stores because
15 he knows that those guns are brand new.

16 Q. Did he ever -- I think that he also during this time of
17 your marriage, would also go to gun shows; is that true?

18 A. Yes.

19 Q. And during the times that he went to those gun shows, how
20 many times do you think he went to the gun shows between the
21 time in Colorado, up until the time of the shooting?

22 A. It was only in Colorado --

23 Q. Okay.

24 A. -- he would go.

25 Q. You just went to the gun shows in Colorado?

1 A. Yeah.

2 Q. When you were there at those gun shows, did he ever
3 purchase a gun?

4 A. No. He just looked at everything.

5 Q. And you never knew that, did you, that Devin wasn't
6 allowed to legally possess guns; correct?

7 A. Correct. I never knew. He never told me.

8 Q. If you had known that Devin was not allowed -- able to
9 possess or purchase guns, what difference would that have made
10 in your life?

11 A. If his full background was disclosed, I never would have
12 gotten with him, and if he wasn't allowed to have guns, I
13 would have never -- I would have done everything I could to
14 make it to where he couldn't get them.

15 Q. If you had known that and he had guns, would you have
16 called the police on him?

17 A. Yes. I would figure out a way.

18 Q. Did he beat you with these guns?

19 A. Yes.

20 Q. Did he beat you with the pistol he bought in Colorado?

21 A. Yes.

22 Q. How often would he beat you with this pistol?

23 A. It depended on the punishment. The punishments ranged
24 from levels. He would give me hand signs or he would just tap
25 his arm, which meant it's a warning. One finger meant I get

1 something taken. Two fingers meant I'm getting hit. When he
2 put all his finger on there, it meant that I was going to get
3 beaten until he made me pass out.

4 Q. Would he do this while y'all were in public?

5 A. The hand signals, yes.

6 Q. And he explained those hand signals to you in order to
7 control you?

8 A. Yes.

9 Q. So if you were doing something in public that he didn't
10 like, he would place his --

11 A. He would go like this.

12 Q. Can you show the Court what exactly he would do?

13 A. He'd do one hand -- (indicating). This is a warning.
14 This is I get a punishment. This is I'm getting hit. This
15 means I was getting beaten.

16 Q. And when you say "this," you mean when he would pat on
17 your arm, it meant that he was going to --

18 A. It was on his arm. Because all he had to do was go across
19 the room. If I looked at somebody, that was automatically to
20 the first one. If I talked out of turn, that was level two.
21 If I said something that made him look bad, all the fingers
22 would go up.

23 Q. And so -- and how often -- would this go on every time you
24 went out in public?

25 A. Yes.

1 Q. Now, when you were back home, in either Colorado or in the
2 barndominium at the Kelley compound, how was the violence
3 different than when you were in public?

4 A. In public, he made it seem like he was a good person. All
5 he had to do was do the signaling.

6 Q. And so if you looked at a man that walked by, and he saw
7 you doing that, what would he do at that point?

8 A. He would put his fingers up to where I knew I was getting
9 in trouble. If I looked at a man talking, it was considered
10 cheating. If I talked to somebody, it was considered
11 cheating. If I didn't answer him in a timely manner, I would
12 get punished.

13 Q. How long did y'all stay in Colorado during this time?

14 A. In Colorado, it was until my son was born and then we came
15 back to Texas, and then we went to Colorado again for a little
16 bit and then we came back, and then we moved up there for like
17 a month and came back.

18 Q. I want to break it down for just a minute for the Court so
19 we can understand, kind of, the history of your marriage and
20 where you lived.

21 So why did he decide to move -- first off, why did y'all
22 move to Kingsville, Texas?

23 A. I was going to college.

24 Q. Did you have a job during that time?

25 A. No.

1 Q. What classes were you taking there?

2 A. I was going in to be a biomedical person and studying
3 genetics.

4 Q. Did -- did Devin like that?

5 A. No.

6 Q. Can you tell the Court, why didn't Devin like the fact
7 that you were going to -- that you were going to college in
8 Corpus Christi?

9 A. Because he couldn't control it.

10 Q. He didn't -- he didn't like you being away from him; true?

11 A. True.

12 Q. So if you had to go off to class, he couldn't -- how would
13 he react?

14 A. He would be upset.

15 Q. And would you take beatings when you got home?

16 A. He would slap me around and tell me that if I looked at
17 somebody, you know...

18 Q. When did you become pregnant with Michael, your first son?

19 A. When we were in Colorado, 2014.

20 Q. And during the time that you were pregnant, did he
21 continue to physically abuse you?

22 A. Yes.

23 Q. And when was -- when was Michael born?

24 A. He was born in March.

25 Q. And what was his -- what was his date of birth?

1 A. March 25th of 2015.

2 Q. Was he born in Colorado, or was he born back here in
3 Texas?

4 A. No. He's my Colorado baby.

5 Q. He's your Colorado baby. And so were you still living
6 there in Colorado when he was born?

7 A. Yes.

8 Q. And where were y'all actually living at that point in
9 time?

10 A. In the trailer.

11 Q. Had y'all purchased a trailer, or did you bring it up from
12 Texas, or how did that work?

13 A. We purchased a trailer in Texas and then we moved it up to
14 Colorado.

15 Q. When y'all moved into Colorado, what area of Colorado did
16 you live in?

17 A. In Colorado Springs.

18 Q. So after the baby was born in March of 2015, how long was
19 it before you decided to move back to Texas?

20 A. It was when he was six weeks old.

21 Q. So that would probably be about May of 2015; is that fair?

22 A. Yes.

23 Q. And y'all would have moved back to the barndominium on
24 their property?

25 A. Yes.

1 Q. What did they do with -- what did Devin do with the RV at
2 that point?

3 A. It was left at the stables.

4 Q. Y'all just picked up and left it and drove back?

5 A. What?

6 Q. I'm sorry. Y'all just picked up and -- y'all picked up --
7 y'all left it at the stables? Did y'all still own it, or did
8 y'all just leave it there?

9 A. No. We owned the trailer. Like, every time we moved
10 back, we would bring the trailer, and then we left the trailer
11 in the stables on the Kelley property. I'm sorry.

12 Q. Oh, okay. I didn't mean to misunderstand you -- so y'all
13 brought the trailer back with you, and they would put it in
14 the stables. You would put it there, and that's where it was
15 stored; is that true?

16 A. Yes.

17 Q. So when you moved back in May of 2015, you moved back into
18 the residence that we talked about earlier into the
19 barndominium; correct?

20 A. Yes.

21 Q. Were you still -- were there still rules that you talked
22 about earlier, and the rules, as it dealt with Devin Kelley's
23 family, were those still in existence at that time?

24 A. Yes.

25 Q. Now, when -- excuse me.

1 Why did y'all make the decision to move back from Texas in
2 May of 2015?

3 A. He wanted to move back for his parents so they could help
4 with Michael.

5 Q. Was he patient with Mike at that point?

6 A. At the beginning, he was, because Michael was just a baby.

7 Q. Yeah. And so y'all -- when you moved back, did you have a
8 job?

9 A. Yes. I ended up getting a job at Target.

10 Q. And tell us about the job at Target.

11 What did you do there?

12 A. I was a cashier and I had to close the store down.

13 Q. And that would put you working late a night?

14 A. Yes. I had gone there to, say, you know, work until
15 11:00, which is when the store closed, but that doesn't mean I
16 can go home, because I have to clean -- you know, close the
17 store.

18 Q. During that period of time, was Devin Kelley able to work
19 at that point in time?

20 A. No. He wasn't working.

21 Q. Why?

22 A. He didn't want to work. I had to work.

23 Q. So he would force you to work?

24 A. Yes.

25 Q. How would you get to work?

1 A. He would take me.

2 Q. And would he pick you up from work also?

3 A. Yes.

4 Q. Were you able to keep your job at Target?

5 A. No. He got me fired.

6 Q. Can you explain to the Court why Devin Kelley got you
7 fired during that period of time?

8 A. He kept calling in and saying that I needed to get out,
9 and that he was there and he had been waiting and they had to
10 let me go because it was going to turn into a domestic issue.

11 Q. So you were fired from your job at Target?

12 A. Yes.

13 Q. So after your job at Target, what happened next?

14 What was going on in your lives at that point in time?

15 A. After Target, we went back and then he was using the money
16 that I had from the settlement, and then, you know, things got
17 worse.

18 Q. Let's talk about that for a second.

19 You say you "went back." Did you go back to Colorado?

20 A. No. Like. Went back to just normal seclusion and...

21 Q. Can you tell the judge -- can you tell the judge what a
22 day in 2015 was like, what your days were like with Devin
23 Kelley?

24 A. I had to cater to him hand and foot.

25 Q. Did you feel like you were walking on egg shells?

1 A. It was prison with him. It was like he kept me hostage.

2 Q. During the weeks of -- was he -- during 2015, and the
3 times that you were here at the barndominium, was Devin still
4 interested -- becoming more interested in guns?

5 A. Yes.

6 Q. And when I say, "more interested in guns," what type of
7 things was he doing at this point in time in May of 2015 when
8 you came back from Colorado?

9 A. He just came down and we were taking care of Michael.

10 He didn't get like really, really interested in it until
11 2016.

12 Q. But during 2015, were you having problems in your
13 marriage?

14 A. Yes.

15 Q. Obviously so, if you are being abused, it's a problem in
16 your marriage, but did you ever express during those times
17 that you wanted to divorce Devin Kelley?

18 A. Yes. Repeatedly.

19 Q. And when you said that, what would happen when you would
20 tell him in, say, 2015 that you wanted to get a divorce?

21 A. He would hit me.

22 Q. I'm going to show you what's been previously admitted
23 JEX487-B.

24 Can you see those text messages okay?

25 A. Yes.

1 Q. And do you see -- do you see where in the middle of the
2 page it says October 2nd, 2015?

3 A. Yes.

4 Q. Okay. Now, this would have been during the time while you
5 were still living in Texas; correct?

6 A. Yes.

7 Q. Because you went back to Colorado one more time that we'll
8 talk about in a minute; correct?

9 A. Yes.

10 Q. And so whose number is this at the top or whose phone was
11 this? Who would you have been talking to in this text
12 message?

13 A. Oh, I don't even -- I don't know. I don't know the number
14 because it's blocked out.

15 Q. But when you see where it says, "Devin sent this to me,
16 Hey, Danielle and I are going to part ways with you. It's
17 obvious you don't want to talk to her, so good luck to you.
18 We really enjoyed seeing you last time, especially me. It was
19 way much better than I expected. LOL. Anyway, we love you."
20 And they wrote, "He's cutie." And then you -- and then
21 there's a writing. It says, "I don't know. I didn't even
22 know he was texting you."

23 Do you see that?

24 A. Yes.

25 Q. Did somebody send this to you; do you recall?

1 A. I don't know.

2 Q. If we go to the next page, it says -- it says: "I didn't
3 know he was texting you. I figured. Message him and tell him
4 to leave you alone." Do you see that?

5 A. Yes.

6 Q. And then below that, it says: "What's his deal? I really
7 don't know to be honest. I feel like I chose the wrong mating
8 partner for life."

9 Danielle, does that refresh your recollection that these
10 may have been text messages with someone that you were -- you
11 were talking with?

12 A. I guess.

13 Q. Okay. During those periods of time, did you feel like you
14 had chosen the wrong mating partner for life?

15 A. Yeah. I made a mistake marrying him.

16 Q. Were you depressed during that time?

17 A. Yeah. I wanted to kill myself.

18 Q. Did you ever try?

19 A. Sometimes.

20 Q. Did you cry every day?

21 A. Yes.

22 Q. And if you scroll down where it lists -- it says: "All he
23 does is yell at me and belittle me every day in public, even
24 then..." Are those the kind of things that he would do?

25 A. Yes.

1 Q. If we look on the next page, it says, "I'm taped in a
2 marriage that makes me suffer every day." It should have
3 probably said "trapped"?

4 A. Yes.

5 Q. But do you recall writing that?

6 A. Yeah, I was trapped. I couldn't get out and if I tried,
7 he would make me pay for it. He would block the doors.

8 Q. If you scroll back up just a minute, and we go to the part
9 that says, "When I have to do everything, I spent all of my --
10 all of my settlement money on him. Now I have nothing."

11 Do you see that?

12 A. Yes.

13 Q. That would have been you probably texting these text
14 messages; correct?

15 A. Yes.

16 Q. Because, in fact, by October of 2015, he had spent all of
17 your settlement money; correct?

18 A. Yes.

19 Q. And so how did his behavior change once he had spent
20 through the settlement money?

21 A. He was aggressive.

22 Q. Was he pretty pissed off all the time?

23 A. Yes.

24 Q. Go to page 3572. Keep going, scroll over. Just go to the
25 next page. That's fine. We'll start there.

1 Do you see where he says, "He doesn't even take care of
2 Michael"? Do you see that?

3 A. Yes.

4 Q. During those times when Michael was an infant, did he --
5 did he kind of neglect him?

6 A. He forced me to take care of him, but I didn't mind taking
7 care of Michael because he's my baby.

8 Q. Sure. And that's being a good mom, but what you are
9 saying is you absolutely had no -- he didn't work. He was
10 abusive, and he would not take care of your child, help take
11 care of your child?

12 A. Correct. If I was making dinner and Michael would be
13 crying, I would ask him if he could go and see why he was
14 crying, and he said it's not his job.

15 Q. Okay. What types of things did he do every day?

16 A. Sit there and boss me around.

17 Q. Did he smoke weed?

18 A. Yes. And he did whippets.

19 Q. Can you explain to the Court what a whippet is?

20 A. It's the nitrous cartridges, and when they -- like, when
21 you make with homemade whip cream.

22 Q. Would that be something he would use to get high?

23 A. Yes.

24 Q. During this time in October of 2015, these text messages,
25 was he abusing -- was he also abusing prescription pills?

1 A. Yes.

2 Q. What types of prescription pills would he take?

3 A. When I got pregnant with Rayleigh (phonetic), I was on
4 migraine medicines, because it would make it to where I would
5 throw up and was really, really sick so they had me on
6 Fioricet. He wouldn't allow me to take my Fioricet because he
7 wanted to use it to get high.

8 Q. And so he would take -- he would take your drugs also?

9 A. Yes.

10 Q. Now, if we go to the next page, we can see you sent a
11 picture to -- whomever this person you were talking to, you
12 sent a picture.

13 Do you recall sending this picture?

14 A. Yes. This would be to my mom, Erin.

15 Q. This would have been to Erin Brassfield?

16 A. Yes.

17 Q. Now that you have had a chance to review the exhibit, you
18 can recall these pictures?

19 A. Yes.

20 Q. All right. And it says -- this is on November 11, 2015,
21 roughly a month later to where we started. It says, "Do you
22 still have a picture of when I sent you of me having a black
23 eye?"

24 Do you see that?

25 A. Yes.

1 Q. Can you explain to the Court, have you previously sent
2 pictures to Erin Brassfield showing your abuse, and if you
3 did, how many times?

4 A. Whenever I was able to. I was only allowed to have
5 technology when I earned it. And when he would beat me, he
6 would take it away, so I had to earn it back.

7 Q. What types of things would you have to do to earn it?

8 A. Whatever he told me to do.

9 Q. During this time, from the time you were married in 2014
10 up until November 5th, when was the first time you found out
11 that he had been cheating on you?

12 A. Oh, it was back when we were in Kingsville.

13 Q. So that would have been approximately 2014 -- no, wait.
14 I'm off on my dates. Around May of 2015?

15 A. Yes.

16 Q. And how long did y'all actually stay in Kingsville?

17 A. Like, a month or two.

18 Q. And when you say, "he would take away, you would have to
19 earn it," you said you would have to work for him and do
20 different types of things?

21 A. Yes.

22 Q. But it would also be sexual in nature; correct?

23 A. Yes.

24 Q. So he would force you to do those things, basically, force
25 you to do those things in order for you to earn your

1 privileges in order -- in order to even have contact with the
2 outside world; is that affair assessment?

3 A. Yes. He looked at me as his property.

4 Q. And it says here -- in November of 2015, it says, "It's
5 not. It's fine. I'm trying to get everything together for
6 when I talk to a lawyer. Devin won't ever get to see Michael.
7 He's a predator and abusive."

8 Did I read that correct?

9 A. Yes.

10 Q. So you were reaching out to her when you did have the
11 privileges of technology to try to get some help so that you
12 can get out of this relationship; is that true?

13 A. Yes.

14 Q. And did you believe he was a predator at that point?

15 A. Yes.

16 Q. And you knew at this point in time also that he had --
17 that he had been cheating on you in November of 2015?

18 A. Yes.

19 Q. Now, at what point in time, Danielle, did you and Devin
20 move back to Colorado?

21 A. Which time?

22 Q. How many times did you move back to Colorado? That's a
23 better question.

24 A. I would say at least three times, maybe four if you count
25 the month, when we were down there for like a month.

1 Q. At one point in time, you moved to Colorado and y'all --
2 y'all rented an apartment; do you recall that?

3 A. Yes.

4 Q. Do you recall about what time of year that was when that
5 happened?

6 A. I think it was during the summer.

7 Q. And what year would that have been, 2016?

8 A. Maybe. I mean, Michael was just a little baby, like a
9 couple months old. Maybe four months old.

10 Q. And when you were there in Colorado at that time, what was
11 the reason he continued to move back to Colorado all the time?

12 A. Because he wanted to go back because they had weed.

13 Q. So he would -- he would go back so that he could legally
14 buy marijuana?

15 A. Yes.

16 Q. And y'all would stay there for a while, and then he
17 would -- he would pack up and decide that you were going to
18 leave?

19 A. Yes. That was the first and third time. The second time
20 we left is because I reached out to a roommate at that time
21 with a handprint on Michael, and then when he found out that I
22 did that, he made us up and leave in the middle of the night.

23 Q. And so I think y'all had leased an apartment and lived
24 there maybe two weeks or so.

25 Does that sound familiar?

1 A. Yes.

2 Q. And you saw that your baby, Michael, had a handprint on
3 his leg?

4 A. Yes.

5 Q. And did you talk to Devin about that?

6 A. Yeah. I asked him. And he said it was because he held
7 his leg too tight and his leg got bruised and he said he
8 wasn't going to do it again.

9 Q. Were you pregnant with your daughter at this point in
10 time?

11 A. No. I didn't get pregnant with my daughter until 2016
12 because I had her in 2017.

13 Q. Okay. We're going to get to that.

14 During this time, though, y'all had just rented this,
15 leased this apartment, and you cried out to your roommate at
16 that point in time?

17 A. Yes.

18 Q. And what did she do -- oh, first off, what was her name?

19 A. Her name was Emily.

20 Q. And what did Emily do when she found out, or when you
21 cried out to her and showed her the picture of the abuse to
22 Michael's leg?

23 A. She said that, you know, she would get me help.

24 MS. CHRISTILLES: Objection. Hearsay.

25 THE COURT: That's -- any response to that?

1 MR. WEBSTER: I didn't hear her answer yet.

2 THE COURT: Well, she's calling for hearsay.

3 MR. WEBSTER: Okay. I'm asking what her
4 understanding of -- I asked her what happened when she told --
5 let me reask --

6 THE COURT: No. What you asked was, "What did she
7 say?"

8 MR. WEBSTER: I'm sorry. Let me reask the question.

9 THE COURT: That's sustained.

10 MR. WEBSTER: Thank you, Your Honor.

11 BY MR. WEBSTER:

12 Q. What -- what was your understanding -- what happened after
13 you disclosed to Emily that Michael's leg had been bruised by
14 Devin Kelley?

15 A. That she would help me get out of the marriage.

16 Q. And did --

17 MS. CHRISTILLES: Objection. Hearsay, Your Honor.

18 THE COURT: Yeah. No, that was not hearsay. That's
19 overruled.

20 BY MR. WEBSTER:

21 Q. Now, when you -- when Devin -- how did Devin find out that
22 you had shown her Michael's leg or provided her with a picture
23 of Michael's leg?

24 A. He went through my tablet because I didn't have time to
25 delete the messages.

1 Q. Did he beat you for this?

2 A. He hit me.

3 Q. Where did he hit you?

4 A. On my ribs.

5 Q. And during the time that -- during the time of your
6 marriage, did Devin get better at what I call "better at
7 abusing you" where you can't see it?

8 A. Yes.

9 Q. How did he change the way that he would abuse you during
10 this time?

11 A. He didn't do my face as often unless he knew we were going
12 to not have to be in public. He would hit my ribs to where it
13 would be his whole fist print or kick me in the back or choke
14 me and then I would have to wear shirts to cover it up or put
15 handprints on my legs.

16 Q. Did he ever choke you to where you would lose
17 consciousness?

18 A. Yes.

19 Q. How many times would he do that, that you recall him doing
20 that?

21 A. More times than any of us can count.

22 Q. When he -- during the time in 2015, when you -- when you
23 came back from Colorado -- I think we talked about that --
24 y'all -- I think y'all -- let me rephrase the question.

25 I'm sorry. I got off topic.

1 When you were in Colorado and y'all rented this apartment,
2 y'all had only been there about six weeks -- or two weeks or
3 so; correct?

4 A. Correct.

5 Q. And y'all left? Y'all packed everything and left in the
6 middle of the night?

7 A. Yes.

8 Q. And where did y'all go back to?

9 A. To Michelle's house.

10 Q. And did he, did Devin Kelley know whether or not Emily had
11 ever filed a police report?

12 A. No.

13 Q. Now I want to talk to you about -- I want to talk to you
14 about when you moved back into -- when did you come to
15 permanently live where you weren't coming back and forth to
16 Colorado? About what time?

17 A. I guess the end of '15, early '16.

18 Q. So you moved -- when I say "permanently," between the time
19 of the shooting, up until -- going back --

20 A. Um-hum.

21 Q. -- when was the last time that you actually lived in
22 Colorado? Was it that night y'all moved out in the middle of
23 the night?

24 A. It was the one time we went to Pueblo for a month and then
25 that's when we permanently moved back, and I guess that was

1 2015-ish, 2016. It was before I got pregnant with my
2 daughter.

3 Q. Okay. And when you came back and you got -- and you --
4 when you came back, did you get a job at H-E-B?

5 A. Yes. That was after I was pregnant with my daughter.

6 Q. Was the pregnancy with your daughter planned, Danielle?

7 A. No.

8 Q. Was that pregnancy forced upon you?

9 A. Yes. He would take my birth control away from me as a
10 form of punishment.

11 Q. Okay. And I would assume you did not want to have another
12 baby at this point in time; is that true?

13 A. That's correct. I couldn't have another baby to try and
14 protect from him.

15 Q. During this time, was he forcing you to watch pornography?

16 A. Yes.

17 Q. And he was still being -- still doing the same exact
18 things, punching, slapping, choking, dragging you by the hair?

19 A. Yes.

20 Q. Did he ever -- did y'all ever talk at all about his
21 previous relationships where he was married to Tessa?

22 A. No.

23 Q. Were you not allowed to bring that up or talk about it?

24 A. I wasn't.

25 Q. Now I want to move for a minute and talk to you now about

1 after you came back from Colorado. I want to talk to you
2 about Devin and guns. Okay?

3 A. Okay.

4 Q. Now, at the time of the shooting, Devin owned, from what I
5 remember, three guns that you know of; is that correct?

6 A. From the time of the shooting?

7 Q. Yes, ma'am.

8 A. Yes.

9 Q. He had an AR-15; correct?

10 A. Yes.

11 Q. He had a .22 pistol; is that correct?

12 A. I just know he had two pistols.

13 Q. Fair enough. Two pistols. Okay. Now, I want to go back
14 for a little bit. You stated earlier he didn't have any
15 interest in guns prior to the Air Force that you can recall;
16 correct?

17 A. Correct.

18 Q. I think you told the Court earlier that he started having
19 an interest in guns in 2016; is that true?

20 A. Yes.

21 Q. And so how did it change in 2016 that he started
22 expressing more of an interest in guns?

23 A. He just would research a lot, and then he said he wanted
24 to do a gun school to teach people about guns.

25 Q. When he -- you issued an affidavit in this case with

1 regards to -- would he tell you the types -- would Devin
2 Kelley tell you the types of -- the types of guns that he
3 would want to look at?

4 A. He said he wanted the AR for home protection, is what he
5 would tell me.

6 Q. And when y'all lived there in the barndominium that we
7 talked about earlier, did he have any type of -- he didn't
8 have any type of machining tools or any specialized knowledge
9 in building guns; did he?

10 MS. CHRISTILLES: Objection. Speculation.

11 THE COURT: You can testify from your personal
12 knowledge.

13 THE WITNESS: From my personal knowledge, no. I
14 don't think he knew how to, like, build guns.

15 BY MR. WEBSTER:

16 Q. If we go back and look at the photos of the -- of the
17 barndominium and we look at page JEX799-0015, one of the
18 entrances into the barndominium, the barndominium apartment
19 that you were staying in was just to the right of here; is
20 that correct?

21 A. Yes.

22 Q. And so this would have been the outdoor area where you can
23 see -- is that your stroller and some toys for the kids and
24 stuff over on the right?

25 A. Yes.

1 Q. And so there was not any equipment or any type of machines
2 or any of the rest that you recall, that he could build or
3 assemble or disassemble guns that you recall; correct?

4 A. Correct.

5 Q. He didn't have any -- number one, y'all didn't have the
6 money for that type of stuff, and number two, Devin Kelley
7 didn't have the gun knowledge to even be able to do that; did
8 he?

9 A. To my knowledge, he didn't, no.

10 Q. And so the knowledge that he had acquired from -- at least
11 from what -- from your perspective based upon your own
12 personal knowledge, any gun -- would he have acquired that
13 knowledge from the Air Force?

14 A. Um...

15 MS. CHRISTILLES: Objection. Speculation.

16 THE COURT: That's speculation. That's sustained.

17 MR. WEBSTER: No problem.

18 BY MR. WEBSTER:

19 Q. Do you know whether or not the Air Force ever trained
20 Devin Kelley in how to assemble or disassemble an AR-15?

21 A. I don't -- I don't know. I don't know anything about,
22 like, what they do.

23 Q. Okay. Now, you went to -- on several occasions, y'all
24 would go to different stores and look at guns; is that true?

25 A. Yes.

1 Q. How often would that occur from, say, 2016, when you moved
2 back and you said he got more interested, how often would
3 y'all go to the store and look at those types of things?

4 A. Frequently. When he found a gun that he liked, and then
5 after he got the AR, I know we went back several times because
6 he wanted to buy stuff. And most of the times when he was
7 going back, I would just take Michael and walk around with him
8 so he could see stuff.

9 Q. Now, during that time, somewhere around November/December
10 of 2015, did you go shopping with Devin Kelley at Dick's
11 Sporting Goods?

12 A. Yes.

13 Q. Can you explain to the Court what happened while you were
14 there? Why were y'all -- why did you go to Dick's Sporting
15 Goods in November/December of 2015?

16 A. He wanted to buy a gun, and they said that since he had a
17 Colorado ID and that Dicks wouldn't do it because it's
18 something about their policy or something. They wouldn't sell
19 him it.

20 Q. Were you personally there? Did you see the actual gun he
21 was trying to buy?

22 A. Yes.

23 Q. What did you see at that point in time?

24 A. I mean, guns look the same.

25 Q. It's safe to say you are not real sure on the make or

1 model or type of gun that it was; is that fair?

2 A. Yes.

3 Q. And what were you doing during that time? You had your
4 son; correct?

5 A. Yes.

6 Q. Was he able to walk at that point in time?

7 A. No. He was just a baby.

8 Q. What were you doing while he was trying to purchase this
9 gun?

10 A. I was moving around, keeping him happy.

11 Q. And you were just kind of basically what I would call
12 "hovering around the situation," but not really paying
13 attention to what's going on; is that a fair assessment?

14 A. Yes. When I came back around is when I came up upon them
15 when he was saying like towards the end Dick's wouldn't do it
16 because he had a Colorado ID.

17 Q. Was he upset?

18 A. I mean, we left the store and his face changed.

19 Q. Did he try to force you to go back in and buy the gun?

20 A. No.

21 Q. Would you ever buy a gun for Devin Kelley if he asked you
22 to?

23 A. No.

24 Q. What would happen -- if he asked you to, what would
25 happen?

1 A. I would get -- you know, if I said, "no," he would beat
2 me, but I would take the beating.

3 Q. Did you ever ask you to buy a gun for him?

4 A. No.

5 Q. Did you ever see him ask one of his parents or any other
6 friend or someone else try to purchase a gun for him?

7 A. From my knowledge, no.

8 Q. And that's what I'm asking. Your personal knowledge, you
9 never saw that; correct?

10 A. Correct.

11 Q. And he was pretty much -- during this period of time in
12 2016, y'all were pretty much -- would you say that you were
13 pretty much quartered off from the rest of the world?

14 A. Yes.

15 Q. And during the days of the week, during the normal days of
16 the week, if neither one of you were working, y'all were just
17 there at the house during the entire time; right?

18 A. Yeah. I wasn't allowed to do nothing.

19 Q. So were you allowed to take the kids outside and play?

20 A. He had to watch me and I had to ask permission. The only
21 time I was allowed to do everything is if I got everything
22 finished off the list of stuff that he had for me, and if I
23 didn't finish it on a time stamp that he had, I would get a
24 punishment.

25 Q. When after -- between December 2015 and April of 2016, do

1 you recall ever going to any stores after the Dick's event
2 where Devin Kelley tried to purchase any firearms? Did he go
3 to any private individuals? Did try to do it any other way
4 that you're aware of?

5 A. Besides going to Academy?

6 Q. Yes, ma'am.

7 A. He went to Academy and bought the AR.

8 Q. Right. But I am saying between the time that he went and
9 bought the AR in April of 2016, do you recall -- do you recall
10 at any time, did he try -- did he try to purchase the gun in
11 any way that you're aware of?

12 A. Oh, no. He only wanted it from stores because he didn't
13 want them to break.

14 Q. Now, when you -- once he -- in April of 2016, you went
15 to -- you went to Academy with him; correct?

16 A. Yes.

17 Q. Did y'all go to different Academies from time to time?

18 A. No. We only went to the one Academy that was closest to
19 New Braunfels.

20 Q. But you were there -- you were there the day that the
21 rifle was purchased; correct?

22 A. Yes.

23 Q. If in your statement it says Selma, but the paperwork
24 shows it was purchased at an Academy in San Antonio.

25 Do you recall ever going to an Academy in San Antonio?

1 A. No. I thought it was the Selma one because that's the
2 closest one to New Braunfels.

3 Q. But if it shows it was bought there, are you telling the
4 Court -- where you there when it was bought?

5 A. No. It was bought there. I'm sorry. I didn't know the
6 location.

7 Q. How many times do you think that you went to Academy,
8 Danielle, during the time that you were married to Devin
9 Kelley?

10 A. All of them except for the last one.

11 Q. Meaning, y'all went all the time?

12 A. Yeah. He would drag me along, and I didn't have a say in
13 it, so when he would go in and buy it, I would take Michael
14 around.

15 Q. And so you would go walk around the store and that kind of
16 thing?

17 A. Yes.

18 Q. So regardless of what -- of what Academy it was in that
19 day where the gun was purchased, you are telling the Court as
20 you sit here today under oath that you were there?

21 A. Yes. I was there.

22 Q. Can you describe to the judge what happened when you went
23 into the Academy and purchased the gun that day, what you can
24 recall?

25 A. When we went in, they did a background check. His

1 background check came back pretty quickly. I was driving
2 Michael today around. I came back, and that's when manager
3 was there, and they were talking and the manager, I guess, had
4 to like override or approve, however you want to put it, for
5 him to get the gun.

6 Q. And so once he purchased the weapon, y'all didn't have any
7 problems purchasing it?

8 A. No once the manager came, it was quick.

9 Q. And did you -- were you upset that he was buying a gun?

10 A. I didn't have a say, so I didn't get to show emotions
11 to --

12 Q. Did y'all have the money to buy a gun?

13 A. Oh, I didn't know what money we had because he would take
14 it. He kept all finances away from me.

15 Q. And so once he purchased the gun, did he use the gun?

16 A. Yeah.

17 Q. Would he shoot it?

18 A. Yeah. He would shoot it. I know when we were there, he
19 bought the little things that you put in it.

20 Q. The magazines?

21 A. Yeah. Those. And he bought the really big ones and he
22 would go and shoot the gun. He would force me to pick them
23 up, the shells, and if I didn't do it hard enough, he would
24 take his pistol and hit me.

25 Q. So you would actually be out on their family property

1 shooting the gun?

2 A. No. He would be shooting. I didn't touch it.

3 Q. I understand. Let me rephrase the question.

4 Devin would be out on the family property actually
5 shooting the -- shooting the weapon and you would be standing
6 besides him?

7 A. Yes.

8 Q. And he would force you to watch this?

9 A. Yes.

10 Q. Where would your kids be or Michael at the time?

11 A. I would have to have Michael with me and I put little,
12 like, stuff on his ears, so it wouldn't hurt his ears.

13 Q. So when he would be out there practicing shooting, what
14 types of things would he force you to do?

15 A. I would have to pick up the shells.

16 Q. Now, how often would that go -- would that on, Danielle?

17 A. A lot.

18 Q. Once or twice a week or...

19 A. However many times he went. Sometimes it would be more,
20 or sometimes multiple times a day, like after a while, I
21 just -- I stopped counting because I was forced to do so much
22 stuff, I can't keep track.

23 Q. Would he -- he would never -- would he ever leave you
24 alone in the barndominium?

25 A. No. Oh, I take that back. No, unless he had to work

1 because he had a job towards the end and that's when I had an
2 iPod, and when he left me alone, I had to check in, and if I
3 didn't check in on time, he would come home.

4 Q. Okay. And did he give you any way to communicate with the
5 outside world at that point?

6 A. No. The iPad you can't do nothing. You can only talk to,
7 like, iPhones, but even then he monitored everything.

8 Q. Would he lock you in that barndominium?

9 A. Yes. The doors that you showed, I don't know if you
10 wanted to put it back on so everybody can see so I can show
11 y'all.

12 Q. Sure. Go to 0799-0016. Well, 17 would be better.

13 A. So can you scoot it back to the door, to the main door?

14 Q. Oh, okay. Yes, we'll go back two.

15 A. I'm sorry. On this one, do you see where it's in front,
16 that was like cinder blocks, I think is what you call those
17 concrete blocks. They had it there to block the door -- I say
18 "they," Devin -- to where I couldn't lift it up because he
19 would hear me and it was, yeah, those.

20 Q. Okay. So he would use cinder blocks to hold the door down
21 and you couldn't lift it up?

22 A. Yeah. And then on the side, there is like a little --
23 like a metal thingy. You know, it's like a hook that you are
24 supposed to lock it. He would lock those down to where if
25 you -- if you lifted it, you could hear it, and it was the

1 same on the other side by the front door. Not the barn --
2 not, like, the apartment door, but like the front door to the
3 barn, like, thing that -- like if you go back to your other
4 photo -- yeah, that one.

5 Like he would close it and put stuff there to where I
6 couldn't get out, and then the front door next to it, it would
7 stick to where it would -- you know, you got to pull it really
8 hard and he would hear it.

9 Q. Okay. And when he would leave, though, when he would go
10 to his job later on in time, did he lock you in the house at
11 that point, too?

12 A. Yeah. And the windows -- you know, the first window up
13 there that has the foil, you can't get to it because it's
14 permanently closed. The bathroom window, which is a tiny
15 little square past the big windows.

16 Yeah, that one.

17 There was no way to get to it. And if these, the big ones
18 right there, it can open, but he put the heavy couch in front
19 of it.

20 Q. Okay. So it was a way to keep you inside the house at all
21 times?

22 A. Yes.

23 Q. Okay.

24 A. And if you left, it would be in front of his parent's
25 house.

1 MR. WEBSTER: Your Honor, at this time, could we take
2 a short break?

3 THE COURT: Let's go ahead and take a 10- to
4 15-minute break.

5 MR. WEBSTER: Thank you, Your Honor.

6 (Recess.)

7 THE COURT: You may continue.

8 MR. WEBSTER: Thank you, Your Honor.

9 BY MR. WEBSTER:

10 Q. Danielle, I'd like to transition now to a different area,
11 and I'd like to talk to you about the Sutherland Springs
12 Baptist Church; okay?

13 A. Okay.

14 Q. Can you tell the Court when did you first start going to
15 the Sutherland Springs Baptist Church?

16 A. When I was a child.

17 Q. Okay. And you say, "when you were a child," would you go
18 there with Michelle Shields?

19 A. Yes.

20 Q. Your adopted mother?

21 A. Yes.

22 Q. And was she a member of that church?

23 A. Yes.

24 Q. Is she still a member today?

25 A. Yes.

1 Q. And can you tell us over the years what did that church
2 mean to you?

3 A. I grew up at the church, so it's like another home.

4 Q. Were you close to many of the families there?

5 A. I was close to the Holcombes and the Hills.

6 Q. And did -- when you -- and you say you grew up in the
7 church, did you consistently go there up until when?

8 A. Until I left home.

9 Q. And when you say you "left home," that would have been in
10 April of 2014; correct?

11 A. Yes.

12 Q. And that would have been when you married Devin Kelley?

13 A. No. I left before then, because I moved out from
14 Michelle's when -- I think, around 18 -- then I went to Erin's
15 house. And then after Erin's house, that's when I moved in
16 with him.

17 Q. During the times that you -- when you were growing up, did
18 you go to vacation Bible school?

19 A. Yes.

20 Q. What types of things did y'all do there?

21 A. I helped with the toddlers.

22 Q. How old were you when you were doing that?

23 A. I was a teenager.

24 Q. And you also -- did you work in the nursery during
25 services and stuff?

1 A. I did.

2 Q. And did you have difficulties with the family at the
3 church?

4 A. Yes.

5 Q. And why did you have difficulty with the family at the
6 church?

7 A. I had a family that hasn't been at that church for a very
8 long time. Her daughter and I just had a falling out and the
9 family was just really ugly towards me.

10 Q. So did you stop going for a while -- or once you got
11 married to Devin, did you stop going to church?

12 A. Yeah, because he didn't like church.

13 Q. Would he allow you to go to church?

14 A. Only when you earned the right to go see my mother.

15 Q. Would he attend church with you?

16 A. Yes.

17 Q. What was your mother's role at the church?

18 A. Like when? Like before the shooting? After the shooting?

19 Q. Yes, ma'am. Before the shooting.

20 A. Before the shooting, I think she was just a member. After
21 the shooting, I think she was just a treasurer, kind of the
22 person that deals with like finances.

23 Q. So she's still a member of the church today?

24 A. Yes.

25 Q. What other family members did you have, Danielle, that

1 went to the church there?

2 A. My grandma.

3 Q. And any other family members?

4 A. I mean, just Naw Naw, my -- Lula White.

5 Q. Okay.

6 A. And then Michelle.

7 Q. Can you explain how was Lula White -- I apologize.

8 Can you tell us how Lula White -- I apologize. You were
9 going to finish. I didn't mean to interrupt you.

10 A. Oh, it would be my brother that went to church and then
11 Dan, who is my dad, went to church and then my grandmother and
12 my grandfather before he passed away.

13 Q. Did Erin Brassfield ever go to church there?

14 A. No.

15 Q. Did Kurt Brassfield ever go to church there?

16 A. No.

17 Q. During the times that -- when you were married to Devin
18 Kelley, did he know that that was a -- that you enjoyed being
19 at that church?

20 A. Yes.

21 Q. Tell us how did that interaction work? How did he know
22 that you enjoyed being at the Sutherland Springs Baptist
23 Church?

24 A. He knew I took care of the babies.

25 Q. Was the church -- would you consider the Sutherland

1 Springs Baptist Church a safe place for you?

2 MS. CHRISTILLES: Objection. Leading.

3 THE COURT: That's overruled.

4 THE WITNESS: Yes, it was home.

5 BY MR. WEBSTER:

6 Q. Why would you call it home?

7 A. Because it was just a place you can go in, and I loved the
8 children there. I just wanted to work in the children's
9 ministry.

10 Q. Did you often have conversations with Devin about this?

11 A. No. He knew beforehand that I loved it. I love children.

12 Q. And he knew that that was one of the places that was very
13 sacred in your heart; is that fair?

14 A. Yes, because he knew that. When you teach a child, right,
15 and when they get something, their little eyes sparkle.

16 Q. Right. Did Devin know during the time prior to the
17 shooting that you often looked to the church members for
18 support?

19 A. Yes.

20 Q. How did he know that?

21 A. He knew Karla Holcombe, that I adored her, and she was my
22 youth pastor.

23 Q. She was your youth pastor?

24 A. Yes.

25 Q. Did you often confide in her?

1 A. Yes.

2 Q. Back when I was a teenager -- you know, once I got married
3 to him, I couldn't talk to anybody.

4 Even when you went to church, would he control what you
5 had to say?

6 A. Yes.

7 Q. Now, when -- and how often during the time that you were
8 married to Devin did you attend church there?

9 A. Just a handful of times, just so I could see my mother.

10 Q. Would he ever allow just her to come out to the house?

11 A. No. We had to go to her.

12 Q. The barndominium, he was -- she was never allowed on the
13 property; correct?

14 A. Nobody was allowed there.

15 Q. And when you say that, he would use church as a way for
16 you to be able to see her?

17 A. Yes.

18 Q. And can you explain to the Court when you would have an
19 interaction with your mom, and the other patrons of the
20 church, how was that, how did it work when Devin was with you?

21 A. When we were there, I had to be careful with what I said
22 and how I said it, and I couldn't do eye contact. And I was
23 only allowed short conversations.

24 Q. He didn't want any -- would you agree with me that he
25 didn't want anyone talking to you?

1 A. Yes. If he wasn't present, he would take me away from the
2 conversation and ask what I said.

3 Q. And was that because he was trying -- was he -- at this
4 point, do you believe he was scared that maybe you might tell
5 somebody about the abuse you'd suffered?

6 MS. CHRISTILLES: Objection. Speculation.

7 THE COURT: That's sustained.

8 MR. WEBSTER: Okay.

9 BY MR. WEBSTER:

10 Q. Do you have any personal knowledge? Did Devin ever tell
11 you why you were not allowed to talk to anyone?

12 A. Because I was his property.

13 Q. Did Devin ever express whether or not he actually liked
14 the church to you?

15 A. He didn't say that he felt -- he didn't like churches,
16 like it didn't matter what church it was, because he said he
17 was an atheist. He didn't believe in any type of, like, a
18 deity.

19 Q. So the only time you would get to church is if you earned
20 the right to go and to see your mother?

21 A. Yes.

22 Q. Did Devin ever express that he felt slighted by the church
23 members or that he felt unwelcome?

24 A. I don't really know what "slighted" means.

25 Q. That he felt like they had treated him badly?

1 A. Oh, he thought everybody did. Like he thought everybody
2 was always out to get him.

3 Q. He didn't like people; correct?

4 A. Correct.

5 Q. Now, he also -- during that time, did he have a run-in
6 with your preacher? What I call a run-in or an argument?

7 A. Oh, I have no idea.

8 Q. Do you know whether or not the preacher ever approached
9 Devin about a possible abuse towards you?

10 A. Oh, I wouldn't know.

11 Q. That's not something he would have told you; right?

12 A. No. He told me what he thought I needed to know at what
13 time I needed to know it. Like, he kept a lot of things from
14 me, even though at the time I thought he was being truthful,
15 but he wasn't.

16 Q. And on November 5 of 2017, did Devin Kelley know what this
17 church meant to you?

18 A. Yes.

19 Q. Now, I want to move to the next part, which is -- we're
20 going to talk about -- I'd like to talk about just prior to
21 November 5, 2017; okay?

22 A. Okay.

23 Q. Had y'all -- let me go back for a minute.

24 During that point in time, there was a run in, what I
25 would call a run in or a law enforcement, that came out to the

1 Kelley's property.

2 Do you recall that?

3 A. Yes.

4 Q. And you were not out there at the scene when that
5 happened; correct?

6 A. Correct. I wasn't allowed to be.

7 Q. Where were you when the police came?

8 A. I was in the barn with my baby.

9 Q. How did you find out that the police had come to the
10 Kelley property?

11 A. They left cards everywhere, and it was upsetting them, and
12 then he went down to the gate, and when him and Mr. Kelley
13 came back, they just looked very upset.

14 Q. Was he armed when he went down to the gate?

15 A. I believe so because he never took that off.

16 Q. And then I'll show you what's -- I'll show you JEX799-116.
17 And do you see where it says the number 5 over here?

18 A. Yes.

19 Q. Is that the holster that he would wear on a regular
20 occasion?

21 A. I believe so. I mean, I don't know much about gun stuff,
22 so if it fits, then it's what he used.

23 Q. But he wore that -- I think we talked about that earlier,
24 but he wore that on the property at all times; right?

25 A. Yeah, he wore it everywhere.

1 Q. Now, what was your understanding as to why Devin Kelley
2 didn't want you testifying at the Brassfield trial?

3 A. Because he couldn't control the situation. If he can't
4 control what I say or what I do, he didn't like it.

5 Q. Okay. It wasn't any -- he wasn't looking out for your
6 best interest; was he?

7 A. No.

8 MS. CHRISTILLES: Objection. Speculation.

9 THE COURT: That's sustained.

10 MR. WEBSTER: Here. I'll rephrase the question.

11 BY MR. WEBSTER:

12 Q. Do you feel like, based upon your own personal knowledge,
13 that Devin Kelley was, was interfering in the Donald
14 Brassfield trial in order to protect you?

15 A. He didn't care about me. He cared about himself he didn't
16 care that I would have to -- you know, if he -- if I wanted to
17 testify, right, and if he was there, he would have been fine
18 with it, because all you've got to do is just give a look or
19 do something. If he wasn't allowed there. He didn't want me
20 doing it.

21 Q. Did he ever -- did Devin Kelley ever tell you that he
22 didn't want you testifying because he was scared of what you
23 might tell the police or tell prosecutors?

24 A. He said I was forbidden from talking to anybody.

25 Q. And it -- and it wasn't because -- I mean, do you believe,

1 as you sit there today, based upon your own personal
2 knowledge, that that was because of any type of protection of
3 you in any way?

4 MS. CHRISTILLES: Objection. Leading.

5 THE COURT: That's sustained.

6 BY MR. WEBSTER:

7 Q. Why do you feel like he didn't want you to testify in the
8 Donald Brassfield trial?

9 A. I guess because he thought I would try to get away from
10 him.

11 Q. And would you have?

12 A. If I knew I could get out safely without my babies dying,
13 yes.

14 Q. Now, the abuse and the beatings had continued after he
15 bought the gun in 2016, right up until November 5th of 2017;
16 correct?

17 A. Yes.

18 Q. But the way you felt about things had changed, would you
19 agree?

20 A. Changed like?

21 Q. Meaning how did your reactions to the abuse you suffered
22 under Devin Kelley's hand change over time?

23 A. I didn't want my son growing up to be like him. When I
24 had my daughter, I didn't want her to think that she's some
25 man's trash, some man's property, because she's not.

1 Q. And when your daughter was born -- when was your daughter
2 born?

3 A. May 24th of 2017.

4 Q. So she was just a baby on November 5th, 2017; right?

5 A. Yes, she was only five months old.

6 Q. So we talked about the November 1st, 2017 incident when
7 the police came; okay. Leading up to that time, can you
8 explain to the judge or tell him what happened in your
9 relationship with Devin Kelley before November 5th of 2017?

10 A. He was cheating on me constantly all the time. I found
11 out he was cheating again and I had had enough. I was tired.
12 I was tired of being his punching bag.

13 Q. And did you know -- it was different this time, you had
14 known about the cheating before but did you actually see
15 evidence of it?

16 A. Yes.

17 Q. Can you tell the judge what you saw?

18 A. He had video of somebody giving him oral.

19 Q. And he showed that to you?

20 A. Yes.

21 Q. And what did you tell him, when you saw it?

22 A. I was done. I'm tired. I was done.

23 Q. And you testified earlier -- let's go to -- I want to
24 show --

25 Go to 799-0043.

1 This would have been standing, looking in the
2 barndominium. The bed would have been behind you to the right
3 and the closet would have been over your left shoulder;
4 correct?

5 A. Yes.

6 Q. So this was the small area that many of the beatings that
7 you took occurred; is that true?

8 A. Yes.

9 Q. And so when you would be -- as your daughter was born, she
10 would be laying in the crib that you can see in 0041 there to
11 the right; correct?

12 A. Yes. Oh, no. No. That white one, Michael was in the big
13 one. The little rocker was where my daughter was at.

14 Q. And so they would see and witness this, witness his abuse
15 of you on a daily basis?

16 A. Michael would. I would just tell him to close his eyes,
17 that it didn't hurt.

18 Q. Would he start to cry, when he would see this?

19 A. He would cry and I would tell him: "It's okay. It
20 doesn't hurt mommy. Just close your eyes."

21 Q. When did you tell Devin Kelley that you had had enough and
22 you wanted a divorce?

23 A. It would have been that Friday and Saturday. Friday, he
24 was cheating. I told him I was done. I was tired of him. He
25 was punching me in my ribs. And Saturday I told him I wanted

1 a divorce, I was done. I didn't want to be his punching bag
2 anymore.

3 Q. If we go back to 0041, sir.

4 Danielle, where were y'all, when y'all were having this
5 conversation or this fight?

6 A. It would have been on the couch.

7 Q. And so he would actually hold you down and punch you on
8 the couch?

9 A. He would pull me by my hair and throw me to the table.
10 And I would hit the table and he would hold me down and punch
11 me.

12 Q. Did this happen on that Friday before?

13 A. Yes.

14 Q. Okay. And that's when you told him -- he had shown you
15 the video? At that point in time, he had shown you the video
16 of the cheating, and that's when you said you had had enough?

17 A. Yes, because he got off on it.

18 Q. Did he -- did you -- how did -- were you crying, when this
19 happened?

20 A. Crying, as in to what? That he was cheating on me?

21 Q. Yes, ma'am.

22 A. No, because I was used to being felt like I was trash.

23 Q. Do you think that based upon the way that you told Devin
24 Kelley that you wanted a divorce, that he understood that it
25 was real this time?

1 MS. CHRISTILLES: Objection. Speculation.

2 THE COURT: You can testify from your personal
3 knowledge.

4 THE WITNESS: From my personal knowledge, I think
5 from that moment he knew I would have done everything to get
6 away from him.

7 BY MR. WEBSTER:

8 Q. Why?

9 A. Because I tried fighting back but I lost.

10 Q. And when you say you tried fighting back, what did you do?

11 A. I tried hitting him. I tried doing everything, but it got
12 to the point that I told him "I'm not afraid of you anymore,"
13 but I was.

14 Q. And so what was his reaction at that point on Friday?

15 A. He was beating me and then it stopped. And then on
16 Saturday when I told him I wanted a divorce, he was just calm
17 about it, because I was expecting him to beat me again.

18 Q. But this time he didn't?

19 A. Not on Saturday, no.

20 Q. When you had the conversation -- going back to 0041.

21 When you had the conversation with Devin that day, were
22 y'all sitting on the couch again on Saturday?

23 A. On Saturday, he was standing over me.

24 Q. Okay. Where were you at?

25 A. On the couch.

1 Q. And when you say "standing over," were you sitting? Were
2 you laying? How were you on the couch?

3 A. I was sitting there.

4 Q. And you were just looking up at him and he was standing
5 over you?

6 A. No. I don't look him in the face.

7 Q. You weren't allowed to look him in the face?

8 A. No.

9 Q. So you had your head down and you were sitting there?

10 A. Yes. I had to look down when I talked to him because I
11 wasn't allowed to look up at him.

12 Q. And you just -- can you tell the Judge exactly what you
13 told Devin Kelley on that Saturday?

14 A. I wanted a divorce. I was done.

15 Q. And what did he say to you, if anything, at that point?

16 A. He was calm. And him and I talked and said that Monday we
17 were going to go down to the courthouse to file for a divorce.
18 And he agreed to meet my mother, Michelle, halfway.

19 Q. Okay. Had you reached out to your mom at this time to
20 tell her that you had planned to leave?

21 A. No. All I had to do was call her and she would be there.
22 It didn't matter where. She would drive to Colorado, if I
23 needed her.

24 Q. So the plan at that point in time was that you had planned
25 to leave on Monday?

1 A. Yes.

2 Q. How come you just didn't stand up and leave right then?

3 A. How could I leave? I had two babies I have to worry
4 about. I didn't care if he killed me. I cared if he killed
5 my babies.

6 Q. And was he okay with the plan that you were going to go
7 down there and meet Michelle?

8 A. He seemed like it.

9 Q. And did he get angry at that point, or anything like that?

10 A. He was just calm. Like no emotion. Calm.

11 Q. Did you believe, based upon your own personal knowledge in
12 seeing what was going on, that Devin was okay with you getting
13 a divorce?

14 A. I thought he was going to let me go. But, you know, he
15 will never let you go.

16 Q. When the --

17 THE COURT: Counsel, let me stop you. The record is
18 unclear about what date this Friday and Saturday is.

19 MR. WEBSTER: This would have been --

20 BY MR. WEBSTER:

21 Q. I would believe all of these events, Danielle, what you
22 are talking about would have been on November 3rd and
23 November 4th, two and one days prior to the shooting on
24 November 5th, 2017; correct?

25 A. Correct.

1 Q. And so what happened the rest of the day on Saturday? Do
2 you recall what time approximately this conversation where he
3 became extremely calm occurred, what time of day it was?

4 A. It was nighttime because he had to go to work and he came
5 home early.

6 Q. Okay. So he had gone to his security job at that point in
7 time during the day, and then when he came back is when y'all
8 had the conversation?

9 A. Yes.

10 Q. And that night did y'all sleep in the same bed?

11 A. Yes, because there is nowhere else for us to go.

12 Q. So did he force you to have sex with him that night?

13 A. Yes.

14 Q. Did you want to have sex with him?

15 A. No, I never did.

16 Q. How long had he been forcing or raping you over the
17 past -- since you had been married to him?

18 A. Four years.

19 Q. Would you try to fight him off at times?

20 A. At times I did. No matter how much I screamed, he just
21 pushed my face farther into the bed and said: "This is what
22 whores deserve."

23 Q. Did he -- at any time -- on that night, did you fight him
24 on that night before the shooting?

25 A. I know if I just laid there and did nothing, he would

1 stop.

2 Q. So that's what you did?

3 A. After a while you learn that if you don't fight back and
4 you just let it happen, it will be done quicker and you don't
5 have to die.

6 Q. Was that a constant fear in your life?

7 A. Him killing me? Yes, because I knew he was going to one
8 day.

9 Q. Now, I guess after this occurred you went to sleep; right?

10 A. Yes.

11 Q. Tell me what happened. Take us through -- first off, I
12 want to go back and talk about the scene for a second.

13 Can we go back to Figure 0041 to start.

14 Danielle, you see here -- do you see in the corner the
15 black bucket?

16 A. Yes.

17 Q. See that right there?

18 Let's go to 0116.

19 Talked about that a minute ago. Now, this is what -- I
20 think this is what you referred to in your past testimony as
21 "Devin's black tub;" is that correct?

22 A. Yes.

23 Q. And were you allowed to touch that tub?

24 A. No.

25 Q. Why were you not allowed to touch that tub?

1 A. He made it clear. It was one of his rules. I can't touch
2 it. I can't move it. I can't get near it.

3 Q. Were you allowed to look in it?

4 A. No.

5 Q. Did you, as you sit here today, on November 4th or the
6 morning of November 5th, 2017, did you have any idea what was
7 in that black tub?

8 A. I didn't know what was in it until he forced me to watch
9 him put everything on.

10 Q. Okay. We're going to get to that in a second. But this
11 black tub, is that the place that he always kept it, right
12 there by the door?

13 A. Yes.

14 Q. Where did he keep his AR-15?

15 A. It was in the closet. It had a little rack that he put it
16 on because he didn't want it to get messed up.

17 Q. So he hung the gun in the closet and he kept things in
18 this bucket, but you didn't know what was in there; is that
19 true?

20 A. Correct.

21 Q. You never saw him open it and put it in and you stood over
22 his shoulder and got a chance to look at it?

23 A. No. I wasn't allowed to be there.

24 Q. When he would get in that box?

25 A. Yes.

1 Q. Did he put any type of devices or things on it there that
2 would keep you from being able to get into it?

3 A. He put stuff on there to where he knew I touched it. He
4 would beat me. Or if he felt like I touched it, he would beat
5 me.

6 Q. So you got accused of touching it at certain times but you
7 never touched it?

8 A. Yes.

9 Q. Now, going back to 0041, about what time did y'all get up?
10 About what time did y'all get up that morning on
11 November 5th of 2017?

12 A. Early. I don't know the time because I didn't have
13 anything to tell me time, so it was early in the morning.

14 Q. You didn't have a clock or anything like that, so you
15 wouldn't know what time it was?

16 A. Yes. We didn't have a clock hanging up.

17 Q. Tell me about his demeanor this morning. What did you
18 perceive his demeanor to be that morning, when he woke up?

19 A. He was just different. Like the whole thing was just
20 different.

21 Q. Was he talkative?

22 A. No, not really. He told me to fix him a light breakfast.
23 I fixed him a light breakfast. He threw up that breakfast.
24 And then after that I got my babies taken care of, and that's
25 when he put the gun to my head and told me to get on the bed.

1 Q. Okay. Let's talk about that for a second. So was he
2 sitting on the couch, when he told you to make him some
3 breakfast?

4 A. Yes.

5 Q. And do you recall what you made him?

6 A. I think it was tacos.

7 Q. If there's some pictures here inside to show that you made
8 him some -- that there were pigs in a blanket on the bar?

9 A. Oh, then yeah. It was probably pigs in a blanket.

10 Something breakfast-y and quick.

11 Q. So that was something you warmed up in the microwave?

12 A. Yes.

13 Q. What did you do next? You carried the plate over to him?

14 A. Yes. I had to feed him, like I had to prepare his plates
15 for him.

16 Q. And so once you set the plates down, what happened next?
17 Did he eat the food?

18 A. He ate it and then he threw it up.

19 Q. How long was it between the time he ate it and then he
20 threw it up?

21 A. Not very long.

22 Q. Did he get up from the couch and run into the bathroom?

23 A. Yes. And he threw up.

24 Q. So where were you standing? Did you watch this happen?

25 A. I mean, I knew he was throwing up, but I was taking care

1 of my kids.

2 Q. Where were you in the house and here in the apartment at
3 that point?

4 A. I was taking care of my daughter.

5 Q. So were you over by the little baby, the smaller baby crib
6 that's next to the bed?

7 A. Yes.

8 Q. And so when he came out of the bathroom, what happened
9 next?

10 A. I got my daughter dressed and changed. Michael was in his
11 crib, already changed, and he came over and put the gun to my
12 head.

13 Q. Where did he get the gun from?

14 A. It was the gun that he carried with him all the time.

15 Q. He already it had on that morning?

16 A. Yes.

17 Q. So when he got up and got dressed that morning from bed,
18 he put his gun on?

19 A. Yes. It was by the little table by the bed, like he slept
20 with it and --

21 Q. He had it with him at all times; it was next to the bed?

22 A. Yes.

23 Q. So then he got up and then he came over. And explain to
24 the Court exactly what he did, if you could, please.

25 A. He put the gun to my head and forced me to get on the bed

1 and hog tied me and handcuffed my hands and duct taped them
2 together.

3 Q. When you say he put a gun to your head, did he grab you by
4 your hair?

5 A. Yeah. He --

6 Q. I know this is hard.

7 A. He put the gun to my head and he bunched it up in the back
8 and threw me on the bed and positioned me to where he could
9 hog tie me.

10 Q. So when he would doing this, was he saying anything to
11 you, Danielle?

12 A. He was just quiet.

13 Q. I'm sorry. I can't hear you.

14 A. He was quiet. I knew I didn't fight back. After getting
15 guns to your head so many times, you learn to be compliant.

16 Q. And so he drug you by your hair and then put you on the
17 bed. In what position did he put you, on your stomach?

18 A. On my stomach, because he took my wrists and my ankles and
19 bound them together with rope.

20 Q. Go to 0036, please.

21 And so I know this is hard, and this is not something you
22 want to relive, but we appreciate this. But let me ask you
23 some more questions here. When he threw you on the bed, which
24 way was your head pointed on the bed?

25 A. At first it was pointed towards like the pillow by the

1 corner so he could tie me up.

2 Q. Okay. So your head was forced into the corner here?

3 A. So my head would have been pointing that way but I was
4 more towards the edge so he could tie me up.

5 Q. Okay. And when you say "hog tie", did he tie your hands
6 behind your back?

7 A. Yes. I was on my stomach. He pulled my arms back, both
8 my ankles back, and tied them together.

9 Q. Okay. So in the sense of hog tie, you mean you are laying
10 on your stomach, your feet and your hands are up behind you,
11 and you are handcuffed, duct taped, and rope tied; is that
12 true?

13 A. Yes.

14 Q. Did he say why he was doing this?

15 A. No. After that he just flipped me around to where I had
16 to watch him.

17 Q. Okay. When you say flipped you around, he turned you back
18 towards where we would be looking at the tub that we saw in
19 Exhibit 0041?

20 A. Yes.

21 Q. All right. And so did you ask him, hey -- were you
22 screaming at that point in time?

23 A. I was crying but my son was there, so I didn't want him
24 getting upset.

25 Q. Okay. So you weren't screaming, you were just quiet, just

1 kind of watching; huh?

2 A. Yeah. Because what can you do, if your hog tied and your
3 children are there? Because all he had to do was take them
4 and I couldn't do anything.

5 Q. Was Michael standing up in the crib watching what was
6 going on?

7 A. He was.

8 Q. And what was your baby girl doing?

9 A. She was laying there next to me on her little rocker crib.

10 Q. Were either one of them crying at that point?

11 A. Michael was. I told him it would be okay, he had to just
12 close his eyes.

13 Q. Did he do that?

14 A. He was crying and screaming and closing them.

15 Q. Now, and you -- did you ask him what he was going to do?

16 A. No. I stayed quiet.

17 Q. Did he give you any instructions?

18 A. No. He just -- no. We just laid there. I laid there. I
19 knew this is a time that something was going to happen.

20 Q. How did you know that Danielle?

21 A. Because he hog tied me and he got the guns and he put his
22 face mask on and told my son he would be right back.

23 Q. So he then -- Devin then walked over to the crate that we
24 saw in Exhibit 116; right?

25 A. Yes, the black box.

1 Q. The black box; right?

2 A. Yes.

3 Q. And tell the Court, what did Devin do and how did he do
4 it?

5 A. He was already dressed in all black. He put on the vest
6 that had everything attached to it. He had both the little
7 guns on him and he took his AR-15 and put it on his back.

8 Q. Did he do this slowly and methodically, while you watched
9 him?

10 A. Yes.

11 Q. What was your understanding as to why Devin Kelley was
12 doing that to you?

13 A. Because I wanted to leave him.

14 Q. Do you believe that this was a form of punishment, based
15 upon your personal knowledge of what happened in that room?

16 MS. CHRISTILLES: Objection. Speculation.

17 THE COURT: That's overruled.

18 THE WITNESS: Yes. He punished me because he told me
19 repeatedly the only way one of us got out was a body bag.

20 BY MR. WEBSTER:

21 Q. And so you did not know where he was headed or where he
22 was going to go that day; correct?

23 A. Correct. I didn't know.

24 Q. And so he slowly and methodically put on his body gear,
25 his body armor?

1 A. Yes.

2 Q. Did you even know he owned body armor?

3 A. No. I didn't know half the stuff that was in the box. I
4 say half. Like I didn't know anything.

5 Q. Okay. And so he slowly -- and then the very last thing
6 that he put on was the mask?

7 A. Yes.

8 Q. And the only thing that he said was what?

9 A. That he told my son he would be right back.

10 Q. He looked at Michael and said he would be right back?

11 A. Yes.

12 Q. And then he walked out the door?

13 A. Yes.

14 Q. Okay. Danielle, how long do you think you were there on
15 the bed?

16 A. Oh, I have no idea. It felt like forever.

17 Q. Did you try to escape?

18 A. Yes, but how can you do -- when you move, the handcuffs
19 got tighter. And then kept struggling, and then the rope
20 around my wrists and ankles were getting tighter.

21 Q. Okay. And so you don't know how long you were there.
22 Obviously, there was no clock for you to even tell what time
23 of day it was; right?

24 A. Yes.

25 Q. Did you know it was a Sunday?

1 A. No, I had no idea.

2 Q. Now, when -- tell me what happened next. While you were
3 tied up in there, were your kids screaming?

4 A. Michael was. Rayleigh was just sleeping.

5 Q. Michael watched what was going on?

6 A. Yes.

7 Q. Did he try to get out of the crib at all?

8 A. No. He's only two. He's just a baby. He didn't
9 understand. I told him it didn't hurt and he didn't need to
10 be scared.

11 Q. Okay. Now, when was the first time you knew -- at some
12 point in time the Kelley family came to your aid; right?

13 A. Yes.

14 Q. When I say the Kelley family, I mean his parents.

15 A. Yes, Mr. and Mrs. Kelley.

16 Q. Can you tell the Court what happened next, when the
17 Kelleys showed up to your house, or the barndominium?

18 A. They couldn't -- the door was locked, so they had to like
19 bust down the door. They asked what did I do.

20 Q. They asked what you did?

21 A. Yes.

22 Q. Did you find that odd?

23 A. I mean, at the time I was just like nothing, because I
24 wanted to get out of the restraint.

25 Q. Right. And they untied you?

1 A. Yep. They untied me. That's when he called them and they
2 asked where the keys to the handcuffs were, and then that's
3 when he told them and they undid my handcuffs.

4 Q. And so when he called them on the phone, was it on
5 speaker, or was he just talking to his dad? Who was he
6 talking to then?

7 A. When he called, he put it on -- they put it on speaker for
8 a while, and so he told me to take him off of speaker.

9 Q. Okay. Before he told you to take him off the speaker,
10 what was said by Devin Kelley over the phone at that point in
11 time?

12 A. That he shot a lot of people and that he was shot. And
13 they asked where. He said the church, and that he was trying
14 to come back home.

15 Q. And when you heard that it was the church, when he said
16 the church, did you know what church he meant?

17 A. Not until after, like after more of the conversation.

18 Q. Can you tell us to the best of your recollection how you
19 figured out it was the Sutherland Springs Baptist Church?

20 A. Because they were saying Sulfur Springs, and then he said
21 at her mother's church.

22 Q. Okay.

23 A. And that's when I knew.

24 Q. What else did Devin tell you during that phone call or
25 prior to him going off speaker, what else do you recall that

1 he said to you and the Kelleys?

2 A. He had me take him off speaker and he said he loved me,
3 even though it was just to get me on the phone. And then he
4 blamed me and said it was my fault and he shot himself.

5 Q. Did you hear him shoot himself in the head?

6 A. Yes. That's when I hung up the phone.

7 Q. And you hung up the phone?

8 A. Yes.

9 Q. Now, I think you said he blamed you for this?

10 A. He did. He said: "It was your fault."

11 Q. Michelle -- I'm sorry. Danielle, did y'all call law
12 enforcement after that?

13 A. His parents did.

14 Q. Were you there when that -- what happened after you hung
15 up the phone? What happened next?

16 A. His dad called them and I was getting my babies.

17 Q. And you were trying to take care of the children?

18 A. Yes, because they were my concern.

19 Q. And what happened next in the scheme of things? Did y'all
20 go anywhere? Did you stay at the house? What happened next?

21 A. We went down to their house. They helped me get all my
22 babies and all their stuff. And then we later on that night
23 we had to talk to the Texas Rangers.

24 Q. Okay. And so just after this the Texas Rangers came and
25 they wanted to speak to you about what had happened there; is

1 that correct?

2 A. Yes.

3 Q. And Mr. Kelley went with you there; is that true?

4 A. Well, all of us were there. They had us all go.

5 Q. Everybody was there, including Mr. and Mrs. Kelley and
6 you; right?

7 A. Yes.

8 Q. And your children?

9 A. Yes. But when the time to like talk to them, Mr. and
10 Mrs. Kelley went together. Mrs. Kelley came back. And then I
11 went in there, because Mr. Kelley was in there when I gave my
12 statements.

13 Q. Can you please pull up Exhibit 7 -- 694, please.

14 MR. WEBSTER: Your Honor, these are videos that have
15 been previously admitted under the Texas Ranger file. The
16 first clip we are going to listen to is 5411 to 5522.

17 I'd like for you just to pull it to that point and
18 stop. I have some questions but I have to set it up.

19 THE COURT: So just to be clear, this is Joint
20 Exhibit 694?

21 MR. WEBSTER: That is correct, Your Honor. The
22 clips, for the court reporter, are 5411 to 5522 and 10159 to
23 10230.

24 BY MR. WEBER:

25 Q. Okay. Now, Danielle, that's you over in the right-hand

1 corner; is that correct?

2 A. Yes.

3 Q. And that would be your then father-in-law, Mr. Kelley,
4 sitting next to you; is that right?

5 A. Yes.

6 Q. Did anybody advise you that you needed a lawyer at that
7 point in time?

8 A. No.

9 Q. Were you scared in that room?

10 A. Yes. I can't say anything because I don't like conflict.

11 Q. Do you think that that is a reason -- do you think that
12 that is because of the abuse that you suffered over the years?

13 A. Yes.

14 Q. And so when you were there, Mr. Kelley was sitting right
15 next to you listening to everything you had to say; correct?

16 A. Yes.

17 Q. Did you feel open that you could talk about what had
18 actually happened with the Rangers in front of Mr. Kelley?

19 A. Like what do you mean, what happens?

20 Q. Like the fact that you had told Devin Kelley that you
21 wanted a divorce, that you wanted a divorce and that you
22 planned to leave him, and those type of things?

23 A. I thought his parents knew that we were going to get a
24 divorce --

25 Q. Okay.

1 A. -- from my understanding.

2 Q. How did you find that out?

3 A. He said that he was going to have his parents watch one of
4 the days so that we could talk. But on that Monday, we were
5 going to go and get a divorce.

6 Q. And so if we look at -- let's move around real quick. I'm
7 sorry to do this to you.

8 Joint Exhibit 799-00044. If you blow up the portion that
9 says this is 8:14 a.m., this is the same day on November 5th,
10 2017, it says: "If we get Medicaid back, maybe we will just
11 go to counseling. I don't know. Me and her need time to
12 talk." Do you see that?

13 A. Yes.

14 Q. That is a text message from Devin Kelley to his mother.
15 Is that consistent with what you believed that his mother knew
16 at that time, as it relates to you wanting a divorce?

17 A. Yes.

18 Q. And that is November 5th, that was the actual day of the
19 shooting; correct?

20 A. Yeah.

21 Q. If you go back one page to 003, and it says: Okay --
22 this is where he had requested that his parents -- did you
23 know he had requested his parents to watch the kids?

24 A. He told me that he wanted them to watch them before we
25 went to the courthouse so we could talk about the divorce.

1 Q. Okay. And so where he says: "We just need alone time to
2 talk, so maybe tomorrow." That's consistent with what you had
3 told him about wanting a divorce that day; right?

4 A. Yes.

5 Q. If we go back to the video, and this is Joint Exhibit 694,
6 and that's you in the corner at that point; correct?

7 A. Yes.

8 Q. Had you even changed clothes that day from when you got up
9 that morning?

10 A. No.

11 Q. How did you find out that the Texas Rangers wanted to talk
12 to you?

13 A. They called, I think Mr. Kelley, and said they needed all
14 of us to go and talk to them.

15 Q. So you went down and this is where they put you in the
16 room?

17 A. Yes.

18 Q. And who was watching your kids at this point?

19 A. They were out in like I guess a waiting area with
20 Mrs. Kelley.

21 Q. And so Mr. Kelley was there with you during your
22 statement; right?

23 A. Yes.

24 Q. All right. Could you please play this.

25 (Clip was played.)

1 During that time, during that time in that interview, were
2 you shaking?

3 A. Yeah.

4 Q. I could see that -- it looks like, were you crying?

5 A. Yes.

6 Q. Did you feel like you could tell them everything that
7 happened in front of Mr. Kelley?

8 A. No.

9 Q. Can you tell the Judge why?

10 A. I don't like conflict and I didn't know what they would do
11 or say, since I lived with him.

12 Q. There were times in the Texas Rangers' report,
13 specifically on Joint Exhibit 0600-003 --

14 And if you drop down to 2.20.

15 And do you see where it says: "Michael stated earlier
16 that morning he had asked Danielle if she and Devin had a
17 fight. Michael stated Danielle said no, they had not, and
18 everything was great and Devin was happy." Was that truthful?

19 A. No.

20 Q. Why didn't you tell the truth there, Danielle?

21 A. Because I can't tell them because Mr. Kelley was always
22 there every single time I was talking. How can you tell
23 somebody that you were being in an abusive relationship when
24 their parents are sitting in the same room?

25 Q. If you go to the next page, 004. And it says, 2.33, at

1 the very top.

2 It says: "During the interview Danielle stated it was a
3 normal day. She and Devin woke up and Danielle took the dog
4 outside while Devin was in the shower. Danielle described
5 Devin as being normal and very loving that morning." That's
6 not correct either; correct?

7 A. Correct. He wasn't loving.

8 Q. Did he take a shower that morning?

9 A. I don't remember him taking a shower.

10 Q. And then if you drop down to 2.46, it says: "Danielle
11 stated Devin had cheated on her but they had worked through it
12 and everything was fine." Is that true?

13 A. When you say "worked through it," as in beating me and I
14 never brought it up again.

15 Q. Okay. Did you feel like at that point in time -- why
16 would you say that everything was fine?

17 A. Because I don't like talking about it. Like, why -- how
18 do you tell people when you confront somebody, your spouse,
19 and they blame you for every single thing that they did. And
20 then his parents are just sitting there, like his dad would be
21 like, oh, well, I never knew that.

22 Q. Can you show the second clip, please, from the 694 video.

23 (Clip was played.)

24 Did you feel like Mr. Kelley was being in control of you,
25 when you had a hand on your shoulder and rubbed it during the

1 interview?

2 MS. CHRISTILLES: Objection. Leading.

3 THE COURT: You can testify as to how you felt.

4 THE WITNESS: I felt like when he put his hand on me
5 I couldn't say nothing.

6 BY MR. WEBSTER:

7 Q. At this point in time, did you have a car?

8 A. Like of my own, or that we shared?

9 Q. Even the one that you shared. After the shooting here,
10 when you are sitting in that room, did you have any means of
11 transportation at that point?

12 A. No, because the only vehicle we had was the one that he
13 took with him to the shooting.

14 Q. And at that point in time did you have anyplace to really
15 go live at that point?

16 A. I mean, besides Michelle's house, but I didn't want to go
17 there because it's so close to the church.

18 Q. But you were living on the Kelley property and were
19 depending on Mr. Kelley; correct?

20 A. Yeah. I was depending on them, yes, because I had
21 nothing.

22 Q. Was Mr. Kelley with you the entire time that you spoke to
23 any law enforcement officer, including the IG?

24 A. Like the IG?

25 Q. I am terrible with acronyms.

1 The Inspector General's Office.

2 A. Yes. He was there for all of them. The only time
3 Mr. Kelley was never there was when I talked to you.

4 Q. And that was both the time that we met and discussed this
5 case, and then also when you gave your deposition; correct?

6 A. Correct.

7 Q. Is that the first time you felt like you could really tell
8 the truth about what happened?

9 A. Yes, because they weren't there.

10 Q. As you sit here today, Danielle, do you believe that Devin
11 Kelley shot up the Sutherland Springs church to punish you
12 because you wanted a divorce?

13 A. Yes.

14 Q. Your family members died in this; correct?

15 A. Yes.

16 Q. And who was it that passed away, your grandmother?

17 A. My grandma.

18 Q. What was her name?

19 A. Her name was Lula White.

20 Q. Do you believe that Devin Kelley believed that your mother
21 Michelle Shields would have been at the church that day?

22 MS. CHRISTILLES: Objection. Speculation.

23 THE COURT: Only if you know.

24 THE WITNESS: I believe he thought she was, since she
25 went almost every single Sunday and hardly missed.

1 BY MR. WEBSTER:

2 Q. Okay. And the Brassfields, we talked about this earlier,
3 Erin or Kurt Brassfield would not have been in that church;
4 correct?

5 A. Correct.

6 Q. And, in fact, Erin Brassfield and Kurt Brassfield were --
7 he was out free on bond at that point; correct?

8 A. I believe so.

9 Q. So if he -- if this was some type of avenged killing, as
10 the government says it was, as it relates to Mr. Brassfield --

11 MS. CHRISTILLES: Objection. Leading.

12 THE COURT: That's sustained.

13 MR. WEBSTER: Okay.

14 BY MR. WEBSTER:

15 Q. Was there anything stopping Devin Kelley that morning from
16 driving over to Kurt Brassfield's house and killing him?

17 MS. CHRISTILLES: Objection. Speculation.

18 THE COURT: That's sustained.

19 BY MR. WEBSTER:

20 Q. Did Devin Kelley ever express to you, in any way, that he
21 planned to kill Kurt Brassfield?

22 A. No.

23 Q. And, as you sit here today, you believe this was
24 punishment for your divorce?

25 MS. CHRISTILLES: Objection. Asked and answered.

1 THE COURT: That's overruled.

2 THE WITNESS: Yes.

3 MR. WEBSTER: Your Honor, plaintiffs pass the
4 witness.

5 THE COURT: Any questions of this witness, from the
6 government?

7 MS. CHRISTILLES: Your Honor, may we take a brief
8 break?

9 THE COURT: So it's 11:42. Should we break for
10 lunch?

11 MS. CHRISTILLES: I think that would be a good
12 stopping point, Your Honor.

13 THE COURT: Just for time purposes, any estimation
14 how long cross may take?

15 MS. CHRISTILLES: I estimate two hours, Your Honor.
16 I submitted two hours.

17 THE COURT: Are we going to get to Mr. Snyder today?

18 MR. ALSAFFAR: Yes.

19 THE COURT: So, as I mentioned earlier, places to eat
20 around here are very limited. How much time do you want to
21 break, 30 minutes, 45 minutes, an hour?

22 MR. ALSAFFAR: For the plaintiffs, Your Honor, 30
23 minutes is fine.

24 THE COURT: How much time does the government want?

25 MS. CHRISTILLES: Thirty minutes is fine, Your Honor.

1 THE COURT: So let's break for lunch. We'll resume
2 about 12:15, 12:20.

3 MS. CHRISTILLES: I'm sure counsel has prepared for
4 lunch, but I want to make sure the witness has adequate time
5 to eat.

6 MR. ALSAFFAR: We'll take care of it, Your Honor.

7 THE COURT: Thank you.

8 We're in recess.

9 (Recess.)

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1 Q. He grew less tolerant?

2 A. Yes.

3 Q. He was slowly becoming not the person that he used to be?

4 A. Correct.

5 Q. He was shutting down?

6 A. What do you mean by "shutting down"?

7 Q. Ms. Smith, do you remember giving an interview to the
8 San Antonio Express-News?

9 A. Okay.

10 Q. Do you remember telling the San Antonio Express-News that
11 he was, quote, unquote, "shutting down"?

12 A. Oh, he's just wasn't, like, open about things.

13 Q. And that was in the last six months of his life?

14 A. Yes.

15 Q. You were actively trying to get Devin into some mental
16 health treatment, weren't you?

17 A. Yes.

18 Q. Everybody believed he needed it?

19 A. Yes.

20 Q. Even Devin wanted some mental health treatment?

21 A. Yes.

22 Q. He thought he might have some form of split personality
23 disorder or something?

24 A. Yes.

25 Q. Because he could be violent?

1 A. Yes.

2 Q. But he could also be loving and compassionate?

3 A. When he wanted to.

4 Q. Devin actually did start seeing a counselor, correct?

5 A. Yes.

6 Q. Now, he didn't disclose to you why he was going to that
7 counselor, did he?

8 A. No.

9 Q. But he told you that he wanted to go talk to a counselor?

10 A. Yes.

11 Q. In the last two weeks of his life, he got some medicine
12 for his mental health issues, correct?

13 A. Yes.

14 Q. He was prescribed clonazepam?

15 A. Yes.

16 Q. The clonazepam was to treat anxiety, correct?

17 A. Correct.

18 Q. In the last week of his life, he began abusing that
19 clonazepam, didn't he?

20 A. Yes.

21 Q. Even though his mental health deteriorated, you had no
22 idea he intended to commit this act, did you?

23 A. Correct. I didn't know.

24 Q. You never heard him say he wanted to kill anyone?

25 A. No.

1 Q. Sometimes he would write lists of people he didn't like,
2 right?

3 A. That was only one time, way before, like years before the
4 shooting happened.

5 Q. And it was really something the two of you did together,
6 right?

7 A. Yes.

8 Q. And then you'd burn the list?

9 A. Yes. We put everything down. Because, in therapy, they
10 teach you put everything -- anybody that ever wronged you or
11 you felt like they wronged you, and you burn it to let it go.

12 Q. And so the two of you would write down people you maybe
13 didn't like, and you would burn it as an act of therapy?

14 A. Yes.

15 Q. I want to talk to you a little bit more about what was
16 going on in your lives in the year or so before the shooting.

17 In June of 2016, your stepsister reported that she had
18 been sexually abused by -- I think you call him Curt
19 Brassfield?

20 A. Yes.

21 Q. His real name is actually Donald Curt Brassfield, right?

22 A. Yes.

23 Q. And so in 2016, your stepsister reported that he had
24 actually sexually abused her?

25 A. Yes.

1 Q. And I think we've talked about this.

2 Curt Brassfield was your adoptive father, correct?

3 A. Yes.

4 Q. And he also had adopted your stepsister, correct?

5 A. No. My sisters that are from Erin's side, they were not
6 adopted. No, okay. I -- let me, rephrase.

7 So when they got placed in their care, it was not adoption
8 at all. It was just placement. Erin, my mother, didn't adopt
9 my sisters, Marissa and Hayley, until well after everything
10 happened and Curt was no longer in the picture and he was
11 placed in prison.

12 Q. Okay. And thank you for that clarification.

13 But your stepsisters were living with Erin and Curt
14 Brassfield at some point?

15 A. Yes.

16 Q. Now, in addition -- we've talked about the fact that Curt
17 Brassfield sexually abused you, and then you found out he
18 abused your stepsister.

19 He had also sexually assaulted another girl in 2014,
20 correct?

21 A. Yes.

22 Q. He was arrested for your stepsister's assault, correct?

23 A. Yes.

24 Q. And I think that you said he was out on probation at the
25 time of the shooting?

1 A. So he got out of, I guess, probation or bail. So he was
2 out. That's all I know.

3 Q. He was being prosecuted by the Guadalupe County DA's
4 office for the sexual assault of your stepsister?

5 A. Yes.

6 Q. You were also a named victim in that prosecution, correct?

7 A. Yes.

8 Q. And you were set to testify at a trial about the abuse you
9 endured at his hands?

10 A. Yes.

11 Q. You were subpoenaed to testify in that trial?

12 A. Yes.

13 Q. You were subpoenaed in about October of 2017?

14 A. I don't remember, like, exactly. Because I know they came
15 out and talked. And then that's when I talked to the DA on
16 the phone, but I had to have it on speaker.

17 Q. Okay. The trial was originally set for November 27th,
18 2017, correct?

19 A. I guess. I don't really know. I just know, like, after
20 the whole shooting happened, I know then, like, I was
21 subpoenaed and went to court.

22 Q. But the trial was originally set for less than two weeks
23 after the shooting, correct?

24 A. I guess so.

25 Q. Do you not recall, sitting here today, when that trial was

1 originally scheduled for?

2 A. I don't know when it was originally scheduled. Like, I
3 don't know dates for the very first time or when Devin was in
4 the picture.

5 Q. Ms. Smith, we've talked a little bit about the interview
6 you had with the rangers, correct?

7 A. Yes.

8 Q. Do you recall telling the rangers the date that you were
9 originally set to testify?

10 A. If I did, then that means it was fresh on my mind at that
11 time.

12 Q. So looking at the testimony or the interview that you gave
13 with the rangers would help you remember that date because it
14 was closer in time, correct?

15 A. Yes.

16 Q. Okay. I'm going to show you JEX 477 at 092 -- 0092.

17 *(Discussion off the record)*

18 THE COURT: Go ahead.

19 BY MS. CHRISTILLES:

20 Q. Ms. Smith, I'm showing you a transcript of the interview
21 you had with the rangers. Can you read through that to
22 yourself and let me know when you're finished.

23 A. Okay.

24 Q. That refreshes your recollection about what date you were
25 originally supposed to testify against Donald Brassfield,

1 correct?

2 A. Correct.

3 Q. And this was November 27th, less than two weeks after the
4 shooting, correct?

5 A. Correct.

6 Q. Devin was not happy about you testifying, was he?

7 A. No.

8 Q. He forbid you to testify?

9 A. Yes.

10 Q. Now, it's fair to say that testifying about this abuse was
11 going to be pretty traumatic for you, wasn't it?

12 A. Yes.

13 Q. You were going to have to relive all the pain during that
14 prosecution, weren't you?

15 A. Yes.

16 Q. Now, the first time that you had reported that Donald
17 Brassfield sexually assaulted you, you tried to kill yourself,
18 didn't you?

19 A. Yes.

20 Q. And Devin knew about the abuse at the hands of Curt
21 Brassfield?

22 A. Yes.

23 Q. He knew you'd tried to kill yourself?

24 A. Yes.

25 Q. He made you a promise that after you tried to take your

1 own life, he was always going to be there for you?

2 A. Yes.

3 Q. You tried to kill yourself in part because nobody believed
4 you when you reported it; is that right?

5 A. Yes.

6 Q. In fact, some people treated you badly after you reported
7 it?

8 A. Yes.

9 Q. Nobody listened, and you were the black sheep of the
10 family?

11 A. Yes.

12 Q. Some of the people that didn't believe you and that
13 treated you badly were members of the First Baptist Church of
14 Sutherland Springs when the abuse occurred, correct?

15 A. That would only be that one family that I stated about.
16 Everybody else, they were -- they were like family.

17 Q. But there were people that made fun of you for the abuse,
18 correct?

19 A. It was one family, in particular, yes.

20 Q. Your testimony today is it was just one family, correct?

21 A. Yes. They no longer go to the church.

22 Q. You've been interviewed a lot for this case, haven't you,
23 Ms. Smith?

24 A. Yes.

25 Q. Interviewed by the rangers?

1 A. Yes.

2 Q. You were interviewed by the Department of Defense Office
3 of the Inspector General, correct?

4 A. Yes.

5 Q. Okay. And you gave a deposition in this case?

6 A. Yes.

7 Q. And you've also been interviewed by news media, right?

8 A. Yes.

9 Q. Now, when you gave that -- and do you mind if I call it
10 "OIG" when I'm talking about the Department of Defense agents?

11 A. Okay.

12 Q. Okay. Can we agree that that's what I'm talking about?

13 A. Yes.

14 Q. Appreciate you not making me say that whole thing.

15 When you were interviewed by OIG, you were under oath,
16 correct?

17 A. Yes.

18 Q. You told the OIG, quote, unquote, they mocked you and said
19 I deserved it.

20 Do you remember telling them that?

21 A. Yes.

22 Q. They told you that you should have died when you tried to
23 commit suicide.

24 Do you remember that?

25 A. Yes.

1 Q. Do you remember telling OIG some of the adults said you
2 were a plague?

3 A. Yes.

4 Q. They didn't want their children hanging out with you?

5 A. Yes.

6 Q. They told you that you deserved to be raped and molested?

7 A. Yes.

8 Q. Someone's parents even said their daughter couldn't hang
9 out with you because you were promiscuous?

10 A. Yes.

11 Q. Now, Devin knew that members of the church knew about the
12 abuse, didn't he?

13 A. He knew about that one family, yes.

14 Q. He knew that some members had been awful to you when you
15 reported the abuse?

16 A. Yes.

17 Q. Devin was angry about the way you had been treated, wasn't
18 he?

19 A. He was just an angry individual.

20 Q. Ms. Smith, Curt Brassfield took pictures of the abuse of
21 you, didn't he?

22 A. Yes.

23 Q. He took videos?

24 A. Yes.

25 Q. You found those photos and videos in Michelle Shields'

1 house, correct?

2 A. Yes.

3 Q. Devin was with you when you found them?

4 A. Yes.

5 Q. He was upset when he -- when you found those photos and
6 videos?

7 A. Yes.

8 Q. Now, you claim that you found the photos and videos years
9 before the shooting; is that right?

10 A. Yes.

11 Q. You claim you destroyed the photos and videos years before
12 the shooting?

13 A. I did.

14 Q. And you destroyed them because no one had believed you
15 about the abuse when you first told someone that it occurred,
16 correct?

17 A. Correct.

18 Q. At some point the district attorney's office, the
19 Guadalupe County DA's office that we talked about, learned
20 about the photos and video, didn't they?

21 A. Yes.

22 Q. And you're aware that they learned about them from Erin
23 Higgins, correct?

24 A. Yes.

25 Q. And Erin Higgins, I think we've already discussed, was

1 formerly Erin Brassfield?

2 A. Yes.

3 Q. And at one time she was married to Curt Brassfield?

4 A. Yes.

5 Q. And you've indicated that you were very close to Erin when
6 she was married to Curt Brassfield, correct?

7 A. Yes.

8 Q. And you've remained close to her?

9 A. Yes.

10 Q. In fact, when Michelle Shields and Curt Brassfield got
11 divorced, you actually wanted to live with Erin?

12 A. Yes.

13 Q. You wanted to live with Erin even though she was still
14 married to Curt Brassfield?

15 A. Yes.

16 Q. At some point, you even ran away from Michelle Shields to
17 live with Erin; is that correct?

18 A. Yes.

19 Q. Now, I think you indicated on direct that Devin would go
20 over to Erin's house after he got out of the Air Force to see
21 you; is that right?

22 A. Yeah. The one time when he came over and, like, he picked
23 me up. And then that's when I moved out from her house.

24 Q. Okay. And he also came over to Erin's house to see you
25 when he was 17 and you were 13; is that correct?

1 A. Yes.

2 Q. So it's fair to say Erin had known Devin Kelley for some
3 time as well?

4 A. Not when I was seeing him when I was 13. She only, like,
5 saw him and did a background check when I was 18, and I was
6 living with her.

7 Q. Okay. Are you aware that Erin Higgins claims that Devin
8 told her that he found the photos and videos at Michelle
9 Shields' house on October 31st, 2017?

10 A. At the time I didn't know, until now.

11 Q. But you've since learned that Erin Higgins claims that
12 Devin Kelley told her he found those photos and videos on
13 October 31st, 2017?

14 A. Yes.

15 Q. Now, four days before the shooting, a detective came to
16 your house, correct?

17 A. Correct.

18 Q. He came to your house to collect the photos and videos of
19 the abuse, correct?

20 A. Yes.

21 Q. He came to your house because the Guadalupe County DA's
22 office wanted those photos and videos for their prosecution?

23 A. Yes.

24 Q. So it's fair to say that that detective was coming to your
25 home to get evidence, correct?

1 A. Yes.

2 Q. Devin was angry about the detective coming to the house,
3 right?

4 A. Yes.

5 Q. He was angry because you'd already told the prosecutor
6 that those things had been destroyed?

7 A. Yes.

8 Q. But he wasn't angry at you?

9 A. No. He was angry at the situation.

10 Q. Now, Devin was also angry about the situation because if
11 people had believed you, two other girls wouldn't have gotten
12 hurt; isn't that true?

13 A. Yes.

14 Q. Devin blamed a lot of people for what happened to you as a
15 child?

16 A. I think he blamed everybody for everything.

17 Q. But he blamed a lot of people for what had happened to you
18 as a child?

19 A. Yes.

20 Q. Devin had issues with the people at the church because of
21 the abuse and treatment that you experienced as a kid?

22 A. No. He had an issue with my mom because he thought, in
23 his eyes, that she was trying to break us up. Because he
24 thought everybody was out against him.

25 Q. Now, Ms. Smith, you, again, recall that interview with the

1 rangers, correct?

2 A. Yes.

3 Q. Okay. So is it your testimony that -- today that Devin
4 didn't have issues with the people at the church because of
5 the abuse and treatment you experienced as a kid?

6 A. After that family, no. Like, there was only that one
7 family that was an issue that he knew about. So everyone else
8 in the church congregation, they weren't ones to make him
9 upset.

10 Q. Ms. Smith, I'm going to play JEX 694, which has been
11 previously admitted at 9709 through 9718.

12 Oh, wait. Hold on. Oh, no 8917 through 9312. Sorry.

13 MR. WEBSTER: Did you change the numbers?

14 MS. CHRISTILLES: Yes. I apologize. It's JEX 94.

15 And we're going to do 8917 through 9312.

16 Was looking at the wrong line, Your Honor.

17 MR. WEBSTER: Thank you, ma'am.

18 MS. CHRISTILLES: Sorry about that.

19 *(Pause)*

20 *(Playing video)*

21 BY MS. CHRISTILLES:

22 Q. Ms. Smith, do you recall telling the rangers, in response
23 to why you thought Devin might have gone to the church, that
24 it had something to do with what had happened to you as a kid?

25 A. Yes.

1 Q. Now, besides being angry with the people at the church,
2 Devin also resented God, didn't he?

3 A. Yes.

4 Q. He resented God for not protecting you?

5 A. He resented God because he was an atheist.

6 Q. He also resented God for not protecting you, correct?

7 A. I guess, using his terms.

8 Q. Isn't that what you told the San Antonio Express-News,
9 Ms. Smith?

10 A. Yes.

11 Q. You also told the San Antonio Express-News that Devin
12 resented God for not protecting him from the world's
13 cruelties?

14 A. Yes.

15 Q. And you said Devin was a staunch atheist?

16 A. Yes.

17 Q. He thought religion was unfair?

18 A. Yes.

19 Q. He thought partially that religion was unfair because if
20 babies weren't baptized, they would go to hell?

21 A. Yes.

22 Q. You ultimately testified at Donald Brassfield's trial,
23 correct?

24 A. Yes.

25 Q. And it was a pretty horrible experience?

1 A. Yes.

2 Q. Donald Brassfield was ultimately convicted of sexual
3 assault, correct?

4 A. Correct.

5 Q. I want to shift gears and talk to you a little bit more
6 about Devin Kelley's character.

7 I think you indicated that you'd known him since you were
8 13 years old?

9 A. Yes.

10 Q. Even after he joined the military, you still kept in touch
11 with him?

12 A. Yes.

13 Q. You even kept in touch with him while he was in
14 confinement in the Air Force, correct?

15 A. Yes.

16 Q. Now, it was your understanding that Devin was in
17 confinement for abusing his stepson, correct?

18 A. No. That's -- he was -- he told me he was in confinement
19 because he put a gun to his CO's head.

20 Q. But you later found -- or, at least, Devin told you later
21 that he was in confinement for abusing his stepson, but he
22 didn't do it; he did it to protect Tessa -- or he confessed to
23 it to protect Tessa?

24 A. So him and his parents stated that it wasn't his handprint
25 on Jack, that it was Tessa. And all of them told me that it

1 wasn't him. The reason why he got put in the brig was because
2 he put a gun to his CO's head when he found Tessa and that CO
3 in intercourse.

4 Q. But you also knew that there was some conversations about
5 a handprint on Jack?

6 A. That's what they were just saying.

7 Q. Devin was a pretty determined guy, wasn't he?

8 A. Yes.

9 Q. I think on direct, you said he would call you constantly,
10 he would message you constantly, he would stop by Erin's
11 house, he wouldn't leave you alone?

12 A. Yes.

13 Q. When he set his mind to something, he followed through
14 with it?

15 A. Yes.

16 Q. He had a determined side.

17 He also had a protective side, correct?

18 A. Yes.

19 Q. In fact, he bartered a shotgun for a dog that had been
20 severely abused, right?

21 A. Yes.

22 Q. Now, he liked that shotgun, didn't he?

23 A. He liked it because I guess it was, like, kind of like a
24 free gun.

25 Q. He used it to shoot bats?

1 A. Yes.

2 Q. He used it to shoot birds?

3 A. Yes.

4 Q. So he used that shotgun quite a bit?

5 A. Yes.

6 Q. When you got that dog, the two of you took care of it,
7 didn't you?

8 A. I took care of the dog.

9 Q. You made sure the dog's ear and tail grew back?

10 A. Yes.

11 Q. Nursed that dog back to health?

12 A. Yes.

13 Q. And I think we just discussed this.

14 It was your belief, or what you had been told, that Devin
15 had confessed to abusing Tessa's son to protect Tessa,
16 correct?

17 A. Yes.

18 Q. You later found out that Devin had actually confessed to
19 abusing Tessa's son, correct?

20 A. Yes.

21 Q. And that that's why he was in confinement?

22 A. Yes.

23 Q. Now, your friend Emily from Colorado, you told her about
24 the abuse allegation, correct?

25 A. I didn't tell her.

1 Q. How else would Emily have found out about it?

2 A. It would have been a conversation between her and Devin.

3 Q. Okay. I think we've talked about this a lot, but Devin
4 also had an abusive side?

5 A. Yes.

6 Q. You later found out that he had been physically abusive
7 with Tessa?

8 A. Yes.

9 Q. Much like how he had physically abused you?

10 A. Yes.

11 Q. You actually knew that Devin was abusive before you
12 married him, didn't you?

13 A. Yes.

14 Q. In fact, two months before you were married, you called
15 the police because he was abusing you?

16 A. No. That's not correct. I did not call the police.

17 Q. Somebody found out that he was abusing you two months
18 before your marriage, correct?

19 A. Yes.

20 Q. Someone called the police?

21 A. Yes.

22 Q. And the police showed up?

23 A. Yes.

24 Q. But you still married Devin two months later?

25 A. Yes.

1 Q. Devin was also controlling?

2 A. Yes.

3 Q. The only time you were allowed to use the phone was when
4 he allowed you to use it?

5 A. Correct.

6 Q. You weren't allowed to make calls to anyone unless he told
7 you it was okay?

8 A. Yes.

9 Q. When you made calls, the other person had to be on
10 speakerphone?

11 A. Yes.

12 Q. So it's fair to say if you messaged anyone via cellphone,
13 there was a good chance Devin was going to find out?

14 A. Yes.

15 Q. He'd see those messages?

16 A. If he found out, yes, he would find them.

17 Q. And that actually happened a couple of times, right?

18 A. Yes.

19 Q. Devin also had problems with obeying the law, didn't he?

20 A. Yes.

21 Q. You were aware of several occasions where he got in
22 trouble for violating the law?

23 A. Yes. The one with the dog.

24 Q. He also got in trouble for using marijuana in 2006,
25 correct?

1 A. Yes.

2 Q. You knew that he used K2 -- or it's also called Spice --
3 when he was in the Air Force?

4 A. Yes.

5 Q. And he knew it was illegal to use Spice in the Air Force?

6 A. Yes.

7 Q. But he did it anyway?

8 A. Yes.

9 Q. He only stopped, not because he thought he'd get caught,
10 but because he got too high?

11 A. Yeah.

12 Q. He also did whippits in the Air Force?

13 A. No. The whippits were when him and I were married.

14 Q. Okay. After the Air Force, he obtained Xanax illegally?

15 A. Yes.

16 Q. Once he received -- we've talked about his clonazepam
17 prescription.

18 Once he got that prescription, he still kept using the
19 Xanax, correct?

20 A. Yes.

21 Q. He would double dose on the clonazepam and Xanax?

22 A. Yes.

23 Q. He would also abuse your medication?

24 A. Yes.

25 Q. We've talked about the Fioricet for your migraines that he

1 would abuse.

2 But he also abused some muscle relaxers you had, correct?

3 A. Yes.

4 Q. He would take six of those muscle relaxers at a time?

5 A. Yes.

6 Q. We talked about the time he got in trouble for abusing the
7 dog in Colorado, correct?

8 A. Yes.

9 Q. In 2010, he was also accused of sexual assaulting a girl,
10 correct?

11 A. I didn't know about that until this whole court stuff's
12 going on.

13 Q. After his time in the Air Force, Devin Kelley started
14 associating with the Bandidos, correct?

15 A. Yes.

16 Q. He wanted to be a member of the Bandidos?

17 A. Yes.

18 Q. The Bandidos is a motorcycle club known to be violent?

19 A. Yes.

20 Q. The Bandidos are known for their criminal activity?

21 A. Yes. They're considered an outlaw group.

22 Q. And Devin wanted to be a member of that outlaw group?

23 A. Yes.

24 Q. After his time in the military, Devin developed an
25 interest in firearms while you were in Colorado, correct?

1 A. Yes.

2 Q. He also wanted to have his own shooting school?

3 A. Yes.

4 Q. When he was looking at having a shooting school, it was
5 your understanding that he wanted to teach people that guns
6 aren't all bad?

7 A. Yes.

8 Q. He wanted to show people that guns aren't the cause of bad
9 things?

10 A. Yes.

11 Q. That the person who carries out the act is the one at
12 fault?

13 A. Yes.

14 Q. He also took an interest in parts for guns?

15 A. If you're talking about, like, he wanted to do designs on,
16 like, the plastic part where you hold, then, yes.

17 Q. He started ordering things for guns online?

18 A. No. He -- oh, okay. He ordered the thingy you put on you
19 and you, like, stick your gun in. You know what I'm talking
20 about?

21 Q. The holster or the sling?

22 A. Sure. Yeah. That stuff.

23 Q. Okay.

24 A. He ordered that stuff.

25 Q. So he didn't start ordering things for guns online?

1 A. The only thing he ordered was he -- I think it's like a
2 sleeve. I don't know. You, like, pull it up, like, the
3 handle and you can, like -- I think you get a thing and you
4 can, like, burn on it to design it. You know?

5 Q. No, I don't. But that's okay. Thank you for trying to
6 describe it to me.

7 What I'm asking about is, during your deposition, you
8 talked about him ordering things for guns online.

9 Do you remember talking about that?

10 A. Okay.

11 Q. Okay. And during your interview with OIG, you told the
12 OIG that Devin took an interest in parts for guns.

13 Do you recall that?

14 A. Okay. Then, if that's it, then it'd be like the little
15 thing on the top that you can look through. It's -- it's like
16 a magnifying glass.

17 Q. Maybe like the scope?

18 A. Yeah, that.

19 Q. Okay.

20 A. And then I guess the thing that you attach at the end to,
21 like, put it around your body, like that stuff, partwise.

22 Q. Okay. So it's fair to say he was ordering parts for guns
23 online?

24 A. Yes.

25 Q. He would spend what little money you had on guns and

1 ammunition, wouldn't he?

2 A. Yes.

3 Q. Even if that meant you would do without?

4 A. Yes. I was used to it.

5 Q. Devin loved guns?

6 A. Yes.

7 Q. He babied his guns?

8 A. Yes.

9 Q. He loved taking them apart?

10 A. He would clean them.

11 Q. He also loved taking them apart and comparing the
12 specifications to newer models, correct?

13 A. Yeah. He wanted to make sure his gun was top of the line.

14 Q. He weighed the parts for his guns?

15 A. Oh, I don't know if he weighed them. I just know he
16 wanted to make sure nothing would break.

17 Q. He was always cleaning them, I think you just said?

18 A. Yes.

19 Q. He also cleaned his parents' guns, didn't he?

20 A. I know one time he cleaned them because he said if they
21 get like -- I don't want to say jammed. But, like, if you
22 don't -- he said if you don't clean them properly, they won't
23 work.

24 Q. So you know he cleaned his parents' guns?

25 A. Yeah. Like, one time he did, I guess, like trying to

1 teach them how to do it.

2 Q. Now, Devin's dad had tools, correct?

3 A. Yeah. He had a garage for tools.

4 Q. Because he was --

5 A. Normal tools.

6 Q. What's that?

7 A. Normal tools.

8 Q. He was always remodeling his house, wasn't he?

9 A. Yes.

10 Q. So it's fair to say he had a lot of tools?

11 A. Yes.

12 Q. Now, Devin did nonstop research on guns, didn't he?

13 A. Yes.

14 Q. He looked up the AR-15 online?

15 A. Yes.

16 Q. He looked up the AR-15 at gun shows?

17 A. Yes.

18 Q. And then when he got the AR-15, he shot it almost daily?

19 A. Yes.

20 Q. Devin liked going to gun shows, didn't he?

21 A. Yes.

22 Q. He went to gun shows a lot?

23 A. Yes, when we were in Colorado.

24 Q. And that's right.

25 Ms. Smith, on direct, you testified that he only went to

1 gun shows in Colorado. Is that your testimony?

2 A. Yes.

3 Q. Do you recall giving a deposition in this case, Ms. Smith?

4 A. Yes.

5 Q. And you wanted to be honest during that deposition,
6 correct?

7 A. Yes.

8 Q. I think in direct, you said, "It was the first time I
9 really told the truth."

10 A. Yes.

11 Q. I'm going to show you -- so it's your testimony today that
12 Devin only went to gun shows in Colorado, correct?

13 A. As far as I believe, yes.

14 Q. You never would have said that he also went to gun shows
15 in Texas?

16 A. I mean, if he did, then he did. I just know -- most of
17 what I remember is they were up in Colorado because they were
18 easy to get to because they're, like, close by to where we
19 lived.

20 Q. Ms. Smith, did Devin Kelley go to gun shows in Texas?

21 A. If he did, then he did. I don't really remember.

22 Q. I'm going to show you Government Exhibit 53, page 121,
23 lines 14 through 15.

24 THE COURT: It's not been admitted yet.

25 MS. CHRISTILLES: Correct, Your Honor.

1 THE COURT: So you can take it down.

2 MS. CHRISTILLES: Okay.

3 THE COURT: If you want to move for the admission,
4 then you can display it.

5 MS. CHRISTILLES: Your Honor, I'm using it for
6 purposes of impeachment.

7 Is there a different way you would like me to do that?

8 THE COURT: So it's not going to be admitted; it's
9 just for impeachment purposes only?

10 MS. CHRISTILLES: That's correct. I did not intend
11 to offer it.

12 THE COURT: Go ahead.

13 MS. CHRISTILLES: May I put it back up on the screen,
14 Your Honor?

15 THE COURT: Yes.

16 MS. CHRISTILLES: I apologize for not being clear
17 about that.

18 *(Discussion off the record)*

19 BY MS. CHRISTILLES:

20 Q. Ms. Smith, do you remember being asked a question by
21 Mr. Stern about gun shows? This was in Colorado and in Texas.

22 A. Yes.

23 Q. And do you recall answering yes?

24 A. Yes.

25 Q. Thank you.

1 So, Ms. Smith, Devin Kelley went to gun shows in Texas,
2 too, didn't he?

3 A. During that time, in the question, all I heard was "this
4 was in Colorado." And I said yes.

5 Q. You weren't always paying attention to what Devin Kelley
6 did at gun shows, were you?

7 A. No.

8 Q. Because you were caring for your children?

9 A. Yes.

10 Q. To your knowledge, Devin didn't purchase a firearm at a
11 gun show?

12 A. Correct.

13 Q. But he did buy a gun from a friend in Colorado?

14 A. No. He bought a gun from a Colorado shop.

15 Q. Is it your testimony today that he did not buy a gun from
16 a friend in Colorado?

17 A. He never once bought a gun in Colorado from a friend. The
18 only time he bought a gun from a friend was when he got out of
19 the military, and that would have been in Texas.

20 Q. So you never would have testified that he bought a gun
21 from a friend in Colorado?

22 A. No. Because it was not in Colorado. The only time he
23 bought a gun in Colorado was from a gun store.

24 Q. Ms. Smith, again, do you recall giving a deposition in
25 this case?

1 A. Yes.

2 Q. And you recall being under oath?

3 A. Yes.

4 Q. And you wanted to tell the truth during that deposition,
5 correct?

6 A. Yes.

7 Q. Okay. I'm going to show you Government Exhibit 53,
8 line 122 -- or page 122. Start at 7 through 25.

9 So here in this deposition, Mr. Stern is asking you about
10 your testimony to the OIG. And he confirms with you, "Is that
11 accurate? He bought a gun from a friend?" And your answer is
12 yes.

13 MR. WEBSTER: I'll object, Your Honor, under optional
14 completeness, and also that it mischaracterizes the testimony
15 and question that was actually posed to the witness.

16 THE COURT: You can clean it up on redirect.

17 MR. WEBSTER: Thank you, Your Honor.

18 MS. CHRISTILLES: And we can go to JEX 157.

19 BY MS. CHRISTILLES:

20 Q. Ms. Smith, this was your testimony to the OIG, which was
21 also referenced in your deposition where Mr. Stern was talking
22 to you about that gun.

23 And you said to the OIG, "It started when we were in
24 Colorado, really majorly in Colorado. So he bought -- so
25 after he got out of the military, he bought a gun from his

1 friend."

2 Do you recall telling the OIG that?

3 A. Yes.

4 Q. And then confirming that in your deposition?

5 A. Yes, that his major gun interest was in Colorado. But he
6 did not buy a gun from a friend in Colorado. That was
7 strictly a Texas thing.

8 Q. That he bought a gun from a friend?

9 A. Yes. That was in Texas. After he got out of the
10 military, he was in Texas. He was never in Colorado after he
11 got out of the military, straight after.

12 Q. Okay. Ms. Smith, but he bought a gun from a friend?

13 A. Yes.

14 Q. Okay. He also bartered for a shotgun -- he also bartered
15 for a shotgun, correct?

16 A. Yes.

17 Q. A 12-gauge shotgun?

18 A. Yes.

19 Q. He bartered for the shotgun online?

20 A. Yes.

21 Q. I'm showing you what has been admitted as JEX 687. Wait.

22 Do you recognize what's depicted in this picture?

23 A. Yes.

24 Q. That's the shotgun that Devin Kelley bartered for online,
25 correct?

1 A. Yes.

2 Q. Showing you JEX 500 at 0036.

3 This is a picture of Devin with that shotgun, isn't it?

4 A. It's not on my screen.

5 Q. Oh. That's not good. Is anything showing on your screen,
6 Ms. Smith?

7 A. Yes.

8 Q. What's up on your screen right now?

9 A. It's of him and the shotgun.

10 Q. Okay. Do you see the picture of Devin Kelley with a
11 shotgun over his shoulder on your screen?

12 A. Yes.

13 Q. Is that the same shotgun he bartered for online?

14 A. Yes.

15 Q. It's the shotgun he used to shoot bats?

16 A. Yes.

17 Q. Used to shoot birds?

18 A. Yes.

19 Q. At some point, he exchanged that gun on Craigslist for a
20 dog, correct?

21 A. Yes.

22 Q. I'm going to talk about some of Devin Kelley's other
23 purchases related to guns.

24 On October 28th, 2017, just a week before the shooting,
25 Devin purchased two 100-round drum magazines, correct?

1 A. Yes.

2 Q. He'd seen an advertisement on Facebook for these
3 magazines?

4 A. I guess. I don't know. I just know he took us there and
5 said he was buying it. I didn't have a say in it.

6 Q. He took you to the Hill Country Truck and Gun Store,
7 correct?

8 A. Yes.

9 Q. To purchase those magazines?

10 A. Yes.

11 Q. Devin told you he was buying them to resell them, correct?

12 A. Yes.

13 Q. Are you aware that he actually returned those drums
14 because they didn't fit his AR-15?

15 A. I know he said he was having problems with them, but
16 that's as far as I know.

17 Q. And he ordered new ones?

18 A. Oh, I don't know.

19 Q. Okay. He actually -- are you aware he actually called the
20 Hill Country Truck and Gun Store every single day leading up
21 to the shooting to see if those drums were in?

22 A. Oh, I didn't know.

23 Q. He also purchased body armor online?

24 A. I mean, I guess. I don't know. He bought a lot of stuff.

25 I wasn't allowed to look at the bank statements or what he

1 bought or anything.

2 Q. He tried to conceal those purchases from you, didn't he?

3 A. Yes.

4 Q. He made a purchase from LA Police Gear?

5 A. Oh, I have no idea.

6 Q. That's right. Because he concealed those purchases from
7 you, correct?

8 A. Yes.

9 Q. It's fair to say that he kept purchases -- a lot of
10 purchases from you?

11 A. Yes.

12 Q. But you were with Devin when he purchased the AR-15 at
13 Academy, correct?

14 A. Yes.

15 Q. He made that purchase after he was turned down at Dick's
16 Sporting Goods?

17 A. Yes.

18 Q. He was turned down at Dick's Sporting Goods because he had
19 a Colorado driver's license, correct?

20 A. Yes.

21 Q. He purchased the gun at Academy after the manager overrode
22 the Colorado ID issue, correct?

23 A. Yes.

24 Q. The store clerk needed to call a manager over before Devin
25 was able to purchase the AR-15, correct?

1 A. Yes.

2 Q. You weren't concerned about all his purchases, were you?

3 A. How could I keep track if he didn't tell me anything?

4 Q. And because you had no idea that he was prohibited from
5 buying guns?

6 A. Correct. I didn't know he wasn't allowed to have guns --

7 Q. You also --

8 A. -- until now, for court.

9 Q. Right.

10 You also weren't concerned because, quote, unquote, "guns
11 are everywhere in Texas"?

12 A. They are.

13 Q. Devin Kelley also urged his father to buy an AR-556,
14 correct?

15 A. Yes.

16 Q. And when I say "AR-556," it's just a brand of AR-15,
17 correct?

18 A. Oh, I don't know anything about guns. I just know it
19 looks like his.

20 Q. He urged his father to buy a gun that looked just like
21 his?

22 A. Yes.

23 Q. His father actually bought that gun at Cabela's, correct?

24 A. Yes.

25 Q. Devin was with him?

1 A. All of us were together.

2 Q. That's right. The whole family went to Cabela's to buy
3 this gun?

4 A. Yes.

5 Q. Ms. Smith, I want to shift gears and move towards the
6 weeks leading up to the shooting. Okay?

7 A. Okay.

8 Q. On October 31st, 2017, you, Devin, and your daughter went
9 to the fall festival at Sutherland Springs Baptist Church,
10 didn't you?

11 A. Yes.

12 Q. It was Devin's idea to go to the church that day?

13 A. No. He let me go. It'd be the first time my family would
14 get to meet my daughter at five months old.

15 Q. But it was his idea to go?

16 A. No. I had to beg him. Like, he said, you know, I could
17 go and see her.

18 Q. Ms. Smith, is it your testimony here today that it was not
19 Devin's idea to go to the church that day?

20 A. No. I had to beg him, and he allowed me to go. Like, he
21 said okay. Like, it wasn't like a fight or anything.

22 Q. So you never would have said it was Devin's idea to go to
23 the church that day?

24 A. No. I wanted to go to see my mom. Like, I got to earn
25 that privilege from him.

1 Q. Ms. Smith, we've talked a lot about that ranger interview,
2 and I want to set the stage a little bit for that ranger
3 interview.

4 That happened just hours after the shooting, didn't it?

5 A. Yes.

6 Q. You didn't know all the details of what had happened that
7 day, did you?

8 A. No.

9 Q. You didn't know that so many people had been killed?

10 A. No.

11 Q. You really didn't even know Devin's involvement in all of
12 it?

13 A. No. I'll take -- no. So when he called, that's when he
14 told us that he killed everybody. But as far as everything
15 else, I didn't know anything besides him going and saying that
16 he shot up the church and killed people.

17 Q. And that interview was on the day of the shooting?

18 A. Yes.

19 Q. It was on November 5th, 2017?

20 A. Yes.

21 Q. So if you were talking about events that happened on
22 October 31st, 2017, it's fair to say that your memory on
23 November 5th was probably better than it is today, correct?

24 A. Yes.

25 Q. But today you're telling us you never would have said it

1 was Devin's idea to go to the church that day?

2 A. On the 31st? No. Because I wanted to go.

3 Q. Okay. I'm going to show you JEX 477 at -- let's go to
4 102. And we're going to go through a little bit of this to
5 give you context. Okay? So we'll start at -- marked as
6 page 102 and start at line 20. We're talking about Halloween.

7 October 31st, 2017, is also Halloween; is that right,
8 Ms. Smith?

9 A. Yes.

10 Q. Okay. So when you're -- if you're talking about
11 Halloween, you would be talking about the fall festival on
12 October 31st, 2017?

13 A. Yes.

14 Q. Okay. So we're talking about Halloween. Let's go to the
15 next page.

16 All right. And so do you see where you tell the rangers
17 it was his idea to go over?

18 A. Okay.

19 Q. So, Ms. Smith, you actually did tell the rangers that it
20 was Devin's idea to go to the fall festival, correct?

21 A. Yes.

22 Q. Now, you'd stopped being a member of the church when you
23 were 18, correct?

24 A. Yes.

25 Q. Even when you were a member, you were in and out?

1 A. Yes.

2 Q. The only time you were really active was during Vacation
3 Bible School?

4 A. Vacation Bible School and Sunday school.

5 Q. When you went for the fall festival, it was the first time
6 you'd been back to the church in several years, correct?

7 A. For a while, yes.

8 Q. Because you'd only gone a handful of times during your
9 marriage to Devin?

10 A. Correct.

11 Q. You called your mom the day before to ask her if you could
12 come out for the fall festival?

13 A. Yes.

14 Q. And when we say your mother, I'm talking about Michelle
15 Shields?

16 A. Yes.

17 Q. Okay. You hadn't seen Michelle Shields, your mother,
18 since before the birth of your daughter in May of 2017,
19 correct?

20 A. Correct.

21 Q. You were going to cut off the relationship with your
22 mother that day?

23 A. That's what he wanted.

24 Q. Devin wanted you to cut off the relationship with your
25 mother that day?

1 A. Yes.

2 Q. And that was the plan?

3 A. He said I had to go and, you know, try and make things
4 right between her. And then we talked for a little bit, and
5 then we left. Like, it was a very short visit.

6 Q. Your mom got to see your daughter?

7 A. Yes.

8 Q. And Devin actually left you alone with your mother for a
9 little bit, didn't he?

10 A. Yes.

11 Q. That was really unusual?

12 A. Yeah.

13 Q. Fair to say that that was the first time you'd been left
14 alone with your mother since you'd been married to Devin
15 Kelley?

16 A. Correct.

17 Q. As you were getting ready to leave, your mother told Devin
18 she loved him?

19 A. Yes.

20 Q. He told her he loved her, too?

21 A. Yes.

22 Q. During the fall festival, Devin was acting like something
23 was on his mind, correct?

24 A. Yes.

25 Q. He was really quiet?

1 A. Yes.

2 Q. Now, Ms. Smith, you indicated that you asked Devin for a
3 divorce the night before the shooting?

4 A. Yes.

5 Q. You indicated that the reason that you asked him for a
6 divorce, on direct examination, was you'd found a video of him
7 cheating on you?

8 A. Yes.

9 Q. Ms. Smith, we've talked about all the times you've been
10 interviewed for this case, correct?

11 A. Yes.

12 Q. Interviewed by the rangers on the day of the shooting?

13 A. Yes.

14 Q. Interviewed by OIG?

15 A. Yes.

16 Q. Gave a deposition in this case?

17 A. Yes.

18 Q. And, again, during that deposition, on direct, you said it
19 was the first time that you really could tell the truth,
20 correct?

21 A. Yes.

22 Q. Interviewed by the news media?

23 A. Yes.

24 Q. Ms. Smith, not in a single statement did you ever say that
25 the reason that you were leaving Devin Kelley or that you had

1 asked him for a divorce was because of this video, did you?

2 A. No.

3 Q. First time that ever came up was today during direct
4 examination?

5 A. No. That would have been -- I told him I wanted to leave
6 because he was cheating on me, and I was tired of being a
7 punching bag.

8 Q. That's what you're testifying that you told Devin Kelley?

9 A. Yeah. That would have been when I talked to Webster to
10 come in and give my statement that one time, that I told him I
11 wanted a divorce.

12 Q. Okay. And, Ms. Smith, if I'm confusing you, I apologize.

13 The first time that you have ever told anybody about a
14 video of Devin Kelley cheating on you was today on direct
15 examination?

16 A. Okay.

17 Q. In fact, when you were talking about asking him for a
18 divorce the night before the shooting -- and I do want to get
19 back to that -- in your deposition, you said the reason was
20 you didn't want your daughter to think it was okay to be
21 abused by a man?

22 A. Correct.

23 Q. Nothing about a video?

24 A. Nope.

25 Q. In fact, your deposition was actually the first time you

1 ever told anybody that you told Devin the night before the
2 shooting that you wanted a divorce, wasn't it?

3 A. No. That would have been when I went and talked to
4 Webster, that I wanted a divorce around the time of him, like,
5 taking my -- I guess, an affidavit for everything.

6 Q. Ms. Smith, is it your testimony that you told Mr. Webster
7 that you had asked Devin Kelley for a divorce the night before
8 the shooting?

9 A. Yes.

10 Q. But you never told the rangers?

11 A. No.

12 Q. Never told OIG?

13 A. Nope. How can you tell somebody that when his parents are
14 in the room with you?

15 Q. But I'm confused, Ms. Smith, because, on direct, you told
16 us that they already knew about the divorce.

17 A. Yeah. There was a conversation about it. But when you
18 lead up to that, how can you bring up the conversation of
19 their son being abusive when they wouldn't tell me the truth
20 about why he went to the brig?

21 Then there's the fact that even then, when you told --
22 when I told them that his -- when I talked to the rangers the
23 one time and said I found him cheating multiple times, and his
24 father will be like, "Oh, that's news to me."

25 Q. All right. Ms. Smith, let's break this down a little bit.

1 Okay?

2 On direct, you told us that Mr. and Mrs. Kelley knew
3 before the shooting that the two of you were looking to get
4 divorced, correct?

5 A. Yes.

6 Q. So they knew before you went into that rangers' interview
7 that you and Devin were looking at getting a divorce?

8 A. Yes. It's the reason why he was asking them to watch the
9 kids.

10 Q. Okay. But when the rangers were talking to you and they
11 specifically asked you if you had any problems in your
12 marriage, your testimony today is that you didn't feel like
13 you could tell the rangers that you had asked for a divorce
14 because Michael Kelley was in the room?

15 A. Yeah. I don't like conflict, and I was still living with
16 them. You know how uncomfortable that would have been?

17 Q. So when the rangers specifically asked you if you had any
18 problems in your marriage, you told them Devin was not a bad
19 guy?

20 A. Yep.

21 Q. You did tell them that Devin had cheated on you?

22 A. Yes.

23 Q. But you'd worked it out?

24 A. Yep.

25 Q. And everything was fine?

1 A. Yes.

2 Q. And then you were interviewed by the Department of Defense
3 Office of Inspector General, the OIG, on May 15th, 2018?

4 A. Yes.

5 Q. And you didn't tell them that you had asked Devin for a
6 divorce the night before the shooting, did you?

7 A. No, because Mr. Kelley was there.

8 Q. But you said a lot of things during that interview that
9 Mr. Kelley didn't know about, didn't you?

10 A. Yep.

11 Q. You told the agents that Devin attempted to kill himself
12 at one point?

13 A. Yes.

14 Q. Mr. Kelley didn't know about that?

15 A. Nope.

16 Q. You told the OIG that Devin was doing whippits?

17 A. Yes.

18 Q. And Mr. Kelley didn't know about that?

19 A. Nope.

20 Q. Now, on direct examination, you said that when you
21 allegedly told Devin the night before the shooting that you
22 wanted a divorce, that he knew it was for real this time
23 because you tried fighting back, correct?

24 A. Yes.

25 Q. But you also testified on direct that there were times

1 that you had tried to fight him off, right?

2 A. Yep.

3 Q. So this wouldn't have been the first time you fought back?

4 A. No.

5 Q. Ms. Smith, you testified on direct examination that you
6 think that you asking for a divorce was what caused this
7 shooting, right?

8 A. Yes.

9 Q. But that's not what you told the rangers, is it?

10 A. Nope.

11 Q. In fact, we saw a video where you told the rangers it was
12 because of what had happened to you as a child?

13 A. Yep.

14 Q. That's also what you told OIG, isn't it?

15 A. Yes.

16 Q. You told the OIG, "Devin knew that, during the process of
17 the abuse I went through, that the church and her knew and
18 they made fun of me for it"?

19 A. Yep. That would be in reference to that one family.

20 Q. But you didn't tell the OIG it was just one family, did
21 you?

22 A. They never asked. If y'all would ask, I would answer the
23 question.

24 Q. You didn't tell the rangers it was just one family, did
25 you?

1 A. They didn't ask.

2 Q. You used the term "they" with the rangers?

3 A. As in the family.

4 Q. And you used "parents," plural, with the rangers, correct?

5 A. As in that person's mother and father.

6 Q. Now, we've also discussed that you were interviewed by
7 several media outlets, correct?

8 A. One news media outlet.

9 Q. Sure. The San Antonio Express-News?

10 A. Yes.

11 Q. You didn't tell the Express News that you had asked for a
12 divorce the night before the shooting, did you?

13 A. Because they didn't ask, and they have their own
14 narrative.

15 Q. You also had some Facebook conversations with one of the
16 plaintiffs in this case, correct?

17 A. I guess.

18 Q. Charlene Uhl?

19 A. Yes.

20 Q. You told Charlene Uhl you had no idea why Devin committed
21 this shooting?

22 A. I mean, what do you tell the families? A lot of the
23 families really do not care what I have to say, the ones --
24 besides the ones who are really nice. There are some that
25 blame me for the reason why their family died. I carry that.

1 What's the point in trying to explain to people my side
2 when nobody listens?

3 Q. Charlene doesn't blame you, does she?

4 A. No. She's really sweet. But it's not something to tell
5 her. She doesn't need to understand or know. I just tell her
6 I'm sorry because I will always, always carry that burden.

7 Q. Now, I think on direct examination that -- you had asked
8 for a divorce from Devin lots of times, correct?

9 A. Yep.

10 Q. The first time was when he hit you and he caused you to
11 lose your first pregnancy?

12 A. We weren't married during -- when I lost my first
13 pregnancy.

14 Q. One time you told him that you wanted a divorce was around
15 the time when your son was about a year old?

16 A. Yes.

17 Q. And in response to that, he became abusive and took your
18 tablet away?

19 A. Yes.

20 Q. And I think we saw some text messages that you were able
21 to identify as text messages with Erin, correct?

22 A. Yes.

23 Q. And in those text messages, you're also talking about
24 divorce, correct?

25 A. Yes.

1 Q. I want to take a look at those text messages, which have
2 been previously admitted as JEX 478B, page 4.

3 And we've established that these messages are with Erin
4 Higgins, correct?

5 A. Yes.

6 Q. And Erin is telling you, "And either go live with Michelle
7 or find a shelter to start your life," correct?

8 A. Yes.

9 Q. And these messages occurred in 2015?

10 A. Oh, I don't know. There's not a timestamp. I have no
11 idea.

12 Q. Sure. Let's go back to page 1.

13 Do you see the date on those text messages?

14 A. Yes.

15 Q. So these messages would have occurred in 2015?

16 A. Yes.

17 Q. You were having conversations with Erin via text message
18 about divorcing Devin?

19 A. Yes.

20 Q. And she suggested you go live with Michelle?

21 A. Or a woman's shelter. But how can you leave when they
22 block everything? And I barely had time to message her.

23 Q. Ms. Smith, it's fair to say that you want to help the
24 plaintiffs in this case, don't you?

25 A. Yes.

1 Q. Even though you stopped going to the church when you were
2 18, you knew many of the victims of the shooting?

3 A. Yes, I did.

4 Q. You'd volunteer at the church?

5 A. Yes. Many of the babies that died, I babysat them.

6 Q. You lost your grandmother?

7 A. Yes.

8 Q. And your mother, Michelle Shields, is actually employed by
9 the First Baptist Church of Sutherland Springs currently,
10 isn't she?

11 A. Yes.

12 Q. Been employed there since 2018?

13 A. I don't know when she got employed. I just know she works
14 for them.

15 Q. You've attended services at the church since the shooting?

16 A. I've gone, I think, twice. Once was on the year
17 anniversary to go, and then I think maybe one time before
18 that. Other than that, I don't go.

19 Q. And I think you were talking about this when we were
20 talking about those messages with Charlene.

21 You carry a lot of sorrow for those victims?

22 A. Yes.

23 Q. You carry the shame from Devin?

24 A. Yes. Because everybody died so I could be free of him.
25 And that's sad.

1 Q. Prior to this trial, you discussed the purchase of guns
2 with the attorneys for the families because you wanted to help
3 them, correct?

4 A. Yes.

5 Q. Mr. Webster was one of those attorneys?

6 A. Yes.

7 Q. You signed an affidavit regarding the purchase of the
8 firearms?

9 A. Yes.

10 Q. Someone associated with Mr. Webster drafted your
11 statement?

12 A. Yes.

13 Q. They drafted it the day you met with them?

14 A. Yes.

15 Q. And besides Mr. Webster, several other attorneys for the
16 families were there, correct?

17 A. Yes.

18 Q. Ms. Smith, I want to shift to the morning of the shooting.
19 Okay?

20 A. Okay.

21 Q. That morning, Devin Kelley asked you to make him a light
22 breakfast, correct?

23 A. Yes.

24 Q. That was kind of unusual, right?

25 A. Yeah.

1 Q. He likes to eat a little more than a light breakfast?

2 A. Yeah. He eats a lot.

3 Q. He then either went to his parents' house or texted his
4 parents about watching the children, correct?

5 A. Yes.

6 Q. At some point, he restrained you?

7 A. Yes.

8 Q. He made it so you couldn't leave the room?

9 A. Yes.

10 Q. He put a gun to your head?

11 A. Yes.

12 Q. But he didn't hit you?

13 A. That would have been before Sunday. He didn't hit me on
14 Sunday. He drug me by my hair.

15 Q. He didn't tell you he was going to kill you?

16 A. No.

17 Q. He didn't tell you he was going to make you pay for
18 leaving him?

19 A. Not when he was tying me up.

20 Q. Instead, he pulled out a black box?

21 A. Yes.

22 Q. And you'd seen that black box before?

23 A. Yes.

24 Q. The black box had been in your home for a while?

25 A. Yes.

1 Q. But he strictly forbid you from touching that black box,
2 correct?

3 A. Correct.

4 Q. You weren't allowed to even touch it?

5 A. Nope.

6 Q. He took everything out of that black box?

7 A. Yes.

8 Q. And you'd never seen a lot of the things in there?

9 A. Correct.

10 Q. You'd never seen the ballistic vest?

11 A. No.

12 Q. That vest already had a lot of things on it?

13 A. Yes.

14 Q. He took a mask out from the box?

15 A. Yes.

16 Q. A mask resembling the Marvel anti-hero, The Punisher?

17 A. Yes.

18 Q. He put that mask on?

19 A. Yes.

20 Q. While he was doing this, he kept saying he was sorry?

21 A. If I said that, I don't remember today if he did.

22 Q. He didn't tell you he was going to prevent you from
23 divorcing him, did he?

24 A. No.

25 Q. He didn't tell you he was going after Michelle?

1 A. No.

2 Q. He said he was sorry, and then he told your son, "I'll be
3 right back"?

4 A. He told my son he'd be right back, after he had everything
5 on him.

6 Q. The next thing that happened was your in-laws came into
7 the house and untied you?

8 A. Yes.

9 Q. You later found out that Devin had actually told them you
10 were tied up and that they should come untie you?

11 A. Correct.

12 Q. After Devin committed the shooting, he called you and left
13 you a voicemail?

14 A. Correct.

15 Q. On that voicemail, he told you he was sorry?

16 A. Yes.

17 Q. That he loved you?

18 A. Yes.

19 Q. That he was a fucking wreck and didn't know what had gone
20 on in his head?

21 A. Yes.

22 Q. Devin was also able to get ahold of your father-in-law's
23 phone after the shooting?

24 A. Yes.

25 Q. Y'all listened on speaker?

1 A. Yes.

2 Q. Told you he loved you?

3 A. Yes.

4 Q. Told you he was sorry?

5 A. Yes.

6 Q. Told you he was trying to get home?

7 A. Yes.

8 Q. Now, on direct you stated that you then got on the phone
9 with him, and he said he blamed you and it was all your fault?

10 A. He had me take him off of speakerphone. And then he told
11 me that it was my fault, and killed himself.

12 Q. Ms. Smith, that's the first time you have ever told
13 anybody that, isn't it?

14 A. Yeah.

15 Q. In fact, in your deposition, Mr. Webster asked you -- I'm
16 going to go to Government Exhibit 53 at page 240.

17 MR. WEBSTER: I object, Your Honor, as improper
18 impeachment. I never asked her that question. In fact, I
19 stopped asking questions at that point.

20 THE COURT: Well, I'll wait to see if she points out
21 a question.

22 MR. WEBSTER: Okay.

23 BY MS. CHRISTILLES:

24 Q. Mr. Webster asked you, "Anything else that Devin told you
25 during this phonecall?"

1 "That he loved me and that he was just sorry.

2 "Did you hear anything else or anything else that happened
3 then?

4 "No."

5 Didn't tell Mr. Webster about Devin telling you he blamed
6 you, did you?

7 A. No. Because I don't like talking about it.

8 Q. But you wanted to be truthful in that deposition, correct?

9 A. Yes.

10 Q. In fact, you told us on direct it's the first time you
11 ever were really truthful?

12 A. Yes.

13 MR. WEBSTER: Could you please give me that page
14 number, please.

15 MS. CHRISTILLES: Sure. That's 240. Yeah, 240.

16 MR. WEBSTER: Page 240? Thank you.

17 MS. CHRISTILLES: Yes.

18 Your Honor, may I have one moment?

19 THE COURT: Yes.

20 MS. CHRISTILLES: Pass the witness, Your Honor.

21 THE COURT: Any redirect?

22 MR. WEBSTER: Yes, Your Honor. Briefly.

23 REDIRECT EXAMINATION

24 BY MR. WEBSTER:

25 Q. Let's begin with what he just talked about on page 240 of

1 Exhibit Number 53. First off, while he's pulling that up, in
2 order to move things along, Danielle, you told both me and
3 Justin Demerath, another lawyer for the plaintiffs, this exact
4 story when we were at the library that day, didn't you?

5 A. Yes.

6 Q. And you told me what happened with the phone, correct?

7 A. Yes. But I didn't tell, like, the rangers or anybody
8 because nobody asked.

9 Q. But you did tell -- you did tell me that story, didn't
10 you?

11 A. Yes.

12 Q. And, in fact, when we were at your deposition that day,
13 and I was asking you questions about what went on that day,
14 you started getting really upset, didn't you, when we started
15 getting to that point to talk about what happened in the end,
16 didn't you?

17 A. Yes.

18 Q. And, in fact, if you look at the deposition testimony that
19 we're talking about, Defense Exhibit -- or G-53.

20 *(Pause)*

21 THE COURT: If you just want to approach the witness
22 with a -- it looks like you have the page ready.

23 MR. WEBSTER: Sure. Your Honor, you know it.
24 Basically -- is it okay to approach her?

25 THE COURT: Yes.

1 MR. WEBSTER: Thank you.

2 THE COURT: Oh, here it comes up.

3 MR. WEBSTER: Okay. Here we go. Pull up the entire
4 front lines, from lines 9 through -- oh, you can't pull it up?
5 There we go.

6 BY MR. WEBSTER:

7 Q. Do you see where it says -- after what the government read
8 to you there, it says, "Did you hear anything else or anything
9 else that happened then?"

10 "No."

11 And I said, "Okay. You don't want to talk about it?"

12 And she says, "(Witness indicating by shaking her head
13 negatively)." Do you recall that?

14 A. Yeah.

15 Q. Why did you -- why did you -- why did I say that, you
16 don't want to talk about it?

17 A. Because I don't like having to keep going back.

18 Q. And that's because you had told me, hadn't you, about what
19 happened on the phone after they -- after Devin asked you to
20 take him off speaker, didn't you?

21 MS. CHRISTILLES: Objection. Leading.

22 THE COURT: That's sustained.

23 BY MR. WEBSTER:

24 Q. Okay. Why did you -- why did you not want to talk about
25 it?

1 A. Because I don't like having to keep going back into that
2 memory.

3 Q. And what had you told me -- what had you told me in that
4 library that day when you signed that statement?

5 A. At the library, when y'all asked about it, I told y'all
6 about it. But as far as everything else, I never told anybody
7 about that time.

8 Q. And no one from the government followed up in your
9 deposition, that you can recall, and asked you about what
10 specifically happened, did they?

11 MS. CHRISTILLES: Objection. Leading.

12 THE COURT: Sustained.

13 BY MR. WEBSTER:

14 Q. Can you tell us, did anyone else ask you any questions
15 with regard to that moment, until today?

16 A. No.

17 Q. Also --

18 *(Discussion off the record)*

19 BY MR. WEBSTER:

20 Q. I'll show you JEX 478A-0002.

21 It's already in evidence, Your Honor.

22 And this was Erin Higgins, who's your other mother, right?

23 A. Yes.

24 Q. And it says -- if you go down to the section -- I need to
25 see it. Okay. That's not the point I want.

1 *(Pause)*

2 MS. CHRISTILLES: Your Honor.

3 THE COURT: One second. We're changing court
4 reporters, I believe.

5 Let us know when we're ready.

6 COURT REPORTER: I'm ready, Your Honor.

7 THE COURT: Okay. Go ahead.

8 MS. CHRISTILLES: Your Honor, counsel would ask if we
9 could approach the bench.

10 THE COURT: Come on up.

11 *(At the bench)*

12 MS. CHRISTILLES: Your Honor, where would you like
13 us? I don't want to invade your space.

14 THE COURT: So I'm okay. But I'm not sure how I'm
15 supposed to mute and get to that side at the same time,
16 though. I have to hold this button down. Why don't you guys
17 come up here.

18 MS. CHRISTILLES: Your Honor, I think Mr. Webster's
19 made himself a witness in this case. He has indicated that
20 she's indicating the only person she told this statement to is
21 Mr. Webster. So, I mean, do I call Mr. Webster?

22 THE COURT: So I think the point's already been made
23 that she was asked a question in deposition, and then the
24 followup question is -- or following statement -- I guess, it
25 wasn't a question -- is, "You don't want to talk about it."

1 And the witness answers by shaking her head negative. So I
2 don't think I need to hear anything more on this point.

3 MR. WEBSTER: No problem -- yes, sir.

4 THE COURT: So are you making a motion to recuse
5 counsel?

6 MS. CHRISTILLES: Your Honor, I'm just concerned that
7 I have impeached the witness on the statement, and now she's
8 indicating that there's a witness to her ever saying this
9 statement, and that witness appears to be Mr. Webster.

10 THE COURT: -- point is going to be just to whether
11 or not she really made the statement before. I mean, given
12 everything that's happened to this lady, and the statement was
13 clear in deposition she didn't want to have any more followup
14 on this. And so I'm crediting that.

15 MR. WEBSTER: Thank you, Your Honor.

16 *(Open court)*

17 THE COURT: Do you have any further questions for
18 this witness?

19 MR. WEBSTER: Yes, sir. Just a few more.

20 BY MR. WEBSTER:

21 Q. Danielle, this -- I'll show you what's been marked as JEX
22 478A-002. And this was -- this is Erin Higgins' statement or
23 affidavit that she was given that's been marked as an exhibit
24 here. It says, "Danielle was aware that Devin was cheating on
25 her in the time leading up to the church shooting. Danielle

1 shared with me that on one occasion, one to three months
2 before the church shooting, he had left his computer open and
3 she'd seen a video of Devin Kelley in a sexual act with
4 another woman."

5 Does that refresh your recollection as to whether or
6 not --

7 THE COURT: So one second.

8 Is there an objection?

9 MR. WEBSTER: I'm sorry.

10 MS. CHRISTILLES: Yes. Objection. Leading.
11 Personal knowledge. I mean, this is Erin Higgins' statement.

12 THE COURT: Yeah. So what is the purpose of this
13 question?

14 MR. WEBSTER: I was just going to ask her if -- as a
15 matter of her impeachment, I was asking if this refreshes her
16 recollection as to whether or not she actually told someone
17 about this prior to that.

18 THE COURT: So these are two separate matters that
19 we're now talking about. And so this is not used for
20 impeachment purposes. So your next question.

21 MR. WEBSTER: No problem, Your Honor.

22 THE COURT: That's sustained.

23 BY MR. WEBSTER:

24 Q. Did Devin --

25 You can take it down. Thank you.

1 Did Devin embark on any particularly complex tasks such as
2 writing a novel or seeking publicity for some impractical
3 invention?

4 A. I don't -- I don't know.

5 Q. Did you ever see anything like that?

6 A. No. I didn't see nothing.

7 Q. Did he ever tell people he had a special or secret
8 relationship with a famous person?

9 A. No, not that I know of.

10 Q. Okay. Was his speech characterized by jokes, puns,
11 theatricality or with dramatic mannerisms such as singing or
12 excessive gesturing?

13 THE COURT: One second.

14 Is there an objection?

15 MS. CHRISTILLES: Objection. Leading.

16 THE COURT: That's sustained. And this is going
17 beyond the testimony previously on cross.

18 MR. WEBSTER: Your Honor, she actually -- they
19 actually brought up his severe mental decline, in the
20 questioning at the start of her cross-examination. And this
21 goes -- and this goes to exactly what she's talking about in a
22 medical manner. I'm asking --

23 THE COURT: I'll let that in. But you're still
24 leading.

25 MR. WEBSTER: Okay. No problem.

1 BY MR. WEBSTER:

2 Q. Let me ask you this. Did you -- did you ever observe him
3 making any jokes?

4 A. No.

5 Q. Did you ever observe him making any puns or theatricality
6 or with dramatic mannerisms?

7 A. No.

8 Q. Did you ever see him singing or excessive gesturing?

9 A. No.

10 Q. Did you ever see him talk really fast or have any type of
11 accelerated speech or disorganized or incoherent speech?

12 A. When he was high off the clonazepam, he would. But it was
13 hard to make out what he would say. And sometimes he would
14 speed up everything he would say.

15 Q. When you would have conversations with Devin, did he ever
16 get distracted easily by your clothing, by background noises
17 or furnishings in the room so that he couldn't hold a rational
18 conversation? Like, would he divert when he would see those
19 things?

20 THE COURT: One second.

21 MS. CHRISTILLES: Objection. Leading.

22 THE COURT: That's overruled. He's asking for her
23 observations.

24 THE WITNESS: If I wore something that he didn't
25 like, he would stop his conversation and address -- you know,

1 I would have to go and change, or if something else was out of
2 place in the house, he'd tell me to go and fix it.

3 BY MR. WEBSTER:

4 Q. Did you ever -- did you ever see him take or plan multiple
5 activities at once, such as occupational, political or
6 religious activities?

7 A. No. He stayed on one task at one time.

8 Q. Let me show you what's been previously marked as -- for
9 the final questions that I have, what's been previously marked
10 as JEX 0799-0079. 79. 0079.

11 MR. WEBSTER: Apologize, Your Honor. This is the
12 last set of questions I have.

13 BY MR. WEBSTER:

14 Q. The government asked you about the masks that he wore, and
15 they talk about that he -- the one that he put on that
16 morning, that he slowly put on from the box, that was the
17 Punisher mask; is that correct? That's what you saw?

18 A. Yes.

19 Q. He also had this other mask in the box that -- did you
20 know about that?

21 A. No.

22 Q. But on the day in question, even though he has this other
23 mask that was found in the house by the Texas Rangers, he
24 chose the Punisher mask, didn't he?

25 A. Yes.

1 Q. And he chose that Punisher mask because he wanted to
2 punish you, didn't he?

3 MS. CHRISTILLES: Objection. Leading.

4 THE COURT: That's sustained.

5 BY MR. WEBSTER:

6 Q. Okay. Can you tell me why you think he put the Punisher
7 mask on, ma'am?

8 A. To what I feel like today, it was to get back at me for
9 not wanting to be with him.

10 MR. WEBSTER: Pass the witness.

11 THE COURT: Anything based on those questions?

12 MS. CHRISTILLES: Just one question, Your Honor.

13 RECROSS-EXAMINATION

14 BY MS. CHRISTILLES:

15 Q. Ms. Smith, I just want to be clear about what you're
16 testifying to today about Devin telling you on that phonecall
17 that he blamed you and it was all your fault. Okay?

18 A. Okay.

19 Q. Just to be clear, the only person you have ever told that
20 to is plaintiffs' counsel, correct?

21 A. Correct.

22 MS. CHRISTILLES: Nothing further, Your Honor.

23 THE COURT: You may step down.

24 Is there any further need for this witness, or is she
25 going to be excused?

1 MR. ALSAFFAR: She may be excused, Your Honor.

2 THE COURT: Any necessity for her further?

3 MS. CHRISTILLES: No, Your Honor.

4 THE COURT: Thank you, ma'am. You're excused.

5 THE WITNESS: Okay.

6 MR. WEBSTER: Your Honor, we need to switch players
7 for a minute, if that's all right.

8 THE COURT: Let's go ahead and just take a ten-minute
9 break. And that'll give time to sanitize the area.

10 MR. WEBSTER: Thank you, Your Honor.

11 *(Recess)*

12 *(Change in reporter)*

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TERRY SNYDER - DIRECT

1 (Change in reporter.)

2 MR. LeGRAND: Your Honor, we would call Texas Ranger
3 Terry Snyder to the stand.

4 THE COURT: Someone will need to get him.

5 MR. LeGRAND: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. LeGRAND: I have placed a copy of my binder and a
8 copy of Ranger Snyder's deposition in front of him. And I've
9 given you a copy of Ranger Snyder's deposition because I'm
10 going to make reference to a couple of areas of
11 question-and-answer with him to save time.

12 THE COURT: Thank you.

13 MR. LeGRAND: And I did not give you a binder, unless
14 you want one, because everything in there is going to be up on
15 the screens.

16 THE COURT: That's fine. Thank you.

17 (TERRY SNYDER, having been duly sworn, testified as
18 follows:)

19 THE COURT: Mr. LeGrand.

20 DIRECT EXAMINATION

21 BY MR. LeGRAND:

22 Q. Good afternoon. Would you please state your name, sir.

23 A. Terry Snyder.

24 Q. And what is your occupation?

25 A. Texas Department of Public Safety, Texas Ranger.

1 Q. Is it okay if I refer to you as Ranger Snyder during the
2 examination?

3 A. Yes, sir.

4 Q. Ranger Snyder, I've placed in front of you a binder -- a
5 white binder there. And I'm not sure if you're going to have
6 to refer to it. If you need a hard copy of any of the things
7 we put on your screen there, you may refer to it, and I'll
8 give you a tab number.

9 In the black folder is your deposition, and I am going to
10 refer to a few sections of it where I want to ask the question
11 and then you state what your answer was back at that time.
12 And it will be fairly quick.

13 A. Yes, sir.

14 Q. Okay. Do you understand you are under oath?

15 A. Yes, sir.

16 Q. And as a Texas ranger, do you know what that means?

17 A. Yes, sir.

18 Q. Okay. Would you tell the truth anyway?

19 A. Yes, sir.

20 Q. Were you involved at all in the Sutherland Springs church
21 massacre that occurred November 5th of 2017?

22 A. Yes, I was.

23 Q. Was the FBI involved?

24 A. Yes, they were.

25 Q. Was the ATF involved?

1 A. Yes, they were.

2 Q. Was Homeland Security involved?

3 A. Yes, I believe so.

4 Q. Were various branches of local law enforcement involved?

5 MR. STERN: Your Honor, objection. Vague.

6 THE WITNESS: Yes.

7 THE COURT: Are you objecting to the word "involved"?

8 MR. STERN: I believe he asked if they were involved
9 in the shooting.

10 THE COURT: No. He left off the word "shooting"
11 because I was expecting that.

12 MR. LeGRAND: I meant "investigation."

13 BY MR. LeGRAND:

14 Q. Ranger Snyder, were you involved in an investigation after
15 the shooting?

16 A. Yes, I was.

17 Q. Were you, in any way, at the church -- the baptist church
18 in Sutherland Springs before a shooting took place?

19 A. No, I wasn't.

20 Q. So when I ask you these questions, I'm assuming that you
21 didn't arrive on the scene until after the shooting had
22 occurred. Fair enough?

23 A. That's correct.

24 Q. Would that be accurate?

25 A. Yes, sir.

TERRY SNYDER - DIRECT

1 Q. And all the various law enforcement organizations I asked
2 you about a few moments ago, would that be accurate for them
3 as well?

4 A. That's correct.

5 Q. And the local law enforcement organizations that were
6 involved, can you name some of them?

7 A. Wilson County Sheriff's Office, LaVernia Police
8 Department, Bexar County Sheriff's Office, I think the city
9 marshal's office out of Stockdale, and Guadalupe County and
10 Texas DPS.

11 Q. Was the DPS involved, Department of Public Safety, from
12 Texas?

13 A. Yes.

14 Q. And were the Texas Rangers involved?

15 A. Yes.

16 Q. Did -- the FBI, did they take charge of the investigation?

17 A. No, sir. We worked jointly.

18 Q. Okay. Who worked jointly?

19 A. We worked side by side, or along -- we worked with each
20 other during the investigative part -- or during the
21 investigation.

22 Q. Did the ATF work alongside you--all?

23 A. Yes, sir.

24 Q. Let's back up just a minute, then.

25 How did you find out that something had happened?

Gigi Simcox, RMR, CRR

1 A. I received a call that morning from Investigator Stephen
2 Moore with the Wilson County Sheriff's Office informing me
3 they had an active shooter at the church in Stockdale, the
4 Sutherland Springs Baptist Church.

5 Q. And what did you do next?

6 A. I inquired and got some information from him. He said
7 that the number of count that was deceased at the time was
8 very low that he had received. So we hung up. I called my
9 supervisor and immediately reported it to him, Lieutenant
10 Michael Parker at the time, who has since transferred.

11 And once I made that call to my lieutenant, of course, the
12 additional resources were called in at that time because we --
13 or I felt it was something bad.

14 Q. And I'm going to back up with you again. I want you to
15 tell the Court something about yourself.

16 Where did you grow up?

17 A. Snyder, Texas.

18 Q. And how did you get involved -- or can you give us a
19 rendition of how you became a Texas ranger? What did you go
20 through? Did you go to high school in Snyder?

21 A. I went to high school in Snyder and graduated.

22 Q. Take us from there to the Texas Rangers.

23 A. So after graduating high school, I did some side work and
24 put myself through junior college. And then I -- at the same
25 time, I got on with the local police department there as a

TERRY SNYDER - DIRECT

1 dispatcher and then later joined the academy out of Odessa,
2 where I received my basic peace officer training and then
3 later became a patrolman with the Snyder Police Department.

4 After four years with the police department, I tested and
5 was accepted with Texas DPS in 1998. I graduated the
6 '98 school. And upon graduation, I returned back to Snyder
7 where I did four years as a highway patrolman, and then I
8 tested for motor vehicle theft service. At the time, it was
9 part of the criminal investigations division with DPS.

10 I made motor vehicle theft. I transferred to McAllen,
11 Texas, for five years. And then I voluntarily transferred to
12 Lubbock, Texas, and was there for about a year. I promoted to
13 lieutenant. Came to San Antonio.

14 In January of 2011, I tested for the Texas Rangers, was
15 accepted and was assigned to Brownsville for eight months. And
16 then after my time in Brownsville, I came back to the
17 San Antonio area, stationed in Devine. And then I transferred
18 over to Floresville -- the Kerrville station.

19 Q. Where were you stationed on November the 5th of 2017?

20 A. In Floresville, Texas.

21 Q. And did that have anything to do with you receiving a call
22 about the shooting in Sutherland Springs?

23 A. Being that the Sutherland Springs Baptist Church lies
24 within Wilson County, Wilson County is a county that I'm
25 assigned to cover. And I assist the local sheriff's office

Gigi Simcox, RMR, CRR

1 and the local police departments there with investigations.

2 Q. Okay. After you received the call -- or what kind of call
3 did you receive?

4 A. It was a personal call. I say "personal call." It was on
5 my cell phone -- my work cell phone from an investigator in
6 Wilson County of an active shooter.

7 Q. What does "active shooter" mean to you, if you receive a
8 call?

9 A. That an individual has been seen or observed at the First
10 Baptist Church in Sutherland Springs actively shooting and
11 harming people.

12 Q. Did you head that way?

13 A. Yes. It took me a little while to get there. But, yes, I
14 prepared myself, and then I traveled -- I live in Pleasanton,
15 Texas. So it's about an hour-and-a-half drive,
16 hour-and-15-minute drive for me.

17 Q. What did you do when you arrived at the church in
18 Sutherland Springs?

19 A. Upon arrival, I met with the chief deputy of Wilson
20 County. At the time -- they've had an administration change.
21 But at that time, it was Johnnie Deagan is who I met with and
22 began gathering information as far as what all information
23 they had gathered prior to my arrival.

24 Q. Were you the first Texas ranger to arrive on the scene?

25 A. Yes.

TERRY SNYDER - DIRECT

1 Q. How long were the Texas Rangers present at the Sutherland
2 Springs Baptist Church --

3 A. From that Sunday --

4 Q. -- doing their investigation? I'm sorry.

5 A. From that Sunday to about Thursday or Friday into the next
6 week.

7 Q. Were you there the whole time?

8 A. Yes.

9 Q. Why?

10 A. Basically I was assigned as the lead investigator of this
11 investigation, and after coordinating with Wilson County
12 Sheriff's Department, they are initially the lead agency but
13 due to the scope of the incident, they did not have the
14 resources or the manpower to handle such investigation, so
15 they asked us to take over the investigation. And then I'm
16 assigned to that county. I'm considered the lead ranger
17 responsible for the investigation part of it.

18 Q. How many Rangers were involved, in total, in the entire
19 investigation?

20 A. To give you an exact number, approximately 15 to 20
21 Rangers from across the state came in, maybe 30.

22 Q. Did you have superiors that you reported to?

23 A. Yes, I did.

24 Q. And we've seen the acronym ROI, like Reports of
25 Investigation. You Rangers on the scene, were you involved in

Gigi Simcox, RMR, CRR

1 those from time to time?

2 A. Yes, I was.

3 Q. And are those reports to your superiors?

4 A. That's correct.

5 Q. And who are your superiors, or who were they back at that
6 time?

7 A. My office lieutenant here was Lieutenant Jessie Valdez. I
8 think he was out of town at the time, so I called Lieutenant
9 Parker, who was out of Waco, and Major Lane (phonetic), who is
10 also stationed in Waco.

11 Q. That deposition that's laying in front of you, am I
12 correct it's dated July 7th of 2020?

13 A. That's correct.

14 Q. Do you recall giving that deposition?

15 A. Yes, sir, I do.

16 Q. Do you recall the government of the United States taking
17 your deposition?

18 A. Yes, sir.

19 Q. Do you know why -- was the Attorney General, were they
20 your lawyer during that deposition?

21 A. Yes, sir.

22 Q. Do you know why you were selected to give the deposition?

23 A. No, sir.

24 Q. Okay. Did you know that the federal government noticed
25 the Texas Rangers for a deposition?

TERRY SNYDER - DIRECT

1 A. I'm sorry. Ask again.

2 Q. In other words, did you understand at the time your
3 deposition was taken, did you understand that the government
4 didn't notice Terry Snyder's deposition, they noticed the
5 Texas Rangers' deposition; did you know that?

6 A. No, sir.

7 Q. Okay. You were just told to show up and give a
8 deposition?

9 A. Answer to a subpoena.

10 Q. Okay. Okay. Pretty much like you did today?

11 A. Yes, sir.

12 Q. Okay. Can you describe in a little more detail the time
13 you came in?

14 A. The Texas ranger division has their own chain of command.
15 We fall under the Texas Department of Public Safety. And the
16 Texas Department of Public Safety is led by a director.

17 And the ranger division has a chief that is under that
18 director. So we have a ranger chief, an assistant chief, and
19 then we have four or five captains stationed in Austin. And
20 then the field commanders of the six companies, A through F
21 that we have, are led by a major. And each under each major
22 are two to three lieutenants.

23 Q. Where do you fall in that hierarchy, or that pyramid?

24 A. I'm field ranger, supervised by the first lieutenant.

25 Q. Do you know why you were selected to lead this

1 investigation?

2 A. Being that it was -- it occurred in Wilson County, which
3 Wilson County is a county I'm assigned to.

4 Q. Does a Texas ranger -- am I using the term correct when I
5 say "investigation?"

6 A. Yes, sir.

7 Q. Does that have anything to do with the fact that the event
8 has already occurred? And what I mean by that, in other
9 words, the shooting had already taken place when you arrived;
10 correct?

11 A. Yes, sir.

12 Q. So was your role as a Texas ranger and all the other
13 agencies that arrived -- one, I guess, was to take care of the
14 massive amount of victims; correct?

15 A. That was one of the roles, yes.

16 Q. Okay. And so what I'm leading up to is that the other
17 part of your presence is to investigate what happened?

18 A. That's correct.

19 Q. When you arrived, did you know whether there were multiple
20 shooters?

21 A. No, sir, not at the time.

22 Q. When you arrived, did you know whether this was some kind
23 of foreign attack?

24 A. No, sir, I didn't.

25 Q. When you arrived, did you know anything about what had

1 happened?

2 A. No, sir, other than there was an active shooter and that
3 by the time I arrived that individual had fled the scene and
4 the officers or the different agencies were in pursuit.

5 Q. So were you at the church?

6 A. Yes, sir.

7 Q. Tell me what you did there, when you arrived.

8 A. I met with Johnie Deagan and we conducted a walk-through
9 of the church. And shortly after my arrival our crime scene
10 team working group coordinator ranger Troy Wilson arrived and
11 I pretty much partnered up with him and Johnie afterwards and
12 we started kind of organizing and triaging a plan, as far as
13 the resources that we would need on the scene, and trying to
14 gain control, basically, of the scene at that time for
15 integrity purposes.

16 Q. So upon your arrival, does that start the clock on
17 collecting facts?

18 A. Yes.

19 Q. And as a result of the Texas ranger investigation in its
20 entirety, do you know how many documents resulted from that,
21 roughly? I don't need an exact number.

22 A. I currently have approximately seven to eight binders
23 full.

24 Q. Did we make you read all of those last night, or -- I'm
25 sorry. I don't mean to make any humor out of this.

1 A. I've studied some of them, yes. I've gone through this
2 stuff a number of times, so...

3 Q. Who compiled the Texas ranger file that exists right now
4 on Sutherland Springs?

5 A. Basically the other Rangers that are called in, they are
6 assigned a task and they eventually write a report on
7 everything they did. And that report, their reports are
8 written in our system under a file number which I create.
9 When I create that file number, all those other reports come
10 in and I eventually print them off, or my office prints them
11 off and I put them together.

12 Q. So would I be correct that because you were made the lead
13 ranger there, you're at the top of the pyramid, as far as the
14 end result report is concerned?

15 A. That's correct.

16 Q. I want to go to JEX597-002. Can you put that up.
17 Have you seen this document before, Ranger Snyder?

18 A. Yes, sir.

19 Q. Okay. Is that -- I will represent to you that all the
20 exhibits I plan to use today are from the Texas ranger file;
21 okay?

22 A. Yes, sir.

23 Q. And what is JEX597-0002?

24 Is it on the screen in front of you?

25 A. No, sir, not in front of me.

1 Q. Can we take a second to see what the technology is doing
2 there, because I don't want him to have to stare up.

3 Ranger Snyder, we're going to do this the old-fashioned
4 way. Would you grab that white binder and go to Tab 2. I
5 think if you look at Tab 2, you will find that JEX597-002.

6 A. Yes, sir. I've got it.

7 Q. What is that?

8 A. It looks like a time line of events that was compiled and
9 put together.

10 Q. Would I be correct that if one goes through the entirety
11 of the Texas ranger file, there will be several time lines;
12 correct?

13 A. Yes, sir.

14 Q. For example, if we look at JEX597-001, that's the page
15 before this one; correct?

16 A. Yes, sir.

17 Q. And is that also a time line?

18 A. That's correct.

19 Q. Okay. I want you to understand, I'm going to spend quite
20 a bit of time on 597-001 and 597-002; okay?

21 A. Yes, sir.

22 Q. And, to your knowledge, these time lines, were they
23 compiled by the Texas Rangers?

24 A. The information was provided to our analysts who worked
25 along with us and she compiled the information into this

1 format.

2 Q. What I'm really driving at, is all the information on
3 597-001 and JEX597-002, all of that information was compiled
4 and gathered from the investigation of the Texas Rangers;
5 would that be correct?

6 A. That's correct.

7 Q. So this time line wasn't generated the day of the
8 shooting; was it?

9 A. No, sir.

10 Q. Okay. Let's start with JEX597-002. Is that a time line
11 of the morning of the shooting?

12 A. Yes, sir.

13 Q. And then JEX597-001, the other companion under Tab 2 in
14 your notebook, that's an annual time line?

15 A. Yes, sir.

16 Q. Okay. Let's first go to the morning of the shooting. So
17 this apparently runs from roughly early in the morning to
18 11:32 a.m.; correct?

19 A. That's correct.

20 Q. The first thing, the first thing we have on the line, the
21 time line is in the middle of the page; correct?

22 A. Yes, sir.

23 Q. So under morning, it's got: "Kelley contacts his parents
24 to watch the kids." Underneath that, it's got: "Kelley
25 enters the bedroom with a handgun and held his wife at

1 gunpoint. Then he handcuffed her to the bed." Correct?

2 A. Correct.

3 Q. Then it says: "Kelley retrieves a black, quote, rifle,
4 close quote, bag and departs the apartment located on his
5 parents' property." Have I read all of those correctly?

6 A. Yes.

7 Q. Those were all based on statements that were taken by
8 various Rangers to accumulate these facts; correct?

9 A. Correct.

10 Q. So instead of going through hundreds of pages of Texas
11 Rangers interviews, I'm okay to rely on these facts on this
12 time line; correct?

13 A. Correct.

14 Q. The second dot in the middle of the page would be from
15 11:14. It goes up and around to the top of the document and
16 says it's from 11:14 a.m. to 11:22 a.m.; correct?

17 A. Correct.

18 Q. And you told us you were the head ranger, you would have
19 been in charge of all the compilation of all these facts;
20 correct?

21 A. Yes, sir.

22 THE COURT: One second here. Ranger, do you mind if
23 this IT specialist works around you?

24 THE WITNESS: Not at all.

25 THE COURT: Go ahead, Daniel.

1 You can continue.

2 MR. LeGRAND: Thank you, Your Honor.

3 BY MR. LeGRAND:

4 Q. Do you know, Ranger Snyder, how long it took, for example,
5 to compile all the facts that make up JEX597-002? A long
6 period of time?

7 A. We were there from like Sunday to Thursday, so during
8 those days all this information was compiled and documented.

9 Q. Now, was the attempt of JEX597-2 to demonstrate what
10 happened that morning, up until the point, I think over here
11 at the end it's got: "Kelley is found deceased in the
12 interior of the vehicle with gunshot wounds, including a
13 self-inflicted gunshot wound to the head. Additional firearms
14 and ammunition were removed from the vehicle." Have I read
15 that correctly?

16 A. That's correct.

17 Q. So the start of the time line is Mr. Kelley contacting his
18 parents and the various things we just went through. The end
19 of the time line is he's dead in his vehicle from a
20 self-inflicted wound; correct?

21 A. Correct.

22 Q. And in between, there is a number of things on this time
23 line. I'd like to walk through them a little bit with you;
24 fair enough?

25 A. Yes, sir.

1 Q. Okay. Going to the box that's up here, 11:14 a.m. to
2 11:22 a.m., it's got: "Kelley parks the Ford Expedition
3 directly in front of the front door of the Sutherland Springs
4 church and exits the vehicle, dressed in all black military
5 style tactical gear and face mask, armed with a Ruger AR-556
6 semiautomatic rifle." Have I read that accurately?

7 A. Correct.

8 Q. All of this was determined by your Texas ranger
9 investigation; correct?

10 A. Yes, sir.

11 Q. For example, as far as you know, would anything be on
12 these two time lines 597-1 and 597-2, if the FBI or the ATF
13 disagreed with it?

14 MR. STERN: Objection. Calls for speculation.

15 THE COURT: That's overruled.

16 BY MR. LeGRAND:

17 Q. You worked directly with them; didn't you?

18 A. At the scene we worked side by side, yes.

19 Q. So, as far as you know, anything on these two time
20 lines -- do you know of anything --

21 Do you know of anything, Ranger Snyder, on these two time
22 lines that the FBI, or the ATF, or Homeland Security
23 specifically disagree with?

24 A. I would think not.

25 Q. Now, when you got to the church, Ranger Snyder, did you go

1 into the church?

2 A. Yes, I did.

3 Q. What did you see?

4 A. Um --

5 Q. Are you okay?

6 A. I first saw a small child, two years old, surrounded with
7 colors -- coloring pages, that you would think that she had
8 been there with her grandparents, you know, at the church
9 service and just coloring.

10 And then throughout the church was just -- I mean, there
11 was property damage, bullet defects, a lot of just deceased
12 individuals. And the pews had been moved. There had been --
13 some had been repositioned prior to our arrival. And that was
14 due to medical intervention, trying to triage and assist the
15 wounded.

16 Q. Ranger Snyder, we were on the part of 597-2, when the last
17 thing I read was "armed with a Ruger AR-556 semiautomatic
18 rifle." Had it already been moved before you got there?

19 A. Yes. I was later contacted by a Wilson County deputy who
20 had entered the church prior to us. He, along with LaVernia
21 Police Department officers, they entered the church to clear
22 the church and make sure there was no other threat.

23 And prior to them exiting the church, that Wilson County
24 deputy picked a rifle up from the center walkway between the
25 pews, the center walkway there, and he took the rifle and

1 secured it in his patrol car.

2 Q. Was that before you arrived?

3 A. Yes, sir.

4 Q. So when you walked into the church, had any ambulance
5 arrived yet?

6 A. Yes.

7 Q. So was the process of treating injured people and dealing
8 with the scene still going on, when you arrived?

9 A. Yes. Upon my arrival, there was -- I don't want to
10 describe it as chaos, but the scene was very busy with a large
11 number of people. People coming from everywhere, the
12 community, the outskirts of the community, off-duty officers,
13 law enforcement, EMS personnel.

14 And, as I explained, we were trying to gain control of the
15 scene to conserve the integrity of any evidence that we would
16 gather, and also be able to treat and continue to treat the
17 wounded and get them to the hospital.

18 Q. If you notice at the top of the exhibit we're referring
19 to, 597-002, it's got 11:14 to 11:22, but if we look down on
20 the line there are actually some events that occurred during
21 that; correct?

22 A. That's correct.

23 Q. For example, 11:17, it says -- down under here, it says:
24 "Wilson County Sheriff's Office receives first 9-11 call."
25 Was that before you arrived?

1 A. Yes.

2 Q. Do you know what time you arrived? Did you document that?

3 A. I'm sure I did. I would have to go back and research it,
4 but I probably didn't get the call until 11:30 maybe, or prior
5 to just a few minutes before. And it takes me roughly an
6 hour-and-15, 20 minutes to get over there.

7 Q. So the first Texas ranger on the scene was you; correct?

8 A. That's correct.

9 Q. So you would have arrived after the end of this time line
10 that is 597-002, JEX; correct?

11 A. Yes. Upon my arrival I learned that the pursuit -- they
12 were in pursuit, and that they were -- the car had fled. The
13 suspect had fled and they were pursuing him and that he had
14 driven off the road, off the FM road, going back towards
15 Lubbock County, and he drove off the road and into a field.

16 Q. Was that a considered a crime scene?

17 A. Yes.

18 Q. Was the church considered a crime scene?

19 A. Yes.

20 Q. Were there any other crime scenes?

21 A. Two additional crime scenes, being the scene where the
22 civilian in the community that encountered -- his name was
23 Stephen Willeford, who encountered the gunman inside the
24 church at the time. His crime scene was across the street at
25 a corner residence that's right across from the church.

1 And then the other additional scene is the scene in
2 Comal County where Devin left that morning, and where he had
3 handcuffed and hog tied his wife and left his children.

4 Q. So what's the total number of crime scenes that developed,
5 roughly?

6 A. A total of four.

7 Q. And one of those would have been where Danielle Kelly was
8 hog tied on the bed; correct?

9 A. That's correct.

10 Q. And then Mr. Willeford, who was he? Is that his picture
11 here on JEX597-2?

12 A. Yes, it is.

13 Q. And next to him it says: "Kelley exits the sanctuary and
14 is engaged by Stephen Willeford?"

15 A. That's correct.

16 Q. And, as you sit here today, do you know whether or not
17 Mr. Willeford fired on Mr. Kelley with a firearm?

18 A. He did.

19 Q. Do you know, as you sit here today, whether he wounded
20 Mr. Kelley?

21 A. Yeah, I believe he did. Yes.

22 Q. And do you know whether or not Mr. Kelley succumbed from
23 those wounds, or as we see over here, a self-inflicted wound?

24 A. It was determined that he succumbed to a self-inflicted
25 wound.

1 Q. And Mr. Willeford, is this accurate, that on the
2 right-hand side of this exhibit that Mr. Willeford is picked
3 up by Johnnie Langendorff, and then the two of them then
4 pursued Kelley?

5 A. That's correct.

6 Q. And they ended up at the second crime scene where
7 Mr. Kelley went off into the field and committed suicide;
8 correct?

9 A. That's correct.

10 THE COURT: Let's pause for just a second.

11 Daniel.

12 (Off the record discussion.)

13 BY MR. LeGRAND:

14 Q. Ranger Snyder, would you pick up your --

15 THE COURT: One second here.

16 MR. LeGRAND: I'm sorry. I apologize, Your Honor.

17 THE COURT: He's going to be off the Zoom in just a
18 moment and we'll wait for him to come back in.

19 Okay. We're back in business.

20 Mr. LeGrand.

21 BY MR. LeGRAND:

22 Q. Ranger Snyder, I may from time to time come back to
23 Exhibit JEX597-2, which is the morning of the event -- okay?
24 -- I may come back to that from time to time, but I want to
25 move now to the other page of that. Do you know how -- it's

1 in front of you.

2 I want to go to 597-1.

3 Do you see that in front of you?

4 A. Yes, sir.

5 Q. And we're going to spend quite a bit of time on this
6 today, but do you see that it begins in 2009, when it says:
7 "Suspect Devin Kelley enlists in the Air Force?"

8 A. Yes.

9 Q. And then it ends on November 5th of 2017, the morning you
10 drove up to the Sutherland Springs Baptist Church and
11 witnessed what you told us you witnessed, when you walked in;
12 correct?

13 A. Yes, sir.

14 Q. Okay. And throughout this testimony I'm going to take you
15 through these various years and what the -- the Texas Rangers
16 were unable -- or were able. The Texas Rangers were able to
17 uncover and investigate all this information that's on
18 JEX0597-1; correct?

19 A. That's correct.

20 Q. And when you gave your deposition back in July of last
21 year, you knew that; correct?

22 A. Yes, sir.

23 Q. And you knew all this various information, when you gave
24 your deposition?

25 A. Yes, sir.

1 Q. And you knew Mr. Kelley's history?

2 A. Yes.

3 Q. With that in mind, I'd like you to take your deposition
4 and I'm going to go through certain passages of it with you,
5 pretty much as if I were asking you the questions today, but
6 I'm going to give you page and line; okay? I'm going to give
7 you the page and the line to go to. I'm going to read the
8 question, and then I'd like you to read the answer, as if it
9 was your testimony today; fair enough?

10 A. Yes, sir.

11 THE COURT: One second.

12 BY MR. LeGRAND:

13 Q. If you disagree with any of the answers that you gave back
14 in July, would you interrupt and tell us: "I don't agree with
15 that anymore"?

16 A. Yes, sir.

17 THE COURT: Is there an objection?

18 MR. STERN: There is, Your Honor. I know there is
19 not a question pending, but this is a government exhibit of a
20 deposition, which, as I understand Mr. LeGrand plans to use to
21 ask the questions, almost to supplement his own. If it was a
22 matter of impeaching, that would be one thing. But,
23 otherwise, if they are willing to put in the government
24 exhibits of the depositions, we certainly don't object to
25 that.

1 THE COURT: Yeah. You need to ask him a question.
2 He needs to answer to the best of his ability without
3 referring to his deposition. Then if you need to get him to
4 refresh his memory, then you can perhaps go to that, but this
5 is an improper questioning technique.

6 MR. LeGRAND: Your Honor, my attempt was to save
7 time. And that's always my attempt, is to save time.

8 THE COURT: Yeah. Thank you for that, but let's just
9 ask questions and get his best answer.

10 MR. LeGRAND: Okay.

11 BY MR. LeGRAND:

12 Q. I'm going to ask you questions, Ranger Snyder, based; on
13 your deposition, and if your answers disagree with what you
14 gave back then, we'll talk about it; fair enough?

15 A. Yes, sir.

16 Q. So I was asking you about Devin Kelley, and I said: "Did
17 you determine that he's a convicted felon?"

18 A. Yes. We learned that he was, yes.

19 Q. Okay. And you didn't know that at the time you arrived at
20 the scene; did you?

21 A. No, sir, we did not.

22 Q. And you didn't learn that for the first time -- you didn't
23 learn all of that -- then I said: "When is the first time you
24 learned that he was a convicted felon?"

25 A. It was later that first day or the next day. I know we

1 requested the analytical assistance. The resources that we
2 were utilizing, we asked them to run background checks and run
3 any information that we could get on this guy's name and date
4 of birth, because at the time we didn't know what kind of
5 event that we had or what we were looking at to investigate,
6 if there were multiple shooters, if it was a terrorist act,
7 what we were dealing with at the time. So we wanted to learn
8 as much information as we could about by his name and date of
9 birth.

10 Q. Ranger Snyder, do you recall when your deposition was
11 taken that the United States attorney that asked you
12 questions, I think it was for roughly seven hours; do you
13 recall that?

14 A. Yes, sir.

15 Q. Okay. Do you remember that his name was Mr. Furman?

16 A. Yes, sir.

17 Q. And Mr. Furman asked you, I think -- do you recall that
18 Mr. Furman asked you a lot of questions about how criminals
19 got firearms, like stealing, borrowing, straw purchases, gun
20 shows; do you remember that line of questioning?

21 A. Yes, sir.

22 Q. And would you agree, Ranger Snyder, that every single gun
23 that was in Devin Kelley's possession on the day of the
24 shooting, he bought through a federal firearms licensee, and
25 that the sale was approved by the federal government?

1 MR. STERN: Objection. Is he being asked if he
2 recalls from his deposition?

3 MR. LeGRAND: No. I asked a question.

4 THE COURT: That was all predicate. Now the question
5 is: "Do you know whether the guns used were all purchased
6 through a federally licensed arms dealer?"

7 THE WITNESS: The investigative facts that we
8 gathered from Kelley being in possession of these firearms,
9 all these firearms collected and background checks, revealed
10 that he did purchase those firearms.

11 BY MR. LeGRAND:

12 Q. So he didn't have a weapon that he got by a straw
13 purchase?

14 A. No, sir. Nothing indicated such.

15 Q. And he didn't have a weapon that he stole?

16 A. No, sir.

17 Q. And he didn't have any weapons that he borrowed?

18 A. No, sir.

19 Q. And he didn't have any weapons that he bought at a gun
20 show?

21 A. No, sir.

22 Q. And did you determine that all of the weapons -- in fact,
23 did he have three weapons there that day?

24 A. I believe there was three that was collected from him,
25 yes.

TERRY SNYDER - DIRECT

1 Q. So one was a Ruger AR-556 assault rifle?

2 A. That's correct.

3 Q. And that was left laying on the floor of the church;
4 correct?

5 A. Yes, sir.

6 Q. And it was picked up by law a enforcement individual and
7 placed in a car?

8 A. That's correct.

9 Q. And was it bought at an FFL, or a federal firearms
10 licensed store?

11 A. Yes.

12 Q. And did your investigation turn up that that store was an
13 Academy store?

14 A. That's correct.

15 Q. And did your investigation turn up that Mr. Kelley filled
16 out a Form 4473 from the ATF in order to purchase that weapon?

17 A. That's correct.

18 Q. And that he purchased this new in the box; correct?

19 A. Yes, sir.

20 Q. And that was true with all three weapons that he had there
21 that day; correct?

22 A. True, that they were legally -- or that they were
23 purchased -- I don't know, I can't remember if they were all
24 purchased from the Academy store, but, yes, they were all
25 purchased.

Gigi Simcox, RMR, CRR

1 Q. No, sir. In fact, I think one, if we go to JEX0597-001,
2 the annual time line --

3 A. Yes, sir.

4 Q. I think if you look on 2016, it says: "Kelley purchases
5 Ruger AR-556 rifle, not eligible to purchase, due to his
6 conviction." Have I read that correctly?

7 A. I'm sorry, sir. Will you direct me?

8 Q. Go to 2016.

9 A. Yes, sir.

10 Q. Okay. And it says: "Kelley purchases Ruger AR-556
11 rifle." And then it says: "Not eligible to purchase, due to
12 conviction." Correct?

13 A. Correct.

14 Q. So you had determined he was a felon by the time this
15 document was generated?

16 A. That's correct.

17 Q. So it would have been illegal for him to purchase that gun
18 as a felon; correct?

19 A. Yes, sir.

20 Q. But he did purchase it. He purchased it new and it was
21 laying in the floor of the church; correct?

22 A. That's correct.

23 Q. And he used it to reek the havoc that he did on
24 November 5th, 2017; correct?

25 A. Yes, sir.

1 Q. Now, if you look over on 2014, do you see down on the
2 bottom right-hand side of 2014, it says: "Kelley purchases
3 Glock, model 19, .9mm pistol." Do you see that?

4 A. Yes, sir.

5 Q. And it also says: "Not eligible to purchase, due to
6 conviction?"

7 A. Yes, sir.

8 Q. He had a Glock in his possession the day of the shooting;
9 correct?

10 A. Yes, sir.

11 Q. Did you determine that it was that Glock that's referred
12 to here that was purchased December 22nd of 2014?

13 A. Yes, sir.

14 Q. And then also, if you come up to 2017, October 18th -- you
15 with me?

16 A. Yes, sir.

17 Q. "Kelley purchases Ruger SR-22 pistol. Not eligible to
18 purchase, due to conviction." Have I read that correctly?

19 A. That's correct.

20 Q. The three guns I just went through, the AR-556, the Glock,
21 and the Ruger SR-22, I think the AR-556 and the SR-22 both
22 came from Academy; is that your recollection?

23 A. I would agree.

24 Q. Okay. And that the SR-22 was in Mr. Kelley's backpack in
25 his car?

TERRY SNYDER - DIRECT

1 A. That's correct.

2 Q. It was never fired the day of the event; was it?

3 A. No, sir. There is no evidence indicating so.

4 Q. And then he committed suicide with the Glock?

5 A. That's correct.

6 Q. Any evidence that he fired the Glock inside the church? I
7 think you were asked that in your deposition.

8 A. No evidence that he fired it inside the church. I think
9 he discharged that weapon exiting the church in the gun fight
10 with the civilian.

11 Q. So the investigation from the Texas Rangers -- am I
12 correct? -- it determined that Mr. Kelley used the Glock to
13 shoot at Mr. Willeford?

14 A. That's correct.

15 Q. But all the shooting he did to kill and maim and harm all
16 the people inside the church was done with this AR-556 assault
17 rifle; correct?

18 A. That's correct.

19 Q. That he bought with the clearance of the FBI. Did your
20 investigation determine that? That he filled out a 4473, and
21 that the FBI green lighted that because the Air Force never
22 told them he was a felon. We reached that conclusion in your
23 deposition; correct?

24 A. So the application was cleared for him to purchase that
25 from the Academy store, yes.

Gigi Simcox, RMR, CRR

TERRY SNYDER - DIRECT

1 Q. Right. And your investigation determined that the Air
2 Force never told the FBI that Mr. Kelley had been convicted of
3 a child abuse felony; correct?

4 A. The investigation -- I guess to answer that, it's revealed
5 that Kelley had been charged with a child abuse charge for a
6 domestic charge.

7 Q. And would you go to 2012 on the exhibit?

8 I'm sorry. Did I interrupt you?

9 A. No, sir. Go ahead.

10 Q. Go to the bottom right-hand corner of 2012 under JEX597-1.
11 Do you see where it says: "Kelley found guilty of domestic
12 abuse by Air Force. Due to conviction, Kelley was not
13 eligible to purchase firearms." Have I read the Texas ranger
14 time line correctly?

15 A. Yes, sir.

16 Q. So the result of your investigation was the Air Force
17 didn't report that to the FBI; did they?

18 A. Well, according to this time line and according to the
19 investigation, it was found that he was convicted of this
20 domestic abuse and it was discovered we learned that
21 information. How that information was communicated amongst
22 the agencies or the different entities, we didn't find
23 anything on that. I mean --

24 Q. I'm not asking you that. What I'm asking you is that the
25 end result of your investigation, do you recall in your

Gigi Simcox, RMR, CRR

1 deposition you were asked "Do you agree that you-all
2 determined that Mr. -- that the Air Force did not report
3 Mr. Kelley's felony conviction to the FBI?"

4 MR. STERN: Objection. Asked and answered.

5 THE COURT: That's overruled.

6 THE WITNESS: That's correct.

7 BY MR. LeGRAND:

8 Q. Okay. Would you agree, Ranger Snyder, that your
9 investigation brought you to the conclusion that every single
10 one of the guns that Mr. Kelley had at the church, that he
11 bought from a licensed gun dealer with a form that he filled
12 out and sent in to the U.S. Government?

13 A. That's correct.

14 Q. Now, do you recall telling me in your deposition that it
15 was somewhere in the neighborhood of three days before you,
16 the Texas Rangers, the FBI, and the ATF determined that
17 Mr. Kelley was a convicted felon?

18 A. It was two to three days. We didn't learn that
19 immediately upon the onset of the investigation.

20 Q. And do you recall telling me that you and the FBI and the
21 ATF all learned that about the same time?

22 A. That's correct.

23 Q. And do you recall telling me that the FBI told you that
24 the reason for that is that the Air Force never reported it to
25 them; do you recall telling me that in your deposition?

1 A. Yes.

2 Q. Do you recall telling me that the reason Mr. Kelley had
3 those three guns is because the Air Force didn't tell the FBI
4 that he was a convicted felon?

5 MR. STERN: Objection. Form.

6 THE COURT: So this is improper impeachment. You
7 need to ask him the question, rather than referencing the
8 deposition.

9 That's sustained.

10 BY MR. LeGRAND:

11 Q. Is it correct, Ranger Snyder, that you-all at the Texas
12 Rangers learned through the FBI that the reason they didn't
13 know Mr. Kelley was a convicted felon is because the Air Force
14 didn't tell them that?

15 A. Yes, sir.

16 Q. Now, —

17 (Off the record discussion.)

18 THE COURT: Let's just ask a question.

19 MR. LeGRAND: That's what I'm trying to do, Your
20 Honor. I apologize.

21 BY MR. LeGRAND:

22 Q. Ranger Snyder, would you agree that in your job with the
23 Texas Rangers there is times when you report to the next NICS
24 database?

25 A. Yes.

TERRY SNYDER - DIRECT

1 Q. And do you report -- as a Texas ranger, do you report
2 felony convictions to the NICS database?

3 A. Yes.

4 Q. And do you agree that if -- what is your understanding of
5 what the NICS database is?

6 A. We operate, or we run our checks on the individual's name,
7 date of birth, their driver's license number, social security
8 number through two different databases. One is the --
9 (Reporter clarification.)

10 So we run our information through two databases, one being
11 the TCIC, being the Texas Crime Information Center, and then
12 the other one in NCIC, which is the National Crime Information
13 Center.

14 BY MR. LeGRAND:

15 Q. And when Mr. Kelley or anybody else fills out a 4473 ATF
16 form that goes into the FBI, do you know, or is it your
17 understanding that that search through the NICS database to
18 see if they are eligible to buy a firearm?

19 A. The search through the NICS system would return anybody
20 with a convicted felony or it would show their convictions and
21 their charges.

22 Q. So as a Texas ranger do you report felons to the NICS
23 database, so they won't be able to buy firearms?

24 Is that one of the reasons you report them?

25 A. That's correct.

Gigi Simcox, RMR, CRR

TERRY SNYDER - DIRECT

1 Q. Okay. And do you recall ever having not reported a felon
2 to the NICS database, when you were required to do so?

3 A. No, sir.

4 Q. Are you required to report felons to the NICS database, if
5 it's your area or responsibility?

6 A. Yes, sir.

7 Q. Do you have supervisors that make sure you do that?

8 A. That's correct.

9 Q. And if you didn't do it, would your supervisor be very
10 upset with you?

11 A. That's correct.

12 Q. Would you, in fact, probably be fired from the Texas
13 Rangers, if you didn't report a felon to the NICS database?

14 A. Yes.

15 Q. And, in addition to not being allowed to buy a firearm, is
16 it your understanding from your work as a Texas ranger that
17 Mr. Kelley should not have been allowed to carry a firearm as
18 a convicted felon?

19 A. There is other parameters that would determine that, just
20 not being based as a convicted felon, I guess you could say.

21 Q. Okay. Let me be more specific. If he was a convicted
22 domestic abuse felon, would he be allowed to carry a firearm
23 in Texas?

24 A. No, sir.

25 Q. Okay. And if you look back at JEX0597-1, 2012, you and I

Gigi Simcox, RMR, CRR

1 read earlier -- correct? -- that he was: "Found guilty for
2 domestic abuse by the USAF, and Kelley was therefore not
3 eligible to purchase firearms." Correct?

4 A. Correct.

5 Q. He couldn't possess them, or wear them, or carry them
6 either; correct?

7 A. That's correct.

8 Q. So if he was wearing a firearm in 2017 everywhere he went,
9 would he be breaking the law everywhere he went?

10 A. That's correct.

11 Q. Do you recall in your deposition I went through a
12 hypothetical with you about if you had pulled Devin Kelley
13 over on Highway 87 on his way to Sutherland Springs the
14 morning of the shooting; do you recall that?

15 A. Yes.

16 Q. Okay. And I think I took you back to your DPS days, when
17 you were driving a patrol car. If you had pulled Devin Kelley
18 over for speeding -- do you recall me asking you about that?

19 A. Yes, sir.

20 Q. And you had seen a long gun, this AR-556 laying on his
21 back seat, would you have gone back to your patrol car and run
22 him up on your NICS database?

23 MR. STERN: Objection. Called for facts not in
24 evidence.

25 THE COURT: That's overruled.

1 THE WITNESS: I would have.

2 BY MR. LeGRAND:

3 Q. And in hindsight, you wouldn't have found a thing, because
4 the Air Force never reported his felony; correct?

5 A. His background I looked at during my investigation doesn't
6 report anything on there that would cause me any concern of
7 him being in possession of a firearm at the time that I would
8 have conducted a traffic stop.

9 Q. And so, if he's convicted as a domestic abuse felon, he
10 can't wear body armor either; can he?

11 A. No, sir.

12 Q. He can't even possess body armor; can he?

13 A. No, sir.

14 Q. But that morning, if you had pulled him over and he had
15 body armor on, you couldn't have done anything to him -- could
16 you? -- because he was clean in the NICS system?

17 MR. STERN: Objection. Calls for speculation.

18 THE COURT: That's overruled.

19 THE WITNESS: Same as the firearm. I mean, if I
20 would have noticed the body armor and I run a check on him, it
21 wouldn't have raised any concern because there was nothing
22 indicating on his criminal history.

23 BY MR. LeGRAND:

24 Q. So if that morning if you had pulled him over for speeding
25 and you had run him in your NICS database in your DPS patrol

1 car, and that Ruger AR-556 assault rifle had been laying on
2 the back seat of the car, you wouldn't have done anything, you
3 would have let him go -- correct? -- after you gave him a
4 speeding ticket?

5 MR. STERN: Objection.

6 THE WITNESS: That's correct.

7 THE COURT: That's been asked and answered, but we
8 got the answer.

9 BY MR. LeGRAND:

10 Q. Now, you, and the FBI, and the ATF all found out about
11 Devin Kelley being a child abuse felon, along about the same
12 time?

13 A. Yes. Within a couple of days, yes.

14 Q. Do you recall that the ATF boots on the ground and the FBI
15 boots on the ground there with you in Sutherland Springs were
16 shocked by that?

17 A. I never -- I can't testify and say I ever heard a
18 statement made of such or any comment.

19 Q. Do you recall telling me in your deposition that they were
20 shocked by it?

21 A. I would have to refresh my memory or go back to it.

22 Q. Okay. Would you grab it there in front of you, page 248,
23 line 8. Tell me when you're there with me; okay?

24 A. Yes, sir.

25 Q. Question on Line 8: "But, okay, but you remember working

TERRY SNYDER - DIRECT

1 with the FBI and the ATF. Were they shocked when they found
2 out that the Air Force had not turned this data in to them?"

3 And what was your answer?

4 A. I answered: "Yes, sir."

5 Q. And do you agree with that answer today, or does that
6 refresh your recollection?

7 A. I would agree. I guess I'm implying and answering a
8 question to them being shocked because I was surprised because
9 the criminal history did not indicate anything as such.

10 Q. Were you surprised and shocked that his criminal history
11 had not been turned into the FBI?

12 A. I can't say that his criminal history hadn't been turned
13 over to the FBI, because there was some reports on there for
14 some juvenile records, so he did have a criminal history.
15 However, charges that would prevent him from purchasing a
16 firearm, being in possession of a firearm, or a body armor was
17 not indicated on that criminal history.

18 Q. And did that shock you?

19 A. Yes.

20 Q. It wouldn't happen in the Texas Rangers; would it?

21 A. No.

22 Q. At least somebody would be in a whole lot of trouble?

23 A. Yes.

24 Q. Now, at the very end of your deposition -- well, I'll ask
25 you the question. Do you agree, Ranger Snyder, that if we

Gigi Simcox, RMR, CRR

1 look at JEX0597-1, this is the annual time line?

2 A. That's correct.

3 Q. Do you agree that it shows, in 2012 it shows two purchases
4 at Holloman Air Force Base of firearms from a date standpoint
5 actually before Mr. Kelley was convicted; correct?

6 A. Correct.

7 Q. But do you agree that the Texas Ranger time line shows at
8 least four firearms on here -- and I can walk you through
9 them -- 2015. Do you see on October 20th he purchased a .9mm
10 semiautomatic pistol?

11 A. Yes.

12 Q. And 2014, before that's when he purchased the Glock down
13 here in 2014; correct?

14 A. Correct.

15 Q. And 2016 he purchased the Ruger automatic rifle; correct?

16 A. Correct.

17 Q. And 2017 he purchased the 22?

18 A. Correct.

19 Q. Okay. And do you recall ever having talked to me in your
20 deposition about how buying that many guns and passing that
21 many FBI background checks might eventually tell somebody that
22 they are not in the system?

23 MR. STERN: Objection. Calls for speculation.

24 THE COURT: That's overruled.

25 THE WITNESS: So part of our job as investigators is

1 to compile this information. This information is put together
2 as a puzzle, so I see this as putting the border of this
3 puzzle together, and the remaining pieces we're trying to
4 compile as much information as we can to complete our
5 investigation.

6 What this information was able to tell him -- I know
7 what it tells me is that he purchased four firearms. What he
8 was thinking, or how it made him feel, obviously we didn't get
9 to interview him to get that answer or get the why from him or
10 what he was feeling. I can just indicate he was able to
11 purchase four firearms.

12 BY MR. LeGRAND:

13 Q. Okay. I'm just asking you hypothetically. In your
14 experience as a Texas Ranger, if somebody is able to walk in
15 to a retail store, that's a gun store, that's a federal
16 firearm licensee gun store on four separate occasions after
17 they are convicted as a domestic violence felon and buy
18 firearms, hypothetically, do you believe that at some point in
19 time that would start to tell them they are not in the system?

20 MR. STERN: Same objection, Your Honor. Calls for
21 speculation. Lack of personal knowledge.

22 THE COURT: Yeah. That is sustained.

23 BY MR. LeGRAND:

24 Q. So, Ranger Snyder, we have established, have we not, that
25 you learned during your investigation about the three firearms

1 that were located at the scene and used in Devin Kelley's
2 possession on the day that he went to the Baptist church in
3 Sutherland Springs and committed this massacre?

4 A. That's correct.

5 Q. And we know that those three firearms were traced through
6 the ATF tracing system?

7 A. That's correct.

8 Q. Let's go to JEX552. Have you seen that document before,
9 Ranger Snyder? It's from the Texas ranger file.

10 A. Yes. That's the firearms trace summary provided by ATF.

11 Q. So ATF provided that to the Texas Rangers?

12 A. That's correct.

13 Q. And do you see that it's dated November 5th, 2017?

14 A. Yes.

15 Q. So that's the date of the shooting; correct?

16 A. That's correct.

17 Q. Did it say anything on that exhibit, JEX552, does it say
18 anything whatsoever on it about a previous felon or previous
19 felony?

20 A. No, sir.

21 Q. So does that trace on that firearm, the Ruger AR-556, does
22 it display any history whatsoever that this man is a convicted
23 domestic violence or child abuse felon?

24 A. No, sir.

25 Q. And then let's go to JEX553. Do you see that in front of

1 you?

2 A. Yes, sir. It's a firearms trace summary for a Glock.

3 Q. Is that the firearms trace summary for the Glock that was
4 in his possession?

5 A. That's correct.

6 Q. And so do you see the date on that?

7 A. Completion date November 5th, 2017.

8 Q. Is that the same day as the shooting?

9 A. That's correct.

10 Q. And so do you see anything on that document that shows
11 other than that Mr. Kelley bought that gun from a licensed
12 federal firearms dealer with the approval or go ahead from the
13 FBI?

14 A. No, sir.

15 Q. And then let's look at JEX554. Would you look at the date
16 on that? Is that another ATF trace summary?

17 A. It's a firearms trace summary provided by ATF completed on
18 November 7th, 2017.

19 Q. That's on the SR-22; correct?

20 A. That's correct.

21 Q. So that's two days after the shooting; correct?

22 A. That's correct.

23 Q. Do you see anything on this document, the ATF trace
24 document that's two days after the shooting, that says
25 anything about Devin Kelley being a convicted child abuse

1 felon?

2 A. No, sir.

3 Q. Ranger Snyder, did you know, did you know about
4 Mr. Kelley's application to attain a Texas handgun carry
5 permit?

6 A. We learned of it during the investigation, yes, sir.

7 Q. Okay. If you look at JEX597-1 again, do you see under
8 2015 that it says: "Kelley applies for Texas DPS concealed
9 handgun permit and it was denied." Correct?

10 A. That's correct.

11 Q. Okay. Would you look at JEX578 for me. Have you seen
12 that document before?

13 A. It's the letter of denial I believe from Texas Department
14 of Public Safety Regulatory Service Division.

15 Q. Now, Ranger Snyder, when somebody applies for -- I think
16 they call them a CHL back in the day, a concealed handgun
17 license, but now I think they are called LTCs -- correct? --
18 license to carry?

19 A. Yes, sir.

20 Q. When someone applies for one of those, would I be correct
21 they supply their fingerprints?

22 A. Yes, sir. I believe they do.

23 Q. Okay. And so if Mr. Kelley applied for this Texas DPS
24 concealed handgun permit in 2015, he would have supplied his
25 fingerprints; correct?

1 A. Yes.

2 Q. And those get sent to the FBI by Texas; correct?

3 A. Yes.

4 Q. And so the reason Mr. Kelley was turned down, if we go
5 back to JEX578, is that the letter that tells Mr. Kelley he's
6 turned down?

7 A. Yes. That's the denial letter.

8 Q. Does it tell Mr. Kelley he's turned down because his
9 fingerprints said he was a felon?

10 A. The letter indicates the reason for denial is an animal
11 neglect charge in El Paso County, Colorado in 2014.

12 Q. So, in effect, would you agree it tells Mr. Kelley he was
13 not turned down because of his fingerprints? It doesn't
14 mention that; does it?

15 A. No, sir.

16 Q. In fact, it tells Mr. Kelley, the only reason you were
17 turned down by Texas for your handgun carry license is because
18 you neglected a dog or an animal; correct?

19 A. Animal neglect, correct.

20 Q. In fact, it even tells him if he can clean that up, he can
21 get a Texas handgun carry permit; correct?

22 A. I believe he was asked to respond and he never responded.

23 Q. Right. But wouldn't this letter tell you as a Texas
24 Ranger that the FBI said his fingerprints were clear?

25 A. This letter alone, I don't believe so. The only way I

1 believe that he would be able to know that he's clear is
2 unless he ordered his own criminal history and he reviewed
3 that himself, what you are allowed to do through the Texas
4 DPS.

5 Q. Would you agree this letter does not tell Mr. Kelley he's
6 being rejected because his fingerprints indicate he's a felon?

7 A. Correct.

8 Q. If his fingerprints had indicated that he was a felon, do
9 you believe Texas would have told him that?

10 A. Correct.

11 Q. What would Texas do if somebody that was a child abuse
12 felon and that their fingerprints at the FBI said they were a
13 child abuse felon -- okay? -- do you think Texas would notify
14 the person, if they applied for a handgun carry permit that
15 the FBI says you're a felon?

16 MR. STERN: Objection. Calls for speculation.

17 BY MR. LeGRAND:

18 Q. I'm just asking you what you know as a Texas Ranger. I'm
19 not asking you to guess or speculate. Would Texas tell you
20 that?

21 MR. STERN: Objection.

22 THE COURT: Do you know the answer to that?

23 THE WITNESS: No, sir.

24 THE COURT: Next question.

25 MR. LeGRAND: That's fair.

1 BY MR. LeGRAND:

2 Q. But in 2015 he was rejected for his handgun carry permit
3 because of animal neglect, not because of his fingerprints;
4 correct?

5 THE COURT: That's asked and answered. Next
6 question.

7 BY MR. LeGRAND:

8 Q. Ranger Snyder, was Mr. Kelley ever forced to behave as a
9 criminal in society?

10 MR. STERN: Objection.

11 THE COURT: So you need to be more specific in the
12 objection.

13 But that's awfully vague. You need to clarify your
14 question.

15 BY MR. LeGRAND:

16 Q. Well, Ranger Snyder, I want you — was Mr. Kelley, as far
17 as you know, ever denied the purchase of a firearm at a
18 licensed federal firearm dealer, based on your investigation?

19 A. Based on my investigation, there is no evidence to support
20 that.

21 Q. Was he ever forced to go to a market where criminals go to
22 buy firearms?

23 A. There is no evidence to support that.

24 Q. So as far as gun purchasing, was Mr. Kelley ever forced
25 because of his felony to go to the criminal market for guns?

1 MR. STERN: Objection. Vague.

2 THE COURT: So he can answer that the same way he's
3 been answering.

4 THE WITNESS: The investigation revealed he purchased
5 each weapon that he possessed and owned legally through a
6 licensed dealer.

7 BY MR. LeGRAND:

8 Q. Now, Ranger Snyder, did your investigation determine
9 whether when he left Holloman Air Force Base he was a
10 convicted felon? That's, in fact, on JEX597-1; correct?

11 A. That's correct.

12 Q. Did the Texas Rangers determine that he had escaped from a
13 mental hospital?

14 A. We learned of that information, yes.

15 Q. In fact, if you look at 2012, again on JEX597-1, under
16 2012, in the middle, do you see April 30th to June 7th, it
17 says: "Admitted to Peak psychiatric hospital, and that he
18 eloped from the facility." What does that mean?

19 A. That he walked out, that he escaped from the facility.

20 Q. And then does "eloped" also mean escaped?

21 A. Sure.

22 Q. If you come over to June 13th, does it say: "Kelley
23 located a Greyhound Station in El Paso County -- I think it
24 should be Texas -- was allegedly attempting to carry out death
25 threats to the military chain of command." Is that part of

1 the Texas Ranger, results of their investigation?

2 A. That's information we learned, yes.

3 Q. So the Air Force, according to your time line, knew he was
4 guilty of domestic abuse and was a felon; correct?

5 A. Yes.

6 Q. Did you determine any evidence in your investigation
7 whereby the Air Force told the rest of the world that?

8 MR. STERN: Objection. Vague.

9 THE COURT: That's overruled.

10 THE WITNESS: Through our investigation and through
11 our checks of background on him through the Texas system, the
12 national system, there was no indications of any of this
13 information that we learned outside running the database.

14 BY MR. LeGRAND:

15 Q. Ranger Snyder, I want to change subjects for just a moment
16 and I'm going to go to -- well, before I do that, let me ask
17 you. Up to this point, you and I have talked about six times
18 that the FBI would have checked Mr. Kelley's fingerprints;
19 correct?

20 A. Correct.

21 Q. And all of those six times that they would have checked
22 his fingerprints, they would have said their records don't
23 show any felony conviction; correct?

24 A. That's correct.

25 Q. I want to go to the seventh time now for a second. Do you

1 see on 2017 over here on JEX597-1?

2 A. Yes, sir.

3 Q. Do you see the first thing there, June 8th under 2017, it
4 says: "Kelley issued nine commissioned security guard
5 license." Do you know what one of those is?

6 A. It's a license to participate or practice as a security
7 guard for a business or whoever hires you out here in the
8 private sector, as far as needing security.

9 Q. Okay. Would you look at JEX564. Do you see on the top
10 there, is that a Texas private security registration?

11 A. That's correct.

12 Q. And it looks like a driver's license; correct?

13 A. Yes, sir.

14 Q. Was that issued to Mr. Kelley in June of 2017?

15 A. That's correct.

16 Q. And did Texas issue Mr. Kelley a noncommissioned security
17 guard license in 2017?

18 MR. STERN: Objection, Your Honor. Relevance.

19 THE COURT: What is the relevance to this?

20 MR. LeGRAND: I'll get to it, Your Honor, real quick.

21 THE WITNESS: That's correct.

22 BY MR. LeGRAND:

23 Q. Okay. Did that require an FBI fingerprint background
24 check?

25 A. That's correct.

1 Q. So did the FBI check out Mr. Kelley and tell the state of
2 Texas whether or not it was okay to issue him a
3 noncommissioned security guard license?

4 MR. STERN: Objection. Relevance.

5 THE COURT: That's overruled.

6 THE WITNESS: Through the background check that's
7 conducted through the Texas DPS, who issues the license, it is
8 determined that he met the qualifications to receive the
9 license. There was nothing to disqualify him.

10 BY MR. LeGRAND:

11 Q. All right. And would you -- but if he had on his record
12 at the FBI that he was a convicted domestic violence felon,
13 hopefully Texas would not have given him a security guard
14 license; would you agree?

15 A. A felony wouldn't have met the qualifications. They would
16 have disqualified him.

17 Q. Do you know where he was applying to work, when he got
18 this security guard license?

19 A. I'm not sure where he applied to work, but I think he was
20 working for, if I'm not mistaken, there was Schlitterbahn. It
21 was either Schlitterbahn or an RV park.

22 Q. Would you go to JEX563-001.

23 Is that a Texas Ranger document?

24 A. Yes. It's an email correspondence, December 12, 2017,
25 from, looks like security at Schlitterbahn.com to our analyst

1 and one of the majors that's in Company B.

2 Q. So it's from Schlitterbahn to the Texas Rangers during
3 this investigation?

4 A. Yes. It's to Ranger Analyst Susan Burroughs, and a major
5 who commands Company B, William Kasper.

6 Q. Did Mr. Kelley work at Schlitterbahn, according to the
7 Texas Ranger investigation?

8 A. From June 6, 2017 until July 15, 2017, it indicated that
9 he was employed at the Water Park Management, Inc.

10 Schlitterbahn Waterpark Resort.

11 Q. Was he a security guard there?

12 MR. STERN: Objection, Your Honor. Again, government
13 doesn't see the relevance of this line of questioning.

14 THE COURT: Yeah. What is the relevance of this?

15 MR. LeGRAND: I'll show, Your Honor.

16 THE COURT: Let's tie it up.

17 THE WITNESS: That's correct.

18 BY MR. LeGRAND:

19 Q. Well, let's get to the relevance. Ranger Snyder, you are
20 a Texas Ranger. Do you know what Schlitterbahn is?

21 A. It's a public water park, slides, rides, entertainment.

22 Q. Would you consider it a child's water park?

23 A. Yes.

24 Q. Is it your understanding from your investigation that
25 Devin Kelley had a history of having a felony and that one of

1 the reasons he was convicted is because he cracked his son's
2 skull, fractured his son's skull?

3 MR. STERN: Objection, Your Honor.

4 THE COURT: Yeah. This is not relevant.

5 Next question.

6 BY MR. LeGRAND:

7 Q. Let me ask it this way, Ranger Snyder. Should Devin
8 Kelley had gotten a security license from the state of Texas,
9 based on his background?

10 MR. STERN: Objection, Your Honor. Relevance.

11 THE COURT: That question I'll allow.

12 THE WITNESS: Through the background investigation
13 which was conducted, there was nothing to disqualify him to
14 receive his security license.

15 BY MR. LeGRAND:

16 Q. If the FBI's database check had been properly populated
17 with his felony conviction, should he have been allowed to
18 work at a child's water park as a security guard?

19 MR. STERN: Your Honor, our objection is not just the
20 relevance of where he worked, but even the fact that he was
21 able to obtain this permit. It's just simply not relevant to
22 the issues at hand.

23 THE COURT: Yeah. I'm allowing some in by
24 background, so I'll allow this. That's overruled.

25

1 BY MR. LeGRAND:

2 Q. You may answer, Ranger.

3 A. If there had been a felony conviction indicated on his
4 criminal history during the background --

5 Q. He would not have --

6 A. -- as we talked about, I guess, his domestic violence, he
7 would not have been allowed to obtain a security license.

8 Q. Let me ask it this way. As a Texas Ranger, Ranger Snyder,
9 with Devin Kelley's background as you know it, from your
10 investigation, the Texas Ranger investigation, should Devin
11 Kelley have been allowed to work around children with a
12 security guard license?

13 THE COURT: That's not relevant. Next question.

14 BY MR. LeGRAND:

15 Q. Ranger Snyder, as a Texas Ranger, do you believe somebody
16 with a domestic violence felony should have a security license
17 from the state of Texas, period?

18 MR. STERN: Again, Your Honor, Mr. Kelley's security
19 license has no relevance to this case.

20 THE COURT: Yeah. So, I mean, there's some minimal
21 relevance to foreseeability and those kind of issues, but I've
22 already got the answers to this, so you can move on to
23 something else.

24 BY MR. LeGRAND:

25 Q. Let me ask it this way.

1 THE COURT: Well, no. Let's ask something completely
2 different.

3 BY MR. LeGRAND:

4 Q. Ranger Snyder, I want to go back to JEX597-1. In 2014 he
5 was arrested for animal cruelty in Colorado; do you see that?

6 A. Yes, sir.

7 Q. Based on your background and your investigation, if El
8 Paso, if the El Paso County Police Department checked with the
9 FBI, would they have found out about his felony?

10 A. No, sir.

11 Q. And then right below that when Mr. Kelley purchased the
12 Glock that we've talked about, the FFL that sold that Glock
13 didn't find out about Mr. Kelley's felony either; did he?

14 A. No, sir.

15 Q. Now, when Mr. Kelley was able to buy that Glock, after —
16 he had to lie on his 4473; didn't he? The form that's sent
17 into the federal government, Mr. Kelley had to lie on that;
18 didn't he?

19 A. I believe he did, if I remember reviewing it correctly,
20 yes.

21

22

23

24

25

1 *(Change in reporter)*

2 BY MR. LEGRAND:

3 Q. Now, when Mr. Kelley was able to buy that Glock, after --
4 he had to lie on his 4473, didn't he? The form that's sent
5 into the federal government, Mr. Kelley had to lie on that,
6 didn't he?

7 A. I believe he did, if I remember reviewing it correctly,
8 yes.

9 Q. Because isn't one of the questions on the 4473 whether or
10 not you're a felon?

11 A. That's correct.

12 Q. And Mr. Kelley would have had to say no for that to get
13 past the FFL store, correct?

14 A. That's correct.

15 Q. Okay. So does that -- the purchase of that Glock, does
16 that tell Mr. Kelley that he's in the FBI system as a felon?

17 In other words, the fact that they allowed him to buy that
18 Glock, does that tell Mr. Kelley that he's in the FBI system
19 as a felon?

20 MR. STERN: Objection. Lacks personal knowledge.
21 Outside the scope of this witness's testimony.

22 THE COURT: I'm not sure I am understanding the
23 question.

24 Do you understand the question?

25 THE WITNESS: Vaguely.

1 THE COURT: Rephrase your question.

2 MR. LEGRAND: I'll rephrase it.

3 BY MR. LEGRAND:

4 Q. When Mr. Kelley -- okay.

5 First of all, Mr. Kelley had go through a background check
6 with the FBI to buy that Glock, correct?

7 A. That's correct.

8 Q. Do you agree that when the FFL and the FBI allow
9 Mr. Kelley to buy that Glock, that that indicates to
10 Mr. Kelley that his fingerprints are not in the system?

11 MR. STERN: Again --

12 THE COURT: That's overruled. You can answer the
13 question, if you can.

14 THE WITNESS: I think -- would it indicate that? I
15 can't say what he felt it indicated to him. What it indicates
16 to him is that he's cleared the system and been allowed to
17 purchase this firearm and he was able to purchase it and gain
18 possession of it.

19 BY MR. LEGRAND:

20 Q. And, really, what I'm asking you is does it tell you --
21 does it tell Ranger Snyder that, apparently, Mr. Kelley's
22 fingerprints were not in the system?

23 A. Him being allowed to purchase tells me he was cleared --
24 the system cleared him and did not find any disqualifications
25 for him not to purchase this weapon.

1 Q. Would the same thing be true for the purchase of the
2 9-millimeter on October 20th of 2015?

3 A. That's correct.

4 Q. Would the same thing be true for the purchase of the
5 Ruger AR-556 on April the 7th of 2016?

6 A. That's correct.

7 Q. Would the same thing be true for the issuance of the
8 noncommissioned security license by the State of Texas on
9 June 8th, 2017?

10 A. That's correct.

11 Q. Okay. So if you add all these up, there are seven or
12 eight occasions where Mr. Kelley submitted his fingerprints to
13 the FBI, and he was not told that he was a felon, correct?

14 A. That's correct.

15 Q. Okay. Do you think that that had a chilling effect on
16 Mr. Kelley or a boldening effect?

17 MR. STERN: Objection, Your Honor.

18 THE COURT: So you got to make your objections more
19 specific than just saying "objection."

20 What is your objection?

21 MR. STERN: Objection. Misleading, vague, lacks
22 personal knowledge of what Mr. Kelley understood or the impact
23 that a denial or proceed at an FFL would have on him.

24 THE COURT: Okay. Yeah. So it's calling for
25 speculation, and that's sustained.

1 BY MR. LEGRAND:

2 Q. Do you recall, Ranger Snyder, that you were asked by the
3 government in your deposition as to whether or not you had
4 reviewed the body cam videos at Devin Kelley's gate on
5 November the 1st of 2017?

6 A. Yes, sir.

7 MR. LEGRAND: I'd like to take just a second, Your
8 Honor, and show a clip from JEX 606.

9 BY MR. LEGRAND:

10 Q. Ranger, do you know for a fact that this video reflects an
11 event that took place November 1st of 2017?

12 A. That's correct.

13 Q. And that's four days before the shooting at Sutherland
14 Springs, correct?

15 A. That's correct. Yes.

16 Q. Okay.

17 *(Playing video)*

18 BY MR. LEGRAND:

19 Q. Ranger Snyder, have you seen that video before?

20 A. Yes.

21 Q. Did looking at that clip today refresh your memory?

22 A. Yes.

23 Q. Did you hear in there that Devin Kelley told -- well,
24 first of all, let me ask it this way: Is there any doubt that
25 Devin Kelley knew that he was talking to law enforcement

1 officers?

2 A. No. He indicated and referenced them as such.

3 Q. Did you hear Devin Kelley tell those officers that he
4 didn't like talking to police officers?

5 A. That's correct.

6 Q. Did you hear Devin Kelley tell those officers that he was
7 carrying a gun?

8 A. If I remember correctly, he motioned to his side and he
9 said that he had a gun.

10 Q. As a convicted domestic violence felon, was he allowed to
11 carry a gun?

12 A. On his property?

13 Q. No. On his person.

14 A. On his person? As I answered earlier, there's some
15 parameters behind being a convicted felon, and I can explain
16 that. I mean, briefly, is the fact that if he's a convicted
17 felon and he's put on probation or whatever the service may
18 be -- which I didn't have that information because his
19 criminal history didn't indicate that -- but, however,
20 anything after five years, you're allowed to possess it on
21 your property.

22 Q. Are you sure it's not in your house?

23 A. Without referencing the material, I want to say property
24 or maybe residence.

25 Q. And are you sure it's not ten years in Texas?

1 A. I'm thinking it's five.

2 Q. Okay. So do you believe Devin Kelley was within his
3 rights to carry that gun at the gate in front of those
4 officers?

5 A. If, in fact, he had a gun. He just motioned to his side,
6 but his shirt was concealing. I didn't -- if you can -- I
7 didn't see a gun that he actually displayed. I just saw him
8 motion to his side indicating he had a gun. I don't know if
9 it was on his person at that moment.

10 Q. Did you hear him say "I have a gun too" and pat his side?

11 A. I saw him motion to his side and said, "I have a gun."

12 Q. Did you hear him say, "I have a gun too"?

13 A. Uh-huh.

14 Q. Did you hear the word "too"?

15 A. Yes.

16 Q. Okay. Do you know if a federal law bars possession by a
17 domestic abuse felon of a firearm?

18 A. Ask again, please.

19 Q. Does federal law bar felons -- domestic abuse felons from
20 possessing or carrying firearms?

21 A. I believe so, yes.

22 Q. Okay. So would Devin Kelley -- on the day at that gate
23 that you just saw in that clip, would he have been violating
24 federal law?

25 A. Yes.

1 Q. Is -- the situation in the clip that you just saw at the
2 gate, you just agreed with me that it violates federal law,
3 correct, if he was, in fact, carrying a firearm?

4 A. Correct.

5 Q. Okay. And you know from the shooting at Sutherland
6 Springs that he possessed firearms, correct?

7 A. Correct.

8 Q. That, again, was a violation of the law, correct?

9 A. Yes.

10 Q. When he was at the church and did the shooting, he
11 violated the law with those firearms --

12 A. Correct.

13 Q. -- in commission of the crime that he committed at the
14 church, correct?

15 A. That's correct.

16 Q. But just having the firearms also was a violation of the
17 law, correct?

18 A. Yes, sir.

19 Q. And did you find any evidence whatsoever in your Texas
20 Ranger investigation that any of the guns that Mr. Kelley used
21 to commit this crime, this terrible massacre at this church,
22 were bought other than through federal firearms licensees?

23 A. No evidence indicated such.

24 Q. Were any of them purchased at any kind of market that
25 criminals are forced to go to because they can't go into a

1 regular store?

2 A. No, sir.

3 Q. Did you see any evidence whatsoever, including the gate --
4 in other words, I'd already asked you the seven or eight times
5 that Mr. Kelley was able to pass, apparently, an FBI
6 fingerprint check -- seven or eight of them, correct?

7 A. Yes, sir.

8 MR. STERN: Objection. "Fingerprint check," Your
9 Honor?

10 MR. LEGRAND: Yes, fingerprints.

11 MR. STERN: Misleading.

12 BY MR. LEGRAND:

13 Q. Not a fingerprint check. Okay.

14 Four 4473s to purchase guns, correct?

15 A. That's correct.

16 Q. And the others were fingerprint checks, correct?

17 A. Background checks to include, I guess, the fingerprints,
18 yes.

19 Q. Including the Texas handgun carry permit application?

20 A. That's correct.

21 Q. The security guard application?

22 A. That's correct.

23 Q. And then if we go to the gate incident, does anything
24 about the gate incident indicate to you that Mr. Kelley
25 thought he was in the federal FBI database when he confronted

1 those officers and told them that he had a gun?

2 MR. STERN: Objection. Speculation.

3 THE COURT: That's sustained.

4 BY MR. LEGRAND:

5 Q. Ranger Snyder, when -- in the clip that I played for you,
6 did Devin Kelley look at those officers and indicate to them
7 that he was carrying a gun?

8 A. He did.

9 Q. And Devin Kelley knew that he was a convicted domestic
10 violence felon, correct?

11 MR. STERN: Actually, objection. Assumes facts not
12 in evidence, speculation.

13 THE COURT: Yeah. I get it. You know, so this is
14 not a jury trial where you have to say it two or three times.
15 I generally get it the first time.

16 BY MR. LEGRAND:

17 Q. Ranger Snyder, I'm not asking you to guess or speculate as
18 to what was in Devin Kelley's head.

19 I'm asking you, based on your examination, should -- was
20 Devin Kelley present at Holloman Air Force Base when he was
21 convicted of a felony?

22 A. Yes.

23 Q. Did he serve time in jail?

24 A. Yes.

25 Q. Did he serve time in jail for that felony?

1 A. Yes.

2 Q. Based on your background and experience as a -- as a Texas
3 Ranger, should he have known that he was convicted -- a
4 convicted felon?

5 A. An individual put through the system, I would -- that
6 would lead me to believe through -- that he would know, yes.

7 Q. But we have at least seven occasions where Devin Kelley
8 became aware that the FBI didn't have a record of his felony
9 conviction, correct?

10 A. His criminal history didn't indicate a felony conviction,
11 no, sir.

12 Q. And do you agree, based on looking at the video clip that
13 we looked at, that Mr. Kelley, on November 1st of 2017, four
14 days before the shooting at Sutherland Springs, was bold
15 enough to look at two law enforcement officers and tell them,
16 "I don't talk to police" and "I'm carrying a gun"?

17 A. The video reflected as such.

18 Q. If they had arrested him for carrying that gun, would the
19 Sutherland Springs shooting have taken place?

20 MR. STERN: Objection. Calls for speculation.

21 THE COURT: Sustained.

22 BY MR. LEGRAND:

23 Q. Let me ask this: If they had arrested him on November 1st
24 of 2017, would that have resulted, more likely than not, in a
25 search warrant?

1 MR. STERN: Objection. Calls for speculation.

2 THE COURT: That's sustained.

3 MR. LEGRAND: Can we take a break, Your Honor?

4 THE COURT: Yes.

5 How much more do you have with this witness?

6 MR. LEGRAND: I'm sorry, Your Honor?

7 THE COURT: How much more do you have with this
8 witness?

9 MR. LEGRAND: Just a few more minutes, Your Honor.

10 THE COURT: Let's take about ten minutes.

11 *(Recess)*

12 *(Open court)*

13 THE COURT: Thank you. Please be seated.
14 Anything further?

15 MR. LEGRAND: Yes, Your Honor. Just a few questions.
16 May I proceed?

17 THE COURT: Yes.

18 MR. LEGRAND: Thank you.

19 BY MR. LEGRAND:

20 Q. Ranger Snyder, going back to the gate incident,
21 November 1st -- first of all, according to JEX 597-1 -- can we
22 look at that again.

23 You see in 2013 there, Ranger Snyder, when Mr. Kelley was
24 released from jail?

25 A. Yes. 2013, March 31st.

1 Q. Okay. And if you add five years to that, would that be
2 March 31st, 2018?

3 A. That's correct.

4 Q. So the gate incident would have been well within that,
5 correct?

6 A. Yes.

7 Q. So he's not allowed to carry a firearm at the time of the
8 gate incident, correct?

9 A. That's correct.

10 Q. And you have certain protocols you follow as a Texas
11 Ranger?

12 A. Yes, sir.

13 MR. LEGRAND: Okay. I'd like to go to Exhibit 507,
14 please, JEX 507. Can you blow up the box on the bottom right.

15 TECHNOLOGY SPECIALIST: Here?

16 MR. LEGRAND: Yes. Just the bottom half of it, if
17 you can blow that up.

18 TECHNOLOGY SPECIALIST: Here?

19 MR. LEGRAND: Yeah.

20 BY MR. LEGRAND:

21 Q. This document's from a timeline from the Texas Rangers'
22 file.

23 Do you understand that, Ranger Snyder?

24 A. Yes.

25 Q. And is it often that Texas Rangers work for local law

1 enforcement, such as district attorneys?

2 A. We assist the local agencies, and sometimes the district
3 attorney will ask us to perform an investigative lead on
4 something or to go follow up on something, yes.

5 Q. Okay. I just want to look at the last five bullet points
6 on this document.

7 It says, "Erin Brassfield contacted Guadalupe County
8 District Attorney Courtney Hansen and informed her about the
9 situation and the photos."

10 Do you know what that's about?

11 A. Apparently, there was a sexual assault allegation
12 investigation being conducted. And apparently, it was
13 information to Brassfield that Devin Kelley was in possession
14 of some photos.

15 Q. Could you look at the bullet point right above that.

16 And this also is a result of your Texas Ranger
17 investigation, correct?

18 A. That's correct.

19 Q. This came from an interview of some kind?

20 A. Yes.

21 Q. And would you read that bullet point?

22 A. "D. Kelley called Erin Brassfield, the second ex-wife of
23 Donald Brassfield, and informed her he, Devin Kelley, had
24 found these photos and was unaware of what to do with them."

25 Q. And as a domestic abuse felon, should Devin Kelley have

1 had explicit photos of a minor?

2 A. No, sir, not that I'm aware of.

3 Q. Okay.

4 A. I don't know why he would. I don't know.

5 Q. No. I mean, is he allowed to?

6 A. I don't know. Honestly, I think there's a bunch of felons
7 out there that's in possession of --

8 Q. I understand.

9 Let's go to the next -- we've already done the bullet
10 point right after that. Now, the next one down.

11 "When Hansen contacted" -- in other words, Hansen's the
12 district attorney, correct?

13 "When Hansen contacted Devin Kelley, he was uncooperative
14 and stated that he was not in possession of any photos and was
15 unaware of any photos."

16 Have I read that correctly?

17 A. That's correct.

18 Q. And then it says that Hansen contacted the Cibolo police
19 officers to make contact with Kelley.

20 That's what takes us to the gate scene, correct?

21 A. That's correct.

22 Q. Have you ever been in that situation where a district
23 attorney asked you to go do something like that?

24 A. I've been in situations where the DA's asked me to conduct
25 an investigation on an incident, yes.

1 Q. On an individual that might be in possession of some
2 photos like this? Not specifically --

3 A. Not specifically, but other criminal matters, yes.

4 Q. Okay. What is your protocol as far as checking out the
5 individual that you're going to go talk to before you go out
6 there? Do you check them out at all?

7 A. It all depends on the circumstances. If it's an
8 individual I'm working a case on and the individual's a
9 suspect, I want to know the background -- as much background
10 on that individual as I can. And if it's an individual that
11 I'm going to contact that's going to be a potential witness in
12 my case, I approach them accordingly and treat them as such.

13 Q. What's that mean? What's your protocol for --

14 A. My protocol's different on both. Meaning, if he's a
15 suspect target, I want to be more stringent on what I know
16 about him. I want to know as much as I can about him.

17 If it's a potential witness and I'm going out just to
18 contact the individual who's going to be a witness for our
19 case, it's going to be somewhat more lenient. I'm not going
20 to do a full background check. I'm not going to do -- and
21 hopefully, by that time, if the DA has asked me to do
22 something for them on one of their cases to follow up on, they
23 have that information provided for me already.

24 Q. Well, let's assume these facts that are on this board
25 here, that Kelley has told somebody he has some certain

1 photographs and that the district attorney contacts him, and
2 he's being uncooperative and that the district attorney sends
3 you out there to talk to this uncooperative person.

4 What's the protocol for whether or not you would have
5 checked them out at all?

6 MR. STERN: Objection. Assumes facts not in
7 evidence. Calls for speculation.

8 THE COURT: Yeah. That's -- those objections are --
9 I've got your point. So we're rehashing old stuff.

10 MR. LEGRAND: May I proceed, Your Honor?

11 THE COURT: Yes.

12 BY MR. LEGRAND:

13 Q. Ranger Snyder, what's your protocol for checking out a
14 person that made --

15 THE COURT: -- go back, Mr. LeGrand, to just -- the
16 point I just tried to get you to move off of. I got it.

17 BY MR. LEGRAND:

18 Q. So going back to the date of release that's on JEX 597-1,
19 based on the five years, Ranger Snyder, Mr. Kelley, if he was
20 in possession of a firearm, could have been prosecuted under
21 federal or state law?

22 MR. STERN: Objection.

23 THE COURT: So, again -- so an objection's not an
24 objection unless you give a specific objection. Global
25 objections are not recognized by the Federal Rules of

1 Evidence.

2 With that said, I know where you're headed. And so this
3 is asked and answered. And let's move on.

4 MR. LEGRAND: I'll pass the witness, Your Honor.

5 THE COURT: Any cross from the government?

6 MR. STERN: There is, Your Honor. Actually, there's
7 some lengthy cross. I know it's coming up on 4:30. I don't
8 know if you want us to proceed now or how you want to handle
9 your schedule.

10 THE COURT: So I've got an hour and 15 minutes. So
11 let's just start with what we can do.

12 MR. STERN: Happily, Your Honor.

13 THE COURT: Hopefully, you can finish within that
14 time.

15 CROSS-EXAMINATION

16 BY MR. STERN:

17 Q. Ranger Snyder, good afternoon.

18 A. Good afternoon.

19 Q. As you recall, my name is Paul Stern. I'm an attorney
20 with the United States Department of Justice. I want to thank
21 you for your time here today.

22 A. Yes, sir.

23 Q. I'm actually going to start where opposing counsel left
24 off, but very quickly because I don't want to belabor the
25 point.

1 But, Ranger Snyder, you are here as a representative of
2 the Texas Rangers, correct?

3 A. That's correct.

4 Q. You're not here to represent any other law enforcement
5 department or agency?

6 A. No, sir.

7 Q. You're not here to represent any other departments or
8 speak about their policies, protocols, or procedures?

9 A. No, sir.

10 Q. You're not here to testify about the National Instant
11 Criminal Background Check System, otherwise known as NICS?

12 A. No, sir.

13 Q. You're not here to testify about the Uniform Code of
14 Military Justice, also known as UCMJ?

15 A. No, sir.

16 Q. You're not here to testify about the Air Force or on
17 behalf of the Air Force?

18 A. No, sir.

19 Q. Or about the information that the Air Force submits to
20 NICS when there's a violation of the UCMJ; is that correct?

21 A. That's correct.

22 Q. In fact, you're not here to testify about what a law
23 enforcement -- a local law enforcement would find if they did
24 a search regarding a violation of the UCMJ that was submitted
25 by the Air Force; is that correct?

1 A. That's correct.

2 Q. Now, I know opposing counsel talked to you at some length
3 about some interactions Devin Kelley had with a few law
4 enforcement entities. And I'd like to briefly talk about
5 them.

6 Mr. LeGrand talked about the time the Cibolo police
7 detectives went to the Kelley property on November 1st.

8 We just spoke about that, correct?

9 A. Yes, sir.

10 Q. But, again, you're not here to testify on behalf of the
11 Cibolo Police Department, correct?

12 A. No, I'm not.

13 Q. Or their policies or procedures?

14 A. No, sir.

15 Q. In fact, when the detectives went to their property, Devin
16 Kelley wasn't a suspect, was he?

17 A. Not that I'm aware of.

18 MR. LEGRAND: Object. That calls for speculation.

19 THE COURT: He answered.

20 BY MR. STERN:

21 Q. What was the purpose --

22 MR. STERN: Sorry. May he answer?

23 THE COURT: He answered.

24 BY MR. STERN:

25 Q. Okay. What was the purpose of the Cibolo police

1 detectives going to the property on that day?

2 A. An attempt to obtain some photographs that he alleged or
3 made a statement that he had regarding a sexual assault
4 investigation that was being conducted.

5 Q. So, in fact, the detectives thought Mr. Kelley would
6 provide them evidence, correct?

7 A. That's correct.

8 Q. In fact, Mr. Kelley was a family member of a potential
9 victim?

10 A. That's correct.

11 Q. And so as you suggested, there may -- would be different
12 protocols for approaching someone who is a family member of a
13 victim as opposed to a suspect?

14 A. Yes.

15 Q. And so you can't testify about what the -- whether the
16 Cibolo police detective would have checked any databases
17 before approaching the property?

18 A. That's correct.

19 Q. If you recall, Mr. LeGrand asked you some questions about
20 Mr. Kelley's misdemeanor for animal cruelty.

21 Do you recall that?

22 A. Yes, sir.

23 Q. In fact, in August 2014, Mr. Kelley was arrested for
24 animal cruelty, correct?

25 A. Yes, sir.

1 Q. And that arrest resulted in a misdemeanor?

2 A. That's correct.

3 Q. You don't know if that punishment or that -- or that
4 misdemeanor would have changed had information been in the
5 NICS system, correct?

6 A. If I remember correctly, I believe that charge may have
7 been a Class C misdemeanor.

8 Q. Uh-huh.

9 A. And Class Cs are up to fine only -- fine only. They're
10 not reported -- that's not an offense -- or a Class C is not
11 an offense to be reported to the NICS system to be part of
12 criminal history. It wouldn't have showed up.

13 Q. And, in fact, that punishment, that Class C misdemeanor
14 you're referring to, that wouldn't have changed classes simply
15 because Devin Kelley's information from the Air Force may have
16 been in the system, correct?

17 A. That's correct.

18 Q. And, finally, Mr. LeGrand talked about Devin Kelley maybe
19 being pulled over for speeding.

20 Do you recall that testimony?

21 A. Yes, sir.

22 Q. But there's no evidence that he was ever pulled over with
23 a firearm in his back seat?

24 A. Not that I -- not that we found.

25 Q. Okay. And I want to shift focus and talk about the things

1 you are here to testify about.

2 And, Ranger Snyder, you have to forgive me. I'm going to
3 be pretty direct right upfront. And so it's not to upset
4 anyone, but we need to get this testimony out. So bear with
5 me, please.

6 A. Sure.

7 Q. Ranger Snyder, when Devin Kelley approached the church on
8 November 5th, 2017, what was he wearing?

9 A. I believe it was described as a mask covering or a
10 covering -- face covering described as a mask of some sort,
11 black, I believe. Black -- all black, black tactical vest and
12 military -- described as military style.

13 Q. You talked about the mask he was wearing.

14 Did that mask depict a white skull similar to the one used
15 by Marvel Comics character the "Punisher"?

16 A. Yes.

17 Q. And was Devin Kelley wearing black tactical gear?

18 A. That's correct.

19 Q. Was he wearing body armor?

20 A. Yes.

21 Q. Is it illegal for convicted felons to possess body armor
22 in Texas?

23 A. Yes.

24 Q. Can you please tell the Court what happened when Devin
25 Kelley arrived at the church.

1 A. Through the investigation, it revealed that, through the
2 witnesses and the interviews, he pulls up front and he exits
3 his vehicle. And he starts -- or he stands in front of the
4 church or the entryway, and he begins discharging his rifle.
5 And he works in a L-shaped pattern.

6 The church faces -- the way the church faces, off the back
7 side of the church, it Ls off the children's Bible study
8 rooms. And he makes that L within there, firing from the
9 outside into the wall, into the inside of the church.

10 Q. So he starts firing from outside the church?

11 A. That's correct.

12 Q. Does he spray the side of the church?

13 A. Yes.

14 Q. He shoots through the walls?

15 A. Yes. I think it was a total of 250-plus times.

16 MR. LEGRAND: In fact, if we pull up Joint
17 Exhibit 669. Go to the first highlighted portion. Blow up
18 that section, please.

19 BY MR. LEGRAND:

20 Q. Ranger Snyder, will you read that section, please.

21 A. "11:15 a.m" -- I'm sorry. "11:15 a.m., suspect exited the
22 SUV wearing all black tactical gear, protective vest,
23 white-print skull mask, and armed with a Ruger semiautomatic
24 rifle and a Glock 9-millimeter handgun. Suspect opened fire
25 on the church from outside (254 shots outside). The skull

1 print on the mask is indicative of the Marvel Comics character
2 the 'Punisher.'"

3 Q. Devin Kelley shot 254 shots outside the church; is that
4 correct?

5 A. Yes, sir.

6 Q. And as you indicated before, he sprayed the church,
7 correct?

8 A. That's correct.

9 Q. He didn't target one specific location of the church?

10 A. What we found in common is that they were all within a
11 line or some sort of line. We discussed and determined that
12 it was -- it would be about head-high of individuals sitting
13 in a pew from the outside.

14 Q. Multiple pews?

15 A. Correct.

16 Q. Sorry to be graphic, but just to make sure that we're
17 clear, you're suggesting that at the level that he was
18 shooting, they were essentially headshots along the side of
19 the church; is that correct?

20 A. Yes.

21 Q. Did he retrieve more ammunition from his vehicle after he
22 started shooting?

23 A. He did afterwards and before he entered the church.

24 Q. And then he eventually made his way into the church,
25 correct?

1 A. That's correct.

2 Q. How many shots did Kelley fire inside the church?

3 A. Inside the church was another 250-plus.

4 Q. Let me make sure we're clear. If we could pull up the
5 next highlighted portion of this document.

6 A. 196.

7 Q. It reads, "11:20 a.m., suspect entered the church building
8 through the main entrance. Suspect began shooting church
9 attendees within the sanctuary room (196 shots inside)."

10 Is that consistent with your investigation?

11 A. Yes, sir.

12 Q. So if we look further down, 450 total shots fired by
13 suspect; is that correct?

14 A. That's correct.

15 Q. And how long did the shooting last?

16 A. Approximately seven and a half minutes, 7 minutes and
17 24 seconds.

18 Q. And how do we know -- or how do the rangers know how long
19 the shooting lasted?

20 A. We monitored the time, the counter -- or the time count on
21 the video.

22 Q. When you talk about a video, was there a video camera in
23 the church that recorded the events in real time?

24 A. Yes. Upon arrival, we learned that there was an
25 individual in the sound booth and that the church would video

1 their services on Sunday morning to put them up on YouTube.

2 Q. And having looked at -- have you looked at the video?

3 A. Yes, sir, I have.

4 Q. Having looked at the video, did Devin Kelley kill men?

5 A. Say that again. I didn't get the last word.

6 Q. Did Devin Kelley kill men?

7 A. Yes.

8 Q. Did he kill women?

9 A. Yes.

10 Q. Did he kill a pregnant woman?

11 A. Yes.

12 Q. Did he kill children?

13 A. Yes.

14 Q. Did he walk up and down through the aisles looking for
15 targets?

16 A. Yes, he did.

17 Q. Did he shoot people at close range?

18 A. Yes.

19 Q. Did he shoot people who were already shot or injured?

20 A. Yes.

21 Q. Did the church fill with smoke?

22 A. Yes.

23 Q. How many people did Devin Kelley kill on November 5th,
24 2017?

25 A. Twenty-six.

1 Q. How many people did he injure?

2 A. Somewhere like 14, 16, maybe.

3 Q. Okay.

4 A. I'd like to look back at that if I could.

5 Q. Could it be that he injured more than 20?

6 A. Yes.

7 Q. Thank you.

8 MR. STERN: Your Honor, at this time, the government
9 requests that Your Honor watch in chambers, and at a time
10 convenient for Your Honor, so long as it is before the close
11 of this trial, that it watches Government Exhibit 141.

12 MR. ALSAFFAR: Can we approach, Your Honor?

13 THE COURT: Come up.

14 *(At the bench)*

15 THE COURT: So it's offered. It's objected to.
16 What's the objection?

17 MR. ALSAFFAR: First, I just want to clarify, this is
18 the church video.

19 THE COURT: Right.

20 MR. ALSAFFAR: Okay. Your Honor, our objection,
21 first of all, is primarily relevance --

22 COURT REPORTER: I'm sorry. "Primarily"?

23 MR. ALSAFFAR: Oh, can you not hear me?

24 COURT REPORTER: There's a mic right there.

25 THE COURT: This is the mic.

1 MR. ALSAFFAR: Relevance, Your Honor. To put this
2 video into evidence -- no one's contesting these people were
3 brutally murdered. No one's contesting that what's going
4 through --

5 COURT REPORTER: I'm sorry. I'm having a hard time
6 hearing.

7 MR. ALSAFFAR: Okay. I'm sorry. I just don't want
8 this -- no one's contesting that this is a horrific shooting.
9 No one's contesting on the liability phase that he was -- he
10 was determined to kill these poor people.

11 This may be relevant in the damages phase, when we're
12 talking about the time and amount of suffering that the
13 plaintiffs went through, conceiving -- being aware of their
14 impending death. But in a liability phase, it makes no sense,
15 under relevance grounds, Your Honor. It doesn't make one fact
16 more -- necessary.

17 MR. STERN: Your Honor, the United States disagrees
18 for many reasons. First, the motive has been put on the table
19 squarely by the Court.

20 *(Static noise)*

21 COURT REPORTER: I'm sorry.

22 MR. STERN: Your Honor, it's directly relevant on
23 three grounds. One motivation. The Court squarely put
24 forward and asked that the matter of fact needs to be
25 addressed in this trial. To the extent plaintiffs are

1 suggesting that Michelle Shields was the target, it is clear
2 from this video that the entire congregation is the target.
3 And that is a crucial piece of evidence.

4 Second, with regard to preventability, the notion that
5 where he got the gun is a substantial factor -- is I think
6 belied by watching the video and recognizing that he would
7 have done this regardless of where he got the firearms.

8 And, third, to the extent that we would ever need to get
9 to -- which the United States strongly states that we will
10 never have to get to, the idea of apportioning fault of the
11 Air Force compared to Devin Kelley and what he did that day is
12 directly relevant to the defense.

13 MR. ALSAFFAR: If I may, Your Honor, I need to --
14 because now we need to add speculation to this whole thing,
15 because now the government's trying to say we can now divine
16 what Devin was -- Devin was thinking just by watching the
17 video.

18 But let me go back to the primary point on that, because
19 the government's completely wrong on this. We don't need to
20 prove Michelle Shields was the only target. We absolutely
21 believe the church was the target. It was the family church.
22 We have no question about that. And that was a
23 domestic-related issue. It was the family church. That's not
24 even relevant. We -- that.

25 So why offering this video now -- it's just for prejudice.

1 It's serving no purpose to advance the ultimate issue.

2 THE COURT: So --

3 MR. STERN: Your Honor --

4 THE COURT: One second. One second. So they have
5 raised proportionate liability. So at some point, the Court's
6 got to determine how much, if any, culpability needs to be
7 assigned to Devin Kelley, to perhaps Academy when we get
8 there. And so, I mean, this liability standpoint, I mean, am
9 I not -- after we make some assessments on liability, am I not
10 making assessments on proportionate liability at this point,
11 and then we move to damages?

12 MR. ALSAFFAR: Of course, Your Honor.

13 THE COURT: So how can you say it's not relevant?

14 MR. ALSAFFAR: Well, the question is what -- what
15 would watching a video of something we all agree happened and
16 stipulated to -- would actually make anyone decide
17 proportionate responsibility in one way or another? We're not
18 -- it's not in dispute.

19 MR. STERN: Your Honor --

20 MR. ALSAFFAR: It is not in dispute that he did this.

21 MR. STERN: Your Honor --

22 THE COURT: Okay.

23 MR. ALSAFFAR: And so --

24 THE COURT: Okay. So objection's noted. Overruled.

25 141's admitted.

1 MR. STERN: Can I say one more point, Your Honor?

2 THE COURT: Yeah. Uh-huh.

3 MR. STERN: If the plaintiffs are stipulating that
4 Michelle Shields was not the target, and you have a footnote
5 in your order --

6 MR. ALSAFFAR: We're not stipulating that. We're not
7 stipulating that.

8 MR. STERN: That's exactly what you just said.

9 MR. ALSAFFAR: -- both claims at the same time.

10 MR. STERN: -- the church. That is directly relevant
11 for motivation as well.

12 MR. ALSAFFAR: Other things the same -- no, we do
13 not, Your Honor.

14 THE COURT: So now I know their point. And so the
15 objection's are noted. Overruled.

16 And one -- watch it sometime this week after court
17 proceedings are adjourned.

18 MR. STERN: Thank you.

19 *(Discussion off the record)*

20 *(At the bench)*

21 THE COURT: You want the video sealed?

22 MR. STERN: Yes, Your Honor. I think the FBI --
23 Jamal, you want to come back up?

24 COURT REPORTER: Hold on a second.

25 *(Discussion off the record)*

1 *(At the bench)*

2 THE COURT: So why is the video sealed?

3 MR. STERN: Well, the Texas Rangers and the FBI have
4 requested that this video not be released -- that it stays
5 under seal. In fact, I've just been handed a motion from DPS
6 that either -- has either been filed or will be filed, asking
7 that this video be under seal. They're concerned about
8 copycats. They're concerned about giving it out.

9 So we support their request. It's not the government's
10 request; although, the FBI has indicated to me that there's
11 strong preference to keep this under seal.

12 Mr. Alsaffar, insofar as -- plaintiffs, they don't need to
13 watch this video. I just ask Your Honor to watch it in
14 chambers before the close of the hearing.

15 THE COURT: So what's the plaintiff say about sealed?

16 MR. ALSAFFAR: I do not oppose that, Your Honor.

17 THE COURT: You don't oppose.

18 Okay. So at this point, I'm going to grant the sealing
19 request. And then let me tell you, as soon as the media come
20 down on me, we'll have a hearing on that with the media
21 present. If I get an objection from the media, then we'll
22 figure out at that point what to do.

23 MR. STERN: Thanks, Judge.

24 MR. ALSAFFAR: Thank you, Your Honor.

25 *(Open court)*

1 THE COURT: You may continue.

2 BY MR. STERN:

3 Q. Ranger Snyder, as you already alluded to, you were one of
4 the lead investigators on this case, correct?

5 A. That's correct.

6 Q. And you helped investigate Devin Kelley's background?

7 A. Yes.

8 Q. Can you walk me through some of the steps of that
9 investigation?

10 A. So through the -- through the investigation -- I mean,
11 once we identified who the suspect was that was at the church,
12 who fled from the church -- of course, after getting our
13 command post set up and our command structure in line and in
14 place, we get an analyst on board and we provide that
15 information to our analyst who is going to be working along
16 with us.

17 And once we provide her with that information, we request
18 a complete workup, is what we refer to it as, on this
19 individual to gain his background. That includes criminal
20 history, his driver's license. The whole workup is his whole
21 history.

22 Q. And the Texas Rangers conducted interviews --

23 A. Yes.

24 Q. -- of those people associated or who knew Devin Kelley.
25 Fair?

1 A. That's correct.

2 Q. They also obtained evidence from Devin Kelley's iCloud
3 account?

4 A. Yes.

5 Q. And obtained material from his social media?

6 A. That's correct.

7 Q. I think, as you stated before, the FBI supported the Texas
8 Rangers in this investigation?

9 A. That's correct.

10 Q. As did the ATF?

11 A. Yes, sir. That's correct.

12 Q. The Texas Rangers created timelines for events based on
13 the information that was obtained?

14 A. That's correct.

15 Q. Also created summaries of the collected evidence?

16 A. Yes, sir.

17 Q. And those summaries were based on the best available
18 evidence at the time?

19 A. Yes, sir.

20 Q. I'd like to discuss some of that evidence with you today.

21 If we could pull up Joint Exhibit 700, please. 700.

22 TECHNOLOGY SPECIALIST: Yes.

23 MR. STERN: Thank you.

24 BY MR. STERN:

25 Q. Ranger Snyder, are you familiar with this document?

1 A. Yes, sir.

2 Q. What is it?

3 A. It's a summary of Devin Kelley's iCloud account.

4 Q. Will you please read the first highlighted paragraph.

5 A. The bullet point, "Notes - Kelley had numerous notes
6 within the account. The notes included reminders of getting
7 ammo, deleting old iPhones, clearing his social media
8 accounts, et cetera. The dates these relevant notes were
9 created indicate he had planned this shooting for quite some
10 time, as early as July 2017."

11 Q. Okay. So we'll discuss these notes in greater detail
12 later.

13 But according to this summary created by the Texas
14 Rangers, there was evidence indicating that Kelley had planned
15 the shooting for quite some time, as early as July 2017; is
16 that correct?

17 A. That's indicated in this document, yes.

18 Q. Correct.

19 Can you read the second paragraph, please.

20 A. The bullet point "screenshots" -- the screenshots --
21 "Kelley saved screenshots to his device or the cloud. Some of
22 these screenshots include his correspondence on YouTube on how
23 to make silencers, research on mass shootings (Columbine), and
24 research on characteristics of mass shooters."

25 Q. And then if we look at the bottom half of this page, we

1 see three columns. Let's take a look at the left-hand side of
2 the exhibit.

3 What does that depict?

4 A. There's some sort of video and context below it. I
5 believe it looks like it's discussing silencers.

6 Q. So would this be the YouTube clip that Devin Kelley
7 commented on regarding how to make silencers?

8 A. Yes, sir.

9 Q. And would you read -- can you read his comment starting
10 with "the freeze plugs."

11 A. Let's see, "the freeze plugs."

12 "So they obviously need a hole for the bullet to pass
13 through. But my question is, really, if the holes are drilled
14 but the plugs are" -- and it ended -- it ends there.

15 Q. So does this indicate to the Texas Rangers that he was
16 learning how to make his own silencer?

17 A. The context in the video, yes.

18 Q. Taking a look at the middle screenshot that -- Kelley's
19 research from SchoolShooters.info?

20 A. That's correct.

21 Q. Take a look at the highlighted portion. I know it's
22 difficult to read. If we can sort of blow it up.

23 Does that say, "Eric and Dylan on Trial"?

24 A. That's correct, yes.

25 Q. This is post -- I'm sorry. This shows an article entitled

1 "Eric and Dylan on Trial" and discusses why the Columbine
2 massacre is still so popular many years later.

3 Is that fair?

4 A. Yes, sir.

5 Q. Do you know how the shooters who committed the Columbine
6 massacre got their weapons to commit the mass killing?

7 A. No, sir.

8 Q. Would it surprise you to learn that they purchased their
9 firearms through a straw purchaser?

10 MR. LEGRAND: Your Honor, object. That's leading,
11 suggestive, and it calls for speculation. He's already
12 answered.

13 THE COURT: He's already answered he doesn't know.

14 BY MR. STERN:

15 Q. Taking a look at the third screenshot, is this an article
16 that discusses characteristics of mass shooters?

17 A. Yes, sir.

18 Q. Okay. Let's move to the next page. Will you read the
19 highlighted portion, please, sir.

20 A. "Photographs - there were numerous images within
21 Kelley's -- within Kelley iCloud account that depict him
22 wearing the same type of tactical gear as when he committed
23 the mass murders in Sutherland Springs."

24 Q. Okay. And, in fact, some of those photos are the
25 photographs that were found on Devin Kelley's iCloud account?

1 A. That's correct.

2 Q. And in at least two of those pictures, he's wearing the
3 "Punisher" mask?

4 A. That's correct.

5 Q. In at least two of those, if not three of those, pictures,
6 he is wearing his tactical armor that he used to commit the
7 shooting, correct?

8 A. Yes, sir.

9 Q. In fact, Devin Kelley had many more pictures of him
10 holding firearms in menacing poses on his social media?

11 A. Correct.

12 Q. Let's take a look at some of those pictures.

13 Joint Exhibit 684, Devin Kelley had this photograph on his
14 iCloud account, correct?

15 A. That's correct.

16 Q. And this picture is believed to be Devin Kelley?

17 A. I can't reference it to -- believe to be Devin Kelley.

18 All I can say is it's a subject standing there in green
19 tactical gear with the same kind of mask, some eye protection
20 and a rifle.

21 Q. Do you recall in your -- do you recall providing a
22 deposition here in this case?

23 A. I do.

24 Q. And do you recall in your deposition saying that you
25 believed this was Devin Kelley?

1 A. I don't believe it was -- if it was this photo, I don't
2 recall that, no.

3 Q. It's okay.

4 Nonetheless, this was in Devin Kelley's iCloud account,
5 correct?

6 A. That's correct.

7 Q. Okay. Let's take a look at Joint Exhibit 682.

8 This is another photograph of Devin Kelley taken from his
9 social media account?

10 A. That's correct.

11 Q. And 681, this is yet another picture of Devin Kelley that
12 was taken from his social media account?

13 A. That is correct.

14 Q. Pull up Joint Exhibit 686.

15 I believe this is one of the photographs that were on the
16 summary of the iCloud account?

17 A. That's correct.

18 Q. Is that believed to be the same Glock that was recovered
19 at the church?

20 A. Yes, sir.

21 Q. If you look underneath his pinky, is that an extended
22 magazine?

23 A. Yes, sir.

24 Q. Does that magazine hold more than the standard rounds for
25 a Glock clip?

1 A. That's correct.

2 Q. Taking a look at Joint Exhibit 691, is that the mask Devin
3 Kelley wore when he committed the mass shooting?

4 A. Yes, sir.

5 Q. Is that the firearm he used?

6 A. Yes, sir.

7 Q. Taking a look at Joint Exhibit 687, this is a photo of a
8 shotgun taken from Devin Kelley's social media account; is
9 that correct?

10 A. That's correct.

11 Q. Are you aware that Danielle Smith, Devin Kelley's widow,
12 testified that he bartered for this shotgun?

13 A. No, I'm not.

14 Q. Okay. But you've never seen any ATF 4473 form associated
15 with this shotgun, correct?

16 A. That's correct.

17 Q. So according to Texas Rangers, he obtained this firearm
18 from a non-FFL?

19 MR. LEGRAND: Your Honor, we object. I mean, that
20 asks this witness to assume that -- first of all, it asks this
21 witness to assume that that picture's a gun belonging to Devin
22 Kelley. That calls for speculation.

23 THE COURT: State your question one more time.

24 BY MR. STERN:

25 Q. This photograph was taken from Devin Kelley's social media

1 account, correct?

2 A. That's correct.

3 Q. And are you aware that his widow, Danielle Smith, already
4 testified that Devin Kelley bartered for a shotgun online?

5 A. No, sir, I'm not.

6 Q. But you have never seen any ATF 4473 form associated with
7 Devin Kelley purchasing a shotgun?

8 MR. LEGRAND: Asked and answered, Your Honor.

9 THE COURT: He hasn't answered that. That's
10 overruled.

11 BY MR. STERN:

12 Q. You can answer.

13 A. I haven't seen that.

14 Q. So according to the Texas Rangers -- or as far as the
15 Texas Rangers are aware, Devin Kelley obtained this shotgun
16 through a non-FFL; is that correct?

17 MR. LEGRAND: Your Honor, we object. There is still
18 no showing that that's -- it was -- showing that it's on Devin
19 Kelley's Facebook account doesn't prove that it's Devin
20 Kelley's gun. We object on that --

21 THE COURT: That testimony came through Danielle.
22 That's overruled.

23 BY MR. STERN:

24 Q. You can answer it.

25 A. We have no evidence supporting that the Federal Firearms

1 License application was completed for this particular firearm,
2 and there was nothing that came back for us to even run a
3 check on this firearm.

4 Q. Thank you. Thank you.

5 Take a look at Joint Exhibit 502-128. This is another
6 picture that was retrieved from Devin Kelley's social media
7 account, correct?

8 A. That's correct.

9 Q. Okay. If we look at the title, it's "Rifle Mod Pew Pew."
10 Do you see that?

11 A. Yes, sir.

12 Q. Do you take "mods" to mean "modification"?

13 A. Yes, sir.

14 Q. This is a picture of Devin Kelley showing all the various
15 modifications he made to his AR-556, correct?

16 A. That is correct.

17 Q. Did the Texas Rangers write those descriptors on when they
18 received the photograph?

19 A. We took note of those -- or of this photograph, yes.

20 Q. You took note, but you didn't write the descriptors,
21 correct?

22 A. That's correct. We just identified the rifle as it -- as
23 it -- as it is.

24 Q. But you obtained this from Facebook as it -- as it was?

25 A. That's correct.

1 Q. Okay. So the descriptors were already on the picture?

2 A. Yes, I believe so.

3 Q. Take a look at Joint Exhibit 502-39.

4 This is another photograph from Devin Kelley's Facebook
5 account, correct?

6 A. That's correct.

7 Q. He made this post on October 29th, 2017, seven days before
8 the shooting. Is that accurate?

9 A. Yes, sir.

10 Q. It's a picture of his AR, and it's titled "She's a bad
11 bitch"?

12 A. That's correct.

13 Q. Ranger Snyder, I'd like to now discuss some of Devin
14 Kelley's iCloud notes obtained by the Texas Rangers.

15 A. Yes, sir.

16 Q. Okay. And, again, according to the summary written by the
17 Texas Rangers, his iCloud notes indicated that he had planned
18 this shooting for quite some time, as early as July 2017,
19 correct?

20 A. Indicated in that summary, yes. I'm not -- I'm not
21 sure -- I can't put a name on that summary, but yes.

22 Q. According to that summary, correct.

23 Taking a look at Joint Exhibit 583-5 -- pull that up -- "I
24 am the angel of death. No one can stop me."

25 Did I read that correctly?

1 A. That's correct.

2 Q. This was one of Devin Kelley's iCloud account notes,
3 correct?

4 A. Yes, sir.

5 Q. And it was created in July 2017?

6 A. That's correct.

7 Q. It's the same month the Texas Rangers summary noted that
8 he started planning the shooting?

9 A. That's correct.

10 Q. Taking a look at Joint Exhibit 583-2. Blow that one up.
11 "Surprise speed violence of action."

12 Did I read that correctly?

13 A. Yes, sir.

14 Q. Do you know what that means?

15 A. Surprise speed violence of action.

16 Q. Would it indicate to you that someone is preparing --
17 preparing to act violently?

18 A. I would -- I would consider that, yes. It would be
19 concerning, I guess you could say.

20 Q. Thank you.

21 And this note was created May 26, 2017; is that correct?

22 A. That's correct.

23 Q. Taking a look at Joint Exhibit 583-11, a set of these
24 notes relate to firearms. Is that fair?

25 A. Yes, that's fair.

1 Q. What is a "ProMag vert"?

2 A. You're asking me what --

3 Q. I'm sorry. Yes.

4 Do you know what a "ProMag vert 5.3 ounce" is?

5 A. It's a -- I guess it's a brand of a magazine and the
6 weight of it.

7 Q. What about "Magpul"? Do you know what a "Magpul" is?

8 A. This is the little handgrip that you mount underneath the
9 barrel at the foot of the rifle.

10 Q. Taking a look at all of these notes, would it be fair to
11 conclude that these are weights that Kelley was preparing his
12 firearm to -- in order to be -- in order for his firearm to be
13 a certain weight?

14 A. According to the notes, I would gather -- I would conclude
15 that, yes.

16 Q. Thank you.

17 And this was created August 7th, 2017?

18 A. That's correct.

19 Q. Taking a look at Joint Exhibit 583-13.

20 And same with this note. Would it be fair to assume that
21 Kelley was weighing his equipment?

22 A. Yes, sir.

23 Q. And that he was calculating the weight of his rifle with
24 everything on it?

25 A. Yes, sir.

1 Q. Was he comparing weights when the items were wet versus
2 dry?

3 A. That's correct.

4 Q. And this was created August 15th, 2017?

5 A. Yes, sir.

6 Q. Taking a look at Joint Exhibit 583-17.

7 Now, this one was created October 26th, 2017, correct?

8 A. That's correct.

9 Q. And that's ten days before the shooting?

10 A. Yes, sir.

11 Q. A note to himself to trash trailer. You see that, where
12 it reads "trash trailer"?

13 A. Yes, sir.

14 Q. "Oil change"?

15 A. Yes, sir.

16 Q. "Turn off card"?

17 A. Yes, sir.

18 Q. "Get a pack pack for more ammo"?

19 A. Yes, sir.

20 Q. "Get more PMAGs"?

21 A. Yes, sir.

22 Q. Again, what are PMAGs?

23 A. It's a type of magazine. It holds ammo that inserts in
24 the bottom of the rifle.

25 Q. So on October 26th, he was making a note to himself to get

1 more magazines?

2 A. That's correct.

3 Q. And then it says, "Try on and reorganize gear."

4 Did I read that correctly?

5 A. Yes, sir.

6 Q. Let's move to the next one, Joint Exhibit 583-18.

7 And this note was created October 28th, 2017, correct?

8 A. Correct.

9 Q. Eight days before the shooting?

10 A. Correct.

11 Q. Do you see where it's a note that appears to be to himself
12 to delete his social media?

13 It says, "Delete Instagram and FB"?

14 A. Yes, sir.

15 Q. Would it be fair to assume that that's Facebook?

16 A. Correct.

17 Q. You see where it says, "Clear YouTube and Safari"?

18 A. Yes, sir.

19 Q. And it says above that, "Stuff in car"?

20 A. Correct.

21 Q. And, finally, the last one -- oh, I'm sorry. The one
22 before that, "Block Sarah and David on all social media and
23 GoPhone"?

24 A. Yes, sir.

25 Q. Do you know what a GoPhone is?

1 A. It's a pay-as-you-go-type phone, pay for your minutes.

2 Q. Okay. And finally the last one, "Destroy old iPhone."

3 Did I read that correctly?

4 A. Correct.

5 Q. So eight days before the shooting, Devin Kelley gave --
6 sent a note to himself or created a note to himself to destroy
7 an old iPhone?

8 A. That's correct.

9 Q. Taking a look at Joint Exhibit 583-19.

10 This note was also created October 28th, 2017, correct?

11 A. Yes, sir.

12 Q. Eight days before the shooting?

13 A. Yes, sir.

14 Q. Look at the first one, "Put together .22 kit."

15 Did I read that correctly?

16 A. Yes, sir.

17 Q. Do you know what a .22 kit is?

18 A. I'm guessing it would be his -- the handgun that --
19 the .22-caliber handgun and its accessories.

20 Q. That's okay. And I don't want you to speculate. If you
21 don't know, that's fine. I just want to make sure --

22 A. Don't know what he's referencing here. I don't know.

23 Q. Fair enough. Thank you.

24 It also reads "Then put it in a backpack," correct?

25 A. Correct.

1 Q. "Roll a joint"?

2 A. Yes, sir.

3 Q. "Change out all batteries"?

4 A. Yes, sir.

5 Q. "Antidiarrhea"?

6 A. Yes, sir.

7 Q. Did you come to learn that Devin Kelley was taking
8 antidiarrhea medication?

9 A. I was not aware.

10 Q. Okay. "Remove all weed stuff from house"?

11 A. Yes, sir.

12 Q. And "put mag funnel back on"?

13 A. Yes, sir.

14 Q. Again, you take "mag" to mean "magazine"?

15 A. Yes, sir.

16 Q. One more, please. If we can go to Joint Exhibit 583-20.
17 This note was created October 30th, 2017, correct?

18 A. Yes, sir.

19 Q. Six days before the shooting?

20 A. Yes, sir.

21 Q. Reminder to "check the tire pressure"?

22 A. Correct.

23 Q. "Charge her GoPhone"?

24 A. Correct.

25 Q. "Add cash to card"?

1 A. Yes, sir.

2 Q. "Make sure her card is in her pocket"?

3 A. Yes, sir.

4 Q. "Find location for push knife"?

5 A. Correct.

6 Q. "Put gun stuff in car when Danielle doesn't notice"?

7 A. Yes, sir.

8 Q. "Rifle into guitar case"?

9 A. Yes, sir.

10 Q. "Put dog tags for Michael in buried location"?

11 A. Yes, sir.

12 Q. Is it fair to suggest that, by putting the rifle into his
13 guitar -- or into a guitar case, he was concealing the rifle?

14 A. It's fair.

15 Q. Is it fair to suggest that when he was putting the gun
16 stuff in the car when Danielle doesn't notice, that he was
17 concealing his intent to at least put the gun stuff in the
18 car?

19 A. Correct.

20 Q. And it says, "Put dog tags for Michael in buried
21 location."

22 Did I read that correctly?

23 A. Yes, sir.

24 Q. Fair to assume that Devin Kelley was hiding dog tags for
25 his son in a buried location?

1 A. Yes, sir.

2 Q. And this note was created five days before the shooting,
3 correct?

4 A. Yes, sir.

5 Q. Thank you.

6 I'm going to transition and talk about some of Devin
7 Kelley's purchases. If we can go to Joint Exhibit 544.

8 I'm not going to be able to read that.

9 Ranger Snyder, are you familiar with this document?

10 A. Yes, sir.

11 Q. What is it?

12 A. It's a Financial Crimes Enforcement Network -- it's, I
13 guess, their purchases or assets, their credit-type report.

14 Q. So is it fair to say that after an event such as a mass
15 shooting, the Treasury Department will be contacted and run
16 one of these reports for suspicious activity?

17 A. Yes, sir.

18 Q. And "BSA," that refers to Bank Secrecy Act, correct?

19 A. Yes, sir.

20 Q. Okay. Any reason --

21 A. I'll agree with you.

22 Q. Fair enough.

23 Do you have any reason to dispute --

24 A. No, sir.

25 Q. -- that BSA would stand for Bank Secrecy Act?

1 A. No, sir.

2 Q. Thank you, Ranger.

3 Let's go to the bottom half of page 2. If we could ask
4 the ranger to -- Ranger Snyder, can you read the highlighted
5 portion.

6 A. "On 8/6/2017, the subject, using PayPal account" ending
7 with "035, purchased AR500 body armor, bulletproof vest, BAM
8 low-profile base frag coating black via eBay (eBay ID
9 DEVIKELLE_23). This purchase of body armor, bulletproof vest,
10 is noteworthy due to media reports that the subject was
11 wearing all black tactical gear and ballistic vest."

12 Q. As you already testified, Devin Kelley was, in fact,
13 wearing body armor during the shooting, correct?

14 A. That's correct.

15 Q. And it was illegal for him to possess body armor in Texas?

16 A. That's correct.

17 Q. Nonetheless, according to this record, he was able to buy
18 it and bought it online?

19 A. Correct.

20 Q. Taking a look at page 4. Sir, if you can read the
21 highlighted portion.

22 A. "Purchases of note: 06/06/2016, \$38.61 at IA Police
23 Gear, Inc., an online police and tactical gear retailer;
24 5/8/2017, \$20.94 at KnifeCenter.com, an online knife retailer;
25 12/7/2015 to 11/3/2017 at Academy Sports, locations in Selma,

1 San Antonio, and San Marcos, Texas, a seller of firearms,
2 ammunition, and sporting goods. There were nine transactions
3 totaling \$356.64, ranging from \$9.65 to \$107.12, with the
4 transaction for \$107.12 occurring on 11/3/2017."

5 Q. I appreciate you reading that. Thank you, Ranger Snyder.

6 According to this suspicious activities report, Kelley
7 purchased items from LA Police Gear, correct?

8 A. Yes, sir.

9 Q. He also purchased -- made purchases from KnifeCenter.com?

10 A. Correct.

11 Q. These are both online retailers?

12 A. Yes, sir.

13 Q. It also notes that Kelley made nine different purchases at
14 Academy Sports between December 7th of 2015 and November 3rd,
15 2017; is that correct?

16 A. Yes, sir.

17 Q. And these purchases range between \$9.65 and \$107.12?

18 A. Correct.

19 Q. One of those purchases occurred two days before the
20 shooting, correct?

21 A. Yes, sir.

22 Q. That last transaction was for \$107.12?

23 A. That's correct.

24 Q. And, of course, a BSA report like this wouldn't factor in
25 all of the transactions that occurred where the individual

1 used cash, correct?

2 A. Yes.

3 Q. Take a look at Joint Exhibit 550.

4 Are you familiar with this document, Ranger Snyder?

5 A. Yes, sir. It's a LeadsOnline database search.

6 Q. And why would Texas Rangers have occasion to run such a
7 search?

8 A. We do in case -- to follow things that have been pawned or
9 bought from the pawnshop, and if anything's been -- any stolen
10 items or anything of that nature's been pawned in a local
11 pawnshop.

12 Q. Okay. And taking a look at the highlighted section, we
13 see a pistol, 9-millimeter semiautomatic single CPX-2,
14 correct?

15 A. Yes, sir.

16 Q. And in your investigation, you never found a ATF 4473 form
17 for a 9-millimeter semiautomatic pistol CPX-2, correct?

18 A. No, sir.

19 Q. And according to this document, Devin Kelley sold this to
20 EZ Pawn in New Braunfels, Texas?

21 A. That's correct.

22 Q. Thank you.

23 If we can go to the next document, Joint Exhibit 744.

24 Now, let's go to the second page and take a look at the
25 synopsis.

1 Ranger Snyder, what is this document reflecting?

2 A. This is a front page or page 1 of 2 of a supplemental
3 report created by a ranger out of our reporting system.

4 Q. Okay. And the rangers interviewed Brandon Beaty, the
5 manager of Hill Country Truck Store; is that correct?

6 A. Yes, sir. That's correct.

7 Q. Do you recall why they interviewed Mr. Beaty? It's okay
8 if you don't. We'll scroll down through the --

9 A. Right off the top of my head, no, sir.

10 Q. Fair enough. Then let's go to the paragraph,
11 paragraph 8.2. Sorry. I'm going to have to ask you to read
12 aloud again, if you don't mind, sir.

13 A. 8.2 -- the 8.2 reference is detailed in Supplement 8.

14 "During the interview, Beaty confirmed that on
15 October 28th, 2017, Devin Kelley came into the store and
16 purchased two 100-round drum magazines and .223/5.56 ammo.
17 Beaty stated he had posted pictures of the magazines marketing
18 them on Facebook, and Devin had contacted him via Facebook and
19 inquired about the purchasing the magazines."

20 Q. Okay. So let's break that paragraph down a little bit.

21 According to Mr. Beaty, Devin Kelley bought two 100-round
22 drum magazines on October 28th, 2017, correct?

23 A. Yes.

24 Q. That's eight days before the shooting?

25 A. Correct.

1 Q. If you recall, this is also the same day Kelley wrote two
2 of his iCloud notes to delete all social media and destroy his
3 old iPhone?

4 A. Correct.

5 Q. Mr. Beaty stated that he posted pictures on Facebook and
6 that Kelley contacted him online via Facebook?

7 A. Correct.

8 Q. If we move to paragraph 8.3. Can we take a look at the
9 highlighted portion.

10 Can you read that aloud, please, sir.

11 A. "Beaty confirmed later that same afternoon Devin called
12 stating the magazines didn't fit and requested to return them.
13 Devin returned the magazines and requested to order two more
14 magazines to fit the rifle. Beaty provided me with a Post-it
15 note that he had written himself that had cellphone number"
16 ending in "134 and a note to call upon arrival of the
17 magazines. I noted this telephone number was Devin Kelley's."

18 Q. So according to this paragraph, Devin Kelley returned the
19 magazines the same day he bought them because they didn't fit
20 his rifle?

21 A. That's correct.

22 Q. He then gave Mr. Beaty his telephone number so that he
23 could call Kelley whenever the new magazines arrived?

24 A. Correct.

25 Q. Taking a look at the next paragraph, if we could finish

1 off this.

2 A. "Beaty stated from the time of the return on October 28,
3 2017, until Saturday, 11/4/2017, Devin called him every day,
4 multiple times a day checking to see if the magazine had
5 arrived. Beaty stated Devin came into the store on Saturday,
6 11/4/2017, to check on the magazines."

7 Q. So between October 28th and the day before the shooting,
8 Devin Kelley called Mr. Beaty every day, multiple times a day,
9 checking to see if the magazines had arrived; is that correct?

10 A. That's correct.

11 Q. In fact, Devin Kelley went into the store on the day
12 before the shooting to check to see if the magazines had
13 arrived?

14 A. That's correct.

15 Q. Would this suggest that Mr. Kelley was anxious to obtain
16 the magazines?

17 MR. LEGRAND: Your Honor, I'm going to object. That
18 calls for speculation.

19 THE COURT: That's overruled.

20 THE WITNESS: That's correct.

21 BY MR. STERN:

22 Q. Thank you.

23 Taking a look at Joint Exhibit 608.

24 I know I'm having you read a lot, Ranger Snyder. How are
25 you holding up?

1 A. I'm good.

2 Q. Thank you.

3 Take a look at the synopsis, please. Can you tell me what
4 this document -- what this document -- let's pull this down.

5 MR. STERN: Your Honor, if I can have a moment,
6 please.

7 *(Discussion off the record)*

8 MR. STERN: So, Your Honor, there's some PII I think
9 that's -- unredacted. If we can just take five minutes?

10 THE COURT: Why don't you push forward. Like I said,
11 we'll redact, and I'll allow later redactions before this gets
12 released.

13 BY MR. STERN:

14 Q. Certainly. Why don't we go right to the highlighted
15 portion. And if you can read this to yourself.

16 Is it fair to state that this is a document that recorded
17 all the evidence found in Devin Kelley's vehicle after he
18 committed -- after he shot himself?

19 A. That's correct.

20 Q. Okay. Taking a look at the highlighted portion, can you
21 read that aloud.

22 A. "Green backpack, back seat behind driver seat. Ziploc
23 with 18 NFCR 9-millimeter Luger cartridges and oil can-type
24 suppressor."

25 Q. Thank you.

1 With regards to the Ziploc with 18 NFCR 9-millimeter Luger
2 cartridges, do you know what that is?

3 A. That would be -- I believe it would be like a Ziploc bag,
4 or some kind of bag, with 18 cartridges of 9-millimeter
5 caliber ammunition.

6 Q. Thank you.

7 And it also reads, "oil can-type suppressor," correct?

8 A. Correct.

9 Q. And, again, we previously looked at a document where Devin
10 Kelley was commenting on a YouTube clip about how to make
11 homemade silencers, correct?

12 A. That's correct.

13 Q. Would it be fair to suggest that this oil can-type
14 suppressor is his attempt to make a homemade silencer?

15 A. Correct.

16 Q. Going further down, next page.

17 The next highlighted portion, "Glock magazine, 15-round
18 capacity."

19 Did I read that correctly?

20 A. Yes, sir.

21 Q. Again, would this indicate that he had a 15-round magazine
22 for his Glock pistol?

23 A. Correct.

24 Q. Okay. It also reads, "containing six Hornady Luger
25 9-millimeter cartridges," one with -- "one Win 9-millimeter

1 cartridge."

2 Did I read that correctly?

3 A. Yes, sir.

4 Q. Do you know what that's in reference to?

5 A. I'm guessing six Hornady Luger 9-millimeter cartridges.

6 So there's a 15-round capacity magazine at the time that they
7 inventoried or collected the live or unfired cartridges from
8 it, and six Hornady Luger 9-millimeter and one Winchester
9 9-millimeter cartridge.

10 Q. Thank you.

11 Looking further down, it reads, "Prescription pill
12 container containing 24 pills, fill date: 10/25/2017 at two
13 pills per day."

14 Did I read that correctly?

15 A. That's correct.

16 Q. So Devin Kelley had a prescription pill container in the
17 car?

18 A. That is correct.

19 Q. Did the Texas Rangers come to learn, through the course of
20 its investigation, that Devin Kelley had recently been
21 prescribed clonazepam?

22 A. I believe it was documented. Yes, sir.

23 Q. Thank you.

24 The next highlighted portion, "Letter from New Braunfels
25 counseling center - LPC Candace Marlowe" --

1 Did I read that correctly?

2 A. That's correct.

3 Q. -- "dated 7/20/2017, two pages of client schedule."

4 A. Correct.

5 Q. So in his car at the time of the shooting, Devin Kelley
6 had a prescription pill container and a letter from a
7 counseling center; is that correct?

8 A. Yes, sir.

9 Q. I'd like to shift focus and talk about some of the
10 interviews conducted by the FBI, if that's okay with you,
11 Ranger Snyder.

12 A. Yes, sir.

13 Q. Okay. The FBI helped with this investigation, correct?

14 A. Yes, sir.

15 Q. They conducted several interviews of associates of Devin
16 Kelley?

17 A. That's correct.

18 Q. I'd like to discuss three of those interviews with you, if
19 that's okay.

20 A. Sure.

21 Q. Thank you.

22 Taking a look at Joint Exhibit 510, this is a report of an
23 interview that the FBI conducted of Jessica Lee Edwards,
24 correct?

25 A. Correct.

1 Q. It reads in part, "Edwards was Devin Patrick Kelley's
2 staff sergeant in the United States Air Force around 2010-2011
3 at Holloman Air Force Base in New Mexico."

4 Did I read that correctly?

5 A. Yes, sir.

6 Q. And I will represent to you that the parties have
7 stipulated that Ms. Edwards was no longer an Air Force
8 employee by December of 2012. Okay?

9 A. Okay.

10 Q. Okay. So at the end of this paragraph -- I want to
11 continue the next highlighted portion -- it reads, "A couple
12 of years later, Kelley contacted Edwards via Facebook."

13 Did I read that correctly?

14 A. Yes, sir.

15 Q. So if it's a couple years after 2010-2011, is it fair to
16 state that she was no longer an Air Force employee?

17 A. Correct.

18 Q. I want you to read the next highlighted portion, please.
19 Can you read it aloud, sir.

20 A. "Kelley also obsessed with church shootings and guns.
21 Regarding the church shooting in South Carolina, Kelley told
22 Edwards, 'I wish I had the nerve to do it.' Kelley also sent
23 Edwards pictures of multiple guns he was building,
24 specifically an AR-15-style rifle."

25 Q. So according to this interview, a couple years after

1 Ms. Edwards leaves the Air Force, a couple years after Devin
2 Kelley leaves the Air Force, he contacts Ms. Edwards and says
3 he's obsessed with church shootings and guns, correct?

4 A. Yes, sir.

5 Q. In fact, "Regarding the church shooting in South Carolina,
6 Kelley told Edwards, 'I wish I had the nerve to do it.'"

7 A. Correct.

8 Q. Do you know when the church shooting in South Carolina
9 occurred?

10 A. I can't tell you the day right now, sir.

11 Q. Okay. And, finally, it also says "Kelley" -- if we can
12 keep that up, please. Thank you. I just want to read the
13 last sentence again.

14 "Kelley also sent Edwards pictures of multiple guns he was
15 building, specifically an AR-15-style rifle."

16 Did I read that correctly?

17 A. Yes, sir.

18 Q. So according to Ms. Edwards, Devin Kelley contacted her
19 and showed her pictures of multiple guns he was building?

20 A. Correct.

21 Q. Thank you.

22 Next paragraph --

23 THE COURT: Do we have a year for this discussion?

24 MR. STERN: It says, "A couple years later, after
25 Mr. Kelley was released from the Air Force."

1 The parties have already stipulated that Ms. Edwards was
2 no longer an employee after December of 2012, and, certainly,
3 by the fact that they're talking about the church shooting in
4 South Carolina, which I'll represent occurred in 2015, it
5 would be sometime thereafter.

6 THE COURT: Thank you.

7 MR. STERN: Thank you.

8 BY MR. STERN:

9 Q. The next paragraph. You can read that portion, sir.

10 A. "Edwards told Kelley to get help, once she realized he was
11 completely obsessed with mass shootings. Edwards then deleted
12 Kelley as a friend on Facebook. Edwards said it was possible
13 that Kelley made a new Facebook account and attempted to add
14 her back as a friend."

15 Q. So, again, according to Ms. Edwards, Kelley was completely
16 obsessed with mass shootings, correct?

17 A. Yes.

18 Q. In fact, she tried to block him on Facebook, correct?

19 A. Correct.

20 Q. And she was concerned that he might have made a new
21 Facebook account to continue their relationship?

22 A. Correct.

23 Q. So she tried to block him. Yet, she thinks he still tried
24 to pursue their relationship?

25 A. Yes, sir.

1 Q. Thank you.

2 Let's go to the next interview, Joint Exhibit 513. Take a
3 look -- this is an FBI interview of Joey Mizell; is that
4 correct? Sorry?

5 A. There's a delay here. But, yes, that's correct.

6 Q. I know we're all -- it's getting late in the day, so I'm
7 trying to rush through. But please take your time, of course.

8 A. Yes, sir.

9 Q. Thank you.

10 This interview occurred November 6th, 2017, one day after
11 the shooting?

12 A. Correct.

13 Q. Okay. Let's take a look at the second paragraph. It
14 says, "Mr. Mizell told the FBI..."

15 Ranger Snyder, can I ask you to read this -- the second --
16 the first page of this interview. And I'd like to just ask
17 you a few questions about it, please.

18 A. Starting from the top or --

19 Q. Just to yourself, the first page, please.

20 A. Okay.

21 *(Witness reading)*

22 THE COURT: Go ahead and scroll up and get rid of the
23 phone numbers.

24 Are you ready for a question, Ranger?

25 THE WITNESS: Yes, sir.

1 MR. STERN: Thank you, sir.

2 BY MR. STERN:

3 Q. So according to Mr. Mizell, he told the FBI that he had
4 known Kelley since middle school or the eighth grade, correct?

5 A. That's correct.

6 Q. And that he thought Kelley was an ADHD-type of guy?

7 A. Yes, sir.

8 Q. He always wanted to be the center of attention, but he was
9 very unlikable?

10 A. Yes, sir.

11 Q. And that people had issues with Kelley's personality, and
12 he was the arrogant type?

13 A. Correct.

14 Q. It also reads that Mr. Mizell stated Kelley had called him
15 after Kelley got out of the -- got out of the military, that
16 the last several weeks was when they were in touch the most,
17 either by text or phonecall?

18 A. Correct.

19 Q. "Mr. Mizell stated that Kelley never had any guns growing
20 up, but maybe after the military, he got involved with guns
21 more and hunted"?

22 A. Correct.

23 MR. STERN: Can you highlight the portion that talks
24 about his secret.

25

1 BY MR. STERN:

2 Q. Mr. Mizell -- I'm sorry. The interview notes read in
3 part, "Mizell felt Kelley had dark secrets but never really
4 expressed them to Mizell," correct?

5 A. Correct.

6 Q. All right. The next highlighted portion.

7 We already talked about Mr. Mizell's belief that Devin
8 Kelley got more interested in firearms after he left the
9 military?

10 A. Yes, sir.

11 Q. Okay. Again, it reads, "Mizell told Kelley" -- I'm sorry.
12 "Mizell stated Kelley was trying to get Mizell mad for telling
13 him about animals because Kelley knew Mizell was very
14 religious."

15 A. Correct.

16 Q. Did I read that correctly?

17 So he was concerned that Devin Kelley was trying to get
18 him angry or get him mad because he was very religious?

19 A. Correct.

20 Q. Okay. Take a look at the next highlighted portion. Can
21 you read that aloud, please, sir.

22 A. "Mizell stated he warned another friend, Tony Last Name
23 Unknown about Kelley's behavior recently after Mizell had a
24 religious conversation with Kelley. Kelley told Mizell that
25 the world was horrible, and Kelley was upset about bringing

1 his kid into the world."

2 Q. So during this religious conversation Mizell and Kelley
3 had, Kelley told him that the world was horrible, and he was
4 upset about bringing his kids into the world, correct?

5 A. Yes, sir.

6 Q. Is that a yes? Sorry.

7 A. Yes, sir.

8 Q. Thank you.

9 And then, finally, the last highlighted portion.

10 Again, based on this interview, there was a YouTube clip
11 of Kelley doing a canister of drugs called whippits?

12 A. Correct.

13 Q. And Mizell told -- stated that Kelley knew that he was
14 going to go to hell?

15 A. Correct.

16 Q. I want to turn your attention to one more FBI interview.

17 THE COURT: So if you finished up with that person,
18 this is probably a good breaking point.

19 It appears to me you have much more to go with this
20 witness.

21 MR. STERN: Much more to go, Your Honor.

22 THE COURT: Yeah. And will there be redirect?

23 MR. LEGRAND: Yes, sir. Yes, Your Honor.

24 THE COURT: Yeah. So it's past 5:30 now. Let's go
25 ahead and take a stop. We'll resume tomorrow morning at 9:00

1 with this witness.

2 I know it's late. But if the two of y'all could confer
3 about what remaining exhibits we need to admit, I'd like to be
4 able to admit any unobjected-to plaintiffs' and government
5 witness exhibits first thing in the morning, if possible. So
6 let's try to show up just slightly before 9:00.

7 Anything else we need to take up before I leave?

8 MR. ALSAFFAR: None from plaintiffs, Your Honor.

9 MR. STERN: None for defendants.

10 THE COURT: We're adjourned until tomorrow morning.

11 * * *

12 *(Overnight recess)*

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1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE WESTERN DISTRICT OF TEXAS
 3 SAN ANTONIO DIVISION

4 JOE HOLCOMBE, ET AL, .
 5 .
 6 PLAINTIFFS, .
 7 vs. . DOCKET NO. 5:18-CV-555-XR
 8 .
 9 UNITED STATES OF AMERICA, .
 10 .
 11 DEFENDANT. .
 12 .

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 TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
 BEFORE THE HONORABLE XAVIER RODRIGUEZ
 UNITED STATES DISTRICT JUDGE
 APRIL 8, 2021

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GIGI SIMCOX, RMR, CRR
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OFFICIAL COURT REPORTERS
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 (*San Antonio, Texas; April 8, 2021, at 8:45 a.m., in open*
2 *court.*)

3 THE COURT: Let's start with plaintiffs' exhibits
4 first. What plaintiffs exhibits may be unobjected to that we
5 can admit at this time?

6 So we have already admitted 87 through 94, 94A
7 through 105, 105A through 109A. And that's where we basically
8 sort of left off. We've admitted 751 and 752.

9 Are there any remaining plaintiffs' that there is an
10 agreement to?

11 MR. JACOB: Yes, Your Honor. Plaintiffs agreed to
12 PEX 797 and PEX 798.

13 THE COURT: Is that correct, Mr. Stern?

14 MR. STERN: That is, Your Honor.

15 THE COURT: 797 is admitted, 798 is admitted.

16 (Plaintiffs Exhibits 797 and 798 received into evidence.)

17 THE COURT: Are there any government exhibits that
18 are unobjected to that we can admit?

19 MR. STERN: Yes, your Honor. Government Exhibit 1
20 through 24.

21 THE COURT: Is that correct from the plaintiffs'
22 side?

23 MR. JACOB: Yes, your Honor.

24 THE COURT: 1 through 24 are admitted.

25 MR. STERN: Next we have Government Exhibit 124

1 through 130.

2 THE COURT: One second here. I'm sorry.

3 MR. STERN: 124 --

4 THE COURT: 124.

5 MR. STERN: -- through 130.

6 THE COURT: Is that correct?

7 MR. JACOB: Yes, your Honor.

8 If I can go back to 1 through 24. I thought the
9 agreement was 1 through 23, GEX 1 through 23. We do have an
10 objection to GEX 24.

11 THE COURT: Okay. So I'll withdraw that for now. 24
12 is not admitted at this time. We'll take that up later.

13 What about 124 through --

14 I'm sorry. What was the number again?

15 MR. STERN: 130.

16 THE COURT: -- 130. Any objections to that?

17 MR. JACOB: No, Your Honor.

18 THE COURT: 124 is admitted, 125, 126, 127, 128, 129,
19 and 130.

20 (Government's Exhibits 124 through 130 received into
21 evidence.)

22 THE COURT: Anything else?

23 MR. STERN: Yes, Your Honor. 132 through 140.

24 THE COURT: Is that correct?

25 MR. JACOB: Yes, Your Honor.

1 THE COURT: 132, 133, 134, 135, 136, 137, 138, 139,
2 and 140 are admitted.

3 (Government's Exhibits 132 through 140 received into
4 evidence.)

5 THE COURT: Anything else?

6 MR. STERN: Just 131 sort of sticks out like a sore
7 thumb. I don't know if Your Honor wants to take up that issue
8 now.

9 THE COURT: So what's the objection to 131?

10 MR. JACOB: It is an email, Your Honor. It's
11 hearsay.

12 THE COURT: So from Hardy, Kathleen, to who?

13 And what's the response to the hearsay objection?

14 MR. STERN: Your Honor, the parties have agreed to
15 produce basically wholesale the Air Force investigative file
16 as well as the Texas Ranger investigative file.

17 This is just one of many documents that have been
18 produced, hearsay or otherwise, that would help the Court come
19 to a finding of fact regarding this case.

20 MR. JACOB: May I respond, Your Honor?

21 THE COURT: Yes.

22 MR. JACOB: Your Honor, the parties have agreed to
23 produce it, but that does not mean they are admissible. They
24 are still hearsay, and that's not an exception to the hearsay
25 rule.

1 MR. STERN: Your Honor, this is an email concerning
2 CPS documents.

3 THE COURT: Yeah, it's part of the hot documents here
4 at the bench.

5 So what are we dealing with?

6 MR. STERN: We're dealing with the Child Protective
7 Services from New Mexico, so it really deals with potential
8 probable cause regarding June 2011, if I'm not mistaken.

9 MR. JACOB: Your Honor, it's a 2017 email.

10 THE COURT: Yeah. 131, at least my exhibit list, is
11 indicating it was a 12/4/2017 email.

12 MR. STERN: Yes, your Honor. But the underlying
13 information concerns a previous investigation.

14 So as part of the Texas Rangers' investigative file,
15 they contacted CPS from New Mexico to obtain all the requisite
16 information. So that's why the underlying information is
17 necessary for the Texas Rangers' investigation.

18 MR. JACOB: And to be clear, Your Honor, we're not
19 objecting. We have admitted the documents produced via this
20 email. It's the email itself that's not — that's hearsay and
21 irrelevant.

22 THE COURT: Right. So besides that, then, let's get
23 to the nitty. What's your prejudice by this being admitted?

24 I've been letting a lot of background in that the
25 government is objecting to. Why isn't this just background

1 for me to consider it and at least flesh out the chronology of
2 events?

3 MR. JACOB: Well, Your Honor, I don't think it
4 contributes in any way to the chronology of the events.

5 THE COURT: But that's not answering my question.
6 I'm asking what's the harm to you by admitting it.

7 MR. JACOB: Other than it being hearsay, Your Honor,
8 no harm.

9 THE COURT: 131 is admitted.

10 (Government's Exhibit 131 received into evidence.)

11 THE COURT: Anything else?

12 MR. STERN: Yes, Your Honor. 142.

13 Is that correct, Mr. Jacob?

14 MR. JACOB: The next document I have is 147.

15 MR. STERN: We'll move 147 without objection.

16 THE COURT: Any objection to 147?

17 MR. JACOB: No, Your Honor.

18 THE COURT: 147 is admitted.

19 (Government's Exhibit 147 received into evidence.)

20 THE COURT: Anything else?

21 MR. JACOB: Mr. Stern is right. We do not have an
22 objection to 142 as well.

23 THE COURT: 142 is admitted.

24 (Government's Exhibit 142 received into evidence.)

25 THE COURT: Anything else?

1 MR. STERN: Next is Government Exhibit 163 through
2 187.

3 THE COURT: Is that correct?

4 MR. JACOB: Yes, Your Honor. We have no objection to
5 those as well.

6 THE COURT: I'm sorry. It's 163 through?

7 MR. JACOB: 187.

8 THE COURT: 187.

9 163, -64, -65, -66, -67, -68, -69, -70, -71, -72,
10 -73, -74, -75, -76, -77, -78, -79, -80, -81, -82, -83, -84,
11 -85, -86, and -87 are all admitted.

12 (Government's Exhibit 163 through 187 received into
13 evidence.)

14 THE COURT: Anything else?

15 MR. STERN: Next, Government Exhibit 112, 113, and
16 114.

17 MR. JACOB: No objection.

18 THE COURT: 112, 113, and 114 are all admitted.

19 (Government's Exhibits 112 through 114 received into
20 evidence.)

21 THE COURT: Anything else?

22 MR. STERN: Did we agree to 144 and 145?

23 MR. JACOB: Yes, Your Honor. 144 and 145 are agreed
24 to.

25 THE COURT: 144 and 145 are admitted.

1 (Government's Exhibits 144 and 145 received into
2 evidence.)

3 THE COURT: Anything else, Mr. Stern?

4 MR. STERN: I don't know if you want to take up the
5 issue of the one outstanding Academy deposition designation,
6 as we've moved to have all the rest of them admitted.

7 THE COURT: What number is that?

8 MR. STERN: Oh, I'm sorry. Before that, Your Honor,
9 government exhibit -- we move to have Government Exhibits 223
10 to 239 admitted.

11 THE COURT: Mr. Stern, the court reporter didn't hear
12 you.

13 MR. STERN: Excuse me. Government Exhibit 223
14 through 239.

15 THE COURT: Any objection to those?

16 MR. JACOB: No, Your Honor.

17 THE COURT: 223, 224, 225, 226, 227, 228, 229, 230,
18 231, 232, 233, 234, 235, 236, 237, 238, and 239 are admitted.

19 (Government's Exhibits 223 through 239 received into
20 evidence.)

21 THE COURT: Anything else?

22 MR. STERN: Yes, Your Honor. We can delay this
23 conversation. However, as we just admitted Government
24 Exhibit 1 through 23, again, 24 sort of sticks out as a sore
25 thumb. It's the answer to the deposition by written questions

1 from Academy witness.

2 If you recall, the United States sought to take a
3 deposition of an Academy 30(b)(6) witness. By way of
4 compromise, we did a deposition through written questions. We
5 received those answers. We timely produced them to
6 plaintiffs. They now have them. We seek to move them into
7 evidence at this time.

8 MR. JACOB: Our objection is under the rule of
9 optional completeness, Your Honor. We sent cross questions to
10 Academy, which they did not respond to. They lodged
11 objections; and, therefore, we would posit that the entire
12 exhibit should not be admitted, given Academy's conduct.

13 THE COURT: I don't recall you bringing that to my
14 attention and asking for a motion to compel them to answer
15 those questions. Did you?

16 MR. JACOB: No, Your Honor, we did not.

17 THE COURT: Yeah. 24 is admitted.

18 (Government's Exhibit 24 received into evidence.)

19 THE COURT: Anything else?

20 MR. STERN: Not at this time, Your Honor.

21 THE COURT: Let's go ahead and bring back the ranger.

22 THE DEPUTY CLERK: Is he still under oath?

23 THE COURT: Yeah. He's under oath. I'll remind him
24 of that.

25 MR. STERN: Your Honor, I don't know if you want to

1 read the admonition to those watching virtually right now.

2 THE COURT: Thank you.

3 MR. STERN: Thank you.

4 THE COURT: One moment. I have to log in.

5 MR. STERN: Of course.

6 (Pause in proceedings.)

7 THE COURT: Good morning, ladies and gentlemen. To
8 those joining, I would like to remind you that all counsel,
9 parties, witnesses, participants, and members of the public
10 are reminded that this is a formal proceeding and that they
11 should behave at all times as though they were present in the
12 courtroom. The standing order of the San Antonio Division of
13 the Western District of Texas on remote access to court
14 proceedings remains in effect.

15 Photography, recording, or streaming of this
16 proceeding is strictly prohibited.

17 Though this proceeding is open to the public.
18 Technological restraints require that members of the general
19 public request access from the courtroom deputy to participate
20 remotely. Those granted approval to participate remotely must
21 not forward the electronic link to any nonparticipating
22 colleagues or persons and must not post a link on any public
23 forum.

24 As with all proceedings, violations of these
25 instructions are subject to contempt proceedings accordingly.

1 Please exercise proper courtroom decorum at all times.

2 And with that, we will resume with the trial and the
3 examination of the witness.

4 Mr. Stern?

5 MR. STERN: Thank you, sir.

6 CROSS-EXAMINATION (Continued)

7 BY MR. STERN:

8 Q. Ranger Snyder, good morning.

9 A. Good morning.

10 Q. Do you understand you're still under oath?

11 A. Yes, sir.

12 Q. Thank you.

13 Ranger Snyder, if you recall, we left off yesterday
14 talking about a few of the interviews that the FBI conducted
15 in support of the rangers' investigation of Devin Kelley.

16 Do you recall that?

17 A. Yes, sir.

18 Q. I'd like to go back and briefly discuss one of those
19 interviews taken by the FBI of Jessika Lee Edwards.

20 If we can pull up Joint Exhibit 510 again.

21 If we look at the bottom half of that interview report, if
22 you recall, Ms. Edwards told the FBI that Kelley was obsessed
23 with church shootings and guns, and that with regard to the
24 church shooting in South Carolina, Kelley told Edwards, quote,
25 "I wish I had the nerve to do it."

1 Do you recall that?

2 A. Yes, sir.

3 Q. She also told the FBI that Kelley sent her pictures of
4 multiple guns he was building.

5 Do you recall that?

6 A. Yes, sir.

7 Q. Now, the Court asked if we can sort of create a time line
8 for when this occurred, and I represented that the church
9 shooting in South Carolina occurred 2015.

10 Do you recall that?

11 A. That's correct.

12 Q. I want to see if we can try to drill down the dates for
13 this a little bit more. So let's look at the second page of
14 this exhibit, the very last line, if you can highlight that.

15 It reads, "Edwards last communicated with Kelley about
16 four months ago."

17 Do you see that?

18 A. Yes, sir.

19 Q. And so you would take it that she stopped the Facebook
20 communication about four months prior to the shooting?

21 A. Yes.

22 Q. Okay. And if we look at the previous page, the last
23 paragraph that's highlighted.

24 "Edwards told Kelley to get help once she realized he was
25 completely obsessed with mass shootings. Edwards then deleted

1 Kelley as a friend on Facebook."

2 Did I read that correctly?

3 A. That's correct.

4 Q. So it's fair to surmise, based on this document, that four
5 months prior to the shooting, Ms. Edwards thought Kelley was
6 so obsessed with mass shootings that she blocked him on
7 Facebook; correct?

8 A. Edwards indicated that in this statement, yes.

9 Q. Thank you.

10 Let's move on to the FBI interview of Valerie Rowe, Joint
11 Exhibit 511.

12 Ranger Snyder, will you read the first highlighted
13 portion?

14 A. "The last time Rowe saw Kelley was in February 2012 when
15 she" last -- or "when she left the Holloman Air Force Base and
16 relocated to Florida, where her recently retired husband
17 obtained a new job."

18 Q. I'll represent to you the parties have already stipulated
19 that Valerie Rowe was Edwards' supervisor in 2011.

20 And according to this document, she left Holloman Air
21 Force Base February 2012; is that correct?

22 A. Correct.

23 Q. Take a look at the next highlighted portion.

24 Can you read that portion, sir.

25 A. "Approximately a year after Rowe left Holloman Air Force

1 Base, she received a threatening Facebook message from Kelley
2 that stated, 'Hey, you stupid bitch. You should have been put
3 in the ground a long time ago. Better hope I don't ever see
4 you. Can't face that piece of shit.'"

5 Q. So according to Ms. Rowe, Devin Kelley sent her this
6 message after she had left the Air Force; correct?

7 A. Correct.

8 Q. And it doesn't say that she reported this to anyone at the
9 Air Force; correct?

10 A. She did not indicate that, no, sir.

11 Q. Can we look at the next highlighted portion.

12 This is from May 2017; correct?

13 A. Yes, sir.

14 Q. Will you read this portion aloud.

15 A. "In May 2017, Rowe received a second Facebook message from
16 Kelley. Rowe did not capture or save this message but
17 recalled it was longer than the first message and essentially
18 stated, 'You know you're lucky. The only thing I regret is
19 not ending you when I had the chance. I wish you'd take a
20 nice long dirt nap.' Rowe stated Kelley would block her on
21 Facebook after sending her a message, which would not allow
22 her to block him."

23 Q. Then the last highlighted portion.

24 A. "Rowe did not pursue any restraining order against Kelley
25 because she did not want him to become aware of her address."

1 Q. So according to Ms. Rowe, Devin Kelley sent her
2 threatening Facebook messages, May 2017; correct?

3 A. That's correct.

4 Q. Ms. Edwards told the FBI that Mr. Kelley sent her
5 threatening messages on Facebook four months before the
6 shooting?

7 A. Correct.

8 Q. And that would put it around July 2017?

9 A. That's correct.

10 Q. And if you recall from the summary of the iCloud account
11 that was created by the Texas Rangers, it indicated that there
12 was evidence that Devin Kelley started planning the shooting
13 as early as July 2017; correct?

14 A. According to that document, yes.

15 Q. According to that document.

16 And that would be right around the same time Ms. Edwards
17 was contacted by Devin Kelley with those threatening messages?

18 A. Yes.

19 Q. And around the same time, Valerie Rowe was contacted
20 regarding those threatening messages?

21 A. Correct.

22 Q. Thank you.

23 Ranger Snyder, I'd like to transition a little bit and
24 talk about Devin Kelley's motivation to commit the mass
25 shooting. Is that okay?

1 A. Yes, sir.

2 Q. Thank you.

3 If we can take a look at Joint Exhibit 593. Thank you.

4 Ranger Snyder, this is the situation report?

5 A. Correct.

6 Q. What is that?

7 A. It's an update report, basically summarizing our events,
8 to keep our chain of command informed of our investigative
9 findings as the day continues and moves forward.

10 Q. So this document would be sent up to your supervisors?

11 A. It's created by the on-scene supervisor by the information
12 provided to him up through the chain of command, yes.

13 Q. So who would receive this report?

14 A. The field-level supervisor would create it, and it would
15 go up the chain of command up to the chief and then director.

16 Q. And it's fair to say that it would be based on the best
17 available evidence at the time?

18 A. That's correct.

19 Q. Thank you.

20 Let's take a look at the second page, the highlighted
21 portion.

22 Will you read the highlighted portion, sir.

23 A. "Danielle Kelley stated she grew up in Sutherland Springs
24 area and has always attended the First Baptist Church in
25 Sutherland Springs. Danielle was reportedly sexually

1 assaulted by her foster dad, Donald Brassfield, a white male,
2 date of birth, who is currently incarcerated in the Guadalupe
3 County Jail awaiting trial on aggravated sex assault of a
4 child on 11/27/2017. It is suspected that Devin was resentful
5 of Danielle's mother, Michelle Shields, for her husband's
6 assault of Danielle."

7 Q. So according to this document that was sent up through
8 your chain of command, it was suspected that Devin was
9 resentful of Danielle's mother, Michelle Shields, for her
10 husband's sexual abuse of Danielle; is that correct?

11 A. According to this statement, yes.

12 Q. Okay. It also reads that Donald Brassfield, at the time,
13 was currently incarcerated?

14 A. That's correct.

15 Q. There's nothing in your investigative file that suggests
16 he was out on bail?

17 A. No, sir.

18 Q. In fact, Donald Brassfield was awaiting trial for
19 aggravated sexual assault?

20 A. Correct.

21 Q. The trial was scheduled for November 27th; is that
22 correct?

23 A. Correct.

24 Q. The same month as the shooting?

25 A. Correct.

1 Q. If we take a look at Joint Exhibit 599.

2 Ranger, what is this document?

3 A. It's a supplemental report, Number 22, a supplemental
4 report created by Christopher -- Ranger Christopher Kindell,
5 Supplement 22 to the Ranger file that's there. It's hard to
6 read the small print.

7 Q. Is this an interview of Erin Brassfield?

8 A. Let's see. The supplement is -- conducted a telephone
9 interview of Erin Brassfield, yes, sir.

10 Q. Thank you.

11 And do you know who Erin Brassfield is?

12 A. I believe he's, like, the stepfather or --

13 Q. That's okay. We can pull up a highlighted portion. I
14 don't want you to have to speculate. I think we have it right
15 here.

16 Take a look at paragraph 22.2. "Erin is the ex-wife of
17 Donald Curtis (Curt) Brassfield. Curt is the biological
18 father of Danielle Lee Kelley, previously identified."

19 Did I read that correctly?

20 A. That's correct, yes.

21 Q. So we know Danielle was actually adopted by Michelle
22 Shields; correct?

23 A. That's correct.

24 Q. And Michelle Shields was married to Donald Curt
25 Brassfield?

1 A. Yes.

2 Q. And then Erin Brassfield would be the ex-wife of Donald
3 Curt Brassfield. Is that fair?

4 A. According to the findings, yes, sir.

5 Q. Thank you.

6 Take a look at the next highlighted portion. I'm going to
7 ask you to read 22.4. I know it's long.

8 A. "Kelley contacted Erin via text message on October 31st,
9 2017, and requested that Erin call as soon as she could. Erin
10 called Kelley on October 31st, 2017.

11 "Kelley stated he was at Michelle Lorene Brassfield
12 Shields' previously identified residence and discovered
13 photographs and videos of Curt engaged in sexual acts with
14 Danielle. Kelley stated he discovered the items in a drawer.

15 "Kelley wanted Erin to meet with him on Sunday,
16 November 5th, 2017, between 9:00 a.m. and 9:30 a.m. Kelley
17 requested that Erin not tell anyone about the images and
18 further asked Erin if she was recording the phone conversation
19 between the two. Kelley informed Erin the images and videos
20 were at Kelley's residence."

21 Q. Okay. It's a pretty long paragraph, so let's try to break
22 that down a little bit.

23 October 31st, that's Halloween; correct?

24 A. That's correct.

25 Q. During the course of your investigation, did you come to

1 realize that the First Baptist Church conducts a festival on
2 the day of Halloween?

3 A. Yes.

4 Q. Is it fair if I call it "fall festival," you'll know what
5 I'm referring to?

6 A. Yes, sir.

7 Q. Okay. And that was six days before the shooting?

8 A. That's correct.

9 Q. Did you come to learn that Devin and Danielle had attended
10 the fall festival?

11 A. Yes.

12 Q. And so on the same day of the fall festival, Devin Kelley
13 contacts Erin Brassfield and says that he found videos --
14 video and photographs depicting the sexual assault of his wife
15 at Michelle Shields' house; is that correct?

16 A. That's correct.

17 Q. Devin doesn't tell Erin Brassfield that he found the
18 photographs and videos years earlier; does he?

19 A. No, sir.

20 Q. He doesn't tell Ms. Brassfield that he burned the
21 photographs and videos years earlier?

22 A. No, sir.

23 Q. According to Ms. Brassfield, Devin asked if she was
24 recording the conversation?

25 A. Correct.

1 Q. In your experience as a law enforcement officer, does that
2 sound like a question from a paranoid person?

3 A. In today's time, I take everything as being recorded. But
4 the document just states that Kelley asked if the conversation
5 had been recorded. I don't know how he was feeling, really.

6 Q. Fair enough.

7 But he did also say that he wanted to meet Ms. Brassfield
8 on Sunday, November 5th, 2017; correct?

9 A. That's correct.

10 Q. And that's the day of the shooting?

11 A. Correct.

12 Q. Let's turn to the next paragraph, 22.5 and 22.6. Sir, if
13 you can read aloud paragraph 22.5.

14 A. "Erin contacted Guadalupe County district attorney's
15 office and informed them regarding Kelley's discovery. The
16 DA's office requested Erin inform Kelley that possessing or
17 copying the items was against the law and that Kelley needed
18 to turn the items in to the police or DA's office."

19 Q. Okay. So according to Ms. Brassfield, she contact Devin
20 and encouraged him to turn in the items?

21 A. That's correct.

22 Q. Kelley told Ms. Brassfield that he had removed the items
23 and wasn't going to release them to authorities?

24 A. That's correct.

25 Q. Can you read 22.6, please.

1 A. "Erin again spoke with Kelley and encouraged him to turn
2 in the items. Kelley stated he removed the items from his
3 residence and he did not plan to release the images or videos
4 to authorities. Kelley stated he did not want his wife,
5 Danielle, to testify or speak with authorities."

6 Q. So, again, that's where we learn that Mr. Kelley told Erin
7 Brassfield that he already removed the items?

8 A. Correct.

9 Q. And that he wasn't going to release them to authorities?

10 A. Yes, sir.

11 Q. And that he didn't want his wife to speak to the
12 authorities?

13 A. Correct.

14 Q. And that he didn't want her to testify; correct?

15 A. Correct.

16 Q. Take a look at paragraph 22.7. Are you there, sir?

17 A. Yes, sir.

18 "Kelley stated he was upset with Michelle due to Michelle
19 having the images and videos for many years and never saying
20 anything about possessing the items. Kelley further stated
21 that Michelle informed him the investigation into the sexual
22 assault of his wife would not 'go anywhere.'"

23 Q. So, again, according to Ms. Brassfield, Devin Kelley was
24 told by Michelle Shields that she didn't think the actual
25 investigation into the sexual assault of his wife would not go

1 anywhere?

2 A. Correct.

3 Q. Does this evidence support the situation report's finding
4 that it was suspected that Devin was resentful of Danielle's
5 mother, Michelle Shields, for her husband's -- for the sexual
6 assault of his wife?

7 A. It's supporting information related to what we were
8 informed, yes.

9 Q. Paragraph 22.8, if you would, sir.

10 A. "Kelley later denied finding the photographs and videos
11 when the authorities questioned him. Erin described Kelley as
12 controlling. Kelley's wife, Danielle, was subpoenaed to
13 testify against Curt later in the month of November 2017.

14 "Kelley stated he did not want Danielle to testify and
15 they would just pay the fine for not appearing in court. Erin
16 stated Kelley began to act 'strange'" -- in quotes, "strange,"
17 the word "strange" -- "last week but did not describe his
18 actions."

19 Q. Thank you, sir.

20 So, again, according to Ms. Brassfield, Devin Kelley
21 denied to the authorities that he found the photographs and
22 videos; correct?

23 A. Correct.

24 Q. And we'll talk about when the Cibolo police detectives
25 went to their property later.

1 But looking at 22.9, we see that Ms. Brassfield describes
2 Devin Kelley as controlling; correct?

3 A. Correct.

4 Q. That he knew that Danielle was subpoenaed to testify
5 against Curt later that month?

6 A. Correct.

7 Q. And that Mr. Kelley stated that he did not want his wife
8 to testify; correct?

9 A. Correct.

10 Q. And that they would just take the fine for not appearing
11 in court?

12 A. Yes, sir.

13 Q. In fact, Ms. Brassfield stated that Devin Kelley began to
14 act strange the week prior to this interview; correct?

15 A. Correct.

16 Q. And this interview was conducted the day after the
17 shooting?

18 A. Correct.

19 Q. Thank you, sir.

20 Then, if we move to Joint Exhibit 603.

21 You know, before we do, Ranger Snyder, we've already
22 talked about -- I'm sorry. You've already spoken with
23 plaintiffs' counsel a little bit about when the Cibolo police
24 detectives went to the property of the Kelleys' on
25 November 1st, 2017?

1 A. Yes, sir.

2 Q. And, again, this was -- the purpose of them going to the
3 property was to retrieve the photographs and video that
4 Mr. Kelley, or Devin Kelley, told Erin Brassfield he found on
5 October 31st?

6 A. Yes.

7 Q. Six days before the shooting?

8 A. Yes, sir.

9 Q. Again, he wasn't a suspect at the time?

10 A. Correct.

11 Q. And they were going because they felt they had evidence
12 that might help their investigation?

13 A. Correct.

14 Q. That he was a family member of one of the potential
15 victims, that being his wife?

16 A. Yes, sir.

17 MR. STERN: Will you play the video, Joint
18 Exhibit 603.

19 (Clip was played.)

20 MR. STERN: Your Honor, I believe we might be able to
21 play it through a different source and be able to hear it
22 better.

23 THE COURT: That's fine.

24 MR. STERN: If we could take five minutes?

25 THE COURT: Let's see if she can --

TERRY SNYDER - CROSS

1 MR. STERN: If we can take a recess in place?

2 THE COURT: Yeah, that's fine.

3 (Recess.)

4 (Clip was played.)

5 MR. STERN: Thank you.

6 BY MR. STERN:

7 Q. Ranger Snyder, this interaction occurred four days before
8 the shooting; correct?

9 A. Correct.

10 Q. And Devin Kelley talks about being pissed off numerous
11 times?

12 A. He mentions it, yes.

13 Q. He used the word "pissed" several times; correct?

14 A. Yes, sir.

15 Q. He talks about the prospect of his wife being a hostile
16 witness?

17 A. He referred to her several times as that, yes.

18 Q. And that, in fact, she wouldn't testify but rather would
19 take the fine?

20 A. Correct.

21 Q. The officer told Devin that he wasn't in trouble; correct?

22 A. He did.

23 Q. And, of course, Devin responded that he doesn't do
24 anything illegal?

25 A. He did.

1 Q. He also said, "We don't have no more photos;" correct?

2 A. Yes.

3 Q. He also told the detectives to go digging around Michelle
4 Shields' home?

5 A. He did.

6 Q. That if they wanted to go find potentially more videos and
7 photographs, to go dig around her home?

8 A. He did.

9 Q. Would you describe Devin as being angry during that
10 interaction?

11 A. I wouldn't say angry. I'd say agitated. He mentions
12 several times that they're just tired of people showing up at
13 their gate. I would say agitated, possibly.

14 Q. He was certainly upset at their presence?

15 A. Yes.

16 Q. And the Cibolo Police Department thought the same thing;
17 correct?

18 A. He did say he wasn't upset with them. He wasn't bitching
19 at them, that he was just upset with the whole situation and
20 that Erin Brassfield needed to get her story straight.

21 Q. Okay. In fact, if we look at Joint Exhibit 571, this is a
22 note that the Cibolo Police Department made reflecting that
23 interaction; is that correct?

24 A. That's correct.

25 Q. Look at the highlighted portion.

1 "Both Michael and Devin appeared upset at our presence and
2 request to speak with Devin regarding this case."

3 Did I read that accurately?

4 A. That's correct.

5 Q. Thank you, sir.

6 After the shooting, the Texas Rangers interviewed Michael
7 Kelley, Rebecca Kelley, and Danielle Kelley, now Danielle
8 Smith?

9 A. That's correct.

10 Q. And that occurred the day of the shooting; correct?

11 A. Yes, sir.

12 Q. What was the importance of those interviews?

13 A. It was to -- I mean, there was a crime scene there that we
14 identified, that we learned through our investigation. And it
15 was to go obtain as much information of what they knew about
16 Kelley's actions.

17 Q. And you would expect them at that time to provide honest,
18 truthful statements; correct?

19 A. Absolutely.

20 Q. That they would try to help the law enforcement in any way
21 they could?

22 A. Yes, sir.

23 Q. Did you have any reason to suspect Devin Kelley's parents
24 or wife were not telling the truth through those interviews?

25 A. We would expect the truth to come out then at that moment.

1 But I would say this: I mean, as a parent and as what
2 their son had just done unto their knowledge, previously
3 learned by the father, they would be in, somewhat, shock.
4 And, you know, I'm not going to say that I wouldn't be
5 surprised.

6 Q. Sure. They were excited in the moment?

7 A. Sure.

8 Q. And they uttered things in that moment; correct?

9 A. Correct.

10 Q. If we could take a look at a few portions of that
11 interview.

12 That interview was recorded; correct?

13 A. Yes, sir.

14 Q. If we could take a look at a few portions of that. This
15 is Joint Exhibit 694, which has been synced with Joint
16 Exhibit 477, which is a transcript of the recorded interviews.

17 Start with A, please.

18 (Clip was played.)

19 BY MR. STERN:

20 Q. Okay. So according to this interview, when the Texas
21 Rangers asked Michael Kelley why his son might have committed
22 this heinous act, he immediately talked about the sexual abuse
23 of Danielle Kelley; correct?

24 A. He provided a history of Danielle Kelley, yes.

25 Q. Well, when he was asked why his son might have done it, he

1 immediately talked about the history of Danielle Kelley's
2 sexual abuse?

3 A. He did mention that.

4 Q. He also talked about how the case was pending?

5 A. That's correct.

6 Q. He talked about how Devin Kelley was, quote, "very upset
7 about all of it"?

8 A. Correct.

9 Q. He talked about how Devin Kelley was, quote, "very
10 protective of his wife and family"?

11 A. Correct.

12 Q. And he talked about how Devin, of course, was aware of
13 what transpired between his wife Danielle and her mother?

14 A. Correct.

15 MR. STERN: Can we watch the second portion.

16 THE COURT: One second, before you do that.

17 Ranger -- just that note -- put that back up.

18 I'm just kind of curious, Ranger --

19 You can stop the audio.

20 I'm just kind of curious. This is the second time
21 now that DPS has done interviews with a woman cowering in the
22 corner and a man hovering next to the woman.

23 Is this normal investigation techniques?

24 THE WITNESS: I'm not aware of the instances. I
25 guess you're referencing this case itself, or --

1 THE COURT: So you saw when Danielle was being
2 interviewed yesterday, and now we see the mother here with the
3 father. And it just seems, to me, odd that DPS would be
4 trying to do interviews of potential witnesses with a man
5 hovering over a woman who is cowering in the corner.

6 Doesn't that tell you, as a law enforcement officer,
7 that perhaps something strange is here?

8 THE WITNESS: You know, Judge, according to -- these
9 interview rooms, I'm not sure how they're set up or how they
10 positioned them in these rooms at the time of --

11 THE COURT: You wouldn't do it one at a time?

12 THE WITNESS: That's a discretion made by the ones
13 doing the interview. So I know each time I participated in an
14 interview with them at the residence, we were all together
15 there.

16 You know, common practice is individual, one at a
17 time. Due to the circumstances of this being both parents, I
18 guess those rangers made the decision to conduct the interview
19 with both of them being present.

20 THE COURT: It just strikes me as body language of
21 the women cowering in the corner would tell law enforcement
22 officers that something odd is here.

23 THE WITNESS: Sure.

24 THE COURT: You can continue.

25 MR. STERN: Let's go to the second clip, please.

1 (Clip was played.)

2 BY MR. STERN:

3 Q. We've already seen the video of the detectives going to
4 the Kelley property on November 1st; correct?

5 A. Yes, sir.

6 Q. So in response to that, Mrs. Kelley tells the rangers that
7 Devin was -- quote, "was so upset he was crying" as a result
8 of that interaction?

9 A. She stated that in her interview, yes.

10 Q. Correct. So she provided that testimony herself; correct?

11 A. Yes.

12 Q. So she spoke up during the interview when she felt that
13 she had something to share?

14 A. That's correct.

15 Q. And you felt Mr. Kelley was in the room to comfort her?

16 A. I just see that they're both together. What the reason
17 being, I don't know. I can't for -- say that, I mean.

18 Q. Sure. But they both provided testimony during the course
19 of that interview; correct?

20 A. Correct.

21 Q. You found her to be truthful and honest during that
22 interview?

23 A. I feel they exaggerated a little, yes.

24 Q. But they just learned their son died; correct?

25 A. Correct.

1 Q. They're obviously very distraught?

2 A. Correct. They then make a note that she indicated that he
3 was upset to the point he was crying. But the video we
4 watched, obviously, he wasn't crying. So that's why I say the
5 exaggeration to some point.

6 Q. Right. But could it be that he was crying afterwards and
7 he was very upset, emotional --

8 THE COURT: That's asking for speculation.

9 MR. LeGRAND: That calls for speculation.

10 BY MR. STERN:

11 Q. But according to her -- according to his mother, he was
12 upset and he was crying?

13 A. She did state that, yes.

14 Q. Thank you.

15 Can we watch the next clip, please.

16 (Clip was played.)

17 So, again, Mrs. Kelley provided testimony during that
18 interview; correct?

19 A. Correct.

20 Q. She told the rangers that Devin had been having a lot of
21 anxiety?

22 A. Correct.

23 Q. That according to her, he had been recently -- that she
24 had taken Devin to a psychiatrist a couple of weeks earlier?

25 A. Correct.

1 Q. And that he was taking medication as a result?

2 A. Correct.

3 Q. Michael Kelley also talked about how it would be very
4 traumatic for both Devin and Danielle if she was made to
5 testify during the trial of Curt Brassfield?

6 A. He stated that, yes.

7 Q. And that Michael Kelley, in fact, told Devin that he
8 didn't really need to be there?

9 A. Yes.

10 Q. That it would be so emotional for him?

11 A. Correct.

12 MR. STERN: Let's watch the next clip, please.

13 (Clip was played.)

14 BY MR. STERN:

15 Q. So, again, according to Mr. Kelley, he asked Danielle
16 Kelley whether or not they -- "they" being Danielle and Devin
17 Kelley -- got into a fight the night before, and she said no?

18 A. Correct.

19 Q. She said, in fact, everything was great?

20 A. Correct.

21 Q. She never told the Texas Rangers that she had asked for a
22 divorce the night before?

23 MR. LeGRAND: Your Honor, we object. The clip speaks
24 for itself.

25 THE COURT: Yeah. I remember all this.

1 BY MR. STERN:

2 Q. Throughout the course of your investigation, had you ever
3 come to learn that Danielle Kelley had asked for a divorce the
4 night before the shooting?

5 A. No, sir.

6 Q. Thank you.

7 Watch the next clip, please.

8 (Clip was played.)

9 So, again, during this interview, Mr. Kelley is
10 specifically asked whether Devin Kelley could access his
11 firearms; correct?

12 A. Correct.

13 Q. In fact, he's asked could he access them, or are they
14 locked up?

15 A. Correct.

16 Q. And Michael Kelley responds that Devin could access his
17 firearms?

18 A. Correct.

19 Q. In fact, that he checked to make sure that they were still
20 accounted for?

21 A. Correct.

22 Q. Did he ever later change or modify that answer?

23 A. Not that I'm aware.

24 Q. So to your knowledge, did he ever respond by saying, "Oh,
25 when I said that my son could access the firearms, I meant if

1 he could find the key that I kept hidden"?

2 A. No, sir.

3 Q. He never said, "If he could break into the wardrobe or any
4 cabinet that I kept my firearms in"?

5 A. No, sir.

6 MR. STERN: Let's go to the next clip, please.

7 (Clip was played.)

8 BY MR. STERN:

9 Q. So, again, this is Mrs. Kelley speaking up during the
10 interview?

11 A. Correct.

12 Q. Telling the rangers that Devin Kelley put them through
13 hell?

14 A. Correct.

15 Q. Thank you.

16 Next clip.

17 (Clip was played.)

18 Okay. So this is Michael Kelley talking about Devin
19 Kelley's run-ins with the law while he was in the Air Force;
20 correct?

21 A. Correct.

22 Q. And that he suggests that Devin Kelley's punishment in the
23 Air Force was the same thing as if he got caught smoking pot?

24 A. He compared that, yes. He stated that.

25 Q. In fact, he talked about how Devin's first wife was,

1 quote, "Just playing him"?

2 A. Correct.

3 Q. That he believed his son took the fall for the baby
4 getting a broken clavicle?

5 A. Correct.

6 MR. STERN: Let's watch the next clip, please.

7 (Clip was played.)

8 BY MR. STERN:

9 Q. Ranger Snyder, was Danielle Kelley very distraught during
10 the start of this interview?

11 A. Seemed upset, yes.

12 Q. She'd just learned that her husband was dead?

13 A. Correct.

14 Q. And that he'd committed a heinous act?

15 A. Correct.

16 Q. Michael Kelley put his arm around her to try to comfort
17 her?

18 A. Yes, sir.

19 Q. In fact, she told the rangers that it was a normal day
20 when they first woke up; correct?

21 A. She described Kelley as being happy, going on about
22 himself and...

23 Q. That's correct. She actually described Devin as happy and
24 was very loving?

25 A. Correct.

1 Q. She also talked about Devin being very adamant that she
2 was not allowed to touch the black box where he kept his
3 firearm, ammunition, and other gear?

4 A. Correct.

5 Q. According to Danielle, Devin left a voice mail for her
6 telling her that he loved her; correct?

7 A. She stated that, yes.

8 Q. And that he wasn't right in the head?

9 A. Yes.

10 Q. She didn't say anything else?

11 A. No, sir.

12 Q. Devin left a message saying he loved her, he wasn't right
13 in the head?

14 A. That's correct.

15 Q. Again, no mention of a divorce?

16 A. No, sir.

17 Q. No mention of it being Danielle's fault?

18 A. No, sir.

19 MR. STERN: The next clip, please.

20 (Clip was played.)

21 BY MR. STERN:

22 Q. Okay. So here, when Danielle Kelley is asked why she
23 thinks Devin may have committed this heinous act, she
24 immediately says, quote, "What I went through as a kid."
25 Correct?

1 A. Correct.

2 Q. She talks about the abuse she suffered?

3 A. She expressed that -- or she explained she was abused,
4 yes, as a child.

5 Q. And when she's asked "So you think that's why Devin may
6 have gone down there was due to your childhood history,"
7 Danielle responds, quote, "I'm sure."

8 A. Correct.

9 Q. She followed up with, quote, "Devin was very upset"?

10 A. Correct.

11 Q. She talked about the pending court case?

12 A. Yes.

13 Q. And she knew she had to testify on November 27th against
14 her adoptive father?

15 A. Yes.

16 Q. She mentioned the photographs and how Devin was upset
17 about the sheriffs coming over to the house?

18 A. Yes.

19 Q. In talking about Curt Brassfield, she said, "He's in jail
20 right now"?

21 A. Yes.

22 Q. So at least based on her belief, Curtis Brassfield was
23 still in prison?

24 A. She stated that she believed he was.

25 MR. STERN: The next video.

1 (Clip was played.)

2 BY MR. STERN:

3 Q. So, again, Danielle Kelley told the rangers that Devin
4 said, quote, "It's a fucked-up situation"?

5 A. Correct.

6 Q. He also said that, quote, "People don't care"?

7 A. Correct.

8 Q. And that people are heartless?

9 A. Correct.

10 Q. Did the rangers come to learn what Danielle meant by, "If
11 people believed me when I said something, two girls wouldn't
12 have gotten hurt"?

13 A. No, sir.

14 Q. Did you come to learn that Curt Brassfield had sexually
15 assaulted other young girls?

16 A. It was mentioned in the video of the officers that
17 approached him from the DA's office.

18 Q. Did the rangers learn that Danielle thought that if people
19 had believed her when she was younger, those two girls
20 wouldn't have been victims?

21 A. I lost track on the first part of that question.

22 Q. Certainly. Danielle is mentioning if people believed her
23 when I said something, two girls wouldn't have gotten hurt.

24 Is it -- during the course of the Texas Rangers'
25 investigation, they had come to learn that Curtis Brassfield

1 had sexually assaulted other young girls; correct?

2 A. We learned that by the Cibolo Police Department or the DA
3 investigator's investigation, yes. We did not investigate
4 that case or were active in that case. We just obtained
5 information that was already documented.

6 Q. But according to that, there were additional victims of
7 Curtis Brassfield?

8 A. Correct.

9 Q. Danielle also told the Texas Rangers that Devin, quote,
10 "had a justification to be angry at the situation"?

11 A. She stated that, yes.

12 Q. Thank you.

13 Watch the next clip.

14 (Clip was played.)

15 So, again, Danielle Kelley was specifically asked whether
16 there were any marital problems; correct?

17 A. That's correct.

18 Q. And she mentioned Devin Kelley cheating on her?

19 A. She did.

20 Q. That they had worked it out?

21 A. She indicated that, yes.

22 Q. And that it was her belief that Devin and was a really
23 good dad and a very good husband?

24 A. She stated that, yes.

25 Q. During this time, Michael Kelley is just scrolling through

1 his phone; correct?

2 A. Correct.

3 MR. STERN: Go to the next video.

4 (Clip was played.)

5 BY MR. STERN:

6 Q. So, again, when Danielle Kelley is asked whether Devin
7 blamed Danielle's mother, Michelle Shields, Danielle responds,
8 "He blamed a lot of people for it."

9 A. She stated that, yes.

10 MR. STERN: Please.

11 (Clip was played.)

12 BY MR. STERN:

13 Q. So according to Danielle, it was Devin's idea to go to the
14 fall festival; correct?

15 A. According to Danielle, yes.

16 Q. And the fall festival, if you recall, was on Halloween?

17 A. That's correct.

18 Q. That's the same day Devin contacts Erin Brassfield and
19 says that he found photographs and videos depicting the sexual
20 abuse of his wife at Michelle Shields' home?

21 A. That's correct.

22 Q. Danielle also says that during the fall festival, Devin
23 was real quiet?

24 A. Correct.

25 Q. Like something was on his mind?

1 A. That's how she described it, yes.

2 Q. During the course of your investigation, you interviewed
3 Pastor Frank Pomeroy; correct?

4 A. That's correct.

5 Q. This interview occurred about one month after the
6 shooting?

7 A. Yes, sir.

8 Q. What was the purpose of that interview?

9 A. Just to gain any history that he knew about Devin and
10 Danielle.

11 Q. Did you find the pastor to be truthful and honest?

12 A. I felt he was, yes.

13 MR. STERN: I would like to play just a few clips of
14 that interview, please, if you could start it.

15 I'm sorry. That's Joint Exhibit 582.

16 (Clip was played.)

17 BY MR. STERN:

18 Q. So Pastor Pomeroy told you that upon first meeting Devin,
19 he knew that Devin had, quote, "issues"?

20 A. Yes. He could feel that, or he had that kind of feeling,
21 yes.

22 Q. In fact, he called it "little man's disease"?

23 A. That's how he described it, yes, sir.

24 Q. And that when Devin would come to the church on rare
25 occasions, he would make snide remarks about how he was an

1 atheist?

2 A. Correct.

3 Q. About how God was not real?

4 A. Correct.

5 Q. He found Kelley to be abrasive?

6 A. Yes.

7 Q. And how he thought Devin acted as if the world revolved
8 around him?

9 A. Correct.

10 MR. STERN: Play the next one.

11 (Clip was played.)

12 BY MR. STERN:

13 Q. So, again, according to Pastor Pomeroy, on the rare
14 occasions when Danielle and Devin attended the church, they
15 would sit -- at least Devin would sit in the back and not
16 participate?

17 A. Correct.

18 Q. And how Kelley had animosity towards the church?

19 A. Correct.

20 MR. STERN: Next clip, please.

21 (Clip was played.)

22 BY MR. STERN:

23 Q. So, again, according to Pastor Pomeroy, Danielle Kelley
24 had a, quote, "incredible propensity to lie," correct?

25 A. He stated that, yes.

1 Q. In fact, he also stated that she had an incredible
2 propensity to tell stories?

3 A. Correct.

4 Q. He also told you that Danielle didn't come to him for
5 guidance?

6 A. He did.

7 Q. That was -- one of the reasons may have been that she was
8 concerned that the pastor may not believe her?

9 A. Correct.

10 Q. Is that consistent with her statement to the Texas Rangers
11 when she said, "If people believed me when I said something,
12 two girls would not have gotten hurt"?

13 A. She stated that, yes.

14 Q. She was concerned that people would not believe her?

15 A. Correct.

16 MR. STERN: Next clip.

17 (Clip was played.)

18 BY MR. STERN:

19 Q. Okay. So according to Pastor Pomeroy, Bryan Holcombe was
20 leading the sermon on that day rather than him?

21 A. Correct.

22 Q. He thought Devin Kelley may have taken out the pulpit
23 first?

24 A. That was his thought or his assumption, yes.

25 Q. So he didn't suggest that Devin Kelley had tried to take

1 out Michelle Shields first?

2 A. He did not mention that, no.

3 MR. STERN: Can we go to the last clip, please.

4 (Clip was played.)

5 BY MR. STERN:

6 Q. Pastor Pomeroy told you that they had active shooter
7 training?

8 A. He indicated that, yes.

9 Q. That they would never dream of someone shooting through
10 the walls?

11 A. He stated that.

12 Q. That -- he told you that it was cowardly to shoot women
13 and children?

14 A. Correct.

15 Q. But particularly cowardly to shoot through the walls?

16 A. He stated that, yes.

17 Q. And, in fact, it would never cross his mind that someone
18 would shoot through the walls?

19 A. Correct.

20 Q. He said, as a result, he thought Devin Kelley was, quote,
21 "ate up with darkness"?

22 A. He did state that, yes.

23 Q. I'd like to continue with that theme of Devin Kelley being
24 ate up with darkness by showing you a few more exhibits, if
25 that's okay.

1 A. Sure.

2 THE COURT: Before you move to that, does the record
3 have any indication of when the pastor and Devin Kelley first
4 met?

5 MR. STERN: I'll have to get back to you with an
6 exact time. I know --

7 THE COURT: I'm not looking for an exact time, just
8 the general year would be fine.

9 MR. STERN: I'd prefer to get back to you with an
10 answer on that.

11 THE COURT: Thank you.

12 MR. STERN: Thank you, your Honor.

13 BY MR. STERN:

14 Q. If we could turn to Joint Exhibit 742.

15 Take a look at the synopsis. What is this document
16 reflecting?

17 A. This is Supplemental Report Number 10 created by Ranger
18 Billy Mims.

19 Read the synopsis?

20 Q. If you could read it to yourself.

21 Who are the Texas Rangers interviewing?

22 A. Ranger Billy Mims interviews with Manuel -- I'll spell the
23 last name; I don't know the pronunciation -- it's

24 P-A-N-I-A-G-U-A, and Michael Swanson. And this occurred on
25 November the 9th, 2017.

1 Q. Okay if I try to pronounce it? Paniagua?

2 A. Paniagua. I'll agree with that.

3 Q. Paniagua? Paniagua, I'll try.

4 A. Sure.

5 Q. Thank you. Let's take a look at paragraph 10.14. If
6 you'll read that aloud, please, sir.

7 A. "Swanson stated in hindsight he could see 'little things'
8 in Devin's personality that made him not surprised Devin
9 committed the shooting. Swanson stated he was aware of Devin
10 having 'issues' with his wife (Danielle Kelley) side of the
11 family as related to her pending criminal court case with her
12 father in Guadalupe County."

13 Q. Again, based on this interview, Devin Kelley was even
14 talking to his own colleagues about the upcoming criminal
15 case; correct?

16 A. Correct.

17 Q. And that he had issues with his wife's family as it
18 related to that criminal court case?

19 A. Correct.

20 Q. He also talks about how he could see little things in
21 Devin's personality that made him not surprised that Devin
22 would commit the shooting?

23 A. Swanson indicated that, yes.

24 Q. Thank you.

25 If we could turn to the next highlighted paragraph.

1 Read aloud, sir.

2 A. "Swanson stated he suffers from PTSD and that he takes
3 medications prescribed to him. Swanson also stated Devin had
4 recently begun taking the same medication that Swanson takes,
5 clonazepam, and further added that he was aware of Devin
6 taking more of the meds than prescribed, stating Devin
7 admitted to him on 11/4/2017 that he had taken three times
8 what was prescribed to him due to a headache Devin had on that
9 date."

10 Q. So, again, according to Kelley's coworker, he knew that
11 Devin had recently started taking clonazepam?

12 A. Correct.

13 Q. And had that the coworker knew that Kelley was taking more
14 than what was prescribed?

15 A. Correct.

16 Q. In fact, November 4th — which is the day before the
17 shooting; correct?

18 A. Yes, sir.

19 Q. So the day before the shooting, Kelley had taken three
20 times what was prescribed to him?

21 A. Correct.

22 Q. Let's take a look at 10.21.

23 Read aloud, sir.

24 A. "Swanson stated that after the Las Vegas mass shooting,
25 Devin stated something to the effect of 'if you're going to do

1 it, do it big.' Swanson further stated that Devin described
2 himself as 'homicidal' and 'suicidal.'"

3 Q. So according to Devin's colleagues, Devin described
4 himself as homicidal and suicidal?

5 A. Correct.

6 Q. And that after the Las Vegas massacre, he stated, "If
7 you're going to do it, do it big"?

8 A. Correct.

9 Q. Are you aware that the Las Vegas shooting occurred in
10 October 2017?

11 A. I couldn't recall the date, but I'll agree with you.

12 Q. If we can we take a look at Joint Exhibit 543.

13 Ranger, do you know what this document is?

14 A. It's a sitrep report created by, it appears, the criminal
15 investigation division from the FBI.

16 Q. Yes. So this is the FBI in further assistance of your
17 investigation?

18 A. Correct.

19 Q. And "sitrep," would that mean situation report?

20 A. That's correct.

21 Q. Take a look at the top of page 2 of this document. Can
22 you read the highlighted portion, the first bullet point.

23 A. "Numerous Facebook posts by Kelley provided relevant
24 information, including an indication he owned numerous guns, a
25 history of drug use, an interest in mass shootings, and a

1 reference to Guy Fawkes Day, November 5th, and suicidal
2 tendencies."

3 Q. Is this bullet point consistent with the Rangers'
4 investigation of Kelley?

5 A. Correct.

6 Q. The next bullet point, please.

7 A. "Around 2012, Facebook posts indicate a shift in Kelley's
8 ideology from devout Christianity to atheism."

9 Q. Is that consistent with Pastor Pomeroy's statement about
10 Kelley making snide remarks about his atheism?

11 A. Correct.

12 Q. And about how God was not real?

13 A. Correct.

14 Q. Let's turn to the section that reads "Social Media
15 Exploitation."

16 I'm sorry, sir. I'm going to have to ask you to keep
17 reading aloud please. The highlighted portion.

18 A. "A preliminary review of Kelley's Facebook account
19 revealed direct messages dated over a period of time between
20 November 4, 2017, and November 5th, 2017, with a Facebook
21 account identified as -- who was identified as Kelley's
22 sister.

23 "The messages include claims from the user of Kelley's
24 account indicating possible mental health issues. Of
25 noteworthy interest was a message from -- asking Kelley if he

1 'was able to see a therapist.' Prior to this message, the
2 user of Kelley's account characterized his way of thinking as
3 being 'unusual' and 'irrational.'

4 "The user of Kelley's account also claimed that he must
5 'hide among the sheep' and was worried about being 'hunted and
6 chained down.'"

7 Q. The Texas Rangers obtained the Facebook messages that led
8 to this paragraph; correct?

9 A. That's correct.

10 MR. STERN: I'd like to take a look at those
11 documents. If we could actually pull up Joint Exhibit 501-46,
12 please.

13 BY MR. STERN:

14 Q. Again, if you look at the highlighted portion, this is
15 where L.R., which is Devin Kelley's sister, writes, "Were you
16 ever able to see a therapist? I'm sorry you're struggling so
17 much. I wish there was a way you could let in your feelings
18 and process them slowly and then slowly start to wear less of
19 a mask."

20 Did I read that correctly?

21 A. That's correct.

22 Q. There are two messages from Devin Kelley to his sister
23 right before that that leads to her response; correct?

24 A. That's correct.

25 Q. And this is 2017-11-05; is that correct?

1 A. Yes, sir.

2 Q. November 5th, 2017?

3 A. Yes, sir.

4 Q. I'm not great as converting UTC to central time, but is it
5 fair to suggest these would have been sent the night before
6 the shooting?

7 A. Correct.

8 Q. If I could have you read the first of Devin Kelley's
9 messages to his sister, I guess the first being the bottom
10 one.

11 A. The very bottom?

12 Q. Yeah. If we could do it timewise, so I think the first
13 one is at 12:5:22 UTC.

14 A. "Doing well. LOL. I fake everything because I am far
15 from doing well. The more I fake, the more isolated I become.
16 It's become my way to survive. I've learned the more I blend
17 in by pretending I have emotions or even a personality, that
18 people don't catch on that I am simply -- I simply am not
19 there, a shell of a person. I think some people are catching
20 on, though, which isn't good. I'm more comfortable around
21 people with my mask on."

22 Q. Devin Kelley told his sister the night before the shooting
23 that he's more comfortable around people with his mask on?

24 A. Right.

25 Q. How he's becoming more isolated?

1 A. Correct.

2 Q. That he's blending into his surroundings?

3 A. Correct.

4 Q. And that he was worried that people were catching on?

5 A. Correct.

6 Q. That he was a shell of a person?

7 A. Correct.

8 Q. Read the next one, please.

9 A. "My unusual and irrational thinking, I'm afraid, has
10 plagued my mind constantly. I don't know if a fake life is
11 worth living. If I was truly free to be myself, they would
12 hunt me down and chain me. So the only way is to hide among
13 the sheep, but it only" --

14 Q. "Propitiates the problem"?

15 A. -- "propitiates the problem."

16 Q. Thank you.

17 So, again, the night before the shooting, Devin Kelley
18 messages his sister and talks about his unusual and irrational
19 thinking?

20 A. That's correct.

21 Q. How it plagues his mind constantly?

22 A. Correct.

23 Q. How he doesn't know if a fake life is worth living?

24 A. Correct.

25 Q. And that if he was truly free to be himself, he would be

1 hunted down and chained?

2 A. Correct.

3 Q. And that the only way is to hide among the "sheeple"?

4 A. Correct.

5 Q. But it only "propitiates the problem"?

6 A. Correct.

7 Q. I would like to return to the FBI report, please. Let's
8 go to the paragraph where we left off.

9 October 28th, this is the first message -- I'm sorry. The
10 first paragraph is from October 28th, 2017; is that correct?

11 A. Correct.

12 Q. The same date that Devin Kelley goes to Hill Country to
13 try to obtain two 100-round ammunition magazines?

14 A. Yes, sir.

15 Q. He writes iCloud notes to himself in preparation for the
16 shooting, if you recall from yesterday's testimony?

17 A. I remember the notes that we looked over and discussed.
18 They were notes preparing ammunition, different things with
19 vehicle, and concealing that stuff, yes.

20 Q. Fair enough, sir.

21 "On October 28th, 2017, Kelley's associated Facebook
22 account posted a message stating, 'Remember, remember the
23 5th of November,' a likely reference to Guy Fawkes Day."

24 Did I read that correctly?

25 A. That's correct, sir.

1 Q. In fact, the mass shooting did occur happen on the 5th of
2 November?

3 A. It did.

4 Q. Can I ask you to read the second paragraph, please.

5 A. "Kelley posted malicious and potentially violent messages
6 regarding towards his wife's family. On May 2nd, 2017, one of
7 his associated Facebook accounts posted, 'All I know is if any
8 of my wife's family are going to heaven, I def don't want to
9 spend eternity with them.' And 'I am an atheist, and they are
10 ignorant, self-righteous Christians, or so they claim in
11 public. But behind closed doors, it's drug addiction and
12 domestic violence. My wife was the right person to marry, but
13 the rest of them could get shot in the face and I'd laugh.'"

14 Q. So again in this message, he talks about being an atheist?

15 A. He does.

16 Q. He talks about Danielle's family being "ignorant,
17 self-righteous Christians, or so they claim in public"?

18 A. Correct.

19 Q. But how when they're "behind closed doors, it's drug
20 addiction and domestic violence"?

21 A. Correct.

22 Q. How Danielle was the "right person to marry, but the rest
23 of them could get shot in the face and I'd laugh"?

24 A. Correct.

25 Q. If we could read the next paragraph. Read it aloud, sir.

1 A. "Kelley made numerous Facebook posts displaying opinions
2 on mass shooters and serial killers. On March 21st, 2017, at
3 1807 UTC, associated Facebook account posted, 'You learn to
4 shoot by doing it. A lot of the mass shooters are impossible
5 to detect. I'm pretty sure they don't go around acting crazy,
6 screaming to the world, but are very careful, just like serial
7 killers. So they pass psych evals anyway.'"

8 Q. We can stop there. That's one of the posts. Thank you.

9 So Mr. Kelley, in this post, talks about "mass shooters
10 being impossible to detect"?

11 A. Correct.

12 Q. How "they don't go around acting crazy"?

13 A. Correct.

14 Q. Don't go around "screaming to the world but are very
15 careful"?

16 A. Correct.

17 Q. "Just like serial killers"?

18 A. Correct.

19 Q. In fact, he talked about them passing psych evals?

20 A. Correct.

21 Q. Next post, if you would continue. One last one, sir,
22 starting on 11/19.

23 A. Continue with this one?

24 Q. Please.

25 A. "On 11/19/2016 at 3:10 UTC, one of his associated Facebook

1 accounts posted, 'Mass murderers don't do it because of video
2 games. They do it because they are tired of the fucking
3 bullshit in the rigged system and the hate that breeds in all
4 90 percent of humans. And it's time for payback. Most of
5 them anyway. Serial killers do it because they are addicted
6 to the rush of killing and" getting — "and get bored with
7 killing animals.'"

8 Q. So, again, in this post, Devin Kelley talks about mass
9 murderers doing it because of the "fucking bullshit in the
10 rigged system"?

11 A. Correct.

12 Q. And the "hate that breeds in 90 percent of humans"?

13 A. Correct.

14 Q. He says "time for payback"?

15 A. Correct.

16 Q. And that "serial killers do it because they are addicted
17 to the rush of killing"?

18 A. Correct.

19 Q. Because they "get bored killing animals"?

20 A. Correct.

21 Q. In fact, Devin Kelley did become a mass murderer; correct?

22 A. Correct.

23 Q. In your experience, are criminals who are willing to die
24 difficult to deter?

25 A. In my experience, are they?

TERRY SNYDER - REDIRECT

1 Q. Difficult to deter?

2 A. Correct.

3 Q. And has it been your experience as a Texas Ranger and a
4 law enforcement officer that convicted felons are able to
5 obtain firearms in Texas?

6 A. That's correct.

7 Q. Thank you.

8 MR. STERN: Pass the witness.

9 THE COURT: Anything else?

10 MR. LeGRAND: Yes, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. LeGRAND:

13 Q. Did your Texas — the question Mr. Stern just asked you,
14 did your Texas Ranger investigation, in its entirety, ever
15 find any weapons that Devin Kelley possessed or owned at the
16 time of this shooting that came from any illegitimate place or
17 any place that criminals go to buy guns?

18 A. No, sir.

19 Q. Thank you, sir.

20 And referring back, Mr. Stern just referred to JEX 543,
21 the FBI sitrep.

22 Do you recall that?

23 A. Yes, sir.

24 Q. And you went through pretty much the whole sitrep with
25 Mr. Stern; correct?

1 A. Yes, sir.

2 Q. In that situation report, did you find or see anything
3 from the FBI that they determined that at the time of this
4 shooting that Mr. Kelley owned or possessed any firearms that
5 had not gone through an FBI background check before Mr. Kelley
6 received them?

7 A. No, sir.

8 Q. Now, Mr. Stern played for you the clip at the gate.
9 Do you recall that, the video at the gate?

10 A. Yes, sir.

11 Q. And he pointed out that Mr. Kelley appeared angry?

12 A. Yes, sir.

13 Q. But Mr. Kelley also padded his side, as we showed
14 yesterday, and claimed that he had a gun too, T-O-O; correct?

15 A. Correct.

16 Q. So this angry individual that was talking to these
17 sheriff's deputies from Cibolo, he also pointed out that he
18 had a gun and that he didn't like police; correct?

19 MR. STERN: Objection. Asked and answered. This
20 line of questioning has already been exhausted.

21 THE COURT: That's overruled.

22 Go ahead.

23 THE WITNESS: Correct.

24 BY MR. LeGRAND:

25 Q. Now, when those officers went out there, Mr. Stern pointed

1 out that they were going out there to talk to a witness;
2 correct?

3 A. Yes, sir.

4 Q. But they also knew from the district attorney that they
5 were going out there to talk to a witness that might be in
6 possession of material evidence to a crime; correct?

7 A. That's correct.

8 Q. Okay. Now, with reference to Devin Kelley and those
9 pictures and this whole situation that Mr. Stern -- and with
10 all due respect to Mr. Stern, spent quite a bit of time on
11 this Brassfield situation; correct?

12 A. Yes, sir.

13 Q. Okay. Is it your experience -- well, have you had
14 experience as a Texas Ranger with domestic abuse crimes?

15 A. Yes.

16 Q. Is it your -- and we know from your investigation of the
17 history of Devin Kelley is that he was convicted back in the
18 Air Force of a domestic abuse crime; correct?

19 A. Correct.

20 Q. Is it your experience as a Texas Ranger that domestic
21 abusers like Mr. Kelley want to keep witnesses that they're
22 aware of to their situation under their control?

23 A. The majority of the time, yes.

24 Q. And did Mr. Stern point out to you on several occasions as
25 to how controlling Mr. Kelley was?

1 A. Correct.

2 Q. And one of the things that -- the Danielle Kelley
3 interview that Mr. Stern played for you -- do you recall that?
4 -- the video of it?

5 A. The interview?

6 Q. Of Danielle Kelley --

7 A. Yes.

8 Q. -- by the Texas Rangers.

9 He played that for you; correct?

10 A. Yes, sir.

11 Q. And he also played for you the video of Mr. Kelley in the
12 room with his wife in an interview; correct?

13 A. Yes, sir.

14 Q. Do you recall when the judge asked you why Mr. Kelley was
15 in there with his wife?

16 A. Yes.

17 Q. Okay. Well, I want to ask the same question about
18 Danielle Kelley.

19 Do you know why Mr. Kelley was in there with Danielle
20 Kelley?

21 A. I was not privy to that. It's an interview, and it was
22 the way those two rangers that conducted the interview did the
23 interview at the time.

24 Q. And I just want to make sure the record is clear.

25 In both of those interviews, both Devin Kelley's mother

TERRY SNYDER - REDIRECT

1 and Devin Kelley's wife, Mr. Kelley was included in the room
2 in both of those interviews?

3 A. That's correct.

4 Q. Now, Mr. Stern took you through part of JEX 511.

5 Can we look at JEX 511.

6 It's Valerie Rowe. Do you remember that name?

7 A. Yes, sir.

8 Q. Can we focus on the -- there we go.

9 Ranger, would you read the highlighted portions?

10 A. "Valerie Lynn Rowe. Rowe first met Devin Kelley in 2010
11 when she began working at the Holloman Air Force Base in
12 New Mexico and supervised him. Upon meeting Kelley, Rowe
13 immediately thought he was odd and even told co-workers they
14 needed to 'keep an eye on him because he's the type of guy who
15 will come shoot us.' Rowe believes all her co-workers felt
16 similarly about Kelley."

17 Q. So does that state all of her co-workers at Holloman Air
18 Force Base felt the same way about Kelley?

19 A. She stated that. Rowe stated that, yes.

20 Q. And this is a different paragraph than you read earlier;
21 correct?

22 A. Yes, sir.

23 Q. Okay. And in this paragraph, it goes back to 2010;
24 correct?

25 A. That's correct.

TERRY SNYDER - REDIRECT

1 Q. And it talks about when Mr. Kelley was in the Air Force at
2 Holloman Air Force Base; correct?

3 A. Yes, sir.

4 Q. And it points out that they need to "keep an eye on him
5 because he's the type of guy that will come shoot us."

6 Correct?

7 A. That's correct.

8 Q. And that's back at Holloman Air Force Base; correct?

9 A. Yes, sir.

10 Q. In 2010 before he was convicted?

11 A. Yes, sir.

12 Q. Okay. Now, I'd like to go to JEX 584.

13 Now, Ranger Snyder, during the Texas Rangers'
14 investigation, is it correct, part of what your investigation
15 turned up -- and I think, as Mr. Stern pointed out, a lot of
16 stones were turned over -- correct? -- to find information
17 about Devin Kelley?

18 A. That's correct.

19 Q. And is -- one of the stones that were turned over were the
20 text messages in Michelle's cell phone?

21 A. Yes, sir.

22 Q. Okay. And is that what this exhibit is?

23 MR. STERN: Objection, Your Honor. That's beyond the
24 scope.

25 THE COURT: That's overruled.

1 BY MR. LeGRAND:

2 Q. Did Michelle Brassfield make reference in her cell phone
3 text messages to the extent that she felt that she and her
4 family were a target of Devin Kelley? Michelle Shields, I'm
5 sorry.

6 A. Correct.

7 Q. And, Ranger Snyder, this text message that we're looking
8 at, do you see where it's dated Friday, May 26th, 2011 -- I
9 mean 2017?

10 A. Yes, sir.

11 Q. Okay. And Mr. Stern referred that -- or went through with
12 you evidence where he was -- I believe he was pointing out
13 that Mr. Kelley was thinking about this crime several months
14 before November of 2017.

15 Do you recall that line of questioning?

16 A. Yes, sir.

17 Q. Now, this cell phone text that we just looked at from
18 Michelle Shields, that's several months before the incident;
19 correct?

20 A. That's correct.

21 Q. And it refers to Michelle Shields; Ben Shields; Nana,
22 which was Lula White?

23 A. That's correct.

24 Q. Okay. And Lula White, for example, was killed at the
25 church in this event; correct?

1 A. Yes, sir.

2 Q. In your investigation, did you determine that the --
3 whether or not there were any other people that Devin Kelley
4 had threatened within several months of this incident, other
5 than these folks in this text message?

6 A. Nothing uncovered indicated such.

7 Q. And would you agree that the folks that are mentioned in
8 Ms. Shields -- and before we do that, just so -- for clarity,
9 this cuts off at one point. It doesn't have all the words --
10 correct? -- in JEX 584?

11 A. That's correct.

12 MR. LeGRAND: I'd like to play the audio of this just
13 so the record is complete. It's JEX 598, and it's at
14 11:00 minutes 24 seconds through 13 minutes 7 seconds, Your
15 Honor.

16 Could you play that for me, please.

17 And just for the record, so whoever is watching this
18 is clear, there won't be any person on the screen, Your Honor.
19 It's just audio.

20 (Clip was played.)

21 BY MR. LeGRAND:

22 Q. Ranger Snyder, Mr. Stern took you back through his
23 questioning to show that Mr. Kelley was thinking about that --
24 or this event several months before; correct?

25 MR. STERN: Objection. Mischaracterizes.

TERRY SNYDER - REDIRECT

1 THE COURT: Let me go ahead and hear the question.

2 BY MR. LeGRAND:

3 Q. Well, does -- this text message and the audio that you
4 just heard from Michelle Shields, does it go back to May of
5 2017?

6 A. Correct.

7 Q. Okay. And the folks that are mentioned in this text
8 message of Michelle Shields, did they all have something in
9 common, based on your investigation? In other words, were
10 they all members of the Sutherland Springs Baptist Church?

11 A. They all -- I can't say they were members. They attended
12 or went to the church, and I'm not sure -- I know the mother
13 or mother-in-law was mentioned, but I don't think she,
14 obviously, went there. I don't think.

15 Q. Well, if that's Nana, she was killed the morning of the
16 shooting; correct?

17 A. You're correct.

18 Q. Lula White?

19 A. That's correct.

20 Q. Okay. So she was there? She attended that church;
21 correct?

22 A. Correct.

23 Q. Okay. I want to go now, Ranger Snyder, to -- Mr. Stern
24 referred to the 100-round drum magazines a couple of times.

25 Do you recall that?

1 A. Yes, sir.

2 Q. Do you recall when Mr. Stern asked you -- or pointed out
3 that Devin Kelley called this store? Do you remember the name
4 of the store?

5 It's okay. It's not that important, if you don't.

6 A. I don't remember the name right off the top of my head.

7 Q. That's all right.

8 In any event, was there a store where Mr. Kelley had
9 purchased two 100-round drum magazines?

10 A. Yes.

11 Q. And did your investigation determine that those magazines
12 apparently didn't work right on his gun?

13 A. That's correct.

14 Q. And he brought them back?

15 A. Yes, sir.

16 Q. And did he order some more?

17 A. He did.

18 Q. Okay. Now, Mr. Stern pointed out that Mr. Kelley then
19 kept calling every day to find out about those magazines;
20 correct?

21 A. Correct.

22 Q. Do you know -- Ranger Snyder, do you know if something
23 happened on Saturday night, November 4th, to cause Devin
24 Kelley to forgo or give up on those magazines?

25 MR. STERN: Objection. Speculation.

TERRY SNYDER - REDIRECT

1 THE COURT: Only if you know.

2 MR. LeGRAND: All I asked is if he knows.

3 THE WITNESS: No, sir.

4 BY MR. LeGRAND:

5 Q. So your investigation didn't turn up what happened, if
6 anything, on Saturday night that would have caused Devin
7 Kelley to give up on those hundred-round magazines?

8 A. No, sir.

9 Q. Let's go to JEX 544. I believe it's a document Mr. Stern
10 referred you to.

11 Do you recall this document?

12 A. Yes, sir.

13 Q. Can we come down to -- there's a line that begins with the
14 word "purchases" about two-thirds of the way down the page.
15 It's on JEX 544-4. I'm sorry. Right. Could you highlight
16 that line and the line right below it.

17 Would you read that, Ranger Snyder.

18 A. "Purchases of note: June 6, 2016, \$38.61 at LA Police
19 Gear Inc., an online police and tactical gear retailer.
20 May 8th, 2017, \$20.94 at KnifeCenter.com, an online knife
21 retailer. December 7, 2017 to November 3rd, 2017 at Academy
22 Sports locations in Selma, San Antonio, and San Marcos, Texas,
23 a seller of firearms, ammunition, and sporting goods."

24 Q. And you had looked at other sections of this suspicious
25 activity from FinCEN; correct?

TERRY SNYDER - REDIRECT

1 A. Correct.

2 Q. What is "FinCEN" in your vernacular?

3 A. It's a financial document, to see their financial -- their
4 spending, their income, their earnings, their assets.

5 Q. Did you find anything in your investigation,

6 Ranger Snyder -- with the support and help of FinCEN, the FBI,

7 ATF, did you find anything -- in fact, including

8 JEX 544-004 -- that Mr. Kelley purchased or possessed at the

9 time of the incident -- the shooting at Sutherland Springs,

10 any firearms that he purchased without a background check from

11 the FBI?

12 A. No, sir.

13 Q. And then Mr. Stern showed you a pawn ticket and a picture

14 of a shotgun.

15 Do you recall that?

16 A. Yes, sir.

17 Q. Did your investigation turn up any evidence whatsoever

18 that he possessed those firearms at the time that the shooting

19 occurred in November of 2017?

20 A. No, sir.

21 Q. And did your investigation -- in other words, you went to

22 Mr. Kelley's house; correct?

23 The rangers -- when I say "you," I'm referring to the

24 rangers.

25 A. Yes, sir.

TERRY SNYDER - REDIRECT

1 Q. And did you do a complete search of the house?

2 A. Yes, sir, we did.

3 Q. And did -- you had the three weapons that were recovered
4 at the two or three crime scenes over near Sutherland Springs;
5 correct?

6 A. That's correct.

7 Q. Okay. Did you find, in the course of all your work in
8 this case, any weapons that Mr. Kelley possessed or owned that
9 had not gone through an FBI background check in order to be in
10 Mr. Kelley's possession?

11 A. No, sir.

12 Q. Okay. Did you find any weapons purchased -- or did you
13 find any weapons that were stolen?

14 A. No, sir.

15 Q. Did you find any weapons that were from straw sales?

16 A. No, sir.

17 Q. And if you recall, I think Mr. Stern mentioned
18 Mr. Kelley's interview, and there was some conversation or
19 questions about Mr. Kelley's firearms.

20 Do you recall that?

21 A. Yes, sir.

22 Q. Did you ever find that Mr. -- any evidence whatsoever that
23 Mr. Kelley ever straw purchased a firearm for Devin Kelley?

24 A. No, sir.

25 Q. All of the firearms that Mr. Kelley purchased, were they

1 all purchased with his signature on a Form 4473 that the FBI
2 checked out and gave a proceed?

3 A. Yes, sir.

4 Q. Did you ever find any evidence whatsoever that Mr. Kelley
5 ever used any of his father's firearms for anything?

6 A. No, sir.

7 Q. And that's through your complete investigation, thousands
8 of pages; correct?

9 A. Correct.

10 Q. And then Mr. Stern asked you questions, do you recall,
11 about the 254 shots outside the church and, I think,
12 250-some-odd shots inside the church.

13 Do you recall that?

14 A. Yes.

15 Q. Okay. And did you -- did your investigation determine
16 that all of those shots -- somewhere near 500 shots; correct?

17 A. That's correct.

18 Q. Did you find that all of them came from the AR-556
19 purchased at Academy after the FBI background check?

20 A. That's correct.

21 Q. And that weapon was in the automobile of a law enforcement
22 officer when you arrived?

23 A. Yes, sir.

24 Q. Okay. That was a real gun; correct?

25 A. Correct.

TERRY SNYDER - REDIRECT

1 Q. Purchased at a real store?

2 MR. STERN: Objection. Objection. Vague.

3 THE COURT: That's overruled.

4 BY MR. LeGRAND:

5 Q. Was it a real gun purchased at a real store with a real
6 background check?

7 A. Correct.

8 Q. That said proceed; you can sell this gun to Devin Kelley?

9 A. Yes, sir.

10 Q. It wasn't a fictional gun that was bought or stolen or any
11 of those things; correct?

12 MR. STERN: Objection.

13 THE COURT: So I'm guessing the objection is asked
14 and answered, and that's sustained.

15 BY MR. LeGRAND:

16 Q. Well, Ranger Snyder, the only reason I ask is, as a Texas
17 Ranger, don't the Texas Rangers have to deal in facts?

18 MR. STERN: Objection. Argumentative.

19 THE COURT: That's overruled.

20 THE WITNESS: Correct.

21 BY MR. LeGRAND:

22 Q. When you do your investigation, you're not allowed to deal
23 in fiction; correct?

24 A. Correct.

25 Q. And so did your investigation deal with the facts of what

1 guns you found?

2 A. Yes, sir.

3 Q. Not the fiction of what guns might have been if certain
4 facts were; correct?

5 A. Yes, sir.

6 Q. That didn't happen; did it?

7 A. No, sir.

8 Q. Now I want to go to JEX 510 again. It's the Jessika
9 Edwards -- it's 510-001.

10 Do you recall this document?

11 A. Yes, sir.

12 Q. I want to come down to the last -- next to the last
13 paragraph that Mr. Stern discussed with you.

14 It makes reference to being obsessed with church
15 shootings?

16 A. Correct.

17 Q. And guns; correct?

18 A. Yes, sir.

19 Q. And then it says Kelley also sent Ms. Edwards pictures of
20 multiple guns that he was building, specifically an
21 AR-15-style rifle.

22 Do you see that?

23 A. Yes, sir.

24 Q. Did your investigation and your search warrants and
25 everything the rangers did in conjunction with the FBI and the

TERRY SNYDER - REDIRECT

1 ATF, did you find any firearms whatsoever that Mr. Kelley
2 constructed?

3 A. No, sir.

4 Q. Did you find any evidence that Mr. Kelley had the
5 capability to construct a firearm?

6 A. No, sir.

7 Q. Now I want to go to JEX 545.

8 And what is JEX 545, Ranger Snyder?

9 A. This is a Google Map photo -- a screenshot of three
10 different locations, three different crime scenes that are
11 documented.

12 Q. The three red circles, are those the three different crime
13 scenes?

14 A. Yes, sir.

15 Q. The top one, what is that?

16 A. Number 1, the gunman's residence.

17 Q. The middle one, what is that?

18 A. Number 3, Devin Kelley found dead.

19 Q. And what's the bottom red circle?

20 A. Number 2, the site of the massacre.

21 Q. Would you agree, from a Google Earth standpoint,
22 Ranger Snyder, that JEX 545 actually depicts that the site of
23 the massacre is closer to New Braunfels, the gunman's
24 residence, than San Antonio is?

25 In other words, San Antonio is closer to his residence

1 than the massacre?

2 A. Correct.

3 MR. STERN: Objection. Leading.

4 THE COURT: That's overruled.

5 MR. LeGRAND: Well, physically, is all I'm asking.

6 THE COURT: Right. It's overruled. Go ahead.

7 BY MR. LeGRAND:

8 Q. So, Ranger Snyder, would it be your -- and you worked this
9 area; correct?

10 A. Yes, sir.

11 Q. Between New Braunfels and the site of the massacre, are
12 there lots of churches and movie theaters and malls and
13 schools and targets for a shooting?

14 A. Yes.

15 Q. Okay. But Mr. Kelley on the day -- on November the 5th of
16 2017, am I correct your investigation determined that he chose
17 the church at Sutherland Springs to drive to; correct?

18 A. The investigation revealed that, yes.

19 Q. And that's where this crime occurred; correct?

20 A. That's correct.

21 Q. Okay. Would you agree that that church, as Mr. Stern
22 pointed out, is the church where Danielle Kelley had attended
23 in her lifetime?

24 A. That's correct.

25 Q. And that her mother attended?

1 A. That's correct.

2 Q. And her grandmother attended?

3 A. That's correct.

4 Q. That her stepfather attended?

5 A. Correct.

6 Q. That her brother attended?

7 A. Yes.

8 Q. So did your investigation, in any place whatsoever in
9 conjunction with the FBI and the ATF, determine anywhere --
10 did any of those reports ever say that this church was a
11 random location?

12 A. No, sir.

13 Q. In fact, a few moments ago with Mr. Stern, do you recall
14 that you discussed Pastor Pomeroy?

15 A. Yes, sir.

16 Q. And when you were talking to Mr. Stern a few minutes
17 ago -- I think it may have been Mr. Stern that pointed out
18 that according to Pastor Pomeroy, Mr. Kelley felt an animosity
19 towards that church?

20 A. He did state that, yes.

21 MR. LeGRAND: I don't have any further questions,
22 sir. Thank you very much.

23 THE COURT: Anything else?

24 MR. STERN: Very briefly, Your Honor.

25

1 A. No. I'm not aware of the federal law, their standards, or
2 practices, no, sir.

3 Q. And due to the fact that if they actually comported with
4 federal law, they would have -- wouldn't have sold Devin
5 Kelley the firearm in April of 2016?

6 MR. LeGRAND: Your Honor, we object. He just
7 testified that he didn't know about federal law in that
8 regard.

9 THE COURT: Can you answer the question or not?

10 THE WITNESS: I'm not aware of the federal law to
11 stand here and testify to it, no, sir.

12 THE COURT: Next question.

13 MR. STERN: I'll move on.

14 BY MR. STERN:

15 Q. Let's briefly discuss the text messages that Mr. LeGrand
16 just showed you back and forth between Devin Kelley and
17 Michelle Shields.

18 That was in May, 2017; correct?

19 A. That's correct.

20 Q. And, in fact, if we could pull up the interview of Valerie
21 Rowe one more time. It's Joint Exhibit 511. Go to the last
22 paragraph.

23 It talks about Devin Kelley threatening Ms. Rowe in
24 May 2017; correct?

25 A. That's correct.

1 Q. At the same time he was threatening Michelle Shields?

2 A. Correct.

3 Q. We talked about the FBI interview of Jessika Edwards.

4 Do you recall that?

5 You know, before we go to Ms. Edwards' interview, let's
6 take a look again at that paragraph, the second paragraph
7 where it talks about Rowe being concerned about Devin Kelley
8 while she was in the Air Force.

9 Do you recall that testimony?

10 A. Correct.

11 Q. She doesn't state that she told anyone from Security
12 Forces Squadron about her concerns; does it?

13 A. No, sir.

14 Q. Doesn't state that she told anyone from Air Force Office
15 of Special Investigations about her concerns?

16 A. No, sir.

17 Q. And you know of no duty that she had to submit Devin
18 Kelley's information into the NICS system?

19 A. I'm not aware, no, sir.

20 Q. Thank you.

21 Looking also at the Jessika Edwards' interview again very
22 quickly. That's Joint Exhibit 510.

23 Again, if we look at the very last sentence -- we've
24 already talked about this, so I don't want to belabor the
25 point. But she severed ties with Devin four months before the

1 shooting; correct?

2 A. Yes, sir.

3 Q. And that was because he was completely obsessed with mass
4 shootings?

5 A. That had been stated several times, yes.

6 Q. And that was around the same time that he was threatening
7 Michelle Shields?

8 A. Correct.

9 Q. That was around the same time he was threatening Valerie
10 Rowe?

11 A. Correct.

12 Q. It was around the same time that the summary iCloud
13 account suggests that his notes indicated that he started
14 planning as early as July 2017?

15 A. His notes compiled information that -- I wouldn't
16 necessarily say they were indicating a plan, but he's making
17 notes to himself for reminders.

18 MR. STERN: Ranger Snyder, I want to thank you for
19 your time here today.

20 THE WITNESS: Yes, sir.

21 MR. LeGRAND: Nothing further, Your Honor.

22 THE COURT: Any further need for this witness, or can
23 he be excused?

24 MR. LeGRAND: No, Your Honor.

25 THE COURT: You're excused. Thank you, Ranger.

MICHELLE SHIELDS - DIRECT

1 THE WITNESS: Thank you.

2 THE COURT: Why don't we take a short little break,
3 and then you can have your next witness ready. Let's take
4 about ten minutes.

5 (Recess.)

6 THE COURT: Your next witness?

7 MR. ALSAFFAR: Your Honor, plaintiffs call Michelle
8 Shields.

9 (MICHELLE SHIELDS, having been duly sworn, testified as
10 follows:)

11 MR. ALSAFFAR: May I proceed, Your Honor?

12 THE COURT: Yes.

13 MR. ALSAFFAR: Thank you.

14 DIRECT EXAMINATION

15 BY MR. ALSAFFAR:

16 Q. Good morning, ma'am. Could you introduce yourself to the
17 Court.

18 A. Yes. My name is Michelle Shields.

19 Q. Ms. Shields, I want to thank you for being here. I know
20 this is difficult. So I'd like, if you don't mind, just to
21 start with you telling the judge just a little bit about
22 yourself, where you're from, if you don't mind.

23 A. Okay. I'm from Sutherland Springs. I've been there about
24 30 years. I was -- practically brought my children up in that
25 town and everything. They attended Floresville School, and we

1 went to the church there in Sutherland Springs since about
2 2004.

3 Q. Ms. Shields, are you married?

4 A. Yes.

5 Q. Who is your husband?

6 A. Benjamin Shields.

7 Q. How many children do you have?

8 A. I have four; two that I adopted, and two stepchildren.

9 Q. And how are you related to Danielle Smith?

10 A. She's my stepdaughter. I don't like to use the "step."
11 Actually, not stepdaughter. I'm sorry. She's my adopted
12 daughter. I don't like to use "adoption."

13 Q. Now, you and I have never met before yesterday when I
14 introduced myself to you outside the courtroom; is that right?

15 A. Not in person, correct.

16 Q. And I was on a video of your deposition, but you and I
17 never talked; right?

18 A. Right.

19 Q. And I know you're represented by an independent lawyer.
20 You have an independent counsel — right? — who's here
21 with you today?

22 A. Yes.

23 Q. Okay. I want to talk to you briefly about what happened,
24 and I know it's hard.

25 Can you tell us who you lost in the shooting at Sutherland

1 Springs First Baptist Church on November 5th, 2017?

2 A. I lost my mother and my church family.

3 Q. Just so the Court knows, can you tell us who your mother
4 was.

5 A. My mother was Lula White. She was 71 years old.

6 Q. You also said that you lost your church family.

7 What do you mean by that?

8 A. Everybody there was family. We got together at family
9 get-togethers, went camping together. We spent a lot of time
10 together, so...

11 Q. How long has Sutherland Springs been your home?

12 A. Since '93.

13 Q. What kind of town is it?

14 A. It's a small country town, very tight community.
15 Everybody knows everybody.

16 Q. And what was the importance of the church there?

17 And let me just back up a little. When I say "church,"
18 from here on out, I just want make sure you know I am talking
19 about your church, the Sutherland Springs First Baptist
20 Church. Okay?

21 A. Okay.

22 Q. Okay. So let me ask that again.

23 Can you tell the Court a little bit about the importance
24 of the church itself to that community and everybody who went
25 to it.

1 A. The church offered a lot of help to people at the
2 community, which we still do. We have a food pantry that we
3 provide to people who are in need of food. We have
4 counseling. We talk to a lot of the people in the community
5 that just need help or want to come and know about the Lord.

6 Q. Ms. Shields, did you regularly go to church -- to the
7 church on Sundays?

8 A. Yes.

9 Q. Did everyone in that community know you as a regular
10 church-going, every-Sunday member of the church?

11 A. Yes, sir.

12 Q. Have you ever taken any leadership positions at the
13 church?

14 A. Yes, sir.

15 Q. Can you tell us about that.

16 A. Before, I volunteered as a treasury -- assistant treasurer
17 to my mother, and I helped out in the food pantry. And now
18 they appointed me as the treasurer, as financial
19 administrator. And I'm also head of the stewardship.

20 Q. Did I hear you correctly? Did you say that this
21 treasury -- new treasury position that you're now in for the
22 church, that you took that over from your mother, Lula White?

23 A. Yes.

24 Q. Was that what she -- a board position she was serving in
25 when she was --

1 A. No, sir. She did it as a volunteer treasurer, and she
2 volunteered to be a director at the food pantry that's owned
3 by the church.

4 Q. Did -- your husband, Ben Shields, did he also regularly
5 attend the church with you?

6 A. Yes.

7 Q. And did he -- usually, was it when you went, he went?

8 A. Yes, sir. He also went to the Bible study groups without
9 me.

10 Q. Okay. So he would always go to church with you on Sunday,
11 but he'd also do other things in the church with the church
12 family there?

13 A. Yes.

14 Q. Okay. How about your mother, Lula? Can I ask you, we've
15 seen a lot of referrals to "Nana."

16 A. Nana.

17 Q. Nana. Sorry. Nana. I call mine "Nana." I have a Nana,
18 so I apologize. Nana.

19 Is that what Lula White was affectionately referred to by
20 the members of the church family?

21 A. Yes.

22 Q. So if we see "Nana" anywhere in the phone, text, that's
23 referring to your mother, Lula?

24 A. Yes.

25 Q. All right. Thank you. I asked you about Ms. White, your

1 mom.

2 How about your son David? I believe you said David is his
3 name; correct?

4 A. Yes.

5 Q. How old is David, by the way?

6 A. He's 24 now.

7 Q. And would David also be one of the family members -- your
8 family members that would attend the church as well?

9 A. Yes, sir.

10 Q. Okay. Do you mind if I talk to you a little bit about
11 Danielle and her growing up in the church, if that's okay.

12 Was she a regular member, growing up as a child, going to
13 the church?

14 A. Yes, sir.

15 Q. Did she love that church?

16 A. Yes.

17 Q. Would you mind telling the Court just a little bit about
18 what Danielle loved doing at the church when she was growing
19 up in the years just prior to her marriage to Devin Kelley?

20 A. She loved children. And growing up, she worked in the
21 nursery, assisting with the children. And she did volunteer
22 work whenever it was needed to do, like a float or something.
23 She was always there to be helpful for the church.

24 Q. How was the church with Danielle? Was it part of her
25 family as well?

1 A. Yes. Everybody loves her.

2 Q. Still do?

3 A. Yes.

4 Q. And when you say that everybody loves Danielle, was the
5 church always a place -- for either Danielle or yourself, a
6 place where she could always count on and rely on if she ever
7 needed anything or needed any help?

8 A. Yes.

9 Q. Was the church always welcoming to Danielle?

10 A. Yes, sir.

11 Q. There's been some discussion from the government lawyers
12 in this case about there being one -- some members of the
13 church that maybe Danielle didn't get along with.

14 Do you know what that's about, one family that she had
15 trouble with?

16 A. When she was a teenager, it was --

17 Q. Just one family?

18 A. It was a kid from a family, and so they just would pick on
19 her.

20 Q. It was one kid from one family?

21 A. Right. As far as I remember.

22 Q. But other than that one kid from one family, generally,
23 that church was one big family for Danielle as well?

24 A. Yes.

25 Q. And for you too?

1 A. Yes, sir.

2 Q. For your whole family; is that right?

3 A. Um-hum.

4 Q. I didn't hear you.

5 A. Yes, sir.

6 Q. Okay. Thank you.

7 A. Sorry.

8 Q. That's okay. No. That's my fault. I couldn't hear you.

9 I wanted to talk about after -- if you don't mind, after
10 Danielle -- well, actually, before we get to after Danielle
11 got married to Devin in the church.

12 You had mentioned -- I think you just said that one of the
13 things that Danielle loved to do when she was at the church
14 was help with the children at the church.

15 Can you describe that a little more for the Court?

16 A. We have a daycare where we have different age groups in
17 different classrooms, and she helped with all the different
18 age groups, according to when she was needed. And she was
19 really good with all the children. They all adored her.

20 Q. They all adored her?

21 A. Um-hum.

22 Q. Did --

23 A. And she --

24 Q. Oh, I'm sorry. Please go ahead.

25 A. I was just going to say that she still knows a lot of

1 those kids now growing up, and they come to her when she is
2 there.

3 Q. So those children that she helped raise at the church,
4 they still know her, love her, and come to her from time to
5 time?

6 A. Yes, sir, the ones that are still alive.

7 Q. And I know this is difficult, because I was going to ask a
8 little bit about that. And I won't spend — I apologize. I'm
9 not going to spend too much time, but it's important.

10 Danielle mentioned — has talked about or testified as
11 well that a lot of the children that died in that shooting
12 were her babies.

13 Based on your own experience with Danielle at the church,
14 was she talking about those children that she helped raise her
15 whole life at that church?

16 A. Yes, sir. The Hill family and the Holcombe family, their
17 biological father died of heart failure. We were there for
18 the family, and we had been there for them the whole time
19 growing up and trying to take care of them, be there for them
20 when they needed help.

21 Q. And that was before the shooting when Mr. Holcombe, you're
22 talking about, passed away?

23 A. No. That was Mr. Hill, Peter Hill.

24 Q. I'm sorry. Mr. Hill, right.

25 And she helped comfort and take care of those kids after

1 their loss?

2 A. Yes, sir.

3 Q. Did everyone in the community know that Danielle -- in
4 your church community, the people that you spent time with,
5 the people that you had at your home from the church and the
6 people you went to congregation with, did they all know that
7 Danielle considered the children of that church really like
8 her children?

9 A. I would think so. I'm not -- I haven't talked to people.
10 I just know that the parents knew that. That's why they came
11 to her.

12 Q. And is that how Danielle felt about them?

13 A. Um-hum. Yes, sir.

14 Q. Did Devin Kelley know that too, as far as you know?

15 A. I don't know. I would assume so, but I don't know.

16 Q. Well, let me talk a little bit about that, about what
17 started happening after Danielle married Devin Kelley.

18 Now, before she married Devin Kelley, was the church a
19 regular part of her daily and weekly life?

20 A. Yes.

21 Q. After she married Devin Kelley, was the church a regular
22 part of her daily and weekly life?

23 A. She wasn't around as much. But when she was around, she
24 did go to church a few times with us. They've always asked
25 about her, and she just always asked about the people there

1 too.

2 Q. Right. So after she married Devin Kelley, was she going
3 to the church less and less over time?

4 A. Yes, sir.

5 Q. And I think you said she would go -- she went a handful or
6 a few times in the years after she met -- married Devin
7 Kelley; is that right?

8 A. Yes, sir.

9 Q. Okay. And in those few times that she went, though, I
10 think you've just said -- did you just say that, well, when
11 she was there those few times, the members of the church were
12 so happy to see her and welcoming to her and really conveyed
13 that they missed her; is that accurate?

14 A. Yes, sir.

15 Q. And those few times when she was allowed to go to the
16 church after she married Devin Kelley and the church members
17 were so happy to see her and welcoming to her, Devin Kelley
18 was there with her every time watching that; wasn't he?

19 A. Yes, sir.

20 Q. And he saw, those few times that he allowed Danielle to go
21 to your church, your family church, that they were welcoming
22 and open arms to Danielle?

23 A. Yes, sir.

24 Q. Did he see that? Okay.

25 Even when Danielle, your daughter, was not able to go to

1 the church as often, would you still try to make it very clear
2 to her that she was always welcome whenever she wanted to come
3 to you or the church?

4 A. Yes, sir.

5 Q. You also told -- made sure Devin Kelley knew that too,
6 that he -- you would welcome him and have him at the church
7 and your home, if he needed, as well; right?

8 MS. KRIEGER: Objection. Leading.

9 THE COURT: Sustained.

10 BY MR. ALSAFFAR:

11 Q. Would you also let Devin Kelley know that he was welcome
12 at the church?

13 A. Yes.

14 Q. And can you let the Court know why you did that.

15 A. Try to get him closer to God.

16 Q. Was one of the reasons also that you wanted Danielle to
17 feel that family, that church family as well?

18 MS. KRIEGER: Objection. Leading.

19 THE COURT: Sustained.

20 MR. ALSAFFAR: Let me ask it a different way.

21 BY MR. ALSAFFAR:

22 Q. You said you wanted Devin to feel closer to God.

23 What about your daughter after she was married?

24 A. I don't think she ever strayed away from God. She just
25 didn't have the opportunity.

1 Q. What do you mean by that?

2 A. By him controlling her.

3 Q. Are you talking about --

4 A. Devin.

5 Q. -- Devin? Okay.

6 And when you said "by controlling her," can you tell us
7 what your understanding of that was?

8 A. He always controlled every situation. We weren't allowed
9 to talk together unless it was speakerphone. And if he didn't
10 like what we were saying, he would hang up the phone. And he
11 would take away her phone or her iPod and stuff if he didn't
12 want her calling me, thinking that she was going to call me
13 when he was away.

14 Q. Did that ever happen to Danielle before, in your
15 experience?

16 A. No, sir.

17 Q. Was she ever surveilled by whoever she was with whenever
18 you talked to her?

19 A. No, sir -- well, can you explain that one more time?

20 Q. Oh, sure. When I said "surveilled," I mean monitored.

21 I think you said that when you would call when -- the few
22 times you could call Danielle, he would be there listening on
23 the speakerphone?

24 A. There was another incident that happened, and it wasn't
25 Devin that was there. So it was the day of the shooting.

1 Q. I'll get to that. I'm sorry. I apologize. That's my
2 fault.

3 A. Okay.

4 Q. I was not clear. I'm really sorry about that.

5 I'm just talking about before --

6 A. I didn't want to say "no" when it did happen.

7 Q. No. Of course. Of course. And I appreciate that. Any
8 time you're not sure about what I'm asking, that's my fault,
9 you just tell me and I'll fix it.

10 A. Okay.

11 Q. So I'm asking about sort of the years leading up -- after
12 they were married and not the time -- not exactly the time of
13 the shooting. We'll talk about that in just a second. I'm
14 just talking about sort of generally leading up.

15 You said that when you tried to communicate or talk with
16 Danielle that he would always be listening on the
17 speakerphone?

18 A. Yes.

19 Q. And that's what I meant, that he was surveilling or
20 listening and --

21 A. Yes.

22 Q. Okay. All right. And I'll get to that in a little more
23 detail. But I want to ask you actually about your church
24 pastor, Pastor Pomeroy.

25 When she was an adult and then married to Devin Kelley,

1 would the church and its pastor -- Pastor Pomeroy,
2 specifically -- would they be there for her if she ever needed
3 anything, Danielle?

4 A. Yes, sir.

5 Q. Okay. What was the relationship -- in your understanding,
6 based on your experience with Danielle and Pastor Pomeroy,
7 what was that relationship like when she was an adult and
8 about the time she was married to Devin?

9 A. They really didn't have a close relationship after she got
10 married because she wasn't around, but he always treated her
11 like a daughter.

12 Q. And I understand you didn't have much of a relationship
13 with Danielle after she married Devin because he wouldn't
14 allow it; is that right?

15 A. Yes.

16 Q. Okay. He did the same thing with the pastor; correct?

17 A. Yes, with everyone.

18 Q. And you said Pastor Pomeroy treated Danielle like a
19 daughter.

20 Is that what you said?

21 A. Yes.

22 Q. Okay. And that was how he treated her before she married,
23 Danielle, and after, if he could?

24 A. Right.

25 MS. KRIEGER: Objection. Leading.

1 THE COURT: That's sustained.

2 BY MR. ALSAFFAR:

3 Q. Did Pastor Pomeroy treat Danielle like a daughter before
4 and after she got married to Devin Kelley?

5 A. Yes.

6 Q. Can you tell the Court whether or not you ever confided in
7 Pastor Pomeroy about any concerns and that you had that
8 Danielle was going through with Devin Kelley?

9 A. I may have gone to him and talked about concerns with him,
10 so...

11 Q. And that's what I'm -- do you remember whether or not
12 after -- and I want to be clear of the time period.

13 After Danielle married Devin Kelley, do you recall from
14 time to time whether or not you would seek counsel from Pastor
15 Pomeroy and talk to him about those troubles you saw and were
16 worried about in Danielle's marriage to Devin?

17 A. Yes, sir.

18 Q. You do?

19 A. I would think so, yes.

20 Q. Okay.

21 A. I don't remember a whole lot, but I would think so because
22 he was like a brother to me.

23 Q. Okay. That's all I'm asking.

24 So would Pastor Pomeroy have been aware of some of the
25 mistreatment that Devin was visiting on your daughter during

1 their marriage, based on your counseling with him?

2 A. I'm sure, yes.

3 Q. Okay. Ms. Shields, did you know that your pastor, the
4 head of the church, the Sutherland Springs church, confronted
5 Devin Kelley about what he had learned regarding Devin
6 Kelley's treatment of your daughter?

7 A. No, I wasn't aware of that.

8 Q. I'm going to play you an interview clip just of Pastor
9 Pomeroy, an interview he gave to the Texas Rangers after
10 the -- this horrible event about this issue.

11 If we could play JEX 5282.

12 MS. KRIEGER: Objection. Your Honor, the witness
13 just stated she wasn't aware of the conversation that Pastor
14 Pomeroy had with Mr. Kelley.

15 THE COURT: Yeah. So what's the purpose of this?

16 MR. ALSAFFAR: Your Honor, she said that she had
17 expressed in counsel with Pastor Pomeroy about concerns she
18 had. And this is just Pastor Pomeroy confirming that that
19 did, in fact, happen and that he did, in fact, confront Devin
20 Kelley before the shooting about his domestic abuse of his
21 daughter.

22 THE COURT: I understood the question that you were
23 asking Ms. Shields here, whether she confided with the pastor
24 about Danielle.

25 MR. ALSAFFAR: She did, and she said she did.

1 THE COURT: Right.

2 MR. ALSAFFAR: And this is -- I wanted to ask her
3 about some of the comments he had made about confronting Devin
4 Kelley.

5 MS. KRIEGER: But, Your Honor, she just stated she
6 didn't know that the pastor had confronted Devin Kelley.

7 MR. ALSAFFAR: Well, that's right. That's exactly
8 why we're playing it. It's an interview he gave with the
9 rangers, not with her.

10 THE COURT: I'll take this one step at a time.

11 Go ahead.

12 MR. ALSAFFAR: If you could play Clip 213 to 231.

13 (Clip was played.)

14 MS. KRIEGER: Your Honor --

15 BY MR. ALSAFFAR:

16 Q. Ms. Shields, I have a couple questions about --

17 THE COURT: One second. You have to wait for a
18 question.

19 BY MR. ALSAFFAR:

20 Q. I just have a couple questions about that.

21 First of all, Pastor Pomeroy -- so this was another person
22 at your family church who knew about Devin's treatment of
23 Danielle and confronted him about it; is that right?

24 A. I guess. I didn't know that he had confronted Devin about
25 it.

1 Q. And when you heard Pastor Pomeroy, did you hear that part
2 where he was talking about how Devin Kelley reacted to him
3 after that, and he would make snide remarks?

4 Do you remember that? We just played that part.

5 A. Yes.

6 Q. Okay. Do you ever see -- I just don't know, but did you
7 ever happen to see in the, you know, year or so prior to the
8 shooting, Pastor Pomeroy have any interaction with Devin
9 Kelley just in the church whenever he -- the few times he
10 would come?

11 A. I don't recall. I don't remember.

12 Q. Okay. Now, as far as Pastor Pomeroy -- I know this might
13 seem like an obvious question, but I just don't know -- was he
14 usually there on Sundays at the head of the pulpit?

15 A. Yes, sir.

16 Q. Okay. Some ministers sort of travel around. They're not
17 always there.

18 But was he regularly there at the head of the pulpit
19 almost every Sunday at the church?

20 A. Except for if he had an event to go to or he had another
21 speech or something to go to.

22 Q. And did you expect him to be at the church -- at the
23 pulpit on November 5th, 2017?

24 A. No. We knew that he was going to be gone.

25 Q. All right. So he told the church before that Sunday

1 that -- the members of the church that he had another event he
2 had to be at?

3 A. Yes, sir.

4 Q. Okay. How did he tell the church members that? Was it at
5 the previous sermon, or was it just in the days leading up; if
6 you remember?

7 A. I don't recall. But we always had meetings and Bible
8 studies during the week, and he could have said it during each
9 one of those. I don't recall how. But I talked to him on a
10 daily basis when I could.

11 Q. Okay. And you didn't relay that information to Danielle
12 or Devin that week, that he may not be there that week at the
13 head of the pulpit?

14 A. No, sir.

15 Q. Okay. How are you doing? You okay?

16 All right. I want to talk a little bit about your mother,
17 and I know it's difficult. But would you mind just describing
18 your mother a little bit for us.

19 A. She was a fun-loving mom.

20 Q. So --

21 A. She just enjoyed life and was always there for everybody.
22 If you needed her, she was right there for you. Everybody
23 loved her, liked her. She was a grandma to most everybody
24 there at the church. She was a mom to the pastor and his
25 wife. She treated them like her kids, and they were like my

1 brother and sister.

2 And it was just -- she's just a great person. She always
3 volunteered for different things. She didn't put herself
4 first. She put everybody else first.

5 THE COURT: Why don't we have counsel come up.

6 MR. ALSAFFAR: Yes.

7 Sidebar, Your Honor?

8 THE COURT: Yes. Over here.

9 (At the bench.)

10 I don't want to be insensitive here, but what's the
11 relevance of these questions?

12 MR. ALSAFFAR: Oh, no, we're not going to take long.
13 It's just to establish the predicate that she was well known
14 in the community, in the church, and not digging into any deep
15 background.

16 THE COURT: I'm not going to allow any more questions
17 on this. You need to move on.

18 MR. ALSAFFAR: Okay. No problem, Your Honor. Thank
19 you.

20 (Open court.)

21 BY MR. ALSAFFAR:

22 Q. Ms. Shields, are you ready?

23 A. Um-hum.

24 Q. Okay. I want to ask you about Lula and Danielle's
25 relationship.

1 Did they have a close relationship?

2 A. Yes.

3 Q. Okay. Can you tell us a little bit about that.

4 A. They were always together, spending time together. They
5 had the same interest in arts and poetry, and they just always
6 spent a lot of time together. They had a loving relationship.

7 Q. And did Devin Kelley know that Lula, your mother, and
8 Danielle had a very loving and close relationship?

9 A. Yes, sir.

10 Q. Okay. Would he have known that — well, let me ask you
11 the question.

12 If Danielle needed anything from her grandmother, your
13 mother, from Lula, would she have dropped everything and been
14 there for her if she needed something?

15 A. Yes, sir.

16 Q. Did Devin Kelley know that about your mother?

17 A. I would think so.

18 Q. That's based on your own observation and interaction with
19 Lula, Devin, and Danielle. Is that fair to say?

20 A. Yes, sir.

21 Q. Okay. In fact, do you remember when Danielle had her
22 first two children, your grandkids?

23 A. Yes, sir.

24 Q. Where was Danielle when that happened?

25 A. For the first child, in Colorado.

1 Q. And the second.

2 A. And the second one, in San Antonio.

3 Q. And I'll talk about it a little bit later, but the first
4 child in Colorado, where were you and Lula living at that
5 time?

6 A. In her house, at the same property in Sutherland Springs.

7 Q. And where was Danielle in Colorado?

8 A. She was in Colorado Springs.

9 Q. So when she had her first baby, you and your mother Lula
10 went to Colorado Springs to be there?

11 A. She wanted me to be there and my mom with her.

12 Q. She wanted your mom to be there too?

13 A. Yes, sir.

14 Q. And when you say "she," you mean Danielle wanted both you
15 and Lula to be in Colorado with her when her first child was
16 born?

17 A. Yes, sir.

18 Q. Did you both go?

19 A. Correct.

20 Q. Did you drive? Did you fly?

21 A. No. We drove.

22 Q. Okay. So when Danielle asked you to be there and -- you
23 and Lula to be there for her, you guys were willing to get in
24 the car and drive multiple states to get there to be with her;
25 is that fair?

1 A. Yes.

2 Q. Is that just the kind of relationship that you, Danielle,
3 and Lula White had?

4 A. Yes, sir.

5 Q. Devin knew that? Did he know that?

6 A. Yes, sir.

7 Q. I want to ask you just a very little bit about a prior
8 marriage you had, and I know it's difficult. It's about
9 Donald Brassfield. And I won't spend a lot of time on it.
10 But it's been brought up, and I would like to ask you a few
11 questions, if that's okay.

12 You were married -- Donald Brassfield is your ex-husband;
13 right?

14 A. Yes, sir.

15 Q. Can you tell us when you were married to him.

16 A. From '86 to 2007.

17 Q. Okay. Can you just tell us your understanding of what
18 happened between him and Danielle.

19 A. I wasn't aware of it until after the divorce, but he had
20 sexually assaulted her as a child.

21 Q. Okay. Can you tell the Court what you did to protect
22 Danielle when you found that out?

23 A. Yes. The school had called me. And when I found out the
24 news, I immediately took her to the police department. And we
25 proceeded with two different police departments because he

1 lived in Guadalupe County and I lived in Wilson. Neither one
2 of them wanted to take the case.

3 And so I kept insisting that we go between both, you know,
4 to try to get something done between both counties.

5 Q. You took -- you went to both police departments. You
6 said, "I kept insisting."

7 Can you tell us a little more detail about that.

8 A. Yes. Because I didn't have any evidence to show, and so
9 Guadalupe County actually did a videotape where they sent
10 Mr. Brassfield -- where Danielle called him, and he apologized
11 to her for ever hurting her and admitted to what he had done
12 to her.

13 But then the judge said it wasn't enough evidence, and so
14 they dismissed it and no-billed. And it was very
15 heartbreaking because I couldn't keep her away from him with
16 that being no-billed.

17 Q. And that -- both prosecutions, they didn't go forward with
18 it?

19 A. No. So I then hired an attorney.

20 Q. So that didn't stop you from protecting Danielle; is that
21 right? You didn't stop?

22 A. Right.

23 Q. Can you tell us what you did then when the prosecutors
24 wouldn't go after him?

25 A. I hired an attorney, and I was -- I put up a -- oh, I

1 can't even think right now -- to where he couldn't have any
2 rights around her. I can't think right now. Sorry.

3 Q. That's okay.

4 A. Just nervous.

5 But when we put up the -- to where he couldn't come around
6 or anything or see her, then he got mad. And I was talking to
7 him and convinced him to turn over his parental rights, and so
8 he signed over his parental rights so that -- I guess he -- I
9 don't know. He was just convinced to do it.

10 Q. Was it hard to get that done even though the prosecutors
11 wouldn't go after him?

12 A. Yes, it was.

13 Q. How did you find out about that? What was going on with
14 Danielle and your ex-husband?

15 A. She had gone to a counselor at school and -- after we were
16 divorced. And they called me, and I went up there immediately
17 and was talking to him. And I was, of course, in shock that
18 it ever happened, so...

19 Q. Did you hesitate to protect her the moment you found out?

20 MS. KRIEGER: Objection. Leading.

21 MR. ALSAFFAR: I'll rephrase.

22 BY MR. ALSAFFAR:

23 Q. How long did you take to help protect your daughter when
24 you found out?

25 A. I went from the school to the police department

1 immediately.

2 Q. What were you trying to demonstrate to Danielle, as her
3 mother, when you found out that -- what had happened to her
4 even though, you know, you failed at first to get the
5 prosecutors to move forward, were you trying to demonstrate or
6 model something for her?

7 A. Yeah. She shouldn't put up with any of that and that --
8 that it's not right and that you have to go forward and try to
9 do something about it or they're going to keep doing it.

10 Q. Did Danielle -- based on your knowledge, did she learn in
11 that time that you would do anything to protect her or fight
12 for her if she needed it?

13 A. Yes, sir.

14 Q. I'm going to go back a little bit to what we started
15 talking about in terms of the marriage, what the marriage
16 between Devin Kelley and Danielle was like based on what you
17 saw.

18 Was he controlling of her?

19 A. Yes, sir.

20 Q. Can you give the Court some examples, to the best of your
21 memory, of what types of things -- you'd mentioned the phone
22 thing, but can you talk about what types of things that Devin
23 Kelley would do to control her?

24 A. When they lived with us when they came back from Colorado,
25 I'd asked her to go to the grocery store with me. And he said

1 that he had to go also. He wouldn't let us go together. He
2 had to be present at all times.

3 And he just was always telling her what to do, how to do
4 it. And he was always -- and he was even telling us at some
5 points. And if he didn't agree with what we were having for
6 dinner, he had a hissy fit. And so I told him I would fix him
7 what he wanted to eat; he didn't have to eat what we were
8 eating.

9 Q. There was a few weeks of -- in time where, actually,
10 Mr. Kelley -- Devin Kelley and Danielle lived with you and
11 Mr. Shields; is that right?

12 A. Yes, sir.

13 Q. When was that?

14 A. When they moved back from Colorado.

15 Q. And how long did they live there?

16 A. I would say no more than five weeks or so.

17 Q. Did Devin Kelley, when he was living in your house --
18 well, let me back up a little bit.

19 So was that an occasion where -- you know, why were they
20 living with y'all? Were y'all trying to help them out?

21 A. They asked if they could come stay with us until they got
22 a place. And, of course, I opened -- you know, open arms,
23 so...

24 Q. How was Devin when he was living with you? How were his
25 interactions with you and then your husband, Mr. Shields?

1 A. He was very standoff-ish. He was always picking on my
2 son.

3 Q. Your son -- can you tell us about your son's condition?

4 A. My son is autistic and ADHD and bipolar, and he has
5 control of it with his medicine and stuff. But Devin was
6 always picking on him and making fun of him.

7 Q. Is this David Shields?

8 A. Yes.

9 Q. David also regularly attended the Sutherland Springs
10 church; right?

11 A. Yes, sir.

12 Q. Okay. And you said he would bully and pick on your son?

13 A. Yes, sir.

14 Q. How did your husband feel about that?

15 A. He was upset, I think.

16 Q. Did he --

17 A. I think he would confront Devin about picking on David,
18 and he would always point the finger at David.

19 Q. Okay. So your husband, Ben Shields, had confrontations
20 with Devin about the way Devin treated the family?

21 A. I wouldn't say "confrontation." He did talk to him about
22 it.

23 Q. All right. Did he try to -- when you say he talked to him
24 about it, would he try to get Devin to treat the family
25 better?

1 A. Yes, sir.

2 Q. Okay. What was the reason he -- Devin and Danielle left
3 the house five weeks later?

4 A. Because we told him he had a certain amount of time to get
5 a job, and he wasn't looking for a job. So -- and then he got
6 mad because we told him to look for a job.

7 Q. Um-hum. When he was staying with you and Mr. Shields --
8 when he and Danielle were staying with you, did he have a gun?

9 A. He had a handgun, and we asked him not to have it on the
10 property. So he had told me he had taken it to his dad's
11 house.

12 Q. So he would bring the gun onto your -- into your house?

13 A. He did, yes.

14 Q. Where did he wear it? Was it -- you said it was a
15 handgun. Did he wear it on his person?

16 A. Yeah. His back.

17 Q. His backside, like here?

18 A. Yes, sir.

19 Q. Okay. Did he do that regularly?

20 A. As far as I know.

21 Q. Devin -- was Devin very subtle about having a gun and
22 carrying it around, in your experience?

23 A. I just knew that he had it, and he talked about guns and
24 stuff. But I only knew of the one gun that he had, and we
25 told him just not to bring it on the property.

1 Q. Okay. And the reason I'm asking, you said you always knew
2 that he had it.

3 How did you always know that he had, you know, that gun on
4 his side?

5 A. He always talked about it.

6 Q. Okay. He wouldn't try to conceal the fact that he was
7 wearing a gun on him?

8 A. He didn't conceal it, but it was never showing, really.

9 Q. And that's a good point. I meant not physically.

10 He wouldn't hide -- he would tell people openly, "I've got
11 a gun"?

12 A. Yes, sir.

13 Q. Okay. And at that time, you didn't know that he was a
14 felon who -- it was a felon -- a felony for him to have that
15 gun? You didn't know that?

16 A. No. Correct.

17 Q. And you had mentioned that after he left -- he and
18 Danielle left, do you know where they went to, where they
19 moved?

20 A. I'm not sure exactly where they went at first, but I know
21 that they ended up at his parents' house.

22 Q. Okay. Michael and Rebecca Kelley? Is that who you're
23 referring to?

24 A. Yes.

25 Q. Okay. Thank you.

1 And this is the 2015 time frame?

2 A. I think so, yes.

3 Q. Okay. Is that when -- you mentioned earlier that Devin
4 would isolate Danielle from your family.

5 Am I characterizing that correctly?

6 A. Yes, sir.

7 Q. Okay. Is that -- from that time toward when they left,
8 did that -- Devin Kelley trying to isolate her from your
9 family, did that sort of increase over the time leading up to
10 the shooting?

11 A. It was back and forth during our relationship. But at the
12 very end, it had decreased when the other child was born.

13 Q. Do you remember in 2015, a time when Danielle texted you
14 or reported to you that she was being abused by Devin?

15 A. She sent me some pictures showing that -- where he had
16 made bruises on her, and said that he was hurting her.

17 Q. She sent you text pictures of Devin --

18 A. She emailed them to me.

19 Q. Okay. That was risky for her to do that; wasn't it?

20 A. Yes, it was.

21 Q. Can you tell us why.

22 A. So she just wanted me to have them in case something ever
23 happened to her. And I told her that we would always be
24 there, just say when and we'd be there to pick her up, her and
25 Michael at that time.

1 Q. You told her, as far back as 2015, that all you have to do
2 is say when and you'd be there for her right away?

3 A. Yes, sir.

4 Q. But she wasn't allowed to talk to you very much, was she?

5 A. No, sir.

6 Q. And every time you did -- you were allowed to talk to her,
7 at least on the phone, like, talk on the phone, Devin was
8 there?

9 A. Yes, sir.

10 Q. When you told her that -- when you let her know that, when
11 she was being hurt by Devin, when you let her know that you
12 would be there for her anytime in a moment's notice, did you
13 mean that?

14 A. Of course, I meant it.

15 Q. Was Devin Kelley aware of how close you were to Danielle
16 when he was married to her?

17 A. I would think so.

18 Q. Why would you think so?

19 A. Because he knew that I loved her.

20 Q. Did Devin Kelley ever just make -- sort of make up excuses
21 about conflicts with you that didn't really exist just to keep
22 Danielle away from y'all?

23 A. Yes, sir.

24 Q. Can you give me your explanation of what that means.

25 A. For instance, on -- when the second baby was born, he

1 would say that there was conflict, that -- not to insert
2 ourselves between their family. And we never did.

3 And I just showed up at the hospital because she'd asked
4 me to, my mom and I, when the second child was born. And then
5 he got all mad because we were at the hospital. Then he said
6 I was inserting myself between him and the family.

7 Q. Do you mind if -- I actually want to back up just a little
8 bit because I want to talk about that because I think the
9 second baby -- do you remember when your -- is this your --
10 the year, do you remember when Danielle's second baby was
11 born?

12 A. 2016, I believe. Yes. Or 2017. I'm sorry.

13 Q. That's okay. That's okay.

14 A. 2017 in May.

15 Q. May 2017. All right.

16 I want to talk about that in just a second, but I want to
17 back up, actually, same year, 2017, about another event, if
18 you don't mind.

19 Do you remember your son's birthday party the same year
20 but a few months before that in March of 2017?

21 A. Yes, sir.

22 Q. Okay. If you don't mind, I'm just going to walk right
23 here to this board.

24 A. Okay.

25 Q. When is your son's birthday?

1 A. March 2nd.

2 THE COURT: You can relocate if you want.

3 BY MR. ALSAFFAR:

4 Q. Okay. If you don't mind, can you tell us, did you have a
5 birthday party for your son?

6 A. Yes. It was just family at the time. So -- and it was my
7 mom, my mother-in-law, my husband, myself, my son, and Devin
8 and Danielle and Michael.

9 Q. I'm sorry. I didn't hear everybody who was there at the
10 time. You said --

11 A. It was Devin, Danielle, Michael, my grandson, and then my
12 mom, my mother-in-law, my husband and I, and David.

13 Q. Okay. And David?

14 A. Yes. It was his birthday.

15 Q. Okay. Right. That was David's birthday. Okay.

16 Was this the son who Devin would pick on and bully?

17 A. Yes, sir.

18 Q. Okay. And did you -- did I hear you correctly? You said
19 your mother-in-law was there as well?

20 A. Yes, sir.

21 Q. Okay. Can you tell me what happened at that event,
22 March 2nd, 2017?

23 A. We had gotten my son a hoverboard, and everybody was
24 taking turns on it, just playing around. And we told Devin to
25 get on it and try to see, you know, how he did on it. And my

1 mother-in-law had made a comment, just playing around, like
2 you know, you're being a show-off, you know, because he was
3 doing really good on it.

4 And he didn't like that. He thought that she meant it in
5 another way, I guess, and turned it all around. And he said
6 it was time for them to go. And he asked me to go out on the
7 front porch to talk to them, and I went out there.

8 And he goes, "We're leaving now because I don't like how
9 she talked to me."

10 And I said, "Well, she didn't mean anything by it. She
11 was just saying that you were good at it, showing off because
12 you were better than everybody else."

13 And she came out there and -- she wasn't living with us at
14 the time, and she came out there and said, "Well, I'm going to
15 go ahead and go." And she went up to give him a hug, and she
16 didn't know that he had really taken it that way. And he just
17 pushed her away.

18 Q. What did your husband do when he saw that?

19 A. My husband was very upset that he treated her that way.
20 And he told him not to treat his mother that way and not to
21 come back if he was going to be treating people that way.

22 Q. So this was another family member of yours that -- and
23 Danielle's that Devin Kelley would mistreat, your
24 mother-in-law?

25 A. Yes, sir.

1 Q. And do you remember you gave an interview -- and I know
2 this is hard -- the day of the shooting to the Texas Rangers
3 and you talked about this.

4 Do you remember that?

5 It's okay if you don't. I can play it for you if you
6 don't.

7 A. I don't remember having the interview. But I remember
8 that I was talking to somebody, but I don't remember
9 everything that I said in the interview.

10 Q. That's okay. Would it help you remember if I played it
11 for you?

12 A. Yes, sir.

13 Q. Okay. And then I can ask you about it.

14 If we could, what I'm going to do is we're going to
15 play -- it's an audio clip, JEX 598, just real short. It's
16 12:20 to 12:37. It's going to play over the audio system.
17 And when it's done, I'll just ask you a couple quick
18 questions.

19 Go ahead.

20 (Clip was played.)

21 BY MR. ALSAFFAR:

22 Q. Ms. Shields, the Ben that you were talking about in that
23 audio clip -- did you hear that -- could you hear that okay?

24 A. Yes, sir.

25 Q. Okay. The Ben that you were talking about, that's your

1 husband?

2 A. Yes, sir.

3 Q. Okay. And you told the Texas Rangers that Ben stepped in
4 when Devin Kelley attacked your mother-in-law.

5 That's the phrase you used?

6 A. Well, I don't remember saying "attacked," but he did shove
7 her.

8 Q. Okay. I'm asking, in that clip, when you were describing
9 that, you used the word "attacked."

10 Did you hear that?

11 A. I did, but I don't recall saying that.

12 Q. Oh, that's okay.

13 A. Okay.

14 Q. That's okay. I just wanted to make sure that I heard it
15 correctly, that we accurately heard you telling the Texas
16 Rangers that at the time you were describing it as him
17 attacking your mother-in-law.

18 Is that accurate?

19 A. Yeah, according to the audio.

20 Q. And that's what you were describing a few minutes ago when
21 you said your husband stepped in to protect your
22 mother-in-law --

23 A. Yes, sir.

24 Q. -- from Devin Kelley?

25 A. Yes, sir.

1 Q. All right. And that was at your house; right?

2 A. Yes, sir.

3 Q. Did you do a fair amount of events at your house that
4 included the church family members?

5 A. Yes, sir.

6 Q. Was it kind of one big church family at Sutherland Springs
7 church?

8 A. Yes, sir.

9 Q. Can you tell us a little about some of those gatherings
10 you would regularly have for the church at your house?

11 A. We always had Thanksgiving and Christmas at our house, and
12 everybody was welcome to come. And the family members at the
13 church who didn't have a place to go would always come over.
14 And we would welcome everybody with open arms, and we were
15 just one big family.

16 And then on my husband's birthday, which is New Year's
17 Eve, we always had a big get-together at the house. And
18 everybody would come over from the church that could make it.
19 A lot of them were close friends from the church.

20 Q. A lot of those people that were at those gatherings, were
21 they killed by Devin Kelley?

22 A. Yes, sir.

23 Q. I want to ask you about -- are you okay? Do you need a
24 break?

25 A. I'm okay.

1 Q. Are you okay?

2 A. Yeah.

3 Q. I'm going to ask you -- do you remember the second event
4 you talked about -- I want to get this right -- May 26th,
5 around that time, 2017. I want to ask you about that.

6 That's --

7 A. May 26th?

8 Q. Yeah, when your second grandbaby was born.

9 A. Okay.

10 Q. Okay. What happened in this time frame, May 25th and 26th
11 of 2017?

12 A. Danielle had wanted my mother and I to be there when the
13 second child was born. And they had said that when she had
14 her epidural, that they would call us and that we could go up
15 there and be with her.

16 And so we were going out and doing errands and stuff that
17 day, and Devin had texted saying that she had an epidural. So
18 we said, "We're on our way."

19 And when -- he said, "No, not now."

20 And we were like, "We're just going to be in the waiting
21 room until we're ready." My mom was texting for me, because I
22 was driving. And she had offered to get him some food also.
23 And then he said he wasn't playing around, that -- you know,
24 we'd like to show up, but we went to the waiting room waiting
25 to see. And he said that since we -- he never talked to us;

1 he just did texts. He said that since we disrespected his
2 wishes, that we were not going to see my daughter, so -- or
3 the baby.

4 Q. Do you remember when we were talking about, gosh, a few
5 minutes ago the first time in Colorado when Danielle had the
6 first grandbaby? Do you remember that?

7 A. Yes, sir.

8 Q. And I believe you said you and your mom Lula drove up to
9 Colorado?

10 A. Yes, sir.

11 Q. That hospital event with Danielle's first baby, was there
12 a confrontation that first time you went to help with the
13 baby?

14 A. Yes. It was with Danielle during the pregnancy. We were
15 in a trailer, and she started running a fever. And I told her
16 that, you know, we needed to bundle her up because it was cold
17 outside. We didn't want to put her in ice or nothing, that we
18 would try to sweat it out of her so that way it wouldn't harm
19 the baby or anything. He got mad and said that he was calling
20 his mom, which is in a different state, and asked us to leave
21 because he didn't want me interfering and trying to take care
22 of Danielle.

23 Q. Your mom as well, Lula White, was there?

24 A. Yes.

25 Q. So he -- even though you drove all the way up from Texas,

1 he abruptly told you to leave?

2 A. Yes.

3 Q. Let me ask you now about this event in 2017 -- in May of
4 2017.

5 I think you told us this was when Danielle was giving
6 birth, I believe you said, in San Antonio?

7 A. Yes, sir.

8 Q. And y'all knew -- and, again, you and your mom Lula White
9 went to the hospital because she asked you to come be with her
10 when she had her second child?

11 A. Yes.

12 Q. That's all that was. Nothing big. It's what moms and
13 grandmas do all the time.

14 A. Yes, sir.

15 Q. And y'all wanted to be there with her and for her again?

16 A. Yes.

17 Q. What happened?

18 A. Well, he wouldn't let us see her or the child. And then
19 he started sending threatening messages to me and said that if
20 I didn't obey him, that he would resolve my family, and
21 just --

22 Q. You said he sent you threatening messages?

23 A. Yes.

24 Q. And you said -- what do you mean, "threatening messages"?

25 A. That he would resolve my family, like, take care of us.

1 And he was always that way. Like, in Colorado, he got mad and
2 kicked us out. We went to a hotel room. And the next day, he
3 showed up and jumped on the bed like nothing was happening and
4 wanted to go sightseeing.

5 So I just thought, well, he'll get over it again tomorrow
6 and, you know, it will be a different day.

7 Q. He didn't, though; did he?

8 A. No.

9 Q. Okay. I'm going to ask you about those threats in May of
10 2017, specifically, because it's important. I just played you
11 an audio clip with the officer -- law enforcement ranger that
12 interviewed you on the day of the shooting.

13 Do you remember that you also talked to him about these
14 threats and read your phone texts -- the specific texts that
15 were on your phone referring to this day?

16 A. I didn't quite remember that until I was showed it.

17 Q. Well, would it help you if I showed it to you again?

18 A. That's fine.

19 Q. Okay. If we could, what I'd like to do is, just like with
20 the other audiotapes, you're going to hear yourself -- it's
21 kind of weird, I know. You're going to hear yourself come
22 through.

23 If we could play Joint Exhibit 598 and Clip 11:24 to
24 12:32.

25 (Clip was played.)

1 BY MR. ALSAFFAR:

2 Q. So the text that Devin Kelley sent you is May 2017. I'm
3 just going to put "MS" for Michelle, for you, Michelle
4 Shields.

5 He said he would destroy your entire family; is that
6 right?

7 A. Yes, sir.

8 MR. ALSAFFAR: Your Honor, we'd like to mark this as
9 just a demonstrative for -- preserve it for demonstrative
10 purposes in closing. It's Plaintiffs' Exhibit C.

11 THE COURT: I've already taken the notes, so don't
12 worry about it.

13 MR. ALSAFFAR: Okay. Could you put up the text
14 messages again, please. Thank you.

15 BY MR. ALSAFFAR:

16 Q. Ms. Shields, can you see that on your screen okay?

17 A. Yes, sir.

18 Q. Okay. In those messages he was sending to you, do you
19 note there on the -- we're looking at the one on the right,
20 May 26th, 2017, he mentions you, Ben, or Nana.

21 Do you see that part?

22 A. Okay.

23 Q. We're going to highlight it for you.

24 Okay. And I'm just going to -- just because I want to
25 make this very clear on the record, when Devin Kelley sent

1 this text to you that he would destroy your entire family, and
2 he's referencing you, Ben, or Nana, Ben is Ben Shields; is
3 that right?

4 A. Yes, sir.

5 Q. And "Nana" is your mother, Lula White?

6 A. Yes, sir.

7 Q. And all three of you, along with your son that he picked
8 on and bullied, were regular attendees at Sutherland Springs
9 Baptist Church; is that right?

10 A. Yes, sir.

11 Q. And he knew that? Devin Kelley knew that; didn't he?

12 A. Yes, sir.

13 Q. And you told -- do you remember telling the Texas Rangers
14 that you felt like you were the target or your family was the
15 target of Devin Kelley in the shooting?

16 Do you remember saying that?

17 A. Yes, sir.

18 Q. Can you tell the Court why you said that.

19 A. Well, just after learning about -- I didn't really think
20 it was domestic violence that he was doing before. But after
21 the shooting and looking back at all of his behavior and
22 everything, I just assumed that that's what he was doing was
23 coming after us. And my -- I found out later that my daughter
24 had asked for a divorce, and I would think he was coming to
25 get rid of us so that we -- she couldn't have a place to go.

1 That's the only thing I could think of as the reason why he
2 would do that.

3 Q. And you mentioned the divorce.

4 In the months -- the weeks and the months right after the
5 shooting, did Danielle tell you that I -- that she had told
6 Devin Kelley that she wanted a divorce?

7 A. She told me after the shooting.

8 Q. And that was in the weeks or months after the shooting?

9 A. Yes, sir.

10 Q. Okay. And, Ms. Shields, if Danielle -- if Danielle needed
11 you at a moment's notice to watch her kids and help her get a
12 divorce from Devin Kelley, even if it was on a moment's
13 notice, would you have done that without asking any questions?

14 A. Yes, sir.

15 MR. ALSAFFAR: Your Honor, we pass the witness.

16 THE COURT: Any questions for this witness?

17 MS. KRIEGER: I would ask Mr. Alsaffar to take down
18 his demonstrative.

19 MR. ALSAFFAR: Where would you like me to move it?

20 MS. KRIEGER: Somewhere --

21 THE COURT: Just remove the sheet.

22 MR. ALSAFFAR: Can I just flip it over?

23 THE COURT: Just remove it.

24

25

1 CROSS-EXAMINATION

2 BY MS. KRIEGER:

3 Q. Good morning, Ms. Shields. My name is Jocelyn Krieger.

4 I'm representing the United States in this action.

5 You and I met before. You may recall I took your
6 deposition.

7 A. Yes, sir -- I mean, yes, ma'am. I'm sorry.

8 Q. And I haven't spoken to you other than at that deposition
9 that day; correct?

10 A. Correct.

11 Q. Did you review any of the media coverage of yesterday's
12 testimony?

13 A. No, ma'am.

14 Q. You didn't read or watch anything?

15 A. No, ma'am.

16 Q. Now, Danielle gave you a call on October 30th, 2017; is
17 that right?

18 A. October 30th.

19 Q. The 30th, the day before Halloween.

20 A. Oh, yes. Um-hum.

21 Q. And she asked if she and Devin could come to the fall fest
22 at the church the next day?

23 A. Yes, ma'am.

24 Q. Now, that was a surprise to you; right?

25 A. Very.

1 Q. And that's because you hadn't actually had any
2 conversation with Danielle or Devin for several months?

3 A. Yes, ma'am.

4 Q. And back when you did speak with them, Devin controlled
5 all of the conversations; right?

6 A. Yes.

7 Q. You told Mr. Alsaffar he was always on speakerphone when
8 you talked to Danielle?

9 A. Yes, ma'am.

10 Q. In fact, in all the years that Danielle was married, you
11 never spoke to Danielle without him listening?

12 A. She did try to, with her laptop, send messages and stuff
13 without him being there.

14 Q. But if Devin found out about those conversations --

15 A. Then he would get upset.

16 Q. -- would he take away the laptop?

17 A. Yes.

18 Q. And at other times, he would just prevent her from talking
19 to you for months at a time?

20 A. Yes, ma'am.

21 Q. And when you were talking to them, if he didn't like what
22 you were talking about, he would hang up the phone?

23 A. Yes, ma'am.

24 Q. In fact, you tried to avoid a lot of subjects because he'd
25 get upset?

1 A. Yes.

2 Q. And sometimes even in the middle of the conversation, he'd
3 take the phone away from her?

4 A. Yes, ma'am.

5 Q. And in all the years that they were married, you were
6 never alone with Danielle?

7 A. Correct.

8 Q. Even when they lived with you?

9 A. Correct.

10 Q. There was only one time you thought that Devin was
11 physically abusing Danielle; right?

12 A. Well, the pictures that she sent me.

13 Q. Right. That was what we -- you just talked about with
14 Mr. Alsaffar, in around 2015 when Danielle sent you the
15 pictures of the bruising?

16 A. Yes, ma'am.

17 Q. And when she did that, you asked her if she was hurt;
18 right?

19 A. Yes, ma'am.

20 Q. You asked her if you needed to come get her?

21 A. Yes, ma'am.

22 Q. You asked her if you needed to call the police?

23 A. Yes, ma'am.

24 Q. And she said, "No. Everything is okay now"?

25 A. Yes, I believe so.

1 Q. And other than that one time, you never had any other
2 indications that Devin was physically abusing Danielle;
3 correct?

4 A. I didn't have the evidence of it, no. But I just assumed.

5 Q. You just assumed because he was so controlling?

6 A. Yes. Yes, ma'am.

7 Q. But Danielle never asked you for help leaving Devin?

8 A. Not to leave him, no.

9 Q. In fact, until after the shooting, she never said anything
10 to you at all about trying to leave him?

11 A. Correct.

12 Q. Now, when Devin wanted something, he was very determined
13 to get it; right?

14 A. Yes, ma'am.

15 Q. And Devin lied to you about his criminal record?

16 A. Yes, ma'am.

17 (Cell phone interruption.)

18 THE COURT: Can you turn that off.

19 BY MS. KRIEGER:

20 Q. I'm sorry. You just said "yes"? You just said, yes,
21 Devin lied to you about his criminal record?

22 A. Yes, ma'am.

23 Q. He actually told you he'd gone to prison for assaulting an
24 officer?

25 A. Yes, ma'am.

1 Q. Danielle stopped being a member of the First Baptist
2 Church before she married Devin; correct?

3 A. She never stopped being a member, but she stopped going
4 because she was going to college too.

5 Q. And then after she did marry Devin, she only went to
6 services with him maybe two or three times?

7 A. Yes.

8 Q. And Devin was with her on all of those occasions?

9 A. Yes.

10 Q. Devin never went to the First Baptist Church before his
11 marriage to Danielle?

12 A. No.

13 Q. You would have known if he had done that; right?

14 A. Correct.

15 Q. Do you remember plaintiffs' counsel talked to you a bit
16 about having events at your house?

17 A. Yes.

18 Q. And you talked about having events with your church
19 family?

20 A. Yes, ma'am.

21 Q. Danielle and Devin only ever came to your house for those
22 events two or three times, at most; correct?

23 A. I would say so. I don't -- haven't counted them.

24 Q. It wasn't very often?

25 A. No.

1 Q. So going back to that phone call from Danielle on
2 October 30th, 2017, it was totally out of the blue?

3 A. Yes.

4 Q. And you said she asked about coming to the fall fest?

5 A. Yes.

6 Q. That's an alternative event to Halloween; right?

7 A. Yes, ma'am.

8 Q. It takes place on October 31st?

9 A. Yes, ma'am.

10 Q. Same date every year?

11 A. Yes, ma'am.

12 Q. And that takes place at the church; correct?

13 A. Yes.

14 Q. And Danielle and Devin did actually come to the fall fest
15 in 2017; right?

16 A. Yes.

17 Q. They brought the baby?

18 A. Yes.

19 Q. They didn't bring your grandson; correct?

20 A. No.

21 Q. But you were excited to meet the baby?

22 A. Yes.

23 Q. And now while they were there, Devin mentioned to you that
24 he was taking medication?

25 A. He had said that to my mom and my husband while we were at

1 the registration counter.

2 Q. You heard him say that he was taking medication? He said
3 that the medication was for his moods?

4 A. Yes, ma'am.

5 Q. He said he'd been having mood swings?

6 A. Yes, ma'am.

7 Q. So you said you had been at the registration table.

8 Did you leave the registration table to talk with Danielle
9 and Devin?

10 A. Yes. We all walked into the fellowship hall, and they
11 were showing me the baby. And then he actually left us alone
12 there for a few minutes, which I thought was different for him
13 to do that because he's never done that.

14 Q. So that's right. So at some point, Devin left you all
15 alone?

16 A. Yes. At one point, yes.

17 Q. And that was the first time you'd actually been alone with
18 Danielle since she got married?

19 A. Yes.

20 Q. It was the first time you had a private conversation with
21 Danielle since she had got married?

22 A. Yes, ma'am.

23 Q. And you spent about maybe ten minutes alone with Danielle?

24 A. I would say closer to five minutes.

25 Q. You know what Devin was doing while you were alone with

1 Danielle?

2 A. No. I didn't find out until later by another member that
3 he was -- they saw him casing the place, walking around. That
4 was after the shooting.

5 Q. Now, at the fall festival, did you talk to either Devin or
6 Danielle about Danielle's upcoming testimony against Donald
7 Brassfield?

8 A. Rephrase that. How did you --

9 Q. I'm sorry. Did you know at the time of the fall festival
10 that Danielle was going to testify that Donald -- Curt
11 Brassfield -- your ex-husband; correct?

12 A. Yes.

13 Q. Did you know at the time of the fall festival that
14 Danielle was going to testify against Curt Brassfield at his
15 trial for sexual assault?

16 A. It had been brought up before in a conversation when Devin
17 was on the phone with us and that he was -- she was going to
18 be called to testify against him.

19 Q. When was that conversation?

20 A. I don't remember.

21 Q. Would it have been before the birth of your granddaughter?

22 A. I'm sure it was probably at that time, because the case
23 was being reopened by his ex-wife, other than me.

24 Q. And then you didn't actually talk with Devin or Danielle
25 between the birth of your granddaughter and the end of

1 October 2017; right?

2 A. Correct.

3 Q. Did you bring up that case -- that upcoming testimony at
4 the fall festival at all?

5 A. No, ma'am.

6 Q. Now, you are aware that some of the kids at the church
7 used to bully Danielle; right?

8 A. There was a girl that used to bully her that I know of.

9 Q. In fact, at your -- did you say that all the kids -- I'm
10 sorry.

11 Would all of the kids at the church bully each other?

12 A. No.

13 Q. Do you recall giving your deposition in this case?

14 A. Yes, ma'am.

15 Q. Do you recall -- it's your testimony now that there is
16 only one child at the church who ever used to bully Danielle?

17 A. Well, it was one girl that was supposedly friends with
18 her. But kids are kids when they're around other kids. But
19 with her, she did give Danielle a hard time.

20 Q. So it's your testimony that it was just this one girl who
21 bullied Danielle?

22 A. That I'm aware of, yes.

23 Q. Okay. Do you remember being deposed in this case?

24 A. Pardon me?

25 Q. Do you remember giving your deposition? It was the end of

1 November.

2 A. I remember giving my deposition.

3 MS. KRIEGER: Bring up her deposition. It's GEX 54,
4 page 24 -- 124, excuse me, line 15.

5 BY MS. KRIEGER:

6 Q. Now, at your deposition, you may recall I asked you -- you
7 said that some -- I'm sorry. You can read that to yourself.

8 A. I've read it.

9 Q. Okay. Do you now remember saying that all the kids would
10 bully each other at the church?

11 A. I didn't say "at the church."

12 Q. You said, "All kids bully each other"?

13 A. Yes. Kids will be kids.

14 Q. Let's look at page 123, lines 10 -- I'm sorry. Top of the
15 page, line -- yes, there we go. Can you read that to
16 yourself.

17 A. Okay.

18 Q. Now, I asked you at the time if you were aware of anyone
19 from the church teasing or making fun of Danielle about the
20 abuse.

21 And you said, "Not of the abuse. They made fun of her on
22 other issues"?

23 A. Right. And it was one particular girl, because of her
24 adoption.

25 Q. So it's your testimony today that when you said "they"

1 made fun of her, you were just talking about one girl?

2 A. Yes. Because I don't remember saying "they."

3 MS. KRIEGER: Take that down.

4 BY MS. KRIEGER:

5 Q. Now, you said that person made fun of her for being a
6 foster child and being adopted; is that right?

7 A. Yes, ma'am.

8 Q. Some people at the church did mock her for sexual abuse,
9 though?

10 A. As far as I know, nobody else knew except for the pastor.

11 Q. Did they mock her for being promiscuous?

12 A. Not that I'm aware of.

13 Q. Are you aware that Danielle testified yesterday that they
14 mocked her for being promiscuous?

15 A. No.

16 Q. You weren't aware of any of this kind of mocking; correct?

17 A. Correct.

18 Q. Danielle moved out of your house at age 18; is that right?

19 A. Yes.

20 Q. She actually moved in with Erin Brassfield?

21 A. That was when -- her younger year of 18.

22 Q. Before she was 18, she moved out and moved in with Erin
23 Brassfield?

24 A. She moved over there and came back.

25 Q. She lived with Erin Brassfield for some time, even though

1 Erin was still married to Curt Brassfield at the time?

2 A. I don't know if they were still married. I don't recall.

3 Q. Do you know when Erin and Curt got divorced?

4 A. I don't recall.

5 Q. Let's go back to the fall festival, to October 31st.

6 To your knowledge, did Devin or Danielle go to your house
7 that day?

8 A. No, they did not come to my house.

9 Q. Your house is about half a mile from the church; is that
10 right?

11 A. Yes.

12 Q. We were talking about how Devin left you and Danielle
13 alone for a few minutes.

14 But at some point, he came back?

15 A. Yes.

16 Q. And then you had to go back to working the registration
17 table?

18 A. Yes, ma'am.

19 Q. But you told Devin that you loved him?

20 A. Yes.

21 Q. And he said he loved you too?

22 A. Yes.

23 Q. And then while you were at the registration table, they
24 left?

25 A. Yes.

1 Q. Now, after the fall festival, you didn't speak to Danielle
2 again until the day of the shooting; is that right?

3 A. Correct.

4 Q. It wasn't until weeks after the shooting that Danielle
5 told you she had planned to divorce Devin?

6 A. Yes, ma'am.

7 Q. You don't have any knowledge of why Devin decided to
8 commit a shooting at the church on November 5th, 2017?

9 A. Who would?

10 Q. But you said it feels like you were the target of the
11 shooting?

12 A. Right.

13 Q. That's just a feeling that you have?

14 A. Just a feeling.

15 Q. You feel responsible, even though you didn't do anything
16 wrong?

17 A. I don't feel responsible. I feel like he was targeting us
18 because of my relationship with my daughter, that I wanted to
19 have, you know, a stronger relationship.

20 Q. That's just your feeling; correct?

21 A. Correct.

22 Q. You and Ben and David all lived together; correct?

23 A. Yeah. We were together four years and then married ten.

24 Q. And you lived -- so you lived with your husband Ben
25 Shields?

MICHELLE SHIELDS - REDIRECT

1 A. Yes.

2 Q. And you lived with your son David?

3 A. Yes.

4 Q. You also lived with your mother-in-law?

5 A. My mother-in-law didn't move in until after the shooting.

6 Q. Before the shooting, did Nana live with you?

7 A. No, she lived next door.

8 Q. You don't know if Devin committed the shooting because he
9 was angry at you; right?

10 A. No, ma'am.

11 Q. He didn't show any anger the last time you saw him?

12 A. No, ma'am.

13 Q. No one ever told you that Devin committed the shooting
14 because he was angry at you?

15 A. No, ma'am.

16 Q. In fact, the last time you saw him, you said, "I love you"
17 and he said, "I love you too"?

18 A. Yes, ma'am.

19 MS. KRIEGER: No further questions.

20 THE COURT: Anything else?

21 MR. ALSAFFAR: Very brief, Your Honor, if that's
22 okay.

23 REDIRECT EXAMINATION

24 BY MR. ALSAFFAR:

25 Q. Ms. Shields, I want to ask you about that fall fest that

1 Ms. Krieger was just talking about the few days before the
2 shooting.

3 When Danielle came there with her baby, how did the
4 churchgoers at the church respond when they saw her?

5 A. Everybody was excited to see her. They were happy to see
6 her, the baby and, you know, welcomed them with open arms.

7 Q. Did Devin Kelley witness that when Danielle went to this
8 church on that day, a few days before the shooting, that the
9 church family was welcoming her with open arms?

10 A. Yes. They also welcomed him.

11 MR. ALSAFFAR: No further questions, Your Honor.

12 THE COURT: Anything based on that?

13 MS. KRIEGER: No, sir.

14 THE COURT: Any further need for this witness?

15 MR. ALSAFFAR: No, Your Honor.

16 MS. KRIEGER: No.

17 THE COURT: You're excused, ma'am. Thank you.

18 THE WITNESS: Thank you.

19 THE COURT: With that, let's go ahead and take a
20 lunch break. Let's resume about 1:15, 1:20.

21 (Recess.)
22
23
24
25

1 *(Open court)*

2 THE COURT: Thank you. Please be seated.

3 Your next witness.

4 MR. SCHREIBER: Your Honor, the plaintiffs would call
5 Michael Kelley. Mr. Kelley's here with his own personal
6 attorney. She'll sit here behind me, if that's okay.

7 THE COURT: Yes.

8 *(The oath was administered)*

9 MR. SCHREIBER: Mr. Kelley, first, would you mind
10 taking off your mask since you're away from everybody and
11 behind the plexiglass.

12 Your Honor, I believe you'd like to see him testify
13 without the mask. Is that true? Or do you care?

14 THE COURT: If he can be heard through the mask,
15 that's fine. But we can --

16 MR. SCHREIBER: Okay. That's fine. Whatever you're
17 most comfortable with, Mr. Kelley.

18 THE WITNESS: I prefer the mask.

19 MICHAEL KELLEY, PLAINTIFFS' WITNESS, SWORN

20 DIRECT EXAMINATION

21 BY MR. SCHREIBER:

22 Q. Yes, sir. My name is Joseph Schreiber. You and I met at
23 your deposition, correct?

24 A. Correct.

25 Q. And aside from speaking outside in the hallway just to

1 tell you kind of the order of witnesses, we never talked
2 before or since, have we, sir?

3 A. No, sir.

4 Q. What I want to do today -- and I promise I won't keep you
5 very long -- is I want to talk about your background and your
6 family first. Then I'm going to talk about what you knew
7 about Devin Kelley, your son's crimes in the Air Force. And,
8 third, I want to talk -- talk about guns for a little bit.
9 Okay?

10 A. Uh-huh.

11 Q. And I will switch -- I'll try and let you know when I
12 switch topics. And if you say "uh-huh" or "huh-uh," I'm going
13 to have to ask you if that's a "yes" or a "no" just so the
14 court reporter can get it.

15 A. Okay.

16 Q. If for some reason you don't understand any of my
17 questions, because I mumble or speak too fast, just let me
18 know. And I'll do the same if we can't hear you as well.
19 Okay?

20 A. Okay.

21 Q. First off, what's your full name, sir?

22 A. Michael Kelley.

23 Q. Do you have a middle name?

24 A. Shawn.

25 Q. Tell me, are you married?

1 A. Yes.

2 Q. What's your wife's name?

3 A. Rebecca Anne Kelley.

4 Q. Do you have any children?

5 A. Yes.

6 Q. Can you tell me your children's names.

7 A. Lauren Kelley, Devin Kelley, and Lillian Kelley.

8 Q. How old is Lauren?

9 A. 35.

10 Q. And how old is Lillian?

11 A. 25.

12 Q. How long have you been married to Rebecca?

13 A. 41 years.

14 Q. Give me one moment. Got to get my water in case I need
15 it.

16 In 2017, where did y'all live?

17 Don't give me an exact address. Just tell me general area
18 y'all lived.

19 A. In New Braunfels.

20 Q. Did you live on some property?

21 A. Yes.

22 Q. How many acres did y'all have?

23 A. Approximately 28.

24 Q. How long had you lived on that 28 acres?

25 A. As of 2017 -- right now, it's like 28 years. So I guess

1 that'd be 25-ish.

2 Q. Where did you graduate from college?

3 A. Texas A&M.

4 Q. What years did you go there?

5 A. Graduated in '79.

6 Q. What did you study?

7 A. Economics.

8 Q. And what's your career been?

9 A. I was -- well, I did several things. I started off in
10 sales with a computer company and then went into accounting
11 with an HMO and eventually went up in management. And then I
12 went off onto my own software company.

13 Q. How long did you have your own software company?

14 A. Since 1985 or '86.

15 Q. Do you have an office, or do you work out of your house?

16 A. Work out of the house.

17 Q. Has that been that way since 1985 or '6?

18 A. Yes.

19 Q. A direct question: Have you ever been convicted of any
20 crimes?

21 A. Not that I'm aware of.

22 Q. Have you ever been charged with any crimes?

23 A. Speeding tickets. Does that count? I don't know.

24 Q. Anything other than a speeding ticket?

25 A. Not that I'm aware of.

1 Q. Aside from a speeding ticket, have you ever been in
2 trouble with the law?

3 A. Not that I'm aware of.

4 Q. Your daughter, Lauren, what is -- what does she do?

5 A. She's on disability.

6 Q. Has she ever been in trouble with the law?

7 A. Not that I know of.

8 Q. And what about Lillian? What does she do?

9 A. She is a buying assistant now.

10 Q. For a store or for --

11 A. Yeah, for a corporation.

12 Q. Has she ever been in trouble with the law?

13 A. Not to my knowledge.

14 Q. And we'll talk to your wife in a moment when you're
15 finished.

16 But your wife, has she ever been in trouble with the law?

17 A. Not that I know of.

18 Q. I'm going to switch gears, and I'm going to do this pretty
19 frequently, sir.

20 A. Is it okay if I hold the mic? Because this is making my
21 back hurt, having to lean forward, and this chair won't move.

22 Is it okay if I hold the mic?

23 THE COURT: That's fine.

24 MR. SCHREIBER: Is that all right?

25 THE WITNESS: Yes.

1 THE COURT: Okay.

2 BY MR. SCHREIBER:

3 Q. When did Devin -- or sorry.

4 Devin Kelley is your son, correct?

5 A. Correct.

6 Q. When did Devin go into the Air Force, approximately?

7 A. Six months after he got out of high school, so I guess
8 that would be in '10.

9 Q. 2010?

10 A. Yes. Or January -- it was January 2010, '11. I don't
11 remember now.

12 Q. We'll talk about Devin's court-martial in a little bit.

13 But preceding Devin's court-martial, did he have any
14 trouble in the Air Force before that court-martial, to your
15 knowledge?

16 A. Not to my knowledge.

17 Q. Did he ever go AWOL and come home without leave?

18 A. Yes. There was one time. I don't know if it was
19 officially called AWOL or not.

20 Q. Tell me about that. What happened?

21 A. Well, I just -- I got a call from someone -- I don't
22 remember who it was at the base -- that said Devin is not
23 there and wanted to know if he was there. And I said, "Well,
24 I don't think so."

25 Shortly after, as I recall, he showed up. And they said

1 "Well, we'd rather not list him as AWOL. So, you know, can
2 you call" -- or they were going to call back. I don't
3 remember. But, in essence, I drove him back.

4 Q. So Devin essentially came to your house in New Braunfels
5 without his superiors knowing, I assume?

6 A. I don't know. I would assume so, but I have no direct
7 knowledge.

8 Q. And they wanted him to come back, correct?

9 A. Correct.

10 Q. And did you help get him back to the base?

11 A. Yes. I drove him back.

12 Q. Do you know why Devin came home? Did he tell you?

13 A. I don't remember if he told me or not. I don't really
14 remember the details.

15 Q. I guess the only point I'm making is that when Devin came
16 home, you didn't hide him away or anything. You took him
17 back, correct?

18 A. No. Of course.

19 Q. Was there one point in the Air Force you got a call about
20 getting a gun that Devin had on base?

21 A. Yes. I got a call from his NCO, I believe it was, asking
22 me if I would mind coming down and getting his gun from him
23 and keeping it.

24 Q. Getting Devin's gun from Devin?

25 A. Yes.

1 Q. What -- do you know what the issue with Devin having a gun
2 on the base was?

3 A. I have no idea what base rules are with a gun or not.
4 Nobody told me. I happened to be up there relatively close,
5 distance-wise, at our cabin.

6 Q. Where's your cabin?

7 A. In New Mexico. It was about an hour from Holloman.

8 Q. You drove down to Holloman?

9 A. And I drove down and met Devin and the NCO, and they went
10 into a building that I believe someone told me at some
11 point -- or I came to know -- was where you -- you know,
12 soldiers could check in their own firearms or whatever. I
13 don't know. I didn't go inside. But I assume there were
14 individual safes or something. I have no idea.

15 Anyway, Devin and the NCO came out. And Devin gave me his
16 gun, and I left.

17 Q. What did you do with the gun?

18 A. I kept it at our cabin for a period of time.

19 Q. And what happened at the end of that period of time?

20 A. Eventually, I sold it to the pawnshop or gun shop there in
21 Ruidoso.

22 Q. Why did you sell the gun?

23 A. I already had a pistol, and so I didn't need an extra one.
24 And I was never really given clear answers on anything from
25 the Air Force.

1 Q. Did Devin want you to sell the gun?

2 A. I don't know that he and I ever talked about me doing that
3 in advance.

4 Q. But you did it anyway. You got rid of the gun when
5 somebody asked you to come get it, correct?

6 A. Correct. I took it up to the cabin, yeah.

7 Q. There was no Second Amendment protest or anything like
8 that?

9 A. Not that I recall.

10 Q. I'm going to switch over now, jump ahead and talk about
11 Devin's court-martial.

12 A. Uh-huh.

13 Q. Were you present at any stage in that court-martial
14 proceeding?

15 A. I don't know the technical terms of the various
16 proceedings. But the end, I think, they called sentencing or
17 something, they called me to make a statement.

18 Q. Were you there during the -- I guess they call it either
19 the plea or the punishment -- the plea phase or the trial
20 phase?

21 A. Not that I recall.

22 Q. Did you hear --

23 A. Because I don't think there was, like, an initial stage.

24 Q. Are you aware that Devin pled guilty to a couple of
25 charges?

1 A. I'm aware that he pled guilty to a couple charges.

2 Q. Did you know at the time what those charges were?

3 A. At the time, I don't remember if I knew specifically or
4 not. I assumed something related to Jack and the bruises on
5 his face.

6 Q. Jack was Devin's wife Tessa's son, correct?

7 A. Tessa's son, correct.

8 Q. Did you know the specifics of what Devin was accused of as
9 far as Jack goes?

10 A. No.

11 Q. Did you know --

12 A. Not that I recall.

13 Q. Did you know whether or not Devin was charged with any
14 assault against Tessa, his then wife?

15 A. I don't remember. I don't think I did. But, you know, I
16 was told on several occasions that, you know, "Mr. Kelley,
17 this doesn't involve you; you're just the dad."

18 Q. Who was -- Okay. Who would say that you're just the dad?

19 A. As I recall, it was Mark Rosenow, the Air Force attorney
20 that was supposed to be representing Devin.

21 Q. Do you know what he -- I guess I'm not asking you what he
22 meant, but what did you take that to mean that "you're just
23 the dad"?

24 A. Mixed emotions. Part of it was, okay, we're in a society
25 with HIPAA rules, and no one can talk to anybody after they're

1 18, and blah, blah, blah. But also, as in a -- you know, just
2 be quiet, don't get involved, come by, see him, be moral
3 support, but basically, you know, you're not -- you're not
4 part of this.

5 Q. Did you recall Devin being in a place called Peak Mental
6 Health?

7 A. Yes. I didn't know at the time it was mental health. I
8 just heard it referred to as Peak, whatever that stands for.

9 Q. I have no idea, frankly.

10 Did you visit him at Peak?

11 A. Yes.

12 Q. Were you aware that Peak, at least part of it, was a
13 mental hospital?

14 A. I don't know at the time that I was aware it was a mental
15 hospital. It was explained to me -- and I don't remember who
16 explained it, if it was Devin or somebody else -- that when
17 soldiers from the base there were having issues, they would
18 send them over there for a period of time.

19 Q. Do you know how many times Devin was at Peak?

20 A. At the time, no. I now know from, you know, his
21 depositions and all that it was twice.

22 Q. At the -- I want to know what you knew back then,
23 pre-2017, basically.

24 A. I don't really remember if I knew. We visited him there
25 several times, twice. But, you know, it was a decade ago. I

1 don't remember if it was all on the first trip, the second
2 trip, one each trip. I don't really remember.

3 Q. For a timeline, was Devin, in your recollection, in Peak
4 before or after the court-martial, if you recall?

5 A. I don't really recall. I would assume it would have been
6 before or during, because then they had him in solitary.

7 Q. Do you recall Devin leaving Peak without permission and
8 getting picked up at a bus station?

9 A. I remember hearing about it.

10 Q. How did you hear about it?

11 A. I don't remember. I probably got a call from the first
12 sergeant again or somebody. I don't know.

13 Q. Do you recall what the first sergeant would have said?

14 A. No. I don't recall after this time.

15 Q. Did you get involved in any way in helping get Devin back
16 to the base?

17 A. No. Because he wasn't there. We were 600 miles away.

18 Q. When Devin went back to Peak after eloping, did you go
19 visit him at Peak?

20 A. Yeah. I don't remember when we made visits. I don't
21 remember which timeline they were.

22 Q. When you went -- so let's go back to the court-martial,
23 then.

24 You were present at the sentencing phase, correct?

25 A. I think that's what they called it, yes.

1 Q. And you gave testimony, correct?

2 A. Correct.

3 Q. What was your -- the -- generally, what was your testimony
4 at the sentencing phase?

5 A. I mean, I don't really remember a lot of the specifics.

6 But, generally, the presiding judge or colonel or major,
7 whatever he was, basically was asking me if Devin had a place
8 to go back to when he, you know, was released.

9 Q. And what --

10 A. And the answer was, you know, yes, he has a house. You
11 know, we're not just going to turn him out on the street.

12 Q. So you told the Air Force that Devin was going to come and
13 live with y'all, correct?

14 A. Correct.

15 Q. Back at the same place in New Braunfels?

16 A. Correct.

17 Q. Outside New Braunfels.

18 Did you talk to -- and you said the gentlemen's name was
19 Rosen, correct?

20 A. Mark Rosenow.

21 Q. Rosenow.

22 And that was Devin's Air Force attorney, correct?

23 A. Yeah, the Air Force appointed attorney, yeah.

24 Q. Did you talk to that attorney about any restrictions Devin
25 might have when he came out of confinement?

1 A. Generally. And -- excuse me -- this is very general
2 because it's a decade later. I don't remember all the
3 specifics. But the general gist of it was, is this going to
4 be considered a felony or a misdemeanor or what, so that we
5 would know if, you know, Devin can vote, can he, you know, get
6 a passport to travel or, you know, those kinds of things.

7 And he basically told me that, you know, no one knows.
8 And I said, "Well, what do you mean 'no one knows'?"

9 And he said, "Well, the Air Force is federal; therefore,
10 it's federal." But because of the time or something, it's a
11 misdemeanor. So he said, "You got to go talk to attorneys and
12 pay them and see what they say. But I'm telling you right
13 now, you talk to ten attorneys, you're going to get ten
14 different answers."

15 And I said, "No one really knows?"

16 And he said, "No. It's a gray area."

17 I said, "Okay."

18 Q. Were you told by that attorney or anybody else in the
19 Air Force that Devin could not possess a gun when he got out
20 of military confinement?

21 A. Not that I recall.

22 Q. Is that something you would have wanted to know since he's
23 coming back to your property?

24 A. I would think that I would want to know any restrictions
25 that may or may not be placed upon him.

1 Q. But nobody from the Air Force told you that Devin couldn't
2 possess a gun, correct?

3 A. Not that I recall.

4 Q. When Devin got out of the Air Force, did he come back to
5 your -- to your place?

6 A. Yes. I picked him up. They dropped him off at a hotel in
7 the town outside the base, and I drove down and picked him up
8 at the hotel.

9 Q. And then did y'all go straight back to the New Braunfels
10 area?

11 A. No. We went back to the cabin for -- I don't know what it
12 was -- day or two. I don't remember. And then we headed
13 home.

14 Q. What was the point of going to the cabin?

15 A. Well, for one thing, all of my stuff was there. Okay.
16 And it's a very, very long drive. So to, you know, stop by
17 and pick him up -- and I didn't know what to expect, timing or
18 anything else that -- you know, so I was just, "Okay. I'll
19 pick you up and we'll go back to the cabin."

20 Q. And then y'all went back to New Braunfels, correct?

21 A. Correct.

22 Q. And when you first got back to New Braunfels, where was --
23 where was Devin living on your home place?

24 A. In the barn.

25 Q. I want to talk about your property, in general.

1 You said it's 28 acres, correct?

2 A. Correct.

3 Q. And we saw earlier in the trial a video at the front --
4 the front gate where a police officer came up, right?

5 A. Right.

6 Q. Your area, is it relatively hilly?

7 A. It's upward-sloping from the highway up to our house.

8 Q. Is it wooded?

9 A. Pretty heavily, yes.

10 Q. The house, does it -- where does the house sit, in
11 general? Like in the middle? On the edge? The main house.

12 A. In -- fairly close to the center, right to left. And
13 probably, I don't know, two-thirds of the way back. I'm just
14 guessing.

15 Q. Where is the barn located relative to the house?

16 A. Like I told you in the deposition, I'm not real good with
17 visual distances, so I got to relate it to like a football
18 field. And if I were to guess, I don't know, it's 50 yards,
19 75 yards. I'm just ballparking it.

20 Q. Sure.

21 What's between the house and the barn in those 50 yards?

22 Is it bare, flat ground? Is it pasture? Is it woods?

23 A. Mostly woods. And there's some rocks in between, but it's
24 heavily wooded.

25 Q. Is it on the same level, the barn and the house?

1 A. No. Because it seems like I'm going slightly uphill every
2 time I walk up there.

3 Q. Up to the barn?

4 A. Right. But it's not like it's a huge difference. I don't
5 know. Two-feet-higher elevation, whatever. I don't know.

6 Q. Is there a clear sight line between the house and the
7 barn?

8 A. Not really.

9 Q. So if you're standing -- is there a porch on the house?

10 A. Correct.

11 Q. If you're standing on the porch, can you see what's going
12 on in the barn?

13 A. You couldn't see what's going in. I think maybe -- if
14 you're on the edge of the porch and you lean out, maybe you
15 can see the very corner metal part of the barn, maybe. I
16 don't know. I haven't really paid that close attention to it.
17 But you definitely can't see in the windows, the doors, you
18 know, the full front of it or anything like that.

19 Q. Do y'all have animals on the property?

20 A. At times, yes.

21 Q. What kind of animals do y'all have?

22 A. Dogs, cats, horses, cows.

23 Q. If someone's talking down at the barn, can you hear it up
24 at the house?

25 A. Probably not. It'd have to be yelling, and then it might

1 be kind of muffled. You can't hear anything from inside the
2 house because it's very well insulated.

3 Q. On a day-to-day basis, say from 2015-2017 -- this is a
4 fairly general question -- what were your days like?

5 Did you -- did you get up and work in the house, in an
6 office in the house? Or were you always out on the property,
7 like on an ATV or something? What were your days like?

8 A. No. Well, I don't own an ATV. But, no, I mean, I --
9 typically, we'd get up and we'd go run or walk or whatever our
10 exercise routine was in the morning. And in town, I might
11 make trips to the bank or the post office or, you know,
12 whatever, and then usually in the house.

13 Q. I want to talk about the barn for a minute.

14 A. Okay.

15 Q. When Devin got back from the Air Force, was it outfitted
16 for somebody to live in the barn at this point?

17 A. It had been, yes.

18 Q. And what portion of the barn was outfitted as living
19 quarters?

20 A. Roughly a 10-foot side of it that used to be a raised deck
21 for putting hay and seed and all on.

22 Q. And how big was the rest of the barn, approximately?

23 A. It's 30 by -- 30 by 60, 30 by 90?

24 Q. Did you have tools out at the -- at the barn?

25 A. Yeah. It's a barn. It has, you know --

1 Q. Did it have a full machine shop out there?

2 A. No.

3 Q. When we talk about tools, are we talking -- what kind of
4 tools are we talking about?

5 A. Anything from storing T-posts, rolls of wire, the Bobcat,
6 you know, which is a tractor; implements for the Bobcat. You
7 know, pieces of wood, you know, scrap pieces of wood. You
8 know, just general storage.

9 Q. You didn't have, like, an industrial lathe out there?

10 A. No. I wish.

11 Q. You didn't have, you know, any essentially manufacturing
12 or forging equipment out there, did you?

13 A. No. I mean, at times, there's been a radial arm saw out
14 there.

15 Q. But nothing where you could forge metal out there?

16 A. No. I'm not a metal person.

17 Q. And to your knowledge, was Devin ever trained as a
18 millwright?

19 A. A what?

20 Q. Somebody who uses a lathe.

21 A. Not that I'm aware of.

22 Q. Did Devin have any technical training on how to
23 manufacture metal goods, to your knowledge?

24 A. Not to my knowledge.

25 Q. And there was, again, nothing out there in that barn that

1 was a machine shop, correct?

2 A. No, nothing at all.

3 Q. And anywhere else in your property, there's no machine
4 shops in your property, were there?

5 A. No.

6 Q. And I guess, without saying, there's no lathe anywhere on
7 your property, is there?

8 A. No. A lathe is the thing that just spins round and round?

9 Q. Yeah. It's a giant piece of machinery that a millwright
10 could use to manufacture metal or --

11 A. I have wood saws, and that's --

12 Q. L-A-T-H-E is what I'm talking about.

13 A. Right, right, right, right, right.

14 Q. I want to talk now about your guns.

15 A. Okay.

16 Q. When Devin got out of the Air Force, when he got out of
17 confinement and he came back to the house, did you own any
18 guns?

19 A. Yes.

20 Q. What guns did you own?

21 A. I have a pistol, 9-millimeter pistol. And at that time, I
22 think I had the shotgun and the .22 rifle.

23 Q. Did you later get any other weapons between when Devin got
24 out of court-martial and November 5, 2017, the church
25 shooting?

1 A. Well, at some point, we added another smaller,
2 lighter-weight pistol, but I don't remember exactly the
3 timeframe of it. And then I bought an AR.

4 Q. When did you buy the AR, approximately?

5 A. I don't remember.

6 Q. Ballpark? 2016? 2017?

7 A. I'm going to guess '16, '17. I really don't remember.

8 Q. Where were your guns kept? Where did you keep them on a
9 day-to-day basis?

10 A. On the day in question?

11 Q. No. I mean from basically 2013-2017, where did you keep
12 your guns?

13 A. Same place they are now. It's -- we call it the gun
14 cabinet. It's really an antique wardrobe.

15 Q. Can you describe this thing for me.

16 A. It's like maybe 7-foot tall and 4-foot wide.

17 Q. What's it made out of?

18 A. Wood.

19 Q. Is it light wood? Heavy wood?

20 A. Oh, it's heavy. It's mostly a walnut.

21 Q. Is it -- does it have a lock?

22 A. Yes.

23 Q. What's -- is it just a standard, like, double-key lock?

24 A. Like the old, you know, skeleton key kind of lock. I
25 don't know that "skeleton key" is the right term. But, you

1 know, it's not a padlock, if that's what you mean.

2 Q. Did you consider it secure?

3 A. Well, it's as secure as can be. If someone wanted to come
4 in with a hammer and a crowbar, I'm sure they could do some
5 damage. But it would be pretty obvious.

6 Q. Would it be difficult to get in there?

7 A. To get in there?

8 Q. If the cabinet -- if that gun cabinet was locked, would it
9 be difficult to get in?

10 A. It would -- I would think it would take some time and
11 effort and tools.

12 Q. Did you use trigger locks on your weapons?

13 A. Periodically, at times, yes.

14 Q. Which weapons did you put trigger locks on?

15 A. At various times, on all of them or each of them. It, you
16 know, just depends.

17 Q. And I don't want to -- because we're in open court here, I
18 don't want specifics when I ask this question.

19 Is the gun cabinet, or the gun -- is it in a secluded
20 place in the house or is it somewhere, like, near an entrance?

21 A. No. It's where -- what we call our dressing room, which
22 is off our bathroom.

23 Q. Is that far back into the house?

24 A. That's back on the far, far corner.

25 Q. Did anybody have access to that gun cabinet except for you

1 and your wife?

2 A. Anybody who walked through the house would see it. I
3 don't know how you define "access" to it because it's locked.
4 But, you know, I mean, if someone came in to use our shower or
5 our bathroom, you know, they could see it.

6 Q. And I asked a poor question.

7 How many keys did you have for that?

8 A. There's just one.

9 Q. And who knew where that key was?

10 A. As far as I know, just me and my wife.

11 Q. To your knowledge, did Devin ever access your guns?

12 A. Not to my knowledge.

13 Q. Did Devin have his own guns?

14 A. Yes.

15 Q. What guns did Devin have?

16 And I'm talking now from the time he left the Air Force
17 until the church shooting.

18 A. I don't remember which guns he had at what point.

19 Q. Sure.

20 A. I know the day of the shooting, he had his pistol and his
21 AR. And he had just recently bought a .22 plinker, you know,
22 a little target-shooting pistol.

23 But at some point through the deposition, someone brought
24 up a shotgun, and I do remember him having a shotgun at one
25 point. I don't remember when it was or where it came from or

1 where it went to or anything else.

2 Q. Did Devin ever go into your gun cabinet and get any of
3 your guns?

4 A. Not to my knowledge.

5 Q. Did Devin ever ask to get any of your guns?

6 A. Not to my knowledge.

7 Q. I believe at some point, he helped clean one of the
8 pistols; is that correct?

9 A. Correct.

10 Q. Can you tell me about that.

11 A. Well, it's a smaller pistol that's got a really weird way
12 of taking it apart. It's a special tool and everything. And
13 I still haven't figured out how to do it smoothly. Okay? But
14 it doesn't get used very often, so it doesn't need cleaning
15 very often.

16 But I remember on one occasion -- there may have been a
17 couple -- where, you know, we'd sit down at the kitchen table,
18 and I'd drag out all my cleaning stuff. And we'd go through
19 and clean the shotgun, the rifle, you know, the pistols, or
20 whatever. And, you know, he'd sit there and help and, you
21 know, probably did his. But I don't really remember.

22 Q. Did you then put the guns back up?

23 A. Yes.

24 Q. And was it your habit to keep the guns under lock and key
25 if they weren't being used?

1 A. With the exception of I usually sleep with one on my
2 bedside stand at night.

3 Q. A pistol?

4 A. Yes, pistol.

5 Q. Aside from that, it's your habit to keep the guns locked
6 up?

7 A. Unless we're traveling or, you know, things like that.
8 But, yes, like right now, they're all locked up in there, you
9 know, because we're not at home.

10 Q. You don't just leave them laying around?

11 A. I'm not going to say it's never, ever happened. But I
12 can't think of any time. And as a practical matter, there --
13 you know, that's why we decided where to put them.

14 We had grandkids running around. Back in the day we had
15 kids running around. And last thing I want to do is hear a
16 shot go off and, you know, have a problem, ruin my life.

17 Q. To your knowledge, did Devin buy his guns from gun stores?

18 A. I have no knowledge.

19 Q. You don't know where they got them?

20 A. I have no idea. One of them, I know he bought -- maybe
21 more -- in Colorado. But I was never with him when he bought
22 a gun. I don't ever remember him saying where he bought them.
23 So I have no direct knowledge.

24 Q. Have you ever -- you ever bought a gun for somebody else?

25 A. No.

1 Q. Would you ever buy a gun for somebody else?

2 A. I can't imagine me doing something like that in this day
3 and age.

4 Q. But you're familiar -- you got a -- you bought your gun at
5 gun stores, correct?

6 A. Correct.

7 Q. And you're familiar, generally, when you buy a gun at a
8 gun store, you have to fill out a form for the federal
9 government, correct?

10 A. Yeah. You have to fill out forms, and they do the
11 background check, and then you can get your gun.

12 Q. And one of the things it says is this is going to be your
13 gun, right?

14 A. I don't remember.

15 Q. But you would never -- you never in your life have bought
16 a gun for anybody else, correct?

17 A. Not that I recall, no.

18 Q. And let me back up a second. And I think I asked you this
19 already. I apologize for repeating myself. I want to be real
20 specific.

21 When Devin got out of the Air Force, nobody from the
22 Air Force told you he couldn't have a gun, did they?

23 A. Not that I recall.

24 Q. And Devin did have guns at your property, correct?

25 A. Correct.

1 Q. If you had known that Devin couldn't possess a gun, would
2 you have let him have a gun on your property?

3 A. Well, obviously not. I mean, if I had known he was not
4 allowed to have a gun, I would have told him, "Son, I don't
5 know why you got a gun, but you can't have it on this
6 property. You leave. Go figure it out, whatever. But we're
7 not going to go down that road here."

8 Q. And if you had known Devin couldn't have a gun, you
9 certainly wouldn't have bought him a gun, would you?

10 A. Obviously not.

11 Q. And if somebody were to come in who had never met you and
12 claim they read something about you and said "Well, Mr. Kelley
13 would have bought Devin a gun illegally," you'd disagree with
14 that, wouldn't you?

15 A. Oh, wholeheartedly, because I know I have never bought him
16 a gun.

17 Q. And you never would if it were illegal?

18 A. No. I don't know that I would even buy someone a gun if
19 it were legal, because you got to go through the paperwork,
20 background checks or whatever.

21 Q. I want to switch and talk to you briefly just about the
22 time -- your relationship with Devin and Danielle and the
23 kids.

24 Do you recall when Devin got married to Danielle?

25 A. Yes.

1 Q. Approximately when was that?

2 A. I'm going to guess it was somewhere in that fall, maybe
3 early spring, after he was released from confinement.

4 Q. Did you know her at all before they married?

5 A. Never -- well, I mean, she lived with him in the barn for
6 a period of time, if that's -- prior to that, no, I didn't
7 know who she was.

8 Q. Prior to Devin getting married to Danielle, did you talk
9 to him on a regular basis? I'm talking from the end of
10 confinement when he came back home to when he got married to
11 Danielle -- and so we're splitting up time here -- did you
12 talk to Devin on a daily basis?

13 A. I don't recall if it was daily.

14 Q. Would it be --

15 A. I mean, on a regular basis, yes. I mean, it's just like
16 even afterwards, I might -- I might see him twice in one day.
17 You know, I may not see him for a week, ten days, you know,
18 because I didn't go up to the barn on any kind of regular
19 basis. And we were out of town a lot and --

20 Q. You say "we," you and your wife?

21 A. Yes.

22 Q. At some point when Devin got married, Danielle, I guess
23 she moved onto the property. Was it shortly before or after
24 they got married, do you recall?

25 A. That they what?

1 Q. That she moved onto the property?

2 A. She moved on the property before they got married, as I
3 recall.

4 Q. Did you talk to Devin and see him as much when he got
5 married -- when Danielle moved onto the place?

6 A. I don't remember.

7 Q. At some point, they moved and went down to Kingsville, I
8 believe?

9 A. Correct.

10 Q. Do you recall when that was, approximately?

11 A. It was that spring after he was released in April. It was
12 the following spring, if I recall.

13 Q. So a year later?

14 A. Well, a little less than a year.

15 Q. Do you know how long they were down in Kingsville?

16 A. I believe she dropped out of the school there within
17 couple months, three months. I don't remember.

18 Q. What was your -- how often would you talk to Devin when
19 they were down in Kingsville, approximately?

20 A. No idea.

21 Q. Was it like a weekly occurrence? Two weeks?

22 A. I really don't remember.

23 Q. Did they move up to Colorado at some point?

24 A. Yes. They -- when they decided -- when she decided that
25 she didn't want to stay at Kingsville, the university there,

1 they decided at that point to, as I recall, move to Colorado
2 at that point.

3 Q. And did they go back and forth a couple times?

4 A. Well, they were in Colorado for a period of time, but I
5 don't remember how long it was. It was a year, year and a
6 half, two. I really don't remember. But they moved to
7 Colorado.

8 And then when Michael was born, they moved back with us.
9 And then they moved back to Colorado -- to Pueblo, I think --
10 for -- I don't remember how long it was for.

11 Q. Then about -- what? -- about 2015, they came back to Texas
12 for good?

13 A. Well, I don't know that I'd say "for good" because, even
14 though they came back, then they went back to Pueblo for a
15 period of time and then came back.

16 Q. When they were up in Colorado, did you talk to Devin on
17 any regular basis?

18 A. I don't remember what regular is.

19 Q. Once a week?

20 A. I mean, we talked. But I don't remember if it was once a
21 day, once a week, once a month. I have no idea.

22 Q. I'm sort of trudging through a predicate, and I apologize
23 for belaboring this.

24 I'm just trying to see if from the time -- I know you
25 obviously saw Devin all the time when he was a small boy until

1 he went off to the Air Force, correct?

2 A. Correct.

3 Q. And he lived in the house with you?

4 A. Right.

5 Q. Okay. And then when he was in the Air Force, you went to
6 visit him a couple times, correct?

7 A. Correct.

8 Q. Including a couple times when he was at Peak, you still
9 went to visit him there?

10 A. Correct.

11 Q. Did you visit him when was he was in confinement?

12 A. Yes.

13 Q. And then when he came back to -- when he got out of
14 confinement, you still -- and he was on your property, he was
15 a little further away, though, right?

16 A. Correct.

17 Q. He moved in the barn?

18 A. Correct.

19 Q. And you didn't see him as often as you did up at the
20 house, correct?

21 A. Well, not as often as, you know, when they're in high
22 school, "Get up, let's go get to school," whatever.

23 Q. But you still talked to him on a fairly regular basis,
24 correct?

25 A. Yeah. I can't define how regular is regular because I

1 honestly don't know, but it wasn't like we never talked or
2 like we chitchatted all day long either. Okay. I mean, we
3 just -- whenever we talked, we talked.

4 Q. Did you talk to Danielle by herself often?

5 A. Yeah. On a very regular basis, she'd come down to the
6 house with the kids or without.

7 Q. What did y'all talk about? Just children?

8 A. I don't really remember what.

9 Q. And I forgot -- let me back up a second because I forgot
10 to ask you something when I was talking about the cabinet, the
11 gun cabinet. I asked you -- I'm repeating myself to get the
12 predicate to where I'm going.

13 I asked you about access to the gun cabinet, and you told
14 me that people could come and could see it, but somebody would
15 have to use a crowbar and whatnot to break into it, correct?

16 A. Uh-huh.

17 Q. Yes, sir?

18 A. Yes, sir.

19 Q. Do you recall talking to the Texas Rangers shortly after
20 the church massacre?

21 A. I remember talking to them. But, you know, a lot of that
22 is very fuzzy at this point.

23 Q. Do you recall telling the rangers at any point that Devin
24 might have had, quote, "access to your guns"?

25 A. I saw that on the transcript during the deposition.

1 Q. Yes, sir.

2 A. Okay. I don't really remember saying that. But, you
3 know, conceptually, it would have been -- anybody who goes
4 through the house conceptually could have access to it. It
5 wasn't that he had access like, oh, they're sitting right
6 there on a shelf, you can just grab it and go. Okay?

7 It was more of a conceptual thing, that my guns are in the
8 house. But I went and checked. All my guns are there.

9 Q. And somebody would have had to -- hypothetically, somebody
10 would have had to break in that cabinet with a crowbar and a
11 hammer, you said, right?

12 A. Correct.

13 Q. And then at that point, even if they got in the cabinet,
14 there were still trigger locks on the guns, correct?

15 A. Correct.

16 Q. I'm going to --

17 A. Most of the time.

18 Q. Most of the time.

19 So I want to talk in sort of general terms about Devin's
20 social circle, his personality, things of that nature. Okay?

21 A. Uh-huh.

22 Q. When Devin got out of confinement, did he have, to your
23 knowledge, a social -- like a large group of friends? Did he
24 have a small group of friends? Any group of friends?

25 A. I don't know -- I have no idea what the size was. I know

1 he was going out and hanging out with friends and kind of
2 reacclimating to world after confinement.

3 Q. Did you have any knowledge if Devin was ever in a
4 motorcycle gang or a criminal gang?

5 A. Not to my knowledge.

6 Q. Devin never showed up wearing Bandidos gear?

7 A. No. I think there would have been a big issue if that had
8 happened.

9 Q. You would have taken issue with Devin with that?

10 A. I would have taken issue with all of it. I don't want any
11 of that crap on my property. If that's what you're going to
12 do, then you need to figure out your own life and don't ask me
13 for help. That's not a road we go down.

14 Q. Did Danielle's family come out to your property ever?

15 A. I don't remember them ever coming out, but I honestly
16 don't remember. I mean, they could have when we were not
17 there, out of town.

18 As I said, when you're in the house, you can't hear all
19 the road noise. You step outside the front door, and you hear
20 tons of road noise. So someone could easily have driven up
21 and us not even noticed it, believe it or not.

22 Q. Did you -- you didn't have a problem with the -- say, the
23 Shields family coming over to your property, would you?

24 A. No.

25 Q. And if Erin Brassfield wanted to come over, you wouldn't

1 have a problem with that?

2 A. The only time I recall -- and we were talking about this
3 going over the deposition. I had only heard the name "Erin"
4 in casual conversation, or whatever, prior to. After the
5 shooting, I remember Danielle saying, "There's somebody down
6 at the gate that wants to come up and see me, and I don't want
7 to see them."

8 I walked down, saw this lady -- that's when the deputies
9 were all outside -- saw this lady and said, "Danielle asked me
10 to come down and tell you she doesn't want to see you."

11 Q. This is after the shooting?

12 A. This is after -- within a day or two afterwards. And I
13 later found out that that was Erin. Okay. And I have no idea
14 if they had ever invited her up to their -- you know, their
15 place up there in the barn or not.

16 Q. But you wouldn't have forbidden Erin coming on your
17 property or anything like that, would you?

18 A. Have no reason to.

19 Q. On -- I'm going to switch gears now and talk to you about
20 the day of the shootings. Okay?

21 A. Okay.

22 Q. Did Devin -- I guess, what was your interaction with Devin
23 the day of the shooting?

24 A. Well, he came down that morning. My youngest daughter was
25 down from college with some friends for the weekend. And we

1 were, you know, having breakfast with them. And then I was
2 going up to do some more painting and sanding, trying to get
3 our house finished.

4 And he came down at one point to, I assume, kind of
5 socialize or -- I don't know -- see Lily or say hello or what.
6 I don't know. But he came down and at one point asked us --
7 and I don't remember now if it was via text or in person --
8 but asked us if we would watch the kids that morning and that
9 he and Danielle needed to go someplace.

10 And I says, "Well, no, we can't this morning. You know,
11 Lilly's down with her friends and we're visiting. But we can
12 this afternoon if you'd like. I don't know, say, 1:00, 2:00,
13 whatever, we'd be more than glad to watch the kids."

14 And he said, "Well, okay." And --

15 Q. Was he acting bizarre to you?

16 A. Not at all to me.

17 Q. In the previous, say, six months, had you noticed any
18 changes in Devin -- mental health changes in Devin?

19 A. Not that I noticed and said, "Oh, whoa, that's different"
20 or something like that. It was just pretty much Devin the
21 way, you know, he was, you know.

22 Q. How was Devin?

23 A. Well, as a child, he was very, very happy, always smiling,
24 cutting up, telling jokes, that kind of thing. When he came
25 back from the Air Force, that part of him seemed missing. But

1 I didn't look at it like, "Oh, that's a problem; you got to
2 identify what this is" because it's like, okay, well, if I'd
3 just come back from spending that many months, effectively, in
4 solitary confinement and going through everything he did, you
5 know, there's going to be a period of adjusting, you know,
6 that one would think going through, as well as just growing up
7 in life from an 18-year-old kid to a 20-whatever-year-old man.

8 So there was nothing that I looked at that I felt was
9 strange or suspicious or concerning.

10 Q. You didn't see him fall apart over the last couple of
11 weeks of his life, did you?

12 A. Not that I recall.

13 Q. Was Devin -- in your estimation, just personality-wise,
14 was he introverted? Extroverted?

15 A. When he was younger, I would say he was borderline
16 extrovert. Like I say, always laughing, talking, everything
17 else.

18 When he came back from the Air Force, I would say he was
19 probably more introverted. But when he would be around people
20 he knew, okay, he would kind of, you know, go back to, at
21 times, himself, laughing, kidding, telling jokes, things like
22 that.

23 Q. Was he impulsive as a -- as a general personality trait?
24 Was he slow to do things and careful to consider?

25 A. No. Devin, pretty much, was always a very impulsive --

1 part of his ADD stuff, we believe at least.

2 Q. And when was he diagnosed with ADD, approximately?

3 A. I don't remember.

4 Q. Was he a little kid?

5 A. Yeah. He was a young kid. I don't remember exactly. The
6 wife handles the medical in our family.

7 Q. I'll ask her about that in a minute, then.

8 A. Yeah. It was when he was young. I don't remember how old
9 but --

10 Q. Did you see him change from that impulsive personality
11 through, like, right before the church shooting?

12 A. No. I would say that part of it was typically about the
13 same. I mean, it's not like I sat down and studied it and
14 said, "Okay. You know, is there any change? What is it?
15 Let's document it or let's study it" or -- it's like, you
16 know, he's out. He's trying to get his life back together;
17 we've got our life we're doing. And, you know, so it's not
18 anything that I noticed that, "Oh, wow. This is really
19 different."

20 Q. You were around -- you saw him every couple of days at
21 least, correct?

22 A. Well, it depends. Sometimes they may go -- come down to
23 the house twice, three times in one day. I may be up in the
24 barn getting or doing something, you know. I may not -- may
25 not have seen them for two, three days, a week. If we were

1 out of town, it could be two weeks, three weeks.

2 Q. I guess I was just being inartful in my question.

3 I was just trying to establish that you saw -- when I
4 asked the predicate question of if you saw any major changes,
5 you were still actually seeing Devin during that time I'm
6 talking about, right? That there weren't changes?

7 A. Oh, yeah. I mean, he and I went camping roughly a month
8 before, you know, the shooting. And he seemed perfectly
9 normal, you know, camping buddy.

10 Q. The morning -- getting back to now November 5th 2017.

11 Devin came to the house, asked you to watch the children.
12 You said you couldn't because your younger daughter was in
13 town, correct?

14 A. Correct.

15 Q. And you were doing work on the house, correct?

16 A. Correct.

17 Q. When's the next you heard -- I guess, was it like early
18 morning? Breakfast time? Shortly after?

19 A. Yeah. I would assume it was early morning, breakfast.
20 Because they were -- Lily and her friends were going to be
21 getting ready to head back to college sometime early that
22 morning. I don't remember exactly what time. But, you know,
23 he left, and that was the last time I saw him.

24 Q. When's the next you heard from him?

25 A. At some point, the, you know, rangers/FBI, whoever has my

1 phone with all the text messages that they could look at to
2 see the exact time or whatever. But at some point, Lily and
3 her friends were getting ready to leave. And I went back on
4 upstairs painting, sanding -- I don't remember what I was
5 doing.

6 And I heard my phone beep. And it was like, okay, I'll
7 finish this up or whatever. And after I finished it up, kind
8 of wiped my hands off, I went and picked up my phone and
9 looked at it. It was a text message, a group message to me
10 and my wife from him.

11 Q. From Devin?

12 A. From Devin.

13 Q. What did it say, to the best of your recollection?

14 A. To the best of my recollection -- and, you know, the FBI,
15 rangers, whoever will have it -- you know, the exact. But it
16 was something to the effect of, "I'm sorry. I love you guys.
17 Please go untie Danielle in the barn."

18 Q. Did you know what he meant by "untie Danielle"?

19 A. I had no idea. So I walked downstairs -- because I saw it
20 was a group message, so I walked downstairs to my wife. And I
21 said, "Honey, did you see that message?"

22 And she says. "No. What message?"

23 So we found her phone, and she looked at it. And I said,
24 "Do you know what the hell this means?"

25 She said no, and so we headed up to the barn.

1 Q. What did you find in the barn?

2 A. Well, the door was locked. So it took us a while to
3 figure out how to kind of jimmy it to get in. And we went in,
4 and the two babies were in their playpen. And Danielle was,
5 you know, tied up on the bed.

6 Q. Tied up how?

7 A. Her hands were behind her and a rope between her legs and
8 the handcuffs.

9 Q. Did you get her out of that?

10 A. Yeah. We untied her. But the only thing I could find for
11 the handcuffs were, you know, a cheap, old, crappy piece of
12 wire cutters that I happened to have up there. And they
13 weren't cutting through it or whatever.

14 So, you know, Danielle was sobbing and, you know, couldn't
15 understand what she was saying. And so I left my phone there,
16 and I headed up to the house to get something better. And in
17 the meantime -- and I wasn't there, but I saw the text because
18 my phone was up there with us at that point, not my wife's, as
19 I recall.

20 And apparently my wife had texted him, saying, "Where's
21 the key to these handcuffs?" Now, I don't remember at some
22 point, because I wasn't there, to be able to say was that all
23 text or was that voice, or I don't really remember. But when
24 I got back with a pair of cutters, Danielle's handcuffs were
25 off, and they were talking with Danielle -- I mean, with Devin

1 on the speakerphone.

2 Q. On your speakerphone?

3 A. Yes.

4 Q. And what was the gist of that conversation with Devin on
5 speakerphone?

6 A. I don't know what was said exactly leading up to it.

7 Q. Sure. But when you got there?

8 A. I -- you know, you can ask Becca what was said there. I
9 don't want to put words in her mouth. Okay. I know she told
10 me what was said.

11 Q. I'll ask her.

12 A. But when I got there, it was like, "Wait. You did what?
13 Where? What is this place you're talking about?"

14 And he was saying -- I never heard of the term "Sutherland
15 Springs" before. And he said -- he said something to the
16 effect that -- he said, "Dad, I fucked up. I just killed a
17 bunch of people in church."

18 And I said, "What do you mean you killed" --

19 Q. Sir, if you need to take a moment, just take a moment.
20 Okay? I believe there's tissue in front of you.

21 A. I said, "Son, what do you mean you killed a bunch of
22 people in church?"

23 And he said, "I just killed a bunch of people in church."
24 And he said -- he said, "I've been shot and I'm bleeding out."
25 And he said, "I'm not ever going to get back to the house to

1 see you again."

2 Q. I'll take a moment. Just...

3 (Pause)

4 Q. I'm not in a hurry, so you let me know when you're ready.

5 Okay?

6 A. I think we just need to go on.

7 Q. Yes, sir.

8 What happened next?

9 A. I don't know. It's all a blur. At some point, he said
10 Sutherland Springs or whatever, and I asked Danielle, "What is
11 that?"

12 And she said, "That's the church that, you know, I grew up
13 in, my parent -- my mom goes to."

14 And there was a little bit of chitchat of, "I love you,
15 son."

16 And then at one point, he said, "Let me talk to Danielle."
17 And I remember hearing him say, "Danielle, I love you. Please
18 don't ever forget me."

19 And she said, "I love you too. I'll never, ever forget
20 you."

21 And then I took the phone, and we called 911 to report it.

22 Q. Danielle was here yesterday and testified about being
23 abused by Devin.

24 Do you have any knowledge of what was going on in that
25 barn when they were together by themselves?

1 A. Of being abused by Devin?

2 Q. Yes, sir.

3 A. I have no knowledge of any of that whatsoever. Never saw
4 anything like that. Never saw any evidence of anything like
5 that, you know.

6 Q. You weren't in the barn with them alone, correct?

7 A. Was or was not?

8 Q. Were you ever in the barn alone with them -- I guess, when
9 they were in their living quarters, are you there with them?

10 A. Well, I mean, at times, if I was up in the barn, I might,
11 you know, pop in and say hey and, you know, play with the kids
12 a little bit or whatever. Or he'd call me up a couple of
13 times, "The air-conditioner is not working," and, you know, go
14 up and show him how to clean the filter and that kind of
15 stuff.

16 Q. They had their own life down in barn, correct?

17 A. Yes.

18 Q. Up in the barn.

19 And Devin was a grown man with a wife, and you let him
20 have his life up there, correct?

21 A. And two kids, yes.

22 Q. When Devin was released -- I want to back up a minute.

23 We talked about, briefly, that no one from the Air Force
24 told you Devin couldn't have a gun, correct?

25 A. Correct.

1 Q. And we talked briefly --

2 A. Not that I recall, anyway.

3 Q. That you recall.

4 And we -- I apologize for speaking over you, sir.

5 You said what now?

6 A. No. I just said, not that I recall.

7 Q. And you knew that Devin had been in Peak for a bit,
8 correct?

9 A. Correct.

10 Q. Did anybody from the Air Force ever tell you that Devin
11 had been suicidal when he was in Peak?

12 A. No.

13 Q. Is that information you would have wanted to know as his
14 father?

15 A. Absolutely. In fact, the first time I even heard about a
16 suicide or attempt was at the meeting with the inspector
17 general when it was brought up.

18 Q. Would you have wanted -- and, obviously, Devin had guns on
19 your property.

20 Would you want to know if Devin had ever been suicidal, if
21 he was having a gun?

22 A. Well, of course.

23 Q. If you had known Devin had been suicidal, would that have
24 changed your opinion on him having a gun?

25 A. Absolutely.

1 Q. In what way?

2 A. Well, I mean, look, anybody, if they're suicidal -- I'm no
3 shrink or, whatever, expert. But it's only common sense that
4 if someone is suicidal, that they don't need to have access to
5 something that is potentially, you know, life-ending or
6 whatever.

7 Q. Shifting gears just a moment.

8 Did Devin ever ask you to buy him a gun?

9 A. Not that I recall.

10 Q. If Devin had asked you -- do you know what a "straw
11 purchase" is on a gun?

12 A. A what?

13 Q. It's called a "straw purchase."

14 A. No idea. Never heard that term.

15 Q. A straw -- a straw purchase is basically when someone who
16 can't buy a gun wants you to buy it for them to hide the
17 identity of the eventual owner.

18 A. Oh. Never heard the term.

19 Q. So Devin never asked you to do anything like that?

20 A. No.

21 Q. When Devin got out of the military, were you aware that he
22 had made threats toward his leadership in the military?

23 A. Not that I recall. Not at that time, no.

24 Q. And when you say "at that time," I told you about that at
25 the deposition?

1 A. Right. Subsequently, through whatever this process, I've
2 learned that or been told that.

3 Q. I want to show you an exhibit. And I'm going to use the
4 ELMO, if it's okay with everybody. I'm just more comfortable
5 with it, frankly.

6 This is JEX 21. It's part of the barment file, Your
7 Honor, and it's pages 4 through 5, JEX. It's part of the
8 barment file.

9 THE COURT: Go ahead. It's been admitted.

10 MR. SCHREIBER: And let me make it a little bigger.

11 THE WITNESS: I grabbed my contact case, but there's
12 no contacts in it, so --

13 BY MR. SCHREIBER:

14 Q. Okay. This is -- and I'll walk you through this. This is
15 indicated March 27, 2013. And the subject is "Request for
16 expulsion and order not to reenter Holloman Air Force Base for
17 AB Devin P. Kelley."

18 Do you see that, sir?

19 A. Yes.

20 Q. And if we go down in paragraph 2 under "Background," it
21 says, "Due to Kelley's extensive record of violence and
22 directing death threats toward his leadership and spouse" --

23 MR. DIEDRICHS: Your Honor, I'm going to object this
24 line of questioning. He said he had no personal knowledge of
25 this information.

1 THE COURT: Yeah. So you're doing this by
2 background. What kind of question are you going to ask?

3 MR. SCHREIBER: I'm going to ask him, if he had known
4 this, would that have changed his behavior toward letting
5 Devin have a gun on the property?

6 THE COURT: Go ahead.

7 BY MR. SCHREIBER:

8 Q. And this -- so it says, "Due to Kelley's extensive record
9 of violence and directing death threats toward his leadership
10 and spouse, his leadership has requested that you bar him from
11 Holloman AFB."

12 Did I read that correctly?

13 A. Correct.

14 Q. And then down in 3, "Facts: He has repeatedly threatened
15 to kill his leadership," correct?

16 A. Correct. That's what it says.

17 Q. If you had been told that by the Air Force, would you have
18 let Devin have a gun on your property?

19 A. I can't imagine, no.

20 Q. This is extremely serious to you, isn't it?

21 A. Absolutely.

22 Q. Were you made aware at any point from anybody at the
23 Air Force, before this litigation, that Devin had threatened
24 to kill his leadership?

25 A. Not that I recall.

1 Q. That is something you probably would recall, right?

2 A. I would certainly think so.

3 Q. If you had been aware of that, that Devin had threatened
4 to kill his leadership, would you have tried to get him mental
5 health counseling about that?

6 A. I think I would have, definitely.

7 Q. If you had known that he was suicidal while in the
8 Air Force, would you have tried to get him mental health
9 counseling when you got out?

10 A. Absolutely.

11 MR. SCHREIBER: Your Honor, I'll pass the witness.

12 THE COURT: Any cross?

13 MR. DIEDRICHS: Yes, Your Honor. Thank you.

14 CROSS-EXAMINATION

15 BY MR. DIEDRICHS:

16 Q. Mr. Kelley, we were just talking about the mental status
17 of your son, Devin.

18 THE COURT: Can you pull that closer to you? Your
19 voice isn't carrying. Thank you.

20 BY MR. DIEDRICHS:

21 Q. Okay. So let's kind of talk about a family history.

22 You mentioned in your deposition that one of your
23 daughters has bipolar condition?

24 A. I don't know that I mentioned that.

25 Q. Is it true, though?

1 A. I have no idea. I don't think so.

2 Q. Okay.

3 A. Can you show me in the deposition where I said she has
4 bipolar, and which one?

5 Q. Well, you're not aware if she does or does not?

6 A. I'm not aware of it.

7 Q. Okay. All right. And you --

8 A. I reviewed the deposition. I don't remember anything
9 about bipolar being brought up in mine.

10 Q. But you've never heard that she's had bipolar --

11 A. Not that I recall, no.

12 Q. Okay. Or that she's been diagnosed with that?

13 A. Not that I recall.

14 Q. Okay. How old was Devin when he went to the Air Force?

15 A. It was right after he got out of high school. So I think
16 18, fixing to turn 19, when he was in basic.

17 Q. All right. And how old was he when he left the Air Force?

18 A. I'd have to do the math. I don't remember. Four years
19 later, whatever it was he was in.

20 Q. So 22, 23?

21 A. Yeah. Somewhere in that range, I'm guessing, yeah.

22 Q. You previously, in your testimony, testified that you knew
23 something about the HIPAA rules.

24 A. Just vaguely.

25 Q. Okay. You know the HIPAA rules prevent the transfer of

1 medical information from one -- about a patient to any other
2 person without their permission?

3 MR. SCHREIBER: Your Honor, objection. I think it's
4 calling for a legal conclusion by a lay witness, and I don't
5 know that it's true.

6 THE COURT: Yeah. That's overruled.

7 BY MR. DIEDRICHS:

8 Q. Are you familiar with that?

9 A. Generally, I'm familiar with you're not supposed to tell
10 people about other people's medical.

11 Q. Okay. Are you aware that he was in Peak voluntarily?

12 A. No, I'm not.

13 Q. Devin never told you that?

14 A. Not that I recall.

15 Q. When you asked -- was it his defense attorney Rosenow --
16 is that how you pronounced it?

17 A. I think it's pronounced Rosenow.

18 Q. You asked him about what restrictions Devin might have
19 with respect to his conviction, correct?

20 A. I don't remember the exact wording, but it's conceptually,
21 is this considered a felony or a misdemeanor?

22 Q. Okay. And he referred you to an attorney to figure that
23 out?

24 A. Not immediately, no.

25 Q. What do you mean, "not immediately"?

1 A. Well, like I just said a few minutes ago to the other guy,
2 that he said it's Air Force; therefore, it's federal. But
3 it's -- because it's under 12 months -- or I don't know
4 whatever the deal, the limiting issue is -- it's a
5 misdemeanor.

6 But he said this is, you know -- this is the Air Force
7 stuff. So he says, "I can't give you a clear answer." But he
8 said, "If you want, you can go ask, you know, ten different
9 attorneys, and you'll get ten different answers. But the
10 reality is it's gray area. No one knows. Depends on where
11 you are," whatever that means.

12 Q. Well, you were -- you were coming back to Texas?

13 A. Correct.

14 Q. When you got back here, did you go ask a lawyer what the
15 restrictions were?

16 A. No.

17 Q. You mentioned some tools that you had in the barn.

18 Do you own a drill?

19 A. Yeah.

20 Q. Screwdrivers?

21 A. Yeah.

22 Q. Allen wrenches?

23 A. Not up in the barn.

24 Q. Anywhere in the house?

25 A. Down in my garage.

1 Q. Oh, okay. Did Devin have access to those tools?

2 A. Anybody that walked through the garage could use the
3 tools.

4 Q. Okay. Devin knew where they were?

5 A. Everybody in the household knows where they are. It's
6 obvious. They're hanging on a pegboard in the garage.

7 Q. Okay. Were you aware that Danielle testified in her
8 deposition that when he first got back from the Air Force,
9 he -- Devin was trying to become a member of the Bandidos?

10 A. In the first place, I know nothing about Danielle's
11 testimony or her deposition. I have not read it or seen it.

12 Q. Okay. But if she did testify to that, do you have any
13 reason to disbelieve her?

14 A. I have no reason to believe or disbelieve. I was not
15 aware of anything like that.

16 Q. Okay. In an average month, if you can estimate how many
17 times you would go over the barn and visit.

18 A. There would be no way to estimate that.

19 Q. Okay.

20 A. As I said, sometimes, like earlier this week, I was up
21 there three or four times doing stuff. Before that, I hadn't
22 been up there since probably Christmas. I'm just guessing.
23 So it's a real hit-or-miss when I would be up there or not be
24 up there.

25 Q. Did you ever go up there just to visit with Devin,

1 Danielle, and your grandchildren?

2 A. Not just to visit. It was -- usually, they would come
3 down to the house to visit. Or, you know, like I said,
4 earlier, Devin might call and say, "Hey, something's wrong
5 with the air-conditioner. Can you come look at it?" or "The
6 hot water heater's not working. Can you look at it?"

7 Q. Or if you were up there doing something --

8 A. Right.

9 Q. -- you might stop in?

10 A. Or he might poke his head out, or Danielle or the kids.
11 You know, I'd be up there doing something, and, you know, they
12 might come out and talk with me and, you know...

13 Q. And I guess you just found out today that Danielle accused
14 Devin of physical abuse?

15 A. I don't know. Did I -- did you just say something to that
16 earlier today?

17 Q. You were asked a question earlier about if you were aware
18 that Danielle made accusations --

19 A. Oh.

20 Q. -- that --

21 A. No, I'm not aware of any physical abuse.

22 Q. Okay.

23 A. I'm not aware of any accusations of it other than what may
24 have been said earlier.

25 Q. Okay. So if that was true that he was doing that, he was

1 able to keep that from you?

2 A. Since I was not aware of it, yeah. I mean --

3 Q. Okay. And, again, assuming that his participation in the
4 Bandidos was accurate, he kept that from you?

5 MR. SCHREIBER: Objection, Your Honor. That
6 misstates testimony.

7 THE COURT: That's sustained.

8 BY MR. DIEDRICHS:

9 Q. Okay. Did you know that he used drugs?

10 A. I was aware that he occasionally smoked pot.

11 Q. Did you know that he abused prescription drugs?

12 A. No, not to my knowledge.

13 Q. So if that's true, he was able to keep that from your
14 knowledge?

15 A. They were up there living their lives. I wasn't watching
16 what was in there or --

17 Q. And if Danielle testified that over the last year of his
18 life, the abuse was becoming more and more violent, you don't
19 have any knowledge of that?

20 A. Never saw evidence of any violence towards Danielle or
21 kids or anybody.

22 Q. So if it was true that it was increasing over the last
23 year of his life, he was able to keep that from you?

24 A. I guess that's true. I never saw any evidence of physical
25 abuse to anybody.

1 Q. You mentioned that you would go -- that you went camping
2 with Devin about a month before the shooting?

3 A. Uh-huh.

4 Q. How long were y'all out?

5 A. A week, roughly. Maybe ten days. I don't remember.

6 Q. Do you remember where you went?

7 A. Uh-huh. Colorado.

8 Q. Do you know if Danielle stayed at your property, or did
9 she go to stay with someone else?

10 A. I wasn't there, so I'd have no idea.

11 Q. Okay. Did she ever go camping with you?

12 A. No. I don't know that Danielle is the camping type, but
13 this was just kind of a guys-go-camping thing.

14 Q. Okay. How often did you guys go camping?

15 A. Well, that's probably the first time since, you know,
16 before he went into the Air Force, if I recall.

17 Q. Okay. Did Danielle have her own cellphone?

18 A. She had phones. I don't know if they were hers or if they
19 were, you know, active or not.

20 Well, at one point, they were active because she was
21 talking about she got on one of those monthly plans or
22 whatever where you got to go do a card. I don't remember
23 which one it was, but --

24 Q. Okay. Did you have her phone number in your cellphone?

25 A. I don't recall. I would assume I did, but I don't

1 remember. Danielle has gone through a number of different
2 phone numbers over the years.

3 Q. Okay. Do you ever remember giving her a call from your
4 cellphone to her cellphone?

5 A. I would have no way of remembering that.

6 Q. Okay. All right. You talked a little bit about when you
7 were interviewed by the Texas Rangers on the day of the
8 shooting about -- they asked you if Devin had access to your
9 weapons.

10 Do you recall that testimony earlier?

11 A. I remember the testimony. I don't remember the accuracy
12 of who said what at this point but --

13 Q. Sure. No. I understand that.

14 If we could bring up that clip of JEX 477. Oh, I'm sorry.

15 Okay. I'm sorry. That's Joint Exhibit 694.

16 BY MR. DIEDRICHS:

17 Q. Now, when you went up -- when you were in -- went to --

18 *(Playing video)*

19 MR. DIEDRICHS: Can you pause that for a sec?

20 BY MR. DIEDRICHS:

21 Q. When you went to the Texas Rangers on the day of the
22 shooting, you went there voluntarily, correct?

23 A. I don't know how you describe or call it "voluntarily."

24 They had two police outside saying, "They want to see you down
25 there. The rangers are waiting for you."

1 Q. Oh, okay. And you knew that they were there to discuss
2 circumstances surrounding the shooting, what you knew, what
3 you didn't know?

4 A. I assume that was the reason, yeah.

5 Q. Right. Right.

6 And you knew it was important to answer those questions
7 truthfully, right?

8 A. (Nods.)

9 Q. And you did that, right?

10 A. To the best of my abilities, as I recall.

11 MR. DIEDRICHS: Okay. All right. If we can go ahead
12 and play the clip.

13 *(Playing video)*

14 BY MR. DIEDRICHS:

15 Q. Okay. So in that clip, the ranger specifically asked you
16 if Devin had access to it, and you said --

17 A. Was the word -- was the word "could" in there? I think I
18 heard the word "could."

19 Q. Do you want -- do you want to hear that again?

20 A. Please. Please.

21 Q. We can run it again.

22 *(Playing video)*

23 THE WITNESS: Yeah. He said, "Could he access
24 yours?" Anybody walking through the house could, in theory,
25 access them.

1 BY MR. DIEDRICHS:

2 Q. I believe what he said was "Would he be able to access
3 your weapons?"

4 THE COURT: That's misstates the --

5 THE WITNESS: That's not what he said.

6 BY MR. DIEDRICHS:

7 Q. Is that right?

8 THE COURT: No. Move on.

9 MR. DIEDRICHS: I'm sorry.

10 THE CLERK: He said "could."

11 MR. DIEDRICHS: Okay. I apologize, Your Honor.

12 BY MR. DIEDRICHS:

13 Q. And you said, "He could. But I've checked, and mine are
14 all there"?

15 A. You'd have to show me. I don't remember now, did I say he
16 could? But I know I said I checked mine.

17 Q. That was my error. We can go ahead.

18 MR. DIEDRICHS: Can you run that again.

19 *(Playing video)*

20 BY MR. DIEDRICHS:

21 Q. Okay. And you said he could access them, correct?

22 A. Conceptually, anybody could access them.

23 Q. Further, he asked, "Are they locked up?"

24 A. Did he ask that, or I just volunteered it? Whichever.

25 But, yeah, they're locked up.

1 Q. But you didn't say that. What you said is, "Well, he
2 could" --

3 A. Can we go back?

4 Q. -- "but I've checked. Mine are all there."

5 A. Could you scroll it down?

6 Q. Can you --

7 A. You don't need to play the video, just the wording.

8 Q. Okay. Do you see it there?

9 A. No. No.

10 Q. I'm sorry. How far back did you want to go?

11 A. Okay. Just a little bit further down, then.

12 *(Playing video)*

13 THE WITNESS: Yeah. I mean, he kind of asked are
14 they locked up. And I said, "Well, I checked. Mine are
15 there."

16 BY MR. DIEDRICHS:

17 Q. Right. But you didn't say, "Yeah, they're locked up"?

18 A. I don't think it was really necessary because he had
19 brought up, "Are they locked up?" And I said, "I've already
20 checked. They're there."

21 Q. Well, you could have checked them and found them there
22 even if they weren't locked up?

23 A. I mean, anything's possible. But I'm telling you,
24 historically, our guns are locked in the cabinet. I don't
25 remember that morning. There was a lot going on. A lot of

1 emotions.

2 I don't remember if I walked in there and they were locked
3 or unlocked. But I would be willing to bet that they were
4 locked up, and I had to grab the key and open it and look and
5 see, "Okay. Yes, they're there." That would have been my
6 natural inclination.

7 Q. Okay. And you checked because you wanted to make sure
8 Devin didn't take them?

9 A. Well, I wanted to make sure that -- if something heinous
10 like this happens, as a gun owner, you want to be prudent. To
11 me, that's just normal.

12 Q. And the -- and the heinous thing that happened was your
13 son went and shot, as he said, a bunch of people?

14 A. Yes.

15 Q. And you wanted to make sure that he didn't shoot them with
16 your gun?

17 A. I don't know that that's what was going on in my mind,
18 that it's "Oh, did he shoot them with my gun?" or not. It was
19 just, "Check. Are my guns there? Yes. They're there."

20 Q. Okay.

21 A. There was no thought process to that, as I recall. I
22 mean, as I said, that morning there was a lot of emotion, a
23 lot of hectic. It's been three and a half-plus years or
24 whatever and --

25 Q. But the video isn't from three and a half years ago or

1 it --

2 A. It is from three and a half years ago.

3 THE COURT: Let's move on to a new question.

4 MR. DIEDRICHS: Yes, Your Honor.

5 BY MR. DIEDRICHS:

6 Q. If we could, let's go to your deposition, Government
7 Exhibit 57, page 31, of that exhibit, which is page 240 of
8 your transcript.

9 MR. SCHREIBER: Your Honor, objection. Improper
10 impeachment. Has he asked a question he's impeaching him on
11 now, or is he just talking about the testimony in general?

12 THE COURT: I'll wait for -- I'll take this one at a
13 time.

14 This is not impeachment, right? You're moving on to a new
15 area, correct?

16 MR. DIEDRICHS: No. This is impeachment. This is --
17 I'm continuing on to this.

18 THE COURT: We've already covered this subject, and
19 I've already understood it. So let's move on.

20 MR. DIEDRICHS: But --

21 THE COURT: Move on.

22 MR. DIEDRICHS: Yes, Your Honor.

23 BY MR. DIEDRICHS:

24 Q. And you indicated you had an AR-15 yourself?

25 A. Correct.

1 Q. It was similar to the one Devin had?

2 A. There's a couple different brands. Sorry. I don't know
3 if it was the same brand as his or not, you know.

4 Q. Okay. Did it look similar?

5 A. Generically, I would say, yeah. I'm not a real gun
6 enthusiast, so...

7 Q. If you're not a real gun enthusiast, why did you get that
8 weapon?

9 A. I don't remember.

10 Q. Danielle testified yesterday that you purchased the AR-15
11 because Devin suggested that.

12 Are you aware of that?

13 A. I'm not aware of that. I don't recall that at all.

14 Q. Okay. And if you can't recall it or why you purchased it,
15 you're not trying to tell the Court that Danielle's testimony
16 yesterday was untruthful, are you?

17 A. I have no idea what her testimony was, if it's truthful or
18 not. I can't get into her head. But I would not go and make
19 that expensive of one based on, you know, my son making --
20 saying, "Oh, you need to go buy one."

21 I don't know if that's what you're trying to imply, but
22 that's not -- you know, that's not why I went and bought one.
23 I don't really remember why, but I don't remember it being
24 Devin pressuring me or telling me to.

25 Q. But you can't remember why you bought it?

1 A. Not really.

2 Q. Okay. Do you recall the whole family going up to Cabela's
3 south of Austin to purchase that AR-15?

4 A. I remember we've gone to Cabela's a number of times to do
5 various things as a family. I don't remember if I purchased
6 it at Cabela's on that occasion or Cabela's -- I really don't
7 remember at this point.

8 Q. All right. But if that's Danielle's recollection, again,
9 and she testified to that, your memory wouldn't be able to
10 impeach her on that, would it?

11 A. I'm not sure what you mean, "impeach her on that."

12 Q. Well, you couldn't say, from the memory that you do have,
13 that her testimony was not truthful?

14 MR. SCHREIBER: Your Honor, objection. Repetitive.
15 I think he's been over this a couple of times.

16 THE COURT: That's overruled. Let's just finish this
17 off.

18 THE WITNESS: I mean, I can't get in Danielle's mind.
19 So I have no idea if that's what she saw or perceived or said
20 or -- I have no way of knowing.

21 BY MR. DIEDRICHS:

22 Q. And at least today, because you can't remember it, you
23 can't tell -- you can't tell the Court that it's not accurate?

24 A. I would find it hard to believe that that was -- not that
25 she said that. I can believe she said it, if you said so.

1 But I would find it very hard to believe that I would, you
2 know, go buy something like that at that kind of cost based on
3 my son saying, "Hey, you need to go buy this." That would not
4 be a reason for me for buying a pistol or a rifle or anything
5 else.

6 Q. Do you still own the weapon, sir?

7 A. Yes.

8 Q. And you keep it in that cabinet?

9 A. Yes.

10 Q. In the last year of Devin's life, did you ever see his
11 AR-15?

12 A. Probably. But I have no way of remembering that.

13 Q. Well, let me ask it a different way.

14 Did you ever see some of the modifications he made to that
15 weapon?

16 A. I don't know that I know he made modifications.

17 Q. You never saw the tactical light on the front of it?

18 A. I don't remember.

19 Q. Okay. What about the pistol grip on the barrel?

20 A. I don't remember.

21 Q. Okay. Do you remember if you saw it with a sling on it?

22 A. I'm assuming he probably had a sling, but I don't know. I
23 didn't pay attention.

24 Q. Okay. That's fine. Thank you.

25 Were you aware that he was purchasing high-capacity

1 magazines for his AR-15?

2 A. Not that I remember.

3 Q. He never showed you any of those?

4 A. What do you call "high-capacity"?

5 Q. 30 rounds.

6 A. I think 30-round is pretty standard for most people who
7 have ARs.

8 Q. What about 100 rounds?

9 A. I don't know that you can get 100-round.

10 Q. And if he tried to get one, he at least didn't let you
11 know that?

12 A. I was not aware of it.

13 Q. Okay. Do you have an opinion as to why Devin chose that
14 church as a target?

15 A. You know, I want to be very careful of speculating. I
16 can't get in his mind.

17 Q. Do you remember being interviewed by the Department of
18 Defense OIG, Office of Inspector General?

19 A. Yes.

20 Q. Do you remember telling them what you thought the reason
21 was?

22 A. I remember seeing the transcript, I think, in the
23 depositions or whatever, that I probably said something about,
24 you know, based on what Danielle had told us about her history
25 with that church and everything else. You know, I mean, that

1 would be, to me, kind of a logical conclusion.

2 Q. And the history that you're talking about is Danielle's
3 history of being sexually abused and that she was mocked by
4 people at the church?

5 A. First, I want to clarify that I do not have any direct
6 knowledge of any of that abuse or anything else.

7 Q. I understand.

8 A. All I know is what Danielle told us, meaning me and my
9 wife, and presumably told Devin -- I don't know if Devin was
10 there when she told us these things -- over a period of time.

11 But, you know, just generically, I was familiar with --
12 what she said is that when all of this stuff was happening at
13 home, the sexual abuse and everything, that she felt like the
14 church treated her like it was her fault, that she did it and
15 she deserved it. As I recall, that's the basic sentiment of
16 what she expressed to us.

17 Q. Okay. But you don't -- you don't know if she shared that
18 with Devin also?

19 A. I don't have any idea if -- I don't recall if Devin would
20 have been present when she was saying that to me or my wife.

21 Okay. So all I could do is guess. Just like I can't imagine
22 Danielle telling me that stuff by myself, with my wife not
23 being there, just kind of being a girl thing and all of that.

24 So -- but I don't know if Devin was there or not. But I
25 would say I don't know how Devin would have known those kinds

1 of things if he, you know -- she hadn't told him because he
2 obviously wasn't there at the time either.

3 Q. Certainly.

4 So if he knew them, she would have to have been the one
5 that told him?

6 A. I would have assumed that, but I have no way of knowing
7 that for sure.

8 Q. Okay. But she did tell you and your wife?

9 A. Yes, as I recall.

10 Q. Okay. And the whole situation -- a trial on those -- on
11 Danielle's abuser was approaching at the time of the shooting;
12 is that correct?

13 A. As I recall, yes.

14 Q. And a Cibolo County sheriff came out to your house on the
15 1st of November to talk to you and Devin; is that correct?

16 A. I don't remember what the date was, but somewhere around
17 there.

18 Q. Okay. But you remember one coming out?

19 A. Yes.

20 Q. Do you remember what they wanted?

21 A. Something about pictures of Danielle from when she was
22 younger or something.

23 Q. Okay. Pictures of sexual abuse?

24 A. I don't know.

25 Q. Okay.

1 A. I don't remember if they said "sexual abuse" or not. I
2 just remember, you know, pictures. I didn't say much -- if
3 you go back and watch that whole conversation, I really didn't
4 say much throughout the whole thing, other than clarifying it
5 and saying we've covered this several times now.

6 Q. But you were there when Devin and the sheriff were
7 speaking?

8 A. Correct.

9 Q. Okay. Would you say Devin was upset about him being
10 there?

11 A. He appeared to not be happy that they were coming by. And
12 in the video, I think he expressed that he felt like he was
13 getting -- they were getting harassed and getting tired of it.

14 Q. And even you complained about people leaving cards in your
15 mailbox?

16 A. I don't know that I complained about that. Can we look at
17 the actual quoting?

18 Q. Yeah. Sure. If you want.

19 A. I mean, at some point, a card was left that had Danielle's
20 name on it, and I gave it to her. I don't know that I
21 complained about that.

22 Q. Okay. Well, let's watch the video.

23 MR. DIEDRICHS: I'm sorry, Your Honor. If you can
24 give us just one second.

25 *(Playing video)*

1 BY MR. DIEDRICHS:

2 Q. Does that refresh your recollection, sir?

3 A. Yes. Do you want me to answer now?

4 Q. Yes.

5 A. Okay. It's pretty clear, if you listen to it, that I was
6 not saying I was pissed about a card being left in the
7 mailbox. I was pissed about getting calls all the time,
8 because I don't recognize a number, and I get a boatload of
9 junk calls. And I was in the middle of trying to do some
10 painting and all. And here I am getting calls again, which I
11 presumed was going to be, you know, a junk call.

12 And that's what I was pissed about, getting interrupted
13 once again by junk calls. And it turns out it wasn't a junk
14 call.

15 Q. Okay. Fair enough.

16 Was Devin upset by the police -- or the sheriffs coming up
17 to the fence to talk to him about that?

18 MR. SCHREIBER: Objection, Your Honor. Calls for
19 speculation, to the extent he knows what Devin was -- in
20 Devin's mind.

21 THE COURT: You can testify as to what you saw and
22 his demeanor.

23 THE WITNESS: In the video, it appears to me that he
24 was a little irritated.

25

1 BY MR. DIEDRICHS:

2 Q. Did y'all talk about that after the sheriffs left?

3 A. I don't remember.

4 Q. Okay. Devin was very protective of his family?

5 A. I would say that's a fair assessment.

6 Q. Okay. Did you know that Danielle told Devin she wanted a
7 divorce the night before the shooting?

8 MR. SCHREIBER: Objection, Your Honor. Calls for
9 hearsay, what Danielle said.

10 THE COURT: He asked if he knew.

11 MR. SCHREIBER: Okay.

12 THE WITNESS: I have no knowledge of that.

13 MR. DIEDRICHS: Okay. I have no further questions,
14 Your Honor.

15 THE COURT: Anything else?

16 MR. SCHREIBER: Very brief, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. SCHREIBER:

19 Q. Mr. Diedrichs, a few minutes ago --

20 A. Who?

21 Q. The attorney.

22 A. Oh, I didn't catch the name in the beginning.

23 Q. We're familiar with each other.

24 Mr. Diedrichs was talking to you a few minutes ago about
25 if you knew why Devin chose that church, and there was talk

1 about the stuff that Danielle -- happened to Danielle as a
2 kid.

3 Do you blame anybody at that church for getting shot?

4 A. Those people were in church praying. What my son did was
5 unexcusable, especially knowing that his mom and I are
6 religious people. There was no freaking excuse for that crap.
7 Those people didn't do anything to him. They didn't deserve
8 anything like that. There's no way I would ever blame those
9 26 souls and those that are left behind to deal with his crap.

10 Q. Yes, sir. I just wanted to make it clear.

11 And this is the last thing I have a question about.

12 We talked about the Air Force attorney for Devin back when
13 he got out of -- sorry -- when he was convicted, and saying
14 that -- I believe you testified that he said it might be a
15 misdemeanor because of the time in jail.

16 Is that what you said?

17 A. As I recall, something about 12 months or -- I mean, it's
18 a legal thing but --

19 Q. Sure.

20 A. -- something about if you serve less than 12 months or
21 12 months and a day or if the sentence -- I don't know.
22 Whatever. It's something along those lines.

23 Q. Yes, sir.

24 I'm going to show you a document marked as Joint Exhibit
25 21, page 42. This is the report of result at trial.

1 Can you throw this up on the screen for me, on the ELMO.
2 Maybe we can see that. Okay. Let me make it bigger.

3 You see here where it says, that I've highlighted, "crime
4 of domestic violence"?

5 A. I see that.

6 Q. "Reduction to grade E-1, confinement for 12 months and a
7 bad conduct discharge. PTA-approved sentence to confinement
8 will not exceed three years."

9 You see that?

10 A. I see that.

11 Q. Did the lawyer tell you that?

12 A. I don't recall ever seeing that. I don't really recall
13 any wording to that effect. It was just something about the
14 12-month mark.

15 Q. If the lawyer should have known it was a felony, do you
16 think he should have told you that?

17 A. At the time, I thought I was asking someone who should
18 know that kind of stuff. I mean, he's the attorney, Devin's
19 defense guy. I would assume they've gone through this.
20 They're supposed to be smart people. You would think they'd
21 know that.

22 But it clearly left me with the impression that this is
23 one of those gray areas that civil, military justice system --
24 I don't know, federal, local, whatever, that -- as he says,
25 it's gray area. So I just took it at what he said is, "Oh,

1 okay. It's gray area."

2 And then later, when Devin was able to vote and able to,
3 you know, purchase a gun in Colorado, then I assume he went
4 through a similar process that I did, that, "Well, okay. So
5 it must not have been federal," you know.

6 MR. SCHREIBER: I'll pass the witness back, Your
7 Honor.

8 THE COURT: Anything else based on those questions?

9 MR. DIEDRICHS: Just very briefly, Your Honor.

10 RECROSS-EXAMINATION

11 BY MR. DIEDRICHS:

12 Q. You have no idea what the attorney told Devin, do you?

13 A. I have no idea. I was kept out of the equation by being
14 told I'm just the dad.

15 Q. Well, have you ever heard of the concept of the
16 attorney-client privilege?

17 A. Oh, yes.

18 Q. Okay. And you know that that attorney had that privilege
19 with your son, and you know -- do you know that he could not
20 break that privilege without your son's permission?

21 MR. SCHREIBER: Objection, Your Honor. I think it's
22 a mischaracterization. That's legal advice, not whether or
23 not a sentence is there.

24 THE COURT: That's sustained.

25 Rephrase your question.

1 BY MR. DIEDRICHS:

2 Q. If he had told your son that this was a felony conviction,
3 he certainly couldn't share that with you without Devin's
4 permission?

5 MR. SCHREIBER: Objection, Your Honor. I think that
6 --

7 THE COURT: No. That's a fair question. That's
8 overruled.

9 THE WITNESS: I have no idea if he told Devin that or
10 not.

11 MR. DIEDRICHS: That's all I have, Your Honor.

12 THE COURT: Any further need for this witness?

13 MR. SCHREIBER: No, Your Honor.

14 THE COURT: Can he be excused?

15 MR. DIEDRICHS: Yes, Your Honor.

16 THE COURT: Thank you, sir.

17 THE WITNESS: Thank you.

18 MR. SCHREIBER: At this point, we would call Rebecca
19 Kelley.

20 THE COURT: Let's go ahead and take an afternoon
21 break for about 15 minutes.

22 MR. SCHREIBER: Yes, Your Honor.

23 *(Recess)*

24 *(Open court)*

25 THE COURT: Thank you. Please be seated.

1 If you will call your next witness.

2 MR. STERN: Your Honor, if we may, very quickly
3 before we call the next witness?

4 THE COURT: Yes.

5 MR. STERN: The witness after Mrs. Kelley will be FBI
6 Director of NICS, Kim Del Greco. Now, she has arrived in
7 San Antonio. And she, obviously, will be available. But I'd
8 rather not call her from her hotel now if we're not going to
9 get to her today. I just want to get a sense of the schedule.

10 THE COURT: So I think we're moving along fine. So
11 we'll just get to Ms. Kelley today.

12 MR. STERN: Okay. Thank you, Your Honor.

13 THE COURT: You're calling Rebecca Kelley?

14 MR. SCHREIBER: Yes, Your Honor.

15 THE COURT: If you will swear in the witness.

16 THE WITNESS: Do I stand?

17 THE CLERK: You can just sit.

18 *(The oath was administered)*

19 REBECCA KELLEY, PLAINTIFFS' WITNESS, SWORN

20 DIRECT EXAMINATION

21 BY MR. SCHREIBER:

22 Q. Hello, Ms. Kelley.

23 A. Hi.

24 Q. I'm Joe Schreiber.

25 You and I met at your deposition, correct?

1 A. Yes.

2 Q. And we talked briefly out in the hallway just to say hello
3 before this testimony, correct?

4 A. Correct.

5 Q. And we have not talked otherwise, have we?

6 A. No.

7 Q. We're here for -- obviously, you know we're here about the
8 Sutherland Springs church shooting, correct?

9 A. Yes.

10 Q. And like I said at your deposition, I'm going to be going
11 into some areas that may be relatively difficult to get
12 through. Okay?

13 If, for whatever reason, you need to stop or take a break,
14 that's totally fine. We'll wait. All right?

15 A. Okay.

16 Q. What I'm going to do today -- and I won't keep you long.
17 I promise. I'm going to talk a little bit about Devin first
18 and his personality, after we introduce you just a bit. I'm
19 going to go into talking about you and your husband's guns,
20 and then I'm going to talk about some changes you may have
21 seen in Devin. Okay?

22 A. Okay.

23 Q. Very briefly, can you give us your full name.

24 A. Rebecca Anne Kelley.

25 Q. And when did you marry Michael Kelley?

1 A. In 1979, August the 31st.

2 Q. And you are -- just for the record, obviously, you're the
3 wife of Michael Kelley, correct?

4 A. Yes.

5 Q. And you're the mother of Devin Kelley, correct?

6 A. Yes.

7 Q. And you have two other daughters, correct?

8 A. Correct.

9 Q. And one is older and one was younger than Devin?

10 A. Correct.

11 Q. Tell me about your education.

12 A. I've got a bachelor of science from Texas A&M.

13 Q. When did you get that?

14 A. 1979.

15 Q. And what was your career -- had been your career?

16 A. For the last 30 years, I've been working with my husband
17 in the business.

18 Q. And what do you do in that business?

19 A. I'm officially the art director, but I do things like take
20 mail and -- and we bounce things off. And if he needs any
21 wording on the website changed, I'll change that.

22 Q. What kind of business is it?

23 A. Computer software.

24 Q. Do y'all work at your -- at your house?

25 A. Yes.

1 Q. And we talked to Michael about this, so I won't -- and I
2 apologize. If I refer to your husband by his first name and
3 your son by his first name, it's only to distinguish between
4 the two Mr. Kelleys. Okay?

5 A. Uh-huh.

6 Q. I don't mean any disrespect to either of those two. Okay?

7 A. Okay.

8 Q. Your and Michael's place, Michael told us that it's on
9 about 28 acres and outside New Braunfels, correct?

10 A. Correct.

11 Q. Can you describe the property for us briefly.

12 A. It is heavily wooded. It has our house, our barn, our
13 stables, a pump house.

14 Q. And your house is where on the property, about?

15 A. I would guess it's about halfway up the 28 acres.

16 Q. And where --

17 A. About a quarter of a mile from the highway up.

18 Q. Okay. And where is the barn?

19 A. The barn is -- if you drive up the driveway, it's to the
20 right of the house on its own little road that goes up and
21 then curves right -- curves left.

22 Q. Is the barn outfitted with an apartment?

23 A. It is like an efficiency with a bathroom and a little
24 kitchen, one bedroom and a closet.

25 Q. When did y'all make it into -- I guess, when did y'all put

1 living quarters in the barn, approximately?

2 A. Are you asking for the year?

3 Q. Yeah. Or ten years ago, 20 years ago, something like
4 that. Just approximately.

5 Is it something recent or is it --

6 A. Oh, no. It's been there.

7 Q. And I need to back up. I apologize for not asking this.

8 And it's a formality with witnesses, but have you ever
9 been convicted of any crimes?

10 A. No.

11 Q. You ever been arrested of any crimes?

12 A. No.

13 Q. You've always been a law-abiding citizen?

14 A. Yes.

15 Q. You loved all your children?

16 A. All of them.

17 Q. You love your grandchildren?

18 A. I adore them.

19 Q. You've done your best to raise your children and
20 grandchildren as best you can, correct?

21 A. Yes.

22 Q. And part of that is guiding them as a role model?

23 A. Yes.

24 Q. And part of that is keeping them out of trouble as best
25 you could?

1 A. Yes.

2 Q. And part of that is helping them if they're in trouble,
3 correct?

4 A. What?

5 Q. Helping them if they're in trouble.

6 A. Yes.

7 Q. When you help your kids if they're in trouble, part of
8 that is helping them obey the law, correct?

9 A. Correct.

10 Q. Would you ever help your child violate the law?

11 A. Absolutely not.

12 Q. I want to talk briefly about Devin, what he was like as a
13 child and then kind of get up to his time in the Air Force.
14 Okay?

15 A. Uh-huh.

16 Q. Describe Devin as a child for me.

17 A. He was a very cute, very happy, very chubby, little blond
18 boy with big, long lashes and a belly laugh that would just
19 light up a room.

20 Q. Did he -- did he go to school as a child -- go away to
21 school?

22 A. No. He was -- he was homeschooled.

23 Q. Why he was homeschooled?

24 A. He had some problems reading.

25 Q. Was there anything -- did you come to -- I guess, did you

1 figure out why he had problems reading? Was there a cause of
2 that?

3 A. Well, we went to an ophthalmologist, and he said that he
4 had some monofixation syndrome, which one eye shuts down. But
5 he overcame that, and we were able to -- I was able to teach
6 him to read.

7 Q. Did he have attention issues as a child?

8 A. Yes.

9 Q. What kind of attention issues did he have?

10 A. He was having a hard time focusing on any lessons.

11 Q. Was that with you?

12 A. Oh, yes. Uh-huh.

13 Q. Did you -- did you take him to get medical care for that?

14 A. Yes.

15 Q. What kind of medical care did you get Devin for the
16 attention?

17 A. The doctor put him on one of the ADHD meds.

18 Q. Do you know if he kept taking that throughout his
19 childhood?

20 A. Until he got to high school and refused.

21 Q. Do you know why he refused in high school? Did he tell
22 you why he stopped wanting to take the medicine?

23 A. He just didn't want to take it.

24 Q. So when did he start going to school outside the home?

25 A. There were -- there were some, like, Christian schools

1 that he had -- we went and -- like, I taught and he went to.

2 But that was -- that was like a homeschool thing.

3 Q. Did he go to regular high school?

4 A. He did.

5 Q. How did he do in regular high school?

6 A. When he turned in his homework, he did great.

7 Q. Did he have a problem turning in his homework?

8 A. Yes.

9 Q. I believe at one point you used a phrase Devin gave you
10 hell as a child?

11 A. Uh-huh.

12 Q. You recall using that phrase?

13 A. No, not as a child.

14 Q. Oh.

15 A. As a teenager.

16 Q. As a teenager. Okay.

17 What is that -- what do you mean by that?

18 A. I had to keep track of all of his school stuff, and I had
19 to push him every day. And then he'd have his homework, like,
20 in his hand, and I'd find out then from the teacher that he
21 had his homework and he just didn't put it in the box to turn
22 it in. So I felt like I was riding him every single day.

23 Q. Did Devin -- as a general proposition, if I can split it
24 in half.

25 If some -- on one side being impulsive, as an individual,

1 and another side being very planning and thoughtful and
2 caring, where did Devin fit in that spectrum?

3 A. In the impulsive side.

4 Q. Was he that way from as long as you could remember?

5 A. From the very beginning.

6 Q. Did that change at all in his life --

7 A. Not that I --

8 Q. -- that you saw?

9 A. Not that I know of.

10 Q. When did Devin join the Air Force? About what age?

11 A. I think he was 18 or 19.

12 Q. Do you recall a time when he came home unexpectedly?

13 A. Yes.

14 Q. Tell me about that.

15 A. He took his motorcycle home and -- he drove his motorcycle
16 from Holloman to the house.

17 Q. And Holloman's where?

18 A. In Alamogordo.

19 Q. New Mexico?

20 A. Uh-huh.

21 Q. Is that "yes," ma'am?

22 A. Yes. Yes.

23 Q. I don't mean to fuss at you. It's just hard for the
24 written record if there are "uh-huhs" and "huh-uhs."

25 A. Okay.

1 Q. And so if I say "is that a yes," I'm just asking -- I'm
2 not trying to put words in your mouth.

3 A. Okay.

4 Q. Do you know about how far it is from Holloman to your
5 place in New Braunfels, like, to drive?

6 A. To approximate? I can't tell the exact miles, but I can
7 approximate for you.

8 Q. Please.

9 A. Probably 600.

10 Q. 600 miles?

11 A. Uh-huh.

12 Q. Have you driven back and forth from there?

13 A. Oh, yes.

14 Q. How long did it take you to drive that far?

15 A. Well, I don't usually drive to Alamogordo, but probably
16 nine and a half hours, nine hours.

17 Q. Did Devin ever tell you why he'd left and come to the
18 place in New Braunfels?

19 A. No. But he just -- no, he didn't.

20 Q. What happened after he got home? Did he have to get back?

21 A. He seemed really scared. And we were like, "What the heck
22 are you doing here?" And so I suggested to my husband to call
23 the chaplain.

24 Q. Chaplain of the Air Force?

25 A. Uh-huh.

1 Q. Is that "yes"?

2 A. Yes, it is. Yes.

3 Q. Do you know the outcome of that conversation with the
4 chaplain?

5 A. I don't know the exact words.

6 Q. That's okay.

7 A. But he -- he said something to my husband like, "If you
8 can get him here by -- get him to a place called Peak by a
9 certain time, then he won't get into trouble."

10 Q. Did that happen? Did he go to Peak?

11 A. They left within an hour.

12 Q. Your husband and Devin?

13 A. Yeah. My husband drove Devin there.

14 Q. Did you ever -- are you familiar with what Peak is, what
15 kind of institution it is?

16 A. It is some kind of psychiatric place.

17 Q. Did you visit Devin there ever?

18 A. Yes.

19 Q. Do you recall when?

20 A. I don't remember when it was.

21 Q. Was it when he was in the Air Force?

22 A. Yes.

23 Q. Devin was married at the time of the church shooting to a
24 lady named Danielle, correct?

25 A. Correct.

1 Q. Did Devin have a prior wife?

2 A. Yes.

3 Q. What was her name?

4 A. Tessa.

5 Q. Did you meet Tessa before Devin married Tessa?

6 A. I met her, like, once before, for a very short period of
7 time.

8 Q. Did they have a long courtship or a short courtship?

9 A. Very short.

10 Q. How short are we talking?

11 A. I would say -- ooh, it's hard to say because I don't know
12 the exact amount of time. But it didn't seem very long.

13 Q. You said it did not seem long?

14 A. No.

15 Q. Would you take that as an impulsive decision by Devin?

16 A. Oh, yes.

17 Q. Did Devin's impulsivity change after he got in the
18 Air Force?

19 A. I didn't see a big change in his impulsivity.

20 Q. When Devin got out of the Air Force, did he come back and
21 live with you and your husband?

22 A. Yes.

23 Q. Did he -- I guess before --

24 A. For a period of time.

25 Q. Thank you.

1 Before Devin went in the Air Force, did he live in the
2 house with y'all, I guess, when he was in high school?

3 A. Oh, before he went to the Air Force?

4 Q. Yes, ma'am.

5 A. Yes, he lived in our house.

6 Q. When he came back from the Air Force and he was living on
7 your place, where was he living?

8 A. In the -- in the barn apartment.

9 Q. The barn apartment?

10 A. Uh-huh.

11 Q. I'm just asking you to repeat because it's sometimes hard
12 to hear through the mask. That's all.

13 A. Okay.

14 Q. I don't mean to fuss at you at all, ma'am.

15 A. I'll just put my mouth closer.

16 Q. Okay. At some point, he married Danielle, correct?

17 A. Correct.

18 Q. Do you recall how long after he got out of the Air Force
19 he married Danielle?

20 A. No.

21 Q. You don't --

22 A. I can't remember.

23 Q. Did you see Devin -- I guess, when he was in the house in
24 high school, you saw him every day, correct?

25 A. Yes.

1 Q. When he came back to live on the home place after he got
2 out of the Air Force, before he got married, did you see him
3 every day?

4 A. No.

5 Q. How often -- how long could it be between times you saw
6 him, just ballpark? Like, was it -- a couple days would go
7 by? Did he go away for like a month?

8 A. Oh, no. He wasn't gone like a month, but he'd be -- but
9 then I was also traveling, so I wasn't there all the time. I
10 would say, when I was there, maybe once or twice a week.

11 Q. When he married Danielle, did she come live on the home
12 place with y'all?

13 A. Yes.

14 Q. And did they live in the barn apartment together?

15 A. Initially.

16 Q. And then they moved to Kingsville for a little bit,
17 correct?

18 A. Correct.

19 Q. And then from Kingsville, they went to Colorado?

20 A. Correct.

21 Q. And then they came back down?

22 A. Correct.

23 Q. When they were in Kingsville, did you talk to Devin and
24 Danielle regularly?

25 A. When they were in Kingsville?

1 Q. Yes, ma'am. I know that was only a couple of months.

2 A. It was a short period. I would not -- I don't know.

3 Q. And if you don't recall, that's a perfectly good answer,
4 as long as it's true.

5 A. Yeah. I don't recall.

6 Q. Do you recall how often you talked to Devin when he was in
7 Colorado the first time? Was it a regular occurrence?
8 Irregular?

9 A. I would not say it was regular, in that we had a set day.

10 Q. You talked to him about once a week? Once every two
11 weeks?

12 A. I would say once a week to once every two weeks.

13 Q. And then he came back down to New Braunfels, correct?

14 A. Correct.

15 Q. And then went back into the barn apartment, right?

16 A. Initially, they were in the trailer.

17 Q. The trailer they brought back from Colorado with them?

18 A. Yes.

19 Q. And where was that trailer located on the property? Was
20 it near where the barn is?

21 A. It was underneath the stables.

22 Q. Where is that in relation to the house?

23 A. Okay. It's kind of like -- here's the house, and it was
24 like -- it's like kind of like catty-corner but far away.

25 Kind of like catty-corner like this but far away.

1 Q. Like a football field? Two football fields?

2 A. I would say it's -- I'm bad with distances. It's about as
3 far as the barn is but in a different direction.

4 Q. And your husband testified that was about half a football
5 field or about 50 yards.

6 Is that your recollection as well?

7 A. Yes.

8 Q. Between the house and, I guess, the trailer, what was in
9 between those?

10 A. The house and the trailer?

11 Q. Yeah. Were there trees? Was there an empty field?

12 A. It's a big pasture-like area, and their trailer was on the
13 far side of the stables.

14 Q. Could -- if you were in the house, could you hear anything
15 going on in that trailer?

16 A. Absolutely not.

17 Q. If you were on the porch, could you hear what was going on
18 in the trailer?

19 A. I don't think so, no.

20 Q. What about the barn? What was between the house and the
21 barn apartment?

22 A. The barn apartment -- the barn, you can't see from the
23 house. And between the barn and the house is a stand of --
24 thick stand of, like, cedars and oaks.

25 Q. So you can't see what's going on at the barn from the

1 house?

2 A. No.

3 Q. And you can't hear what's going on in the barn from the
4 house?

5 A. No.

6 Q. When Devin and Danielle came back, they had a baby boy,
7 correct?

8 A. Correct.

9 Q. He was born in Colorado?

10 A. Correct.

11 Q. Did you -- did you take care of the baby?

12 A. Occasionally, I would baby-sit, uh-huh.

13 Q. Did you take care of him often?

14 I guess I should define "often."

15 Like a couple times a week?

16 A. Yeah, probably. Uh-huh.

17 Q. Did he then -- did Danielle bring him up to the house for
18 that, or did you go down to the barn?

19 A. No. She always came to the house.

20 Q. As a general proposition, did you know what was going on
21 between Danielle and Devin down in the barn apartment?

22 MR. STERN: Objection. Vague.

23 THE COURT: That's overruled.

24 BY MR. SCHREIBER:

25 Q. Do you know what I meant?

1 A. No.

2 Q. Okay. You told me that you couldn't hear what was -- you
3 couldn't hear the barn from the house, correct?

4 A. Correct.

5 Q. You couldn't see the barn from the house, correct?

6 A. Correct.

7 Q. For a couple of years, Devin and Danielle, off and on,
8 lived in that barn, correct?

9 A. Correct.

10 Q. Did you know what was going on between those two, between
11 Devin and Danielle, in the confines of the barn when they
12 lived in there?

13 A. I was not there.

14 Q. So you don't know?

15 A. I do not know.

16 Q. Did you notice a change in Devin's personality? At any
17 point in his life, did he kind of switch in his personality?

18 I don't mean like a split personality disorder. I mean
19 like Devin just either grew up, got mature, went from being
20 happy to being sad, something like that?

21 A. After he got out of the Air Force, he was more --

22 Q. What was --

23 A. It's like grown up -- like more grown up and a little
24 serious.

25 Q. You say "serious."

1 Would you say jaded?

2 A. No. I didn't say "jaded."

3 Q. Oh, I'm sorry.

4 MR. STERN: Objection. Mischaracterizes testimony.

5 THE COURT: It's been cleared up.

6 MR. STERN: Okay.

7 BY MR. SCHREIBER:

8 Q. Could you repeat to me, then, what you saw was different
9 in him.

10 A. He was way more serious, a little stoic.

11 Q. Anything else?

12 A. Nope.

13 Q. In the -- in the last couple of months of his life, say
14 between about May and November of 2017, did you notice any big
15 changes in Devin?

16 A. No.

17 Q. Did you notice any big changes in Danielle during that
18 time?

19 A. Not that I can think of.

20 Q. I want to switch gears and talk to you relatively briefly
21 about the guns at your house.

22 A. Okay.

23 Q. When I say "your guns," I mean, any guns that you and your
24 husband had. Okay?

25 A. Okay.

1 Q. Did you and your husband have guns -- I'm talking about
2 the time period from when Devin got out of the military until
3 the time of his death. Okay?

4 A. Okay.

5 Q. Did you and your husband own guns?

6 A. They are in his name, so he owns them. And yes.

7 Q. What were those guns? What kind? Do you know?

8 A. From when to when?

9 Q. If you can -- when Devin got out of the military, until
10 2017.

11 A. Okay. Well, we had the -- what's it called? Beretta, the
12 Walther, a .22 rifle, the AR, and a shotgun.

13 Q. The Beretta and the Walther, those are pistols?

14 A. Correct.

15 Q. Where were those stored?

16 A. They are in a locked cabinet. It's like a wardrobe, an
17 antique wardrobe.

18 Q. What's it made of?

19 A. It's made of wood. The front -- it's got a huge front
20 door on it that has a mirror with a piece of wood behind it.

21 Q. Is it thick wood? Is it thin wood?

22 A. It's pretty thick wood. The door's so heavy we had to
23 anchor it to the wall behind, or it'll fall over.

24 Q. Does that cabinet lock?

25 A. Oh, it does. It doesn't have a handle or anything to open

1 it. You have to have the key.

2 Q. How many keys did y'all have?

3 A. One.

4 Q. Aside from you and your husband, did anybody know where
5 those keys were?

6 A. Nope.

7 Q. To your knowledge, did ever -- did Devin ever go into that
8 gun cabinet?

9 A. Not that I'm aware of.

10 Q. Do you know if anybody but you and your husband went into
11 that gun cabinet?

12 A. I don't think so.

13 Q. You didn't leave -- did you leave the guns laying around,
14 or did you typically put them up when they weren't in use?

15 A. Only at night would they be on the bedside table.

16 Generally, I didn't have one on mine, but sometimes I did.

17 Q. Which gun -- which gun would be on the bedside table at
18 night?

19 A. The handguns.

20 Q. The rifles or the long guns or the .22, the AR and the
21 shotgun?

22 A. They're all locked up.

23 Q. To your knowledge, did Devin ever use your husband's AR?

24 A. No, I don't think so. I can't recall him doing that.

25 Q. He had his own AR, correct?

1 A. Correct.

2 Q. He had no reason to borrow y'all's?

3 A. Correct.

4 Q. Did Devin ever ask you to buy him a gun?

5 A. No, not that I'm aware of.

6 Q. When Devin got out -- I'm going to switch gears now.

7 Let's talk about when Devin got out of the Air Force.

8 A. Okay.

9 Q. Were you aware of what charges Devin had pled guilty to
10 specifically?

11 A. I was not part of all of that, so I can't be specific on
12 what it was.

13 Q. Were you aware of any restrictions placed on Devin when he
14 got out -- when he came out of Air Force confinement?

15 A. No.

16 Q. Did you know whether or not he could own a gun?

17 A. No. But I assumed he could when he -- when he passed a
18 background check and bought one.

19 Q. I've got to ask you a hypothetical question.

20 A. Okay.

21 Q. If you had known it were illegal for Devin to own a gun,
22 would you have given Devin a gun?

23 A. No.

24 MR. STERN: Objection.

25 THE COURT: That's late.

1 BY MR. SCHREIBER:

2 Q. You're a law-abiding citizen, correct?

3 A. Correct.

4 Q. You have been your whole life?

5 A. Yes.

6 Q. You had no intention to start -- become -- doing illegal
7 things late in life, did you?

8 A. Heck no.

9 MR. SCHREIBER: Just a moment.

10 BY MR. SCHREIBER:

11 Q. I want to ask you some -- probably some pretty difficult
12 questions from here on. Okay?

13 A. Okay.

14 Q. Were you aware that Devin had threatened to commit suicide
15 when he was in the Air Force?

16 A. No.

17 Q. Would you have wanted to know that?

18 A. Yes.

19 Q. If you had known that Devin had threatened to commit
20 suicide in the Air Force, would that have changed your opinion
21 on whether he should have a gun on your property?

22 A. Absolutely.

23 Q. How would that have changed your opinion?

24 A. We would have told him not to.

25 Q. And I think through this -- through this litigation, I

1 made you aware that Devin threatened to kill his supervisors
2 in the Air Force.

3 You remember me telling you that?

4 A. Yes.

5 Q. If you had been made aware of that, would you have let
6 Devin have a gun on your property?

7 A. Absolutely not.

8 Q. And you've already told me you loved your kids and your
9 grandkids, all of them?

10 A. Yes.

11 Q. And you loved Devin?

12 A. Yes.

13 Q. No matter what Devin did in the Air Force, you still loved
14 him with all your heart?

15 A. Of course.

16 Q. And as a mother, loving your son, if you had known that he
17 had threatened suicide, you would have tried to get him help,
18 wouldn't you?

19 A. If he would go, yes.

20 Q. You'd do what you could to try and get him to go?

21 A. Correct.

22 Q. And if you had known that he had threatened to kill his
23 supervisors, you would try and get him help for that as well,
24 correct?

25 A. Correct.

1 Q. And do whatever you could to help him, right?

2 A. Correct.

3 Q. Doing whatever you could doesn't mean you'd buy him a gun;
4 it means you'd get him to a doctor, right?

5 A. Correct.

6 Q. I want to switch gears again on you. I want to talk about
7 the days leading up to the church shooting.

8 Did you notice any big changes in Devin in the days
9 leading up to the church shooting?

10 A. He seemed like he had been.

11 Q. I'm sorry, ma'am?

12 A. He seemed like he had been, the way he was before.

13 Q. Do you recall talking to Devin about going to see a
14 counselor with Danielle in the days before the church
15 shooting?

16 A. I can't remember that specifically.

17 Q. Do you recall trading text messages with Devin, just as a
18 matter of course?

19 A. Yes.

20 Q. If I showed you a text message between you and Devin,
21 would that refresh your recollection of some conversation?

22 A. Sure.

23 MR. SCHREIBER: Would you pull up 799 at page 4.

24 It's Joint Exhibit 799, page 4.

25

1 BY MR. SCHREIBER:

2 Q. And it should show up on the screen in front of you.

3 Can you see that, Ms. Kelley?

4 A. Uh-huh. I can.

5 Q. Okay. Do we need to make it bigger or smaller for you?

6 A. No. It's fine.

7 Q. And it appears -- do you recognize this as your phone from
8 the conversation?

9 A. I guess it would be my phone.

10 Q. Do you recall having a conversation with Devin where you
11 said -- or Devin asked you to watch the kids on the 3rd or 4th
12 when they go to Wurstfest?

13 A. Correct.

14 Q. You had that conversation with him?

15 A. Yes.

16 Q. Down below, where it says, "Today, 8:14 a.m., If we get
17 Medicaid back, maybe we will just go to counseling." I
18 believe it's "IDK."

19 A. I don't know.

20 Q. I don't know.

21 "Me and her need time to talk."

22 Did I read that correctly?

23 A. Yes.

24 Q. And then the response back is "Dev, I think that's a good
25 idea."

1 A. Correct.

2 Q. That was you telling him that's a good idea?

3 A. Right.

4 Q. What was the context around this text message?

5 A. The only thing that I can think of is they had both said
6 that they were squabbling. And I didn't want to insert myself
7 in the middle of their marriage, and I felt like it would be
8 good for them to go outside the marriage and go talk to
9 people.

10 Q. Were you aware of any problems between Devin and -- aside
11 from this text message, specifics of any problems between
12 Devin and Danielle? We're talking November 2017.

13 A. Not specific things.

14 Q. I'm going to talk to you now about the day of the
15 shooting.

16 A. Oh.

17 Q. And, again, if you have to stop, just let me know when to
18 stop. Okay?

19 A. (Nods head.)

20 Q. I won't belabor any points with you. Okay?

21 What do you recall about that morning, November 5th? Did
22 you talk to Devin in the morning?

23 A. He came down. We were sitting, having a cup of coffee,
24 because my daughter and her friends were down from Wurstfest.
25 And we were waiting to get up and feed them breakfast before

1 they left. And he came down a couple of times, I think. But
2 I can't recall for sure if it was twice or not, now. Too much
3 has happened, gone on -- and asked if we could babysit.

4 Q. Did you say whether or not you could babysit?

5 A. We said we couldn't, because we had Lily and her friends
6 over to the house, but I could later that day.

7 Q. Then what happened?

8 A. It's big-time blurry. I've gone over it a million times.

9 So what I remember is I was in the kitchen getting ready
10 to start breakfast when Mickey came up and said, "Did you read
11 this text?"

12 Q. When you say "Mickey," you mean your husband Michael?

13 A. (Nods.)

14 Q. Is that "yes," ma'am?

15 A. Yes, that's correct.

16 Q. And you said he had a text.

17 Do you recall what the text said?

18 A. The text said something about "Go untie Danielle."

19 Q. Do you know what that meant?

20 A. No. But I knew it couldn't be good.

21 Q. And what did you -- what did you do next?

22 A. Lily was walking down the stairs at that point, and I had
23 put my phone on the counter. And I told her next is -- to
24 leave, to get her friends and to leave.

25 And then I had a phone, but I think it was my husband's.

1 I don't know whose phone it was in my hand. And I ran to the
2 barn. And when I got there, it was locked.

3 Q. What did y'all do next?

4 A. I couldn't get in the barn. She wasn't opening the door.
5 And so Mickey got something to open -- like a -- something he
6 used, like a screwdriver or something, to open the door.

7 Q. What did y'all find inside?

8 A. It's pretty surreal. We -- I saw Michael in the crib
9 smiling at me.

10 Q. The baby?

11 A. The two-year-old.

12 Q. I'm sorry.

13 A. Oh, I'm sorry. I shouldn't have said his name.

14 Q. It's okay. It's okay.

15 A. I saw Ray-Ray in the little plastic crib thing, and I saw
16 Danielle tied up on the bed.

17 Q. How was she tied up?

18 A. She had handcuffs like this, and her feet were tied like
19 this to the handcuffs.

20 Q. You're demonstrating your hands behind your back and your
21 feet behind the back?

22 A. Uh-huh. And all tied up.

23 Q. And hands and feet tied together?

24 A. Uh-huh.

25 Q. Is that "yes"?

1 A. Yes.

2 Q. Was Danielle in distress?

3 A. Oh, her eyes were swollen like she had been crying a long
4 time.

5 Q. Do you know how long she'd been there?

6 A. And she had snot running all over her face.

7 Q. I guess -- I apologize. I asked you if you knew how long
8 she had been there, and you shook your head no?

9 A. I don't know.

10 Q. I was trying to clear that up. That's all.

11 Did Danielle say anything to you about what happened?

12 A. No. I was untying her.

13 Q. What happened next?

14 A. I was untying her, and then she still was like this with
15 the handcuffs. And it was like, "Where's the key?" And she's
16 like (shaking head). So I called -- no, I didn't call. I
17 texted, "Where's the key? Where's the key?"

18 Q. Texted to whom?

19 A. Devin. "Where's the key?" And --

20 Q. Did you get --

21 A. He called.

22 Q. Devin called your phone?

23 A. I don't know whose -- if it was mine or my husband. I
24 don't know.

25 Q. The phone was in your hand?

1 A. The phone was in my hand.

2 Q. What was the contents of that conversation, to the best
3 you can recall?

4 A. He said the key was in the shoe thing. They have this
5 plastic shoe thing that hooks over the door and comes down,
6 and he said it was in there. And he said, "But you need to
7 wait."

8 And I don't know if I handed the phone to Mickey at that
9 time. I don't know what -- who had the phone at that moment
10 because I was scrambling for the key.

11 Q. Do you know why he said you had to wait?

12 A. I was trying to get Danielle -- I -- he didn't.

13 Q. Oh. Oh, okay.

14 A. I said it.

15 Q. I'm sorry.

16 A. But I don't know at that point who had the phone, because
17 I was trying to unlock her and get her out of the handcuffs.

18 And he kept saying that he had done a terrible thing, and
19 he didn't know what he was thinking. And I said, "Okay. What
20 did you do?"

21 And he said, "Mom, I killed a bunch of people."

22 And I said, "Where? Where are you? Where?"

23 And he started, like, slurring his words. And I couldn't
24 figure out what he was trying to say.

25 And I turn around and I looked at Danielle. And she said,

1 "Sutherland Springs."

2 Q. Do you know how she knew that?

3 A. I'm just thinking she understood Devin-talk more than I
4 did.

5 And I said, "Where's that?" Because at that point, I had
6 never heard of Sutherland Springs.

7 And she says, "That's where my mom lives."

8 And Devin said "Mom, you've got to listen to me. I am
9 dying."

10 And it's like, "What?"

11 He said, "I've been shot."

12 And I might be getting all this out of order. This
13 might -- it's hard for me to remember. During that time,
14 there was so much emotion going on. I don't know if this is
15 the exact order or not. It's just little pieces that I'm
16 remembering here and there.

17 Q. I understand, ma'am.

18 A. Okay. So he said, "I've been shot once in the side and
19 twice in the leg, and I'm bleeding out, and I'm dying."

20 And at that point, I thought in my mind, well, if he's
21 really done this, I can't forgive him. But if it was me that
22 had done something terrible like that, I would at least want
23 to be told that I was still loved. And so I said, "I love
24 you, Devin."

25 And he just fell apart and was wailing, wailing that he

1 was sorry, over and over and over again. And he kept saying,
2 "I didn't know what I was thinking. I wasn't thinking
3 straight."

4 And so then the phone gets passed to my husband and
5 Danielle, and everybody's trying to take a turn to talk to him
6 at the very end. And at that point, I was dealing with the
7 babies.

8 So the only thing that I heard with their conversations
9 was Devin saying, "Dad, please take care of my wife and kids"
10 and Mickey saying, "You know I will, Son."

11 Q. Is that the end of it, that you heard?

12 A. And that was the -- that's all I heard, other than what he
13 said to me.

14 Q. Do you know if Danielle talked to Devin in that process?

15 A. Yes, she did.

16 Q. Do you know what she said with him?

17 A. No.

18 Q. Do you know -- this is a yes or no, whether or not you
19 know this.

20 Do you know why Devin went to the Sutherland Springs
21 Baptist Church and shot it up?

22 A. No.

23 Q. Did you suspect in the last days of Devin's life that he
24 was going to do something like this?

25 A. No.

1 Q. Did Danielle continue to live on your property with you
2 and Michael?

3 A. And Ray-Ray?

4 Q. Yeah. And with the children?

5 A. Yeah. Yes, for a while.

6 Q. Do you know about how long, ballpark? Couple months?
7 Year?

8 A. I can't recall the amount of time, but it was short
9 because she went from our house, and she went to live with
10 friends at that point. And then she went to live with Erin at
11 that point, and then she went to live with her current
12 husband. So it was a lot of bouncing around.

13 Q. Do you think the government should have told you if there
14 were restrictions on Devin owning guns?

15 A. Yes.

16 Q. You think the government should have told you that he had
17 threatened to kill his supervisors?

18 A. Yes.

19 MR. STERN: Objection. Argumentative.

20 THE COURT: It's been asked and answered as well.

21 MR. SCHREIBER: We'll pass the witness, Your Honor.

22 THE COURT: Any questions?

23 MR. STERN: Yes, Your Honor, I do.
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CROSS-EXAMINATION

BY MR. STERN:

Q. Mrs. Kelley, good afternoon.

A. Hi.

Q. Hi.

THE COURT: Can you move your mic up a little closer?

MR. STERN: Of course.

THE WITNESS: You bet.

MR. STERN: I think the judge was talking to me.

THE WITNESS: Okay.

MR. STERN: Sorry. Let me just get oriented here.

BY MR. STERN:

Q. Ms. Kelley, good afternoon.

A. Good afternoon.

Q. As you may recall, my name is Paul Stern. I took your deposition January, this year.

A. Yes.

Q. I want to thank you for being here today.

I'm going to start where we left off.

You weren't aware of what your son was convicted of in the Air Force, correct?

A. I wasn't there, so I do not know what the charges were exactly.

Q. Okay. And you were not aware of any restrictions of Devin as a result of that conviction?

1 A. Correct.

2 Q. You weren't aware that he was prohibited from owning or
3 possessing firearms?

4 A. Nobody told me.

5 Q. And you weren't aware of his attempt at suicide?

6 A. No.

7 Q. Or any threats to kill his supervisors?

8 A. No.

9 Q. Your husband wasn't aware of his -- of your son's
10 conviction or the extent of his conviction equaling a felony,
11 correct?

12 A. As far as I know, but you need to ask him.

13 Q. Fair enough.

14 As far as you're aware, your husband wasn't aware of any
15 prohibitions of your son owning or possessing firearms?

16 A. Correct.

17 Q. As a result, you had no concern for Devin owning or
18 possessing firearms?

19 A. Correct.

20 Q. Danielle and Devin was living on your property at the time
21 of the shooting, correct?

22 A. Correct.

23 Q. In fact, Devin was living on your property on and off
24 between the time he left the Air Force and the shooting?

25 A. Correct.

1 Q. He and Danielle moved to Colorado a few times during that
2 period?

3 A. I don't know how many times.

4 Q. A few times? Three or four?

5 A. I don't --

6 Q. Is that fair?

7 A. I don't know.

8 Q. Okay. But, otherwise, when they were living in Texas,
9 they lived with you at the barn apartment?

10 A. Or they were at Kingsville.

11 Q. Okay. And throughout that time, you only met Danielle's
12 mother, Michelle Shields, a handful of times?

13 A. As far as I can recall.

14 Q. And you knew Danielle was estranged from Michelle Shields
15 when she was living with you?

16 A. Yes.

17 Q. It was your understanding that Danielle chose not to
18 communicate with her mother?

19 A. Correct.

20 Q. Danielle told you that she was sexually abused as a child?

21 A. Yes.

22 Q. And that Devin was protective of Danielle?

23 A. Yes.

24 Q. He was protective -- protective of you?

25 A. Yes.

1 Q. In fact, he had the "I'm a male in the household, and I'm
2 going to protect the females in the household" kind of
3 attitude, didn't he?

4 A. Correct.

5 Q. How would you describe Danielle's disposition?

6 MR. SCHREIBER: Objection, Your Honor. Vague as to
7 time, place, what he means.

8 THE COURT: That's overruled.

9 THE WITNESS: Her disposition?

10 BY MR. STERN:

11 Q. Yeah. Can you describe her characteristics, her demeanor.

12 A. I liked Danielle. She was sweet.

13 Q. And did her sweetness change between whether Devin was
14 around or when she was alone with you?

15 A. Well, I wasn't with her all the time she was around Devin.
16 But when they were in our house, she was the same.

17 Q. Sure.

18 Did you ever spend one-on-one time with Danielle?

19 A. Yes.

20 Q. Okay. And, again, did her character change between when
21 she was alone with you or when Devin was around?

22 A. No.

23 Q. I believe plaintiffs' counsel just asked you to sort of
24 put your son on a spectrum of impulsive versus compulsive. Do
25 you remember that testimony?

1 MR. SCHREIBER: It wasn't impulsive or compulsive.
2 It was impulsive versus planning.

3 MR. STERN: Oh, impulsive versus planning.

4 MR. SCHREIBER: Objection.

5 MR. STERN: Thank you.

6 THE WITNESS: Oh, there you go. Yes.

7 MR. STERN: Fair enough.

8 BY MR. STERN:

9 Q. And you described your son as impulsive?

10 A. Yes.

11 Q. You were Facebook friends with your son, correct?

12 A. Yes and no.

13 Q. What do you mean by that?

14 A. I had him -- he was a friend, but I didn't have him on my
15 news feed.

16 Q. Right. So he wasn't part of your news feed.

17 You didn't see any of his posts?

18 A. I saw maybe one or two every -- once a year, maybe twice a
19 year max. I'd go in and look for something that I could say
20 something so he wouldn't get his feelings hurt.

21 Q. Sure.

22 A. But on -- but them coming through all the time, no.

23 Q. You didn't see anything disturbing?

24 A. No.

25 Q. You didn't Facebook-message with him?

1 A. Not that I remember.

2 Q. And you would never have seen anything he put in his
3 iCloud account?

4 A. No.

5 Q. Did you ever know your son was doing illegal drugs?

6 A. No.

7 Q. Do you know about any other run-ins with the law your son
8 had?

9 A. He got a ticket for an expired -- I think it was
10 inspection.

11 Q. Other than that?

12 A. I can't recall anything.

13 Q. You didn't see a black box in your son's apartment?

14 A. A black box? No.

15 Q. Okay. You never heard about your son training his
16 cardiovascular system, creating a diversion to jump a fence at
17 some point to run several miles to a bus station?

18 A. Not that I can remember.

19 Q. Okay. I'd like to talk a little bit about Devin's
20 upbringing.

21 I believe you previously testified that he was diagnosed
22 with attention deficit disorder around the age -- when he was
23 younger?

24 A. Uh-huh, yes.

25 Q. Around the age of seven?

1 A. Yes. I think he was seven. That's kind of the age that
2 sticks in my brain, but it could be off by a year.

3 Q. I won't hold you to it.

4 A. Yeah.

5 Q. Around seven?

6 A. Yes.

7 Q. Thank you.

8 And he was given medication as a result?

9 A. Correct.

10 Q. You tried various medications?

11 A. Yes.

12 Q. Concerta?

13 A. Yes.

14 Q. Ritalin?

15 A. Yes.

16 Q. Adderall?

17 A. Yep.

18 Q. And Devin was homeschooled until the sixth grade?

19 A. Yes. With -- at the end of sixth grade, we put him in
20 public school.

21 Q. And he was bullied while he was in school, correct?

22 A. Correct.

23 Q. And as you previously testified, when he was in high
24 school, he, quote, "put you through hell"?

25 A. Yes.

1 Q. He was sent to alternative school for some time?

2 A. Correct.

3 Q. And that was a punishment for getting in trouble?

4 A. Yes.

5 Q. He refused to take his medication when he was -- when he
6 was in high school?

7 A. Yes.

8 Q. And Devin went into the Air Force around 2010?

9 A. I don't know the date. I don't know what it was.

10 Q. Sometime after high school?

11 A. Sometime after high school.

12 Q. Fair enough.

13 And you mentioned, at some point, he came home on his
14 motorcycle?

15 A. Yes.

16 Q. Okay. And you said he was frightened upon his arrival?

17 A. Correct.

18 Q. And you weren't told why he left the air force base?

19 A. I can't recall what he said.

20 Q. Okay.

21 A. I just worried that he was going to get in trouble.

22 Q. And so you had your husband contact the chaplain?

23 A. Correct.

24 Q. And the chaplain told him to take him to Peak?

25 A. Within, like, eight hours, he had to get him there.

1 Q. And you visited Devin when he was at Peak, correct?

2 A. Yes.

3 Q. And he seemed like his normal self while he was there?

4 A. Correct.

5 Q. So you didn't see any difference in his mental health
6 between when he was in high school and when he was at Peak?

7 A. He seemed pretty stable at Peak.

8 Q. Let's talk about the time after the Air Force.

9 A. Okay.

10 Q. Again, he came to live with you and your husband?

11 A. Correct.

12 Q. You thought he was acting his normal self?

13 A. His normal self, but he was more adult and he's a little
14 more stoic, I think, but he was acting normal.

15 Q. Normal.

16 His happy-go-lucky self?

17 A. At times, yeah.

18 Q. So he's the same mental health when he was in Peak as when
19 he returned to your home?

20 A. He seemed happier at Peak than he did when he came home.

21 Q. All right.

22 A. But he didn't seem happy at Peak.

23 Q. But roughly the same, maybe even a little happier at Peak.
24 Is that fair?

25 A. I would say -- yeah, he seemed -- I don't -- yeah, I

1 guess. I'm not sure.

2 Q. Okay.

3 A. About the same.

4 Q. About the same.

5 We already talked about Devin and Danielle eventually
6 marrying.

7 Do you recall that Danielle was set to go off to college
8 at some point?

9 A. Oh, no. That's not how it was.

10 Q. Danielle wasn't going to go away to college?

11 A. When she got to our place, she told us that she could go
12 off to college, but it wasn't set up. I helped her set that
13 up.

14 Q. Okay. You helped her actually fill out her paperwork to
15 go to college?

16 A. Correct.

17 Q. And you wanted to see her go off to college?

18 A. Absolutely.

19 Q. She was set to live in the dorms by herself?

20 A. She would have to as a freshman unless she was married.

21 Q. All right. But then she decided she would not go without
22 Devin?

23 A. Correct.

24 Q. And so, instead, they decided to get married?

25 A. Correct.

1 Q. They had their first child in Colorado?

2 A. Correct.

3 Q. And they seemed happy at the time?

4 A. I thought very.

5 Q. You didn't have any concerns about Devin's mental health
6 at that point?

7 A. No.

8 Q. So this is where -- when Devin and Danielle are in
9 Colorado, just had their firstborn, you weren't aware of Devin
10 being interested in guns before he moved to Colorado, correct?

11 A. He was more interested -- he was interested in one of the
12 guns he had while he was at the Air Force, but I don't
13 remember which one it was.

14 Q. Okay. But other than that firearm, you didn't know him to
15 have a strong interest in firearms at the time?

16 A. Not at -- not at that point, not that I can recall.

17 Q. Fair enough. Thank you. And I'm only asking for your
18 recollection, of course.

19 A. Okay.

20 Q. Thank you.

21 But when he returned from Colorado, he talked about owning
22 a business to teach people to use firearms?

23 A. Correct.

24 Q. He owned a shotgun at one point?

25 A. At one point.

1 Q. In fact, when he was living with you, he would go out to
2 practice shooting fairly frequently?

3 A. I don't know how often he did.

4 Q. Do you recall using the phrase "fairly frequently"?

5 A. I don't recall how often he went out.

6 Q. Okay. Is there anything maybe I can use to help refresh
7 your recollection of that phrase? Maybe if I share your
8 deposition?

9 A. He would more than I would.

10 Q. Okay. We'll look at page 73. I'm going to show you
11 Government's Exhibit 58.

12 Do you recall -- I'm just refreshing your recollection.
13 Do you recall having your deposition taken in this case?

14 A. Yes.

15 Q. Remember it was through Zoom --

16 A. Yes.

17 Q. -- and I was asking you some questions? I'm sorry?

18 A. Yes.

19 Q. Okay.

20 A. Uh-huh.

21 Q. Thank you.

22 I want to show you page 73 of that deposition, between 10
23 and 13.

24 Ms. Kelley, can you read that section.

25 A. Uh-huh.

1 Q. Does that refresh your recollection?

2 A. Do you want me to -- hold on just a sec.

3 Yeah.

4 Q. Okay. So let me ask you again -- we'll take that down for
5 right now.

6 Ask, when Devin was living with you, did he use his
7 firearms often?

8 A. When we were in town?

9 Q. I'm sorry?

10 A. When we were in town? I don't know what he was doing when
11 we were out of town.

12 THE COURT: I don't think she heard your question.

13 MR. STERN: Oh, I'm sorry.

14 BY MR. STERN:

15 Q. I was asking, when Devin lived with you on your property,
16 is it fair to say that Devin shot his firearms fairly
17 frequently?

18 A. Probably once a week or so.

19 Q. Devin taught you how to shoot?

20 A. Not totally, but he gave me pointers.

21 Q. Your husband's not a gun enthusiast, is he?

22 A. No.

23 Q. But he has a license to carry?

24 A. Yes.

25 Q. And you have a license to carry?

1 A. Yes.

2 Q. He owned an AK at the time of the shooting?

3 MR. SCHREIBER: Objection, Your Honor. Misstatement.

4 I believe he said AR, not AK.

5 THE COURT: He can ask the question, and she can
6 answer.

7 MR. SCHREIBER: Oh, okay.

8 THE WITNESS: What was your question again?

9 BY MR. STERN:

10 Q. Your husband owned an AR at the time of the shooting?

11 A. Yes.

12 Q. Thank you.

13 He owned a shotgun?

14 A. Yes.

15 Q. A Beretta?

16 A. Uh-huh.

17 Q. And a Walther .22 rifle?

18 A. Uh-huh.

19 Q. He kept these guns in an antique cabinet?

20 A. Yes.

21 Q. It was a piece of furniture, correct?

22 A. Correct.

23 Q. It was not a safe?

24 A. Oh, it would take a lot to get in there.

25 Q. But you weren't intentionally keeping the key from Devin,

1 correct?

2 A. I was not keeping -- I would not give that key to anybody
3 besides my husband and myself.

4 Q. Your concerns were over the kids, the grandchildren
5 getting access?

6 A. My concerns were anybody getting access but my husband and
7 I.

8 Q. Yeah. But you had no concerns about Devin owning or
9 possessing firearms, correct?

10 A. Yes. He had his own.

11 Q. And you don't recall the Texas Rangers -- you don't have
12 any knowledge, one way or another, of whether Devin ever
13 borrowed your husband's firearms?

14 A. Why would he, if he had his own?

15 Q. Right.

16 But you have no knowledge one way or another?

17 A. Absolutely not.

18 Q. Devin made an appointment to see a physician assistant
19 shortly before the shooting, correct?

20 A. Correct.

21 Q. You drove him to that appointment?

22 A. He asked me to drive him because his car was broken down.

23 Q. At the time, he was having anxiety where he would lose
24 control of his bowels, correct?

25 A. Correct.

1 Q. You don't remember him having that much anxiety in the
2 months or years leading up to that visit where he would lose
3 control of his bowels?

4 A. He would -- he would occasionally. He would tell me.

5 Q. But you don't recall within the months or even years
6 leading up to that that he would have such anxiety where he
7 would lose control of his bowels, correct?

8 A. Not that much anxiety.

9 Q. Thank you.

10 So it got so bad in the weeks leading up to the shooting
11 that he went to visit Dr. Batenburg's physician assistant,
12 correct?

13 A. Correct.

14 Q. He was suffering from migraines around that time?

15 A. He'd been suffering with headaches for a while. I can't
16 tell you how long.

17 Q. Okay. But he didn't have those headaches when he was
18 younger?

19 A. No.

20 Q. Around the time of the shooting, he was obese by that
21 point?

22 A. Correct.

23 Q. He'd actually gained a lot of weight between the time he
24 left the Air Force and when he went to see the physician
25 assistant?

1 A. Correct.

2 Q. He was short when he talked to people?

3 I'm sorry. He was short?

4 A. I don't know about other people. He seemed -- he --
5 occasionally, he was short with me and short with everybody.

6 Q. Okay.

7 A. A little irritable.

8 Q. So it would be accurate to say that, by 2017, Devin did
9 not seem like he was the same person?

10 A. From what point?

11 Q. From when he returned to your home after he left the
12 Air Force?

13 A. He was himself. I mean, he wasn't -- he wasn't, like,
14 hallucinating or delusional or anything like that. He was
15 just more serious.

16 Q. Okay. Is it fair to say that, by 2017, he didn't seem
17 mentally totally off, but he didn't seem like the same person?

18 A. He's not -- he didn't seem like he was the same person,
19 no.

20 Q. Okay. You already spoke with plaintiffs' counsel about
21 the day of the shooting, and I don't want to drudge that up
22 again. I do want to ask you one or two questions about the
23 conversation that you had with your son right before he lost
24 his life.

25 A. Okay.

1 Q. During that conversation, he was on speakerphone, correct?

2 A. Correct.

3 Q. And the last thing that you heard him say was telling his
4 father to "Please take care of my wife and kids," correct?

5 A. Correct.

6 Q. He was wailing, saying he was sorry?

7 A. Correct.

8 Q. And that he loved his family?

9 A. Yes.

10 MR. STERN: Pass the witness.

11 THE COURT: Anything else?

12 MR. SCHREIBER: Very short follow-up, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. SCHREIBER:

15 Q. Ms. Kelley, I won't belabor this point.

16 Devin had had anxiety problems well before 2017, correct?

17 A. I -- you mean before he did what he did?

18 Q. Yes, ma'am.

19 A. I think he did.

20 Q. And Devin -- and Devin had other issues -- we talked about
21 his bowel problems.

22 Did he have -- from 2013 to 2017, were there other
23 occasions when he would, I guess, deal with stress digestively
24 and get upset stomach from stress?

25 A. I'm sure.

1 Q. That wasn't something that just started all of a sudden in
2 November 2017, was it?

3 A. I don't -- I cannot tell you when that started because I
4 don't know. I don't remember when it started.

5 Q. Is that an issue that's common in your family?

6 A. Very.

7 Q. I want to make just something clear about change in
8 Devin -- in Devin's personality.

9 A. Okay.

10 Q. Was Devin's -- when the change came, was it between before
11 the Air Force and after the Air Force?

12 A. It was after the Air Force.

13 Q. Did you notice a change occur when he left the Air Force,
14 or did the change occur right before he shot everybody?

15 A. I think he was different after he came out.

16 Q. Right after he came out?

17 A. Uh-huh.

18 Q. Is that a "yes"?

19 A. Yes.

20 MR. SCHREIBER: Pass the witness back.

21 THE COURT: Anything else from those last questions?

22 RECROSS-EXAMINATION

23 BY MR. STERN:

24 Q. Mrs. Kelley --

25 A. Uh-huh.

1 Q. -- it's fair to say that Devin's anxiety got so bad within
2 the weeks prior to the shooting that he went to
3 Dr. Batenburg's physician assistant to get medication,
4 correct?

5 A. I guess, yeah. They wouldn't let me in there.

6 Q. Fair enough.

7 A. So I wasn't in there.

8 MR. STERN: Thank you.

9 No further questions.

10 MR. SCHREIBER: Nothing further, Your Honor.

11 THE COURT: Any further need for this witness, or can
12 she be excused?

13 MR. SCHREIBER: Nothing from us.

14 MR. STERN: Nothing from us.

15 THE COURT: Thank you, ma'am. You're excused.

16 THE WITNESS: Okay. Thank you. Can I leave?

17 THE COURT: Yes, ma'am.

18 So we've concluded all the witnesses that we were
19 expecting today. We'll resume tomorrow.

20 I have to preside over a state bar meeting. I have about
21 an hour's worth of work that I must attend to there, and then
22 I'll turn over the gavel to the vice chair.

23 So I'll start up us at 10:00 in the morning. And so
24 that'll alleviate the need of any morning break. So let's
25 plan on resuming at 10:00, and then we'll work through those

1 witnesses scheduled for tomorrow.

2 Anything else we need to take up today from the
3 plaintiffs?

4 MR. ALSAFFAR: Nothing from the plaintiffs, Your
5 Honor.

6 THE COURT: Anything for the government?

7 MR. STERN: Nothing, Your Honor.

8 THE COURT: We'll see you a couple minutes before
9 10:00.

10 With that, I'm going to adjourn for today. We'll log
11 everyone off.

12 * * *

13 *(Overnight recess)*

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I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
 .
 PLAINTIFFS, .
 vs. . DOCKET NO. 5:18-CV-555-XR
 .
 UNITED STATES OF AMERICA, .
 .
 DEFENDANT. .
 .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 9, 2021

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16 UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

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1 *(San Antonio, Texas; April 9, 2021, at 9:58 a.m., in open*
2 *court.)*

3 THE COURT: Thank you. Please be seated.

4 Good morning, everyone. Let's continue with our trial.

5 I remind all counsel, parties, witnesses, participants,
6 and members of the public that this is a formal proceeding,
7 and that they should behave at all times as if they were
8 present in the courtroom.

9 The standing order of the San Antonio Division of the
10 Western District of Texas on remote access to court
11 proceedings remains in effect. Photography, recording, or
12 streaming of this proceeding by any means is strictly
13 prohibited. Though this proceeding is open to the public,
14 technological restraints require that members of the general
15 public request access from the courtroom deputy to participate
16 remotely.

17 Those granted approval to participate remotely must not
18 forward the electronic link to nonparticipating colleagues or
19 persons and must not post the link on any public forum. As
20 with all proceedings, violation of these instructions are
21 subject to contempt proceedings. Accordingly, please exercise
22 proper courtroom decorum at all times.

23 And with that, your next witness?

24 MR. JACOB: Yes, Your Honor. Plaintiffs call
25 Kimberly Del Greco.

1 *(Witness enters courtroom)*

2 THE CLERK: Please raise your right hand before you
3 sit down.

4 *(The oath was administered)*

5 THE CLERK: You can have a seat.

6 MR. JACOB: May I proceed, Your Honor?

7 THE COURT: Yes.

8 KIMBERLY DEL GRECO, WITNESS, SWORN

9 DIRECT EXAMINATION

10 BY MR. JACOB:

11 Q. Good morning, Ms. Del Greco.

12 A. Good morning.

13 Q. My name is Tom Jacob.

14 Would you mind introducing yourself to the Court, please.

15 A. Yes. My name is Kimberly Del Greco. I'm the deputy
16 assistant director for the FBI in Clarksburg, West Virginia,
17 for division -- it's the Criminal Justice Information Services
18 Division.

19 Q. And does that stand for CJIS?

20 A. Yes, CJIS.

21 Q. CJIS. Okay.

22 Ms. Del Greco, you're a representative of the FBI;
23 correct?

24 A. Yes.

25 Q. And you were actually hand-selected in this case to be the

1 representative of the FBI in this case; fair?

2 A. Yes.

3 Q. Did you know you've also been identified as a person with
4 knowledge about the facts of this case, surrounding this case?

5 A. Yes.

6 Q. And to be fair, you have the authority to speak on behalf
7 of the FBI today?

8 A. I do.

9 Q. Okay. And, Ms. Del Greco, would you mind just speaking up
10 just a little bit louder? I'm having a little bit of
11 difficulty hearing you.

12 A. Absolutely.

13 Q. Thank you.

14 Beyond being a representative of the FBI, you've been
15 working with the FBI for nearly all your career; is that fair?

16 A. Yes.

17 Q. Could you give us a little background into that, please?

18 A. Sure. I began in the government in 1990 with the
19 Department of Education, but only for five years, and then I
20 started with the FBI in 1995.

21 Q. Okay.

22 A. And I've been with them ever since.

23 Q. Are you familiar with the NICS section?

24 A. Yes. I -- when I started my position with the FBI, it was
25 to develop the NICS program.

1 Q. Okay. And how long have you worked in the NICS section?

2 A. The first time, eight years. And then I went back for a
3 couple more years.

4 Q. Have you had any leadership roles in the NICS section?

5 A. I did.

6 Q. Could you tell us a little bit about that, please?

7 A. Sure. I was a unit chief for NICS over their appeals and
8 their analytical staff. I became the assistant section chief,
9 and then I acted as the section chief for a year and a half
10 before I took a position as a section chief in the biometrics
11 section with CJIS.

12 Q. Okay. And before we get too far, could you tell us --
13 NICS is an interesting acronym.

14 Could you tell us what NICS stands for, please?

15 A. Absolutely. The National Instant Criminal Background
16 Check System -- Section.

17 Q. Okay. How many employees does NICS have?

18 A. Right now, about 700 employees and 130 contract staff.

19 Q. 2016, I think you told me they had roughly 450 to 500
20 employees; right?

21 A. They had 600. 400 were in the -- that's the staff that
22 processes the background checks. Yes. You're right.

23 Q. Okay. So you had 400 to 500 employees just processing
24 background checks at the NICS?

25 A. That's correct.

1 Q. Okay. Could you also tell the Court what an FFL is,
2 please?

3 A. Yes. That's a Federal Firearms Licensee. They are a gun
4 store owner that processes the firearm background check.

5 Q. Right. They actually contact the NICS section to do a
6 background check before selling a gun to a potential buyer;
7 right?

8 A. Yes, they do.

9 Q. Okay. And what I'd like to do is just give a little bit
10 more background. And I'd like to do that using Joint Exhibit
11 496. This has been admitted into evidence, and I'm going to
12 show you page 1 on your screen.

13 Do you see page 1?

14 A. I do.

15 Q. You've seen this document before; right?

16 A. Yes, I have.

17 Q. We went through it together in your deposition.

18 You remember that?

19 A. Yes.

20 Q. It just gives an overview of the NICS section; right?

21 A. It does, yes.

22 Q. Okay. Let me take you to page 5 of Joint Exhibit 496.

23 Do you see the map on your screen?

24 A. Yes.

25 Q. Could you tell the Court what this map shows?

1 A. It shows the state participation levels. The red
2 indicates a full point of contact state. Those states process
3 all of the firearm checks in their state.

4 The blue and yellow states are -- we call them partial
5 POCs. The state processes handgun checks, and we process the
6 long gun background checks.

7 And the green -- the green states are nonpoint of contact
8 states. And all of the FFLs in those states process their
9 checks directly to the FBI.

10 Q. Okay. And just to flesh that out a little bit, the red
11 states that are on this map on page 5 of 496 do still access
12 NICS data in order to process background checks; right?

13 A. Yes. That's correct. They run their background checks
14 through our system.

15 Q. Yes.

16 A. Yes.

17 Q. And for a state like Texas, they go directly to the FBI
18 when they need to run a background check; right?

19 A. Correct.

20 Q. Okay. Let me show you, then, page 7 of Joint Exhibit 496.
21 And do you see on your screen page 7?

22 A. I do, yes.

23 Q. And it says the types of records searched by the NICS
24 system; right?

25 A. Yes.

1 Q. And so we have a little background, we know that the NICS
2 searches, specifically, three databases; right?

3 A. That's correct.

4 Q. You have the Interstate Identification Index; yes?

5 A. Yes.

6 Q. And you call the III; right?

7 A. Correct.

8 Q. And then you have the National Crime Information Center;
9 right?

10 A. Correct.

11 Q. And that's known as the NCIC?

12 A. Correct.

13 Q. And then you have the NICS indices; correct?

14 A. That's correct.

15 Q. And on page 7 of this Joint 496, you kind of see some of
16 the records that are within each of these databases; right?

17 A. Yes.

18 Q. And I'd like to look at the NICS indices. NICS -- it
19 notes that the NICS indices contains convictions punishable by
20 an imprisonment for a term exceeding one year.

21 Do you see that?

22 A. Yes.

23 Q. Indictments for those same convictions?

24 A. Yes.

25 Q. You see it has mental health adjudications and

1 dishonorable discharges; right?

2 A. Yes.

3 Q. It also has convictions of misdemeanor crimes and domestic
4 violence; right?

5 A. That's correct.

6 Q. And these are Brady prohibitors?

7 A. They are.

8 Q. Right?

9 And tell us what a "Brady prohibitor" is, please.

10 A. There are ten Brady prohibitors identified under the Brady
11 law that, if held, prohibits someone from purchasing and
12 owning a firearm.

13 Q. Okay. So the NICS -- so a person goes into an FFL. They
14 want to buy a gun, and the FFL does a search with NICS in a --
15 in a point of contact state like Texas; right?

16 A. A nonpoint of contact state; correct.

17 Q. Yes.

18 A. They issue a search of our system.

19 Q. And the NICS automatically searches these three databases:
20 The III -- the III, the NCIC and the NICS indices; right?

21 A. That's correct.

22 Q. If there's information in the NICS indices of a Brady
23 prohibitor, that's an automatic denial, isn't it?

24 MR. STERN: Objection. Leading.

25 THE COURT: Sustained.

1 MR. JACOB: Your Honor, this is an adverse party
2 witness.

3 MR. STERN: They called her as a witness, Your Honor.

4 THE COURT: Let's just avoid the leading.

5 BY MR. JACOB:

6 Q. Ma'am, if the NICS -- if there is a Brady prohibiter on
7 the -- in the NICS indices, would that be an automatic denial?

8 A. Yes.

9 Q. Let me show you -- well, let's talk a little bit about the
10 FFLs going to -- through the NICS background search system
11 real quick.

12 When an FFL needs to do a search and they do a search
13 through the NICS system, the NICS provides three responses;
14 correct?

15 A. Can you repeat that question again?

16 Q. Yeah.

17 When an FFL does a background gun check through NICS, what
18 are the responses that NICS can provide?

19 A. So we only provide one response to the FFL. It could
20 either be a proceed, and that means the sale may proceed -- or
21 the transaction may proceed. The dealer makes the decision
22 whether to actually sell the gun. It may be a denial. That
23 means NICS found something prohibiting in the record and
24 denied the transaction to the dealer. Or it could be a delay,
25 and that indicates that there's additional research that is

1 needed and a NICS transaction number, or NTN, is also provided
2 to the FFL.

3 Q. Okay. If NICS has a record of a felony conviction, that's
4 a conviction punishable by more than a year in prison, would
5 that be an instant denial?

6 A. It depends. If there's additional research that is needed
7 on that felony -- it's up to the individual examiner when
8 they're looking at it, and their training, to make that
9 decision. Potentially, if it's a clean record and the final
10 disposition indicates a felony, yes, they could deny.

11 Q. Ms. Del Greco, has that always been your testimony?

12 A. Has that -- say that again. State that again, please.

13 Q. Sure.

14 Has that response to my question: If a NICS -- if a
15 record of a felony conviction punishable by more than a year
16 in prison is provided, that's an instant denial?

17 Do you remember that question?

18 A. It can be. Yes, sir.

19 Q. Okay. And NICS also has a previously denied persons file;
20 right?

21 A. Yes. It's in the NCIC, yes.

22 Q. Right.

23 So if you're a FFL that does a search and it comes back as
24 denied, NICS puts that person in the previously denied persons
25 file; right?

1 A. That is a file -- yes. It's a file accessible --
2 accessible by state and local law enforcement.

3 Q. And a previously denied persons file is also an instant
4 denial for future -- for future purchases; right?

5 A. It would be a record that would be accessible to NICS;
6 correct.

7 Q. And it would be an instant denial; isn't that fair?

8 MR. STERN: Objection. Leading.

9 THE COURT: That's overruled.

10 THE WITNESS: It can be. You know, it depends on the
11 specific record and the examiner that's making that
12 determination. But, yes, it can be.

13 BY MR. JACOB:

14 Q. Okay. Ms. Del Greco, I want to show you a document that
15 has been preadmitted, Plaintiffs' Exhibit PEX 797. And you
16 should see that on your screen pretty soon here. And I'll
17 show you the first page of 797.

18 You recognize -- do you recognize Plaintiffs' Exhibit 797?

19 A. Yes, I do.

20 Q. Can you identify Plaintiffs' Exhibit 797, please?

21 A. This is a document that's given out to agencies. It
22 highlights the various disqualifiers under the Brady law, and
23 it also highlights in the document how agencies can submit
24 records to the NICS.

25 Q. It provides another overview of the NICS operations in

1 2016; right?

2 A. Yes.

3 Q. And this is a document that the FBI publishes on a yearly
4 basis; right?

5 A. We do.

6 Q. And so you can actually go to the CJIS website and pull
7 every single year up to 2019? I believe that's the most
8 recent year.

9 A. Yes. That's correct.

10 Q. Okay. Let me show you page 2 of Exhibit 797.

11 Do you see that on your screen?

12 A. I do.

13 Q. And I know it's a little small font, so I want to bring --
14 call out the message from the NICS section chief.

15 Do you see that?

16 A. Yes.

17 Q. And if you scroll down to the bottom of that document, can
18 you tell me who the author of this message from the NICS
19 section chief is?

20 A. Yes. It's Kimberly J. Del Greco.

21 Q. Okay. And I want to call out the third full paragraph of
22 PEX 797, page 2.

23 And do you see the last sentence of this paragraph?

24 A. Yes.

25 Q. And I'll just highlight it for you. And when you get --

1 when you see the highlight, would you read that sentence to
2 the Court, please?

3 A. Sure. "Being able to view valuable information in a
4 timely manner aided the NICS section to ensure public safety
5 by denying 120,497 firearm background checks in 2016."

6 Q. Isn't it fair to say that denying firearm checks to felons
7 and child abusers aids the NICS sections in ensuring public
8 safety?

9 A. It does.

10 Q. And this is actually the mission of the NICS; isn't it?

11 A. It is.

12 Q. Let me show you page 4 of PEX 797. And I want to call out
13 the -- specifically, the NICS section mission. This is the
14 FBI's NICS section mission that you're seeing on your screen;
15 right?

16 A. Yes.

17 Q. It's a lot of words there.

18 Would you mind reading the mission of the -- of the NICS
19 section to the Court, please?

20 A. Sure. "The mission of the NICS section is to enhance
21 national security and public safety by providing timely and
22 accurate determination of a person's eligibility to both
23 possess firearms and/or explosives in accordance with federal
24 law."

25 Q. Okay. So for the rest of the conversation, what I'd like

1 to do with you is talk to you a little bit about how the NICS
2 provides both timely and accurate information. Okay?

3 A. Okay.

4 Q. So one at a time. Let's start with the timeliness aspect.
5 Okay.

6 A. Yes.

7 Q. And you know that the NICS -- well, actually, let me --
8 let me ask it this way.

9 There -- what are the two ways that -- that in 2016 an FFL
10 could run a NICS background search?

11 A. Yes. So a NICS -- an FFL can either call our contracted
12 call center in Barbourville, Kentucky, and provide the
13 biographics from the 4473 to a call center employee, which
14 runs the transaction against our system, or an FFL can process
15 a background check through E-Check, and it's an electric
16 mechanism.

17 Q. And I believe a call gets a response within less than 20
18 seconds; right?

19 A. It does.

20 Q. And electronic checks are even faster than that; right?

21 A. They are, sir.

22 Q. By an order of three to one?

23 A. Correct.

24 Q. So for every call that the NICS gets, you can process an
25 electronic check in -- you can process three electronic

1 checks; right?

2 A. That's correct.

3 Q. Okay. Let me show you page 19 of PEX 797.

4 And could you tell the Court what an "immediate
5 determination rate" is?

6 A. It's an immediate proceed or denial to an FFL from a NICS
7 search.

8 Q. Is it fair to say that, throughout the history of the NICS
9 section, the NICS section has strove to meet this 90-percent
10 immediate determination rate?

11 A. We have, yes.

12 Q. And what does it mean have a 90-percent immediate
13 determination rate?

14 A. For the NICS section, it's important to provide service to
15 the FFL. We know that's their business. And we also want
16 people that do not have a prohibiting record, or ones that do,
17 have an immediate response within the three days.

18 Q. Right.

19 So an immediate response is either proceed or deny; right?

20 A. That's correct.

21 Q. And in 90 percent of the cases, the NICS provides either a
22 proceed or deny?

23 A. That's correct.

24 Q. Okay. So we talked a little bit about the timeliness
25 aspect, how fast the NICS system is. I want to talk about how

1 y'all get an accurate proceed or deny. Okay?

2 A. Yes.

3 Q. And to do that, I need to show you -- and I want to talk
4 to you in particular about the Devin Kelley case. And so I
5 need to show you some documents from the Devin Kelley case.
6 And these are all documents that you should have seen before.

7 Let me pull out Joint Exhibit 658, page 199. And I want
8 to compare it to Joint Exhibit 658, page 369.

9 Do you see those two documents on your screens?

10 A. I do, sir.

11 Q. Could you tell the Court first what page 199, the document
12 on your left, is?

13 A. That's a fingerprint card, a manual fingerprint card.

14 Q. And it's a fingerprint card for Devin Kelley; do you see
15 that?

16 A. Yes.

17 Q. Okay. And could you tell us what the document on the
18 right, page 369, is?

19 A. It's a ATF Form 4473 that Devin Kelley filled out.

20 Q. Okay. And I want to look at the identifying biographical
21 features that are provided in each of these cards.

22 Do you see that, between the fingerprint card and the FFL,
23 Devin Kelley -- his name matches; right?

24 A. Yes.

25 Q. Does his height -- or does his gender match?

1 A. Yes.

2 Q. Does his date of birth match?

3 A. Yes, it does.

4 Q. And does his Social Security match?

5 A. Yes, it does.

6 Q. All right. At least on this portion of the ATF form,
7 Devin Kelley told the truth about his identifying
8 characteristics; is that a fair assessment?

9 A. He did.

10 Q. Okay. I want to show you the next page of the ATF form.
11 And that is Page 370 -- 371, actually. Let me show you that.
12 And I'm going to call out the first half of this form for you
13 so you can see it. It's a little blurry.

14 And you can see page 371 of Exhibit 658 is the ATF form
15 that Devin Kelley filled out to get his Ruger AR. Do you see
16 that?

17 A. I do.

18 Q. And do you see the date on this form, 4/7/2016?

19 A. Yes.

20 Q. Ms. Del Greco, isn't it true that if before April 7, 2016,
21 a final disposition had been submitted to the FBI CJIS with
22 Devin Kelley's conviction of a felony, the FBI would have
23 denied that transaction?

24 MR. STERN: Objection. Leading.

25 THE COURT: Overruled.

1 THE WITNESS: Yes.

2 BY MR. JACOB:

3 Q. But the FBI didn't have the information it needed in order
4 to run the background search on Devin Kelley; did it?

5 A. We did not.

6 Q. And at no point did either the DoD or the Air Force
7 correct that missing information; did it?

8 A. No.

9 Q. Ms. Del Greco, I want to show you JEX 658, page 202 and
10 203. Can you tell the Court what pages 202 and 203 are?

11 A. This is the -- what we term as the R-84 form. And it's a
12 request for final disposition.

13 Q. All right. It is a green form that should have the final
14 disposition information of a convicted offender; right?

15 A. It should, yes.

16 Q. And I'll represent to you this, pages 202 and 203, are
17 copies of the final disposition form that was found in Devin
18 Kelley's Air Force file.

19 You know that these final disposition forms come with a
20 self-addressed envelope; right?

21 A. Yes, I do.

22 Q. All right. And were you aware that the Air Force had not
23 even filled out Devin Kelley's final disposition form?

24 A. I am.

25 Q. Okay. Let me talk to you about the consequences of the

1 Air Force's failure to fill out this form and submit it to the
2 FBI. And I'll do that by showing you JEX 658, page 375. And
3 I want to call out that first section so you can see it a
4 little bit better.

5 Can you tell us what we're looking at on page 375?

6 A. This is a response to a NICS E-Check transaction providing
7 the NTN number, NICS transaction number, the date and the time
8 of the transaction, and the proceed response.

9 Q. Okay. Specifically, it's a response to Devin Kelley's
10 E-Check or a NICS check on 4/7/2016; right?

11 A. Yes.

12 Q. And the response at that time was "proceed"; right?

13 A. That's correct.

14 Q. And it was based on the information you had; right?

15 A. Correct.

16 Q. But it -- but you didn't have the information of his
17 felony conviction; right?

18 A. Correct.

19 Q. Ms. Del Greco, I want to talk to you -- keeping along the
20 theme of this -- the consequence of this failure, I'm going to
21 show you what we have premarked as Plaintiffs' Demonstrative
22 Exhibit B.

23 Can you see Plaintiffs' Demonstrative Exhibit B okay?

24 A. Yeah.

25 Q. I can try to reposition it.

1 A. No, I can. Farther to the left, I cannot.

2 Q. And I'm just going to be talking about this section, so it
3 may be a little bit easier for us.

4 Ms. Del Greco, you're aware that on December 12th, 2014,
5 Devin Kelley purchased a Glock; right?

6 A. Correct.

7 Q. And you know now that should have been a denial; right?

8 A. Correct.

9 Q. And if this was a denial, so should his June 26, 2015
10 purchase; right?

11 A. Yes.

12 Q. And if that was a denial, so should the April 7th, 2016
13 purchase; fair?

14 A. Yes.

15 Q. And if his April 7, 2016 purchase of an AR was a denial,
16 so should his October 18th, 2017 purchase of the Ruger?

17 A. Correct.

18 Q. Okay. But it's not just guns that -- preventing felons
19 from acquiring guns that protects public safety; is it?

20 A. Correct.

21 Q. The NICS section is actually used by the law enforcement
22 agencies to help protect public safety; isn't it?

23 MR. STERN: Objection. Leading and mischaracterizes
24 prior testimony.

25 THE COURT: That's overruled.

1 THE WITNESS: I'm not sure -- the question, when you
2 say "use" --

3 BY MR. JACOB:

4 Q. Well, the information in some of the NICS databases, the
5 III and the NCIC, are used by law enforcement agencies across
6 the country to help them close their cases; right?

7 A. So I wouldn't categorize that as a NICS database. III and
8 NCIC, National Crime Information Center, are separate
9 repositories at the FBI.

10 Q. Sure.

11 But, nevertheless, those databases are used by law
12 enforcement agents across the country to help protect the
13 public, right?

14 A. Correct. Separate from NICS. They do not have access to
15 NICS.

16 Q. Okay. Well, if Devin Kelley's information had been
17 submitted, I want to talk -- we've talked with Ranger Snyder,
18 a Texas Ranger, about some of the background checks that were
19 done on Devin Kelley through his employment and through other
20 law enforcement agents that came back clean. And you may not
21 be aware of that. But there's one particular background check
22 I want to talk to you about.

23 And it is this background check on July 14th, 2014 [sic].
24 Were you aware that a roommate of Devin Kelley's had reported
25 Kelley as a child abuser?

1 A. No.

2 Q. And they reported Kelley to the Colorado Springs Police
3 Department.

4 Were you aware of that?

5 A. I don't believe I am.

6 THE COURT: One second.

7 MR. STERN: She just answered.

8 THE WITNESS: I'm sorry.

9 MR. STERN: No. Please.

10 THE COURT: You may continue.

11 MR. JACOB: Okay.

12 BY MR. JACOB:

13 Q. Well, I'll represent to you that the -- this is based on
14 evidence that's already in the record that the police did a
15 background check, and it revealed nothing.

16 THE COURT: One second.

17 Is there a question?

18 MR. JACOB: Yes, Your Honor.

19 THE COURT: What's the question?

20 MR. JACOB: The question is, I'm going to ask her
21 about another consequence of the failure to have that
22 information in the system.

23 THE COURT: But what's the question?

24 MR. JACOB: The specific question is whether she's
25 aware that it hurt a witness' credibility when that

1 information wasn't in the system.

2 THE COURT: What's the objection?

3 MR. STERN: Objection. Speculation.

4 THE COURT: That's sustained.

5 BY MR. JACOB:

6 Q. Okay. Ms. Del Greco, let me actually show you -- and I'm
7 going to cue up -- this has been preadmitted. Willis -- the
8 testimony of Ms. Willis, page 105, lines 18 through 25. And
9 I'll represent to you Ms. Willis is an individual and a
10 roommate of the Kelleys' that reported Kelley as a child
11 abuser.

12 MR. STERN: Objection. This is now a narrative.

13 THE COURT: Yeah. So what's the question?

14 MR. JACOB: The question -- let me -- I was going to
15 play it for her and then ask the question.

16 MR. STERN: But, Your Honor --

17 THE COURT: But she didn't have knowledge. So
18 where's this going?

19 MR. JACOB: My point, Your Honor, is that the
20 information that the Air Force failed to submit into the NICS
21 database hurt a eyewitness' credibility in front of the police
22 when the eyewitness reported a child abuse crime that would
23 have put Devin Kelley in prison and prevented this massacre.

24 MR. STERN: Objection. Speculation. It calls --
25 it's a legal conclusion and a narrative, which should be

1 stricken from the record.

2 THE COURT: Yeah. I'll take this one question at a
3 time. Continue.

4 BY MR. JACOB:

5 Q. Okay. Mr. Hanko, please play for Ms. Del Greco page 105,
6 lines 18 through 25 of Ms. Willis' testimony.

7 *(Playing video)*

8 BY MR. JACOB:

9 Q. Ms. Del Greco, one of the ways the FBI CJIS division helps
10 protect public safety is providing information like the
11 background check information of Devin Kelley, so they can
12 assess the credibility of eyewitnesses; right?

13 MR. STERN: Objection. Leading.

14 THE COURT: That's overruled.

15 THE WITNESS: That would be provided to III, not to
16 NICS. Law enforcement would not have access to the NICS
17 database. They would have access to anything that's submitted
18 to III. And that is your fingerprints, your arrest
19 information, and the criminal history that is associated with
20 that arrest.

21 BY MR. JACOB:

22 Q. Right. Fingerprints like the FD-249 fingerprint card?

23 A. Fingerprints and arrest information and the criminal
24 history that is associated with that arrest.

25 Q. Right.

1 And my question was actually a little different. My
2 question was whether the CJIS division helps -- and CJIS is
3 the division that you used to work for; right?

4 A. I currently work there, yes.

5 Q. Okay.

6 A. Yeah.

7 Q. And the CJIS division is a -- has ownership of the NICS
8 database; right?

9 A. We have ownership of all three databases, but NICS is
10 separate from III.

11 Q. And NICS searches III, NCIC, and the NICS indices; right?

12 A. That's correct.

13 Q. Right.

14 My question is: One of the ways that CJIS, the FBI, helps
15 protect public safety is by providing information in the III
16 and the NCIC to law enforcement agents so they can make
17 credibility determinations about eyewitnesses?

18 A. Yes.

19 Q. And if an eyewitness tells a law enforcement agent that,
20 you know, I think this person has a criminal history of a
21 felony and a domestic abuse, this person's a bad person, and
22 that check of the NCIC comes back as having none of that
23 history, that could hurt that witness' credibility; isn't that
24 true?

25 THE COURT: One second.

1 MR. STERN: Objection. Speculation. Leading.

2 THE COURT: Okay. You can answer, if you know.

3 THE WITNESS: I can't surmise what a law enforcement
4 agency would do if they had access to information. That is up
5 to them.

6 BY MR. JACOB:

7 Q. Okay. Ms. Del Greco, I want to talk to you a little bit
8 about the time from 2012 -- or from December 12th, 2014, to
9 the Sutherland Springs shooting, November 5th, 2017. That's
10 three -- about three years; right?

11 A. Yes.

12 Q. And, you know, one of the issues that -- in this case is
13 about what would happen if Devin Kelley were able to get
14 firearms through a delay in the NICS system.

15 You're aware of that?

16 A. Restate the question again. I want to make sure I
17 understand you correctly.

18 Q. Yeah. Let me actually just talk to you about the
19 documents themselves.

20 Let's look at PEX 797. Okay?

21 A. Okay.

22 Q. And I want to show you page 27 of PEX 797. And this is
23 the NICS report from 2016 that we discussed earlier; right?

24 And I'm going to call out the first paragraph of PEX 797, page
25 27.

1 Can you tell the Court what "firearm retrieval referrals"
2 are?

3 A. Yes. If we have delayed a transaction because additional
4 research is needed before a final decision could be made on a
5 potential firearm transaction and information comes in after
6 the third business day and it denies the transaction, we
7 notify ATF that day that we have a denial and a potential
8 referral for retrieval to ATF.

9 Q. And in 2016, the NICS section referred 4,170 firearm
10 retrieval actions to the ATF; is that right?

11 A. That's correct.

12 Q. And you expect --

13 THE COURT: Just so I'm clear on this, so after three
14 business days, the FFL can still sell the weapon --

15 THE WITNESS: Yeah.

16 THE COURT: -- and so this retrieval is you telling
17 the ATF, "Go get that weapon from this person who shouldn't
18 have gotten it in the first place"?

19 THE WITNESS: We recommend to ATF that there is
20 someone that's prohibited that had received one, yes. We
21 know -- we -- clarifying, we call the FFL, notify him of the
22 denial, and he tells us if the firearm has been sold.

23 BY MR. JACOB:

24 Q. Right. And that only happens if there's a delay; right?

25 A. It does, yes.

1 Q. But in the vast majority of cases, 90 percent of the times
2 it's an instant denial; right?

3 A. Proceed or denial, correct.

4 Q. Proceed or deny.

5 Ms. Del Greco, I want to show you another document.

6 Actually, Plaintiffs' Exhibit Demonstrative Exhibit A.

7 Can you tell me if you can read this. All right?

8 MR. STERN: Your Honor, we do object to this
9 demonstrative.

10 THE COURT: So what is this?

11 MR. JACOB: Your Honor, this is a demonstrative of
12 admissions that we've gotten from various Air Force employees.
13 I'm actually not going to be asking her about this side of the
14 document. I'm just going to be asking her about this side of
15 the document. It's --

16 MR. STERN: Your Honor --

17 THE COURT: One second. Let me read it.

18 So what's the objection?

19 MR. STERN: Your Honor, as if the name of the
20 demonstrative isn't telling enough, all of these questions
21 that were asked are calls for legal conclusions. We objected
22 during the deposition designations. We have renewed those
23 objections during the deposition designations for purposes of
24 this trial.

25 To ask witnesses whether there is an increased risk of

1 harm is an element of the duty at issue, and that is the pure
2 province of the Court to decide. It's inappropriate to ask
3 Ms. Del Greco about an increased risk of harm, much less these
4 lay witnesses who were asked during their depositions. Now
5 they want to blow this up and show it as a demonstrative. And
6 that's inappropriate.

7 MR. JACOB: First of all, Your Honor, this is already
8 evidence that's -- this side of the board, the witness
9 admissions are already in evidence, with the deposition
10 transcripts that we filed with the Court previously.

11 MR. STERN: They're in evidence with our objections
12 and with our renewed objections.

13 THE COURT: Right. So he's going to ask her
14 questions about the left-hand side of that demonstrative. I'm
15 disregarding the title of it. With the exception of the
16 fourth bullet point, though, the other ones aren't asking for
17 any kind of legal conclusion. They're asking about what the
18 NICS does.

19 MR. STERN: And to the extent that she can answer
20 those from her personal knowledge, there's no need to have
21 this demonstrative up for --

22 THE COURT: It's just demonstrative. We're not here
23 in front of a jury.

24 Go ahead.

25 MR. STERN: Thank you, Your Honor.

1 BY MR. STERN:

2 Q. Ms. Del Greco, isn't it fair to say that government
3 agencies should collect fingerprints and submit them to the
4 FBI upon criminal arrests?

5 A. Correct.

6 Q. Government agencies should collect and submit deniable
7 offenses of felons and child abusers to the FBI?

8 A. Upon arrest.

9 Q. And government agencies should collect incomplete
10 information?

11 A. Yes.

12 Q. And isn't it also fair to say that time is of the essence
13 when it comes to reporting this type of disposition
14 information to the FBI?

15 A. We would like to have the information timely and accurate
16 so it's available to all law enforcement across the nation.

17 Q. Right. For the NICS to work, federal agencies must
18 collect -- accurately collect and submit criminal history data
19 upon arrest?

20 A. That's correct.

21 Q. Isn't it also fair to say that the more information the
22 FBI has on dangerous felons, the better decisions that they
23 can make in preventing individuals who shouldn't have firearms
24 from getting those firearms?

25 A. That's correct.

1 Q. Ms. Del Greco, isn't it fair to say that the NICS
2 decreases the risk of shooting deaths by keeping guns out of
3 the hands of felons?

4 MR. STERN: Objection. Calls for a legal conclusion.

5 THE COURT: Can you answer that question?

6 Has your agency done any kind of analysis to make that
7 kind of determination?

8 THE WITNESS: The FBI does not study increase or
9 decrease risks to the American -- the American people. We
10 process the transaction as the system was designed.

11 We do know, from historical cases, people have obtained a
12 firearm in many different ways to commit a crime. But we
13 don't study that at the FBI.

14 BY MR. JACOB:

15 Q. Isn't it true that the reason that the FBI doesn't study
16 that is Congress passed a bill preventing the research on gun
17 violence, by government agencies?

18 A. I'm unaware, in all of my years at CJIS, about that law.
19 We are -- we don't consider our job the job to study the
20 impact to the community.

21 THE COURT: Next question.

22 BY MR. JACOB:

23 Q. Well, let's be very clear, then. We do know that if
24 Kelley's fingerprints had been submitted (loud microphone
25 noise) final disposition -- let me restate the question,

1 Ms. Del Greco.

2 If Devin Kelley's fingerprints and final disposition had
3 been submitted to the FBI, he would have been prohibited from
4 purchasing the firearm, the very firearm that he used to kill
5 26 people; isn't that true?

6 A. That is correct.

7 MR. JACOB: Your Honor, we pass the witness.

8 THE COURT: Any cross?

9 MR. STERN: There is. Can we have five minutes, Your
10 Honor?

11 THE COURT: Yes. We'll break for five.

12 *(Recess)*

13 *(Open court)*

14 THE COURT: Thank you. Please be seated.

15 Any cross?

16 MR. STERN: Please, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. STERN:

19 Q. Deputy Assistant Director Del Greco, good morning.

20 A. Good morning.

21 Q. As you may recall, my name is Paul Stern. I'm an attorney
22 with the Department of Justice. Thank you for being here
23 today.

24 A. You're welcome.

25 Q. I believe you've previously testified that the mission of

1 NICS is to enhance national security and public safety; is
2 that correct?

3 A. That is correct.

4 Q. And do you believe you're successful in your mission?

5 A. I do.

6 Q. Okay. You had -- you successfully ensure that prohibited
7 individuals are prevented from obtaining firearms?

8 A. With the information that we have available to us, yes.

9 Q. Okay. But you also said that the system was limited in
10 its design?

11 A. That is correct.

12 Q. How so?

13 A. I mean, we -- it's a shared management database, and we
14 get information from all federal, state, local, and tribal law
15 enforcement agencies to allow us to access their records on a
16 national level. The examiners are trained extensively, but
17 they all make their own decision based on the information they
18 have in front of them.

19 Q. Is it also limited in its design, based on whether FFLs
20 versus non-FFLs have to participate?

21 A. Yes.

22 Q. How so?

23 A. Well, an FFL has to be registered with the NICS in order
24 to process a firearm transaction with us.

25 Q. Again, could you remind the Court what "FFL" stands for?

1 A. Absolutely. It's a Federal Firearms Licensee.

2 Q. Okay. And is -- are the entities that have to register
3 with NICS, is that defined by federal law?

4 A. It is.

5 Q. Okay. So is it -- is it a business that is engaged in the
6 business of selling firearms?

7 A. We process the transaction. It is -- it is the FFL that
8 makes the determination whether to actually sell the firearm.

9 Q. Correct.

10 But you -- as you suggested, it's limited to only FFLs;
11 correct?

12 A. That is correct. Yes, sir.

13 Q. So is there a legal definition for -- for an FFL in order
14 to have to participate in the NICS system?

15 A. I'm not aware of a legal definition.

16 Q. Okay. Let's pull up Joint Exhibit 32 -- I'm sorry --
17 Government's Exhibit 32. And that is 18 USC 921. Can we look
18 at (a) (21) (D)?

19 So if you look at --

20 MR. JACOB: Your Honor, this -- I object. This
21 witness testified she's not aware of this information.

22 MR. STERN: Your Honor, this --

23 MR. JACOB: She would be speculating, Your Honor.

24 MR. STERN: Showing her the law, which, obviously,
25 the Court can take judicial notice of.

1 THE COURT: Yeah. So, I mean, you're not asking her
2 to opine on the law. So what's the question going to be?

3 MR. STERN: The question is whether or not those who
4 are engaged in the business of selling firearms are those that
5 have to register as FFLs.

6 THE COURT: Why don't you just ask her the other way?
7 What's your -- what's your understanding of non-FFLs?

8 THE WITNESS: A non-FFL is a private sale, family
9 members selling firearms. I'm -- I'm not sure what --

10 THE COURT: And you-all don't regulate those? You
11 don't --

12 THE WITNESS: No, we do not.

13 THE COURT: So point made. Move on.

14 THE WITNESS: And it happens regularly.

15 MR. STERN: Thank you, Your Honor.

16 BY MR. STERN:

17 Q. Just to clarify, non-FFLs don't have to participate in
18 NICS background checks before they sell the firearms. Is that
19 fair?

20 A. That is correct.

21 Q. And are you aware of some of the ways that non-FFLs are
22 able to sell firearms?

23 A. We do. I mean, we know that there are stolen firearms.
24 There are gun shows. There are ghost guns. There are family
25 members that share guns. There are many different ways to

1 obtain a firearm.

2 Q. What about through online sources?

3 A. Yes, and online, correct.

4 Q. So is it fair to say that NICS performs background checks
5 within the legal parameters set forth in the Brady Act?

6 A. Correct.

7 Q. And in your experience, are prohibited individuals able to
8 circumvent the background check to obtain firearms?

9 MR. JACOB: Objection. Speculation.

10 MR. STERN: If she knows.

11 THE COURT: If you know.

12 THE WITNESS: We do know that people get guns outside
13 of a NICS check.

14 BY MR. STERN:

15 Q. And plaintiffs showed you statistics regarding the number
16 of felons who were denied sales at FFLs in 2016.

17 Do you recall that?

18 A. Yes.

19 Q. Do you know how many of them were able to circumvent NICS
20 to obtain firearms?

21 A. I don't know how many. But we do see on a weekly basis
22 crimes committed without --

23 MR. JACOB: Objection, Your Honor. Speculation. She
24 testified --

25 THE COURT: She's answering to her knowledge.

1 Go ahead.

2 THE WITNESS: We -- we see on a weekly basis, crimes
3 that are committed. We research that in our database and see
4 that a NICS check has not been initiated.

5 BY MR. STERN:

6 Q. Did Devin Kelley have alternative means through which to
7 obtain firearms through non-FFL sources?

8 A. He showed intent.

9 Q. You suggested he showed intent. If we could talk a little
10 bit more about that. If we could pull up Joint Exhibit 345.
11 Start with number 4, please. Page 4, please.

12 TECHNOLOGY SPECIALIST: 4?

13 MR. STERN: Yes.

14 BY MR. STERN:

15 Q. Again, I believe plaintiffs' counsel showed you this
16 ATF 4473 form; do you recall?

17 A. Yes.

18 Q. Okay. And can you tell the Court what is an ATF 4473
19 form?

20 A. It's a required form that the FFL gives a potential
21 purchaser to fill out. They have to put their biographics and
22 answer all of the questions honestly on the form.

23 Q. Okay. And can you read the warning label on the top of
24 the form?

25 A. "You may not receive a firearm if prohibited by federal or

1 state law. The information you will provide will be used to
2 determine whether you are prohibited under law from receiving
3 a firearm. Certain violations of the Gun Control Act, 18 USC
4 921, are prohibitive by up to ten years imprisonment and/or up
5 to a \$250,000 fine."

6 Q. So is this warning the individual who's filling out the
7 form that a violation of the Gun Control Act may be subject to
8 ten years imprisonment and up to \$250,000 --

9 A. Yes.

10 Q. -- fine? Thank you.

11 Then if we look at the second page, can you read the
12 certification block. Why don't we have you read where it
13 says, "I also understand that making any false..." In the
14 middle of the paragraph, please.

15 A. Would you like me to read that?

16 Q. Please.

17 A. "I also understand that making any false oral or written
18 statement or exhibiting any false or misrepresented
19 identification with respect to this transaction is a crime
20 punishable as a felony under federal law, and may also violate
21 state and/or local law."

22 Q. So when Devin Kelley was filling out this form, he knew
23 that any lies that he told in filling out that form would
24 subject him to that same -- fines of \$250,000 and up to ten
25 years imprisonment?

1 A. Yes.

2 Q. Let's take a look at the first page of the form again,
3 then. Can you read to the Court Question 11?

4 So this requires -- does this require that Devin Kelley
5 answered various questions about whether or not he was
6 prohibited from owning or possessing firearms under the Gun
7 Control Act?

8 A. Yes. That's correct.

9 Q. And based on your knowledge, was Devin Kelley truthful in
10 providing those answers to Question 11?

11 A. No.

12 Q. Why not?

13 A. He answered "no" to all of the questions that were
14 relevant to his criminal act.

15 Q. You say "his criminal act." Let's take a look at 11(c).
16 If you can read that one.

17 A. You would like me to read it?

18 Q. Please.

19 A. Okay. "Have you ever been convicted in any court of a
20 felony, or any other crime, for which the judge could have
21 imprisoned you for more than one year, even if you received a
22 shorter sentence, including probation."

23 Q. Thank you.

24 And he answered "no" to that; correct?

25 A. That is correct.

1 Q. Take a look at 11(j). I'm sorry. 11(i), please, if you
2 don't mind.

3 A. "Have you ever been convicted in any court of a
4 misdemeanor crime of domestic violence?"

5 Q. Did Devin Kelley answer that question truthfully?

6 A. No.

7 Q. So, in other words, was Devin Kelley willing to lie and
8 subject himself to a felony charge, with a punishment of up to
9 ten years imprisonment and \$250,000, in order to obtain
10 firearms?

11 A. Yes, he was.

12 Q. As the deputy assistant director of NICS, what does
13 someone's willingness to lie on their ATF 4473 form indicate
14 to you?

15 MR. JACOB: Objection. Speculation.

16 THE COURT: That's overruled.

17 THE WITNESS: They have intent to obtain a gun in any
18 means capable to them.

19 BY MR. STERN:

20 Q. Including a willingness to break the law in order to
21 obtain firearms?

22 A. That's correct.

23 Q. Including a willingness to conceal their past convictions
24 to obtain firearms?

25 A. Yes.

1 Q. Does it indicate their determination to obtain firearms?

2 A. Absolutely.

3 Q. Taking a look at Joint Exhibit 65, please.

4 Have you seen this document before?

5 A. Yes.

6 Q. What is it?

7 A. It's a statement by Danielle Kelley.

8 Q. Does she indicate in that statement that she went with
9 Devin Kelley to a Dick's Sporting Goods?

10 A. Yes.

11 Q. And what was the result of that attempted transaction at
12 Dick's?

13 A. It was denied.

14 Q. And does she state a reason why she thinks it was denied?

15 A. I believe it was the Colorado law that required Dick's to
16 deny that transaction.

17 Q. Okay. Then if we look down at paragraph 5, can you read
18 that paragraph, please?

19 A. Sure. "In or around April 2016, Devin and I went to
20 Academy in Selma, Texas. There, he purchased a Ruger AR-556.
21 That day, he also purchased a magazine and ammunition. It was
22 a quick and easy transaction. It is my understanding that the
23 firearm Devin used in the Sutherland Springs shootings was an
24 AR-556 that Devin bought at Academy, located in Selma, Texas."

25 Q. So according to Devin Kelley's wife, Devin Kelley actually

1 went to an FFL and was denied?

2 A. Correct.

3 Q. And then he continued to try to obtain firearms?

4 A. Correct.

5 Q. In fact, he didn't even bother to change his driver's
6 license from Colorado to Texas before he went to continue to
7 obtain -- attempt to obtain firearms?

8 A. That's correct.

9 Q. As the deputy assistant director of NICS, does his attempt
10 to obtain firearms after he was denied at an FFL tell you
11 anything about his intent?

12 A. To me, it tells me that he will obtain a firearm in any
13 means capable to him -- available to him.

14 Q. Including violating the law?

15 A. Including violating the law.

16 Q. Was Devin Kelley deterred from trying to obtain firearms?

17 A. No, he was not.

18 Q. Did he see the error of his ways in trying to obtain
19 firearms through FFLs?

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

21 Q. Did he see the error of his ways in any attempts of his to
22 obtain firearms?

23 A. No.

24 Q. I'd like to pull up an exhibit that plaintiffs' counsel
25 showed you regarding the NICS overview. I believe it's Joint

1 Exhibit 496, please. You've already briefly discussed this
2 document. But what is it?

3 A. It is a PowerPoint presentation, giving the general
4 overview of NICS.

5 Q. Thank you.

6 And I believe you already spoke briefly about page 5, but
7 let's pull that one up. Could you clarify for the Court what
8 is the difference between a POC and a non-POC state?

9 A. Sure. A POC state is full point of contact state. And
10 the FFLs in the POC states go to the state police agencies,
11 state criminal justice agency to process their firearms. They
12 do use the NICS system, but they also use other state
13 databases to make a determination.

14 In the non-POC states, nonpoint of contact states, the
15 FFLs come directly to the NICS, and we search our system.

16 Q. So why would a state want to be a POC state?

17 A. Some states have a revenue that they get from a gun sale,
18 and they have other state databases that they can access.

19 Q. So, in other words, for a non-POC state, they go to --
20 through NICS to perform the database search based on the three
21 databases that CJIS operates; is that fair?

22 A. Yes.

23 Q. Is it fair to say that POC states want to do it themselves
24 because they can check those three databases as well as other
25 state databases?

1 A. That's correct.

2 Q. So it might be a more comprehensive search?

3 A. Yes.

4 Q. And we look at Texas, that's green; right? That means
5 it's a non-POC state?

6 A. That's correct.

7 Q. I'd like to turn to page 20, please.

8 Can you read the portion in red?

9 A. "UCMJ offenses are not classified as felonies or
10 misdemeanors. Punishment for an offense may not exceed such
11 limits" as President -- "as the President may prescribe for
12 that offense."

13 Q. And what does "UCMJ" stand for?

14 A. Uniform Code of Military Justice.

15 THE COURT: Where is this coming from?

16 MR. STERN: I'm sorry?

17 THE COURT: Where is this coming from? Is this some
18 law you're citing to me, or what -- what is this?

19 MR. STERN: Your Honor, this is the overview that
20 plaintiffs' counsel used regarding NICS?

21 THE COURT: No, I know that. But if you're asking me
22 to make decisions, I want to know -- here, there's some
23 confusion about which UCMJ offense he was convicted of.

24 Is that the purpose of showing this me or...

25 MR. STERN: The purpose is when you actually look at

1 a database such as III, it's not self-evident that there would
2 be an automatic denial or that a local law enforcement officer
3 would know that's the equivalent of a felony because you need
4 to convert an article violation under the UCMJ into a state
5 felony or a misdemeanor of domestic violence.

6 THE COURT: So just so I'm clear, then, based upon
7 what Devin Kelley was court-martialled for and convicted by
8 court-martial, should that information have been sent by the
9 Air Force to the NICS?

10 THE WITNESS: To III.

11 THE COURT: To III.

12 THE WITNESS: Yes.

13 THE COURT: And so that information in III would have
14 eventually shown up in any NICS check?

15 THE WITNESS: It would. However, the NICS examiner
16 would not immediately make a determination on a UCMJ without
17 doing research. It doesn't give us an immediate response.

18 THE COURT: So, I mean, you're the chief of that
19 section. Devin Kelley's conviction, does that show -- what
20 you -- is that a gray area, or was it a clearcut area for you
21 to be able to say yes or no to?

22 THE WITNESS: Depending on -- for this particular
23 case, an Article 128 would need do research. There are
24 different various levels of assault. So the NICS examiner has
25 military pages that they refer to. We have internal websites

1 that we access of DoD. So we would actually have to do some
2 research first. And if it's not clear, completely, we would
3 have to reach out to the Air Force for a final disposition on
4 what the maximum conviction would be for that assault.

5 THE COURT: So we know none of that was done because
6 the Air Force never gave you the information in the first
7 instance; right?

8 THE WITNESS: That's correct.

9 THE COURT: Now, let's just assume hypothetically
10 that they had. Have you--all done an analysis now as to
11 whether or not that would have shown up as a yes, you can buy,
12 or a denial?

13 Yeah. You answer my questions. You don't look to him.

14 THE WITNESS: I just want to make -- so the first
15 sentence, for Tessa Kelley, the NICS examiner would have to
16 determine who Tessa Kelley was. The element of force is
17 there. And so once they determine that she is his wife -- at
18 the onset of the record, we would not know who Tessa Kelley
19 is.

20 But the second sentence that he received for the juvenile,
21 we would have been able to deny, referring to that record. It
22 said "guilty" on the charge. The NICS examiner only needs
23 one -- one denial to deny the firearm.

24 THE COURT: Thank you.

25 THE WITNESS: You're welcome.

1 MR. STERN: Your Honor, I'd like to continue with
2 that line of questioning. Just --

3 THE COURT: Go ahead.

4 BY MR. STERN:

5 Q. Based on the -- the way that you just outlined how a NICS
6 examiner would have to interpret an Article 128(g) violation
7 under the UCMJ, would it be fair to assume that if a local law
8 enforcement officer checked III and saw a UCMJ violation,
9 they, likewise, wouldn't know it's an automatic felony?

10 A. They would not know.

11 Q. And so if they had to invoke any state obligation to
12 obtain -- to arrest someone based on a felony possession of a
13 firearm, would they know automatically, based on that UCMJ
14 violation, that that individual had been prohibited from
15 owning or possessing a firearm?

16 A. I think they would have to refer to the same military
17 pages that our examiners refer to.

18 Q. Thank you.

19 I believe plaintiffs' counsel briefly spoke about -- a
20 question about credibility of one of the Kelleys' former
21 roommates, Emily Willis.

22 Do you recall that --

23 A. Yes.

24 Q. -- testimony?

25 I'd like to show you a few pages concerning her report to

1 the police. Let's take a look at Joint Exhibit 521, please.
2 We see here the first line under the comments is "complainant
3 Emily Wollis." I believe that's Willis?

4 A. Yes.

5 Q. And then the third line, "RP believes roommate's child is
6 being abused."

7 A. Yes.

8 Q. The fourth line reads, "No BOLO."

9 Do you know what "no BOLO" means?

10 A. I do. And I can't recollect it right now.

11 THE COURT: Be on the lookout.

12 THE WITNESS: Yes. Thank you.

13 MR. STERN: It's fair.

14 BY MR. STERN:

15 Q. So according to this document, there was no be on the
16 lookout for the Kelleys; correct?

17 A. That's right.

18 Q. And then if we look another two lines down, "UNK location
19 of child or mother." It's fair to say, the location of the
20 child or mother were unknown?

21 A. That's correct.

22 Q. And then a little further down it says, "RP woke up this
23 morning and roommate, child, and belongings are gone."

24 Did I read that correctly?

25 A. Yes.

1 Q. And a little further down it says, once again, "No BOLO"?

2 A. Yeah.

3 Q. Okay. Are you aware that Emily Willis testified that the
4 night before she contacted the police, Devin Kelley took
5 Danielle and the child and moved back to Texas?

6 A. Yes.

7 Q. And so as a result, that's why she's telling the law
8 enforcement officers that she woke up this morning and the
9 roommate and child and belongings were gone?

10 A. Yes.

11 Q. Is it fair to say that it's difficult to prosecute a
12 domestic violence case when the victim is no longer present in
13 the state?

14 A. Yes.

15 Q. Are you here to speculate as to whether the El Paso County
16 Sheriff's office would have handled this case any differently
17 had Devin Kelley's information been in III?

18 A. I mean, it's case by case, officer by officer on how they
19 would handle a situation.

20 Q. Okay. I want to transition and discuss the point in time
21 in which someone is prohibited under the Gun Control Act. Is
22 that okay?

23 A. That's fine.

24 Q. When does an individual become prohibited from possessing
25 or owning a firearm under a 922(g)(1)?

1 A. When we have a complete, final disposition.

2 Q. The disposition of the conviction?

3 A. Yes.

4 Q. So before that time, they're not prohibited under the Gun
5 Control Act; correct?

6 A. Unless they're under indictment.

7 Q. Okay. So we'll get to that one.

8 A. Okay.

9 Q. But let's talk about 922(g)(9).

10 A. Yes.

11 Q. Would that also require a conviction?

12 A. Yes.

13 Q. Okay. And then you alluded to a 922(n).

14 What is that in reference to?

15 A. That means a person's under indictment. And the NICS
16 examiner then can deny a firearm as well.

17 Q. Okay. So the first time the individual would actually be
18 prohibited from owning or possessing a firearm under the Gun
19 Control Act is at the time of indictment?

20 A. That's correct.

21 Q. Do you know what the equivalent of an indictment is under
22 the Uniform Code of Military Justice?

23 A. I believe it's when it's referred to general
24 court-martial.

25 Q. And I'll stipulate -- I'll represent to you that the

1 parties have already stipulated that Devin Kelley's referral
2 of charges occurred on August 27th, 2012.

3 A. That's correct.

4 Q. Thank you.

5 MR. STERN: In fact, I can pull up that exhibit for
6 Your Honor, although it has been stipulated. I can move on.

7 THE COURT: That's fine. I got it down.

8 MR. STERN: Okay. Thank you.

9 BY MR. STERN:

10 Q. Then I'll move on. Take a look at Joint Exhibit 18,
11 please. Take a look at the third page.

12 This shows Devin Kelley purchased a revolver at Holloman
13 Air Force Base Exchange on February 12th, 2012; is that
14 correct?

15 A. Yes.

16 Q. Would there have been any basis for the FBI to issue a
17 denial at that time?

18 A. No.

19 Q. Even if his fingerprints were in the system at that time,
20 would there have been any basis to prohibit Devin Kelley from
21 owning or possessing a firearm?

22 A. No. Having a fingerprint does not equate to a denial.

23 Q. Thank you.

24 Moving on to Joint Exhibit 16, same question with regards
25 to this 4437 Form. If we look at the third page, again, this

1 is another purchase by Devin Kelley of a firearm at the
2 Air Force -- the Holloman Air Force Base Exchange. This one
3 occurred on, I believe, April 12th, 2012; is that correct?

4 A. Yes.

5 Q. Again, same question. Was there any basis to deny Devin
6 Kelley at this point in time?

7 A. No.

8 Q. Even if his fingerprints were in the system at that time,
9 would there have been any basis to prohibit him for owning or
10 possessing a firearm?

11 A. It would not, no.

12 Q. In all of your years of experience as not just the deputy
13 assistant director of NICS, but all your time at CJIS, have
14 you ever heard of an individual being conditioned to purchase
15 guns at an FFL because they received a delay or proceed as
16 opposed to a denial?

17 A. I think it's up to the individual on how their mental
18 state is, and, you know, their desire to have a firearm.

19 Q. I want to transition and talk about one of the two
20 investigations into Devin Kelley during his time at the
21 Air Force.

22 Are you aware that there were two separate investigations
23 of Devin Kelley?

24 A. Yes.

25 Q. One of those were conducted by the 49th Squadron Security

1 Forces. Do you -- is that correct?

2 A. That is correct.

3 Q. And the other one is by the Air Force Office of Special
4 Investigations?

5 A. That's correct.

6 Q. Okay. There's been testimony that's been admitted into
7 evidence already from a Colonel Ford who was a 30(b)(6)
8 witness on behalf of the Security Forces. He testified that
9 Devin Kelley's -- the result of the investigation by Security
10 Forces Squadron of Devin Kelley ended in a letter of
11 reprimand.

12 Would a letter of reprimand be a basis to prohibit an
13 individual from owning or possessing firearms?

14 A. It would not.

15 Q. Why not?

16 A. That's an administrative action. And it doesn't -- I
17 believe there are no arrest charges against anyone with a
18 letter of reprimand.

19 Q. Let's pull that up, if you can. Joint Exhibit 21, page 73
20 and 74.

21 So this is the letter of reprimand Devin Kelley received
22 as a result of the investigation by Security Forces personnel;
23 correct?

24 A. That is correct.

25 Q. If you can read the first sentence on paragraph 1.

1 A. "Investigation has revealed that you physically assaulted
2 Mrs. Tessa K. Kelley on or about February 17, 2012, at 2629B
3 McKinley Loop, Holloman Air Force Base, New Mexico."

4 Q. So this is investigating the abuse engaged in by Devin
5 Kelley on February 17th, 2012; correct?

6 A. That's correct.

7 Q. And if we read the first sentence in paragraph -- or first
8 two sentences in paragraph 2.

9 A. "You are hereby reprimanded! Your actions violated
10 Article 128 of the UCMJ-Assault. I need you to understand
11 that your conduct was criminal and cannot continue."

12 Q. Thank you.

13 So this was his -- equivalent of his punishment; correct?

14 A. That's correct.

15 Q. It was not a conviction?

16 A. No.

17 Q. He would not have been prohibited under the Gun Control
18 Act --

19 A. He is not.

20 Q. -- as a result of this conviction?

21 A. Yes.

22 Q. I'm sorry?

23 A. I'm sorry. He is not.

24 Q. Thank you.

25 In fact, if you look at the second page of this document,

1 Devin Kelley signed it; correct?

2 A. That's correct.

3 Q. So, again, if Devin Kelley's letter of reprimand was the
4 result of the investigation by Security Forces, and that
5 entire investigation ended in a letter of reprimand, then
6 could the investigation by the Security Forces have caused
7 Devin Kelley to be prohibited from owning or possessing a
8 firearm?

9 A. No, they could not.

10 Q. Again, even if his fingerprints would have been submitted?

11 A. Even if his fingerprints are submitted.

12 MR. STERN: Pass the witness.

13 THE COURT: Any questions?

14 MR. JACOB: Yes, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. JACOB:

17 Q. Ms. Del Greco, I want to pick up with the discussion of
18 these guns that Kelley got prior to his conviction. Okay?
19 You remember that conversation?

20 A. Yes.

21 Q. Mr. Stern talked to you about a couple of guns that he
22 bought on February 12th and April 12th of 2012; right?

23 A. Correct.

24 Q. Were you aware that the first gun that Mr. Kelley got was
25 actually confiscated by the Air Force before his conviction?

1 MR. STERN: Objection. Relevance?

2 THE COURT: What is the relevance of that?

3 MR. JACOB: Well, Your Honor, they're arguing that
4 Kelley would have gotten these guns because his conviction
5 wouldn't have denied it, and maybe he would have used these
6 guns. But I'm about to show that all of these guns, prior to
7 his conviction, were either confiscated by the Air Force or
8 his dad.

9 MR. STERN: I don't understand what the scope -- what
10 the alleged duty is with regards to confiscation, or we were
11 -- and, furthermore, we're only simply arguing that he was not
12 prohibited from owning or possessing firearms prior to these
13 referral of charges.

14 THE COURT: That's sustained.

15 Move on.

16 MR. JACOB: Yes, Your Honor.

17 BY MR. JACOB:

18 Q. Ms. Del Greco, I do want to talk, though, about JEX 20.
19 Mr. Stern talked to you about how a letter of reprimand was
20 not a -- not a reason for denial of a firearm.

21 Do you remember that conversation?

22 A. Yes.

23 Q. I want to show you JEX 20. You see that on your screen?

24 A. Yes.

25 Q. And you should see at the top it says, "Report of Trial."

1 We can make that a little bigger. You see "Report of Trial"?

2 A. Yes.

3 Q. And this is a report of trial -- results of trial for
4 Devin Kelley; right?

5 And you can see that the organization is the 49th
6 Logistics Squadron; right?

7 A. Yes.

8 Q. It's a general court-martial?

9 A. Correct.

10 Q. And you can -- and if we scroll down, you'll see the two
11 charges that you were discussing with the Court; right?

12 A. That's correct.

13 Q. The second charge is the charge for the assault on the
14 child.

15 A. That's correct.

16 Q. Do you remember that?

17 Now, let's keep scrolling down, if you wouldn't mind, to
18 the bottom of that page.

19 Do you see the "distribution" section?

20 A. I do.

21 Q. And do you see the 49th Security Forces Commander SFOI?

22 A. Yes.

23 Q. So this document was actually distributed to the Security
24 Forces Squadron; right?

25 A. I don't know that.

1 Q. Well, I'll represent to you, we already have in evidence
2 that this document was distributed to the Security Forces
3 commander, and that they had the information of the Report of
4 Trial to report to the -- to the FBI. Okay?

5 A. Okay.

6 Q. And so based on this information, the Security Forces
7 should report his conviction to the -- to the FBI; isn't that
8 true?

9 MR. STERN: Objection. Leading. Speculation.

10 THE COURT: That's overruled.

11 BY MR. JACOB:

12 Q. Based on the Report of Trial that was reported to the
13 Security Forces, they had enough information to report his
14 conviction for a felony and domestic abuse to the FBI; isn't
15 that true, Ms. Del Greco?

16 A. Yes.

17 Q. Ms. Del Greco, I also want to talk to you about the ten
18 years in prison. You remember how Mr. Stern talked to you
19 about Devin Kelley lied on his ATF forms in December of 2014?

20 A. Yes.

21 Q. That would have subjected him to ten years in prison?

22 A. Yes.

23 Q. He lied on his ATF form in June 26, 2015?

24 A. Yes.

25 Q. That would have subjected him to ten years in prison?

1 A. Yes.

2 Q. So we're at 20 years now?

3 A. I don't know how they would adjudicate that.

4 Q. He lied on his April 7, 2016 ATF form?

5 A. Yes.

6 Q. That's another ten years in prison?

7 MR. STERN: Objection. Speculation.

8 THE COURT: -- doesn't know that already.

9 MR. JACOB: I'm asking whether that violation is a
10 ten-year prison sentence.

11 THE COURT: Are you asking cumulatively, or you're
12 saying that's the maximums he could have been receiving?

13 MR. JACOB: Yes. That's the maximum he could have
14 been receiving.

15 THE COURT: Go ahead.

16 BY MR. JACOB:

17 Q. For this lie on April 7, 2016, the maximum punishment for
18 his lie was ten years in prison; isn't that true?

19 A. That's correct.

20 Q. For this lie on April -- or August -- October 18th, 2017,
21 the maximum sentence is ten years in prison; right?

22 A. That's correct.

23 Q. Now, Ms. Del Greco, I want to show you Plaintiffs' Exhibit
24 798, which has been admitted into evidence already. And it
25 should pop up on your screen in a second. You should see that

1 this is a -- you've seen 798 before; haven't you?

2 A. Yes, I have.

3 Q. This is a document that the FBI publishes on its web page,
4 right?

5 A. Yes.

6 Q. And the FBI actually -- the CJIS division actually
7 updated -- this isn't even the most recent document; is it?

8 A. I believe it's not. It's a monthly --

9 Q. Yeah.

10 A. Yes.

11 Q. And so the most recent edition is from March of 2021;
12 right?

13 A. That's correct.

14 Q. And what this document, PEX 798, shows is the reasons why
15 the NICS section denies a firearm purchase in a background
16 search; right?

17 A. Correct.

18 Q. You can see, from 1998 to 2021, the NICS section has
19 denied nearly a million felony convictions; right?

20 A. Some of them are not felonies.

21 Q. I'm sorry. That's not the one that I wanted to show.
22 It's paragraph 1.

23 A. Yeah. Yeah.

24 Q. You see paragraph 1. And you can see --

25 A. Yeah.

1 Q. -- the NICS section has denied nearly a million felony
2 convictions; right?

3 A. Yes.

4 Q. And I also want to show you paragraph 4.

5 You see paragraph 4, the NICS section has denied nearly
6 200,000 misdemeanor crimes of violence; right?

7 A. Correct.

8 Q. Isn't it fair to say that all of those million-plus
9 people, just like Devin Kelley, lied on their ATF forms?

10 A. That's correct.

11 Q. And all of those million-plus people were prevented from
12 getting a gun, by the NICS section, by denying them to the
13 FFL; right?

14 A. I can't say "prevented." We provide a denial to the FFL.
15 It is up to the FFL to make that final determination.

16 Q. And you expect the FFLs to follow the law; don't you?

17 A. We do -- we do expect that.

18 Q. And if --

19 A. And in some cases, it doesn't. But in the majority, yes.

20 Q. And if they're following the law, they are denying over a
21 million guns to felons and child abusers; right?

22 A. Yes.

23 MR. JACOB: Pass the witness, Your Honor.

24 THE COURT: Anything else?

25

1 distribution list that plaintiffs' counsel was referring to.

2 In fact, there were ten entities that were informed about
3 the result of trial; correct?

4 A. Yes.

5 Q. Not all ten of these are required to submit a final
6 disposition to -- to NICS; are they?

7 A. At the time of arrest and at the time of a disposition.

8 Q. Well, he was suggesting that the Security Forces had the
9 obligation. But are you aware of testimony by Colonel Ford
10 that said it was the -- it was the investigative agency that
11 actually leads to the conviction that had the obligation to
12 submit to NICS?

13 A. Yes.

14 Q. So, again, even if Security Forces Squadron was one of ten
15 entities that got the result of the trial, that doesn't
16 necessarily obligate them to submit to NICS; does it?

17 A. No.

18 THE COURT: But just so I'm -- just so I know the
19 government's position: Who was required to submit to NICS?

20 THE WITNESS: It's actually the entity that made the
21 arrest and took the fingerprints.

22 THE COURT: And so who is that in this case?

23 THE WITNESS: I'm not -- I'd have to look back at the
24 document to see the specific, but I believe it's the
25 investigating agency.

1 MR. STERN: Correct. The investigating agency that
2 led to the actual conviction?

3 THE WITNESS: Yeah.

4 MR. STERN: Which would not be Security Forces.

5 THE COURT: So in nebulous government world, there's
6 a whole bunch of agencies.

7 MR. STERN: Not --

8 THE COURT: Who is the agency in this case?

9 MR. STERN: Air Force Office of Special
10 Investigations, OSI, which is a different component than SFS,
11 which is Security Forces Squadron.

12 So the only purpose with regards to showing the letter of
13 referral -- I'm sorry -- the letter of reprimand was that
14 Security Forces' investigation ended with a letter of
15 reprimand, thereby, not prohibiting Devin Kelley from owning
16 or possessing firearms under the Gun Control Act.

17 THE COURT: So then, to be clear, in Joint Exhibit
18 20, Air Force Office of Special Investigations Detachment 225
19 was the investigating authority, and they received a copy of
20 this report of conviction; correct?

21 MR. STERN: Correct.

22 THE COURT: Okay.

23 THE WITNESS: Yeah.

24 MR. STERN: Correct.

25 But, again, not all ten entities --

1 THE COURT: No. I got that.

2 MR. STERN: Then I'll move on. Then I'll move on.
3 Okay.

4 BY MR. STERN:

5 Q. Devin Kelley was not prohibited from owning or possessing
6 a firearm at this time (indicating)?

7 A. That's correct.

8 Q. He was not prohibited from owning or possessing a firearm
9 at this time (indicating)?

10 A. Correct.

11 Q. He was not prohibited from owning or possessing a firearm
12 at this time (indicating)?

13 A. Correct.

14 Q. He was willingness -- he was willing to subject himself to
15 up to ten years imprisonment to obtain a firearm at this time
16 (indicating)?

17 A. He was.

18 Q. He was willing to subject himself to ten years
19 imprisonment at this time, to obtain firearms (indicating)?

20 A. Yes.

21 Q. He was denied at an FFL; correct?

22 A. That's correct.

23 Q. And continued to try to obtain firearms?

24 A. Yes.

25 Q. He subjected himself to ten years imprisonment to obtain

1 firearms at this time (indicating)?

2 A. Yes.

3 Q. He subjected himself to ten years imprisonment to obtain
4 firearms at this time (indicating)?

5 A. Correct.

6 MR. STERN: No further questions, Your Honor.

7 MR. JACOB: May I, Your Honor?

8 THE COURT: Yes.

9 MR. JACOB: Briefly.

10 FURTHER REDIRECT EXAMINATION

11 BY MR. JACOB:

12 Q. Ms. Del Greco, Mr. Stern talked about how he was denied at
13 Dick's. Do you remember that conversation?

14 A. I do.

15 Q. Between the attempted purchase at Dick's -- or after the
16 attempted purchase at Dick's, you know that Devin Kelley went
17 to an FFL to purchase his gun; right?

18 A. Correct.

19 Q. Do you have any evidence to suggest, between November 2015
20 and his purchase of this AR in April of 2016, that Devin
21 Kelley went to a gun show and bought a gun?

22 A. I have no knowledge of that.

23 Q. Do you have any evidence to suggest, between the Dick's
24 denial and his AR purchase, Devin Kelley built a ghost gun?

25 MR. STERN: Objection. Speculation. Asked and

1 answered.

2 THE COURT: She's representing the FBI here. So she
3 can ask -- she's answering, I believe, as the representative
4 of the FBI; right?

5 MR. JACOB: Yes, Your Honor.

6 THE COURT: And so your answers are, does the FBI or
7 you know whether any evidence exists that you-all are aware
8 of?

9 THE WITNESS: No.

10 MR. STERN: Your Honor, I do want to be clear,
11 because she is a representative of the FBI as a 30(b)(6)
12 witness as it relates to NICS, not with regards to the
13 investigative file of the Texas Rangers that was supported by
14 the FBI. So she's not here to testify on behalf of the FBI
15 at-large.

16 THE COURT: I understand that now.

17 MR. STERN: Thank you.

18 THE COURT: Go ahead with your questions.

19 BY MR. JACOB:

20 Q. Ms. Del Greco, do you have any evidence to suggest that
21 between his denial at Dick's and his purchase of this AR in
22 2016, Devin Kelley built ghost guns or borrowed a gun or got
23 any guns through a non-FFL source?

24 A. I'm not aware.

25 MR. JACOB: Pass the witness, Your Honor.

1 THE COURT: Anything else?

2 MR. STERN: Nothing, Your Honor.

3 THE COURT: Any further need for this witness, or can
4 she be excused?

5 MR. JACOB: One moment, Your Honor.

6 MR. ALSAFFAR: One moment, Your Honor.

7 *(Discussion off the record)*

8 MR. JACOB: Your Honor, we do have one more question
9 for Ms. Del Greco. I apologize.

10 THE COURT: Go ahead.

11 MR. JACOB: We're just cueing up a clip.

12 BY MR. JACOB:

13 Q. Ms. Del Greco, you talked to Mr. Stern about the --
14 Colonel Ford's testimony; right?

15 A. Yes.

16 Q. I'd like to show you, actually, what Colonel Ford
17 testified to on that matter. And I'm going to be playing --
18 okay. We're showing the transcript, page 171 through 172.

19 Do you see line 21 on page 171?

20 A. Yes.

21 Q. He's asked the question: "So this is a mandatory
22 instruction, that once law enforcement agency and DoD Security
23 Forces receives the notification from the SJA on the final
24 disposition of military judicial action, they must send the
25 R-84 to the FBI within 15 days."

1 And on the next page the question is, "Correct?"

2 Do you see that?

3 A. I do.

4 MR. STERN: Objection.

5 Q. How did --

6 THE COURT: What's the objection?

7 MR. STERN: Vague. "They are." The distribution
8 list, she already testified that not all ten -- or at least
9 she doesn't know whether all ten who receive this result of
10 trial need to submit to NICS.

11 THE COURT: So that's not the question pending.

12 So ask your question.

13 BY MR. JACOB:

14 Q. The question is: He answers, "Yes, that's correct"; isn't
15 that true, Ms. Del Greco?

16 A. I see that on the slide, yes.

17 Q. He answers that the Security -- when the Security Forces
18 receives the notification of the results of trial, as you
19 discussed with Mr. Stern, from the SJA on final disposition,
20 they must send the R-84 to the FBI. Is that true?

21 THE COURT: Now, are you asking for her personal
22 knowledge, or are you asking for what -- is that on the
23 screen?

24 MR. JACOB: This is impeachment, Your Honor. They
25 used this witness to try to --

1 THE COURT: My question to you is: Are you asking
2 her whether that's correct, or are you just asking her if
3 that's a correct recitation from the page?

4 MR. JACOB: I'm asking her if it's correct, Your
5 Honor, from her knowledge.

6 THE COURT: So can you answer that question?

7 THE WITNESS: I know that the Department of Defense
8 has an MOU with the FBI to submit timely final dispositions to
9 the NICS. Beyond that, within their own department, I do not
10 know what their specific rules are.

11 THE COURT: So as to the memorandum of understanding,
12 it's your understanding of that MOU that they're supposed to
13 send these notice of finals within 15 days?

14 THE WITNESS: Yes.

15 THE COURT: Your next question.

16 MR. JACOB: Your Honor, that was the point that I was
17 making. I'll pass the witness.

18 THE COURT: Anything else?

19 FURTHER RECROSS-EXAMINATION

20 BY MR. STERN:

21 Q. Is it clear from this transcript who "they" are in terms
22 of the obligation to submit to NICS?

23 A. No.

24 MR. STERN: Thank you.

25 THE COURT: Well, just to make sure I'm understanding

1 things, then -- I mean, I thought we'd already cleared this
2 up. I thought it was the Air Force OSI Detachment 225 who
3 received that final notice. It was their obligation, pursuant
4 to the MOU, to send to NICS within 15 days that final
5 disposition.

6 THE WITNESS: Yes. It would be unusual for us to get
7 it ten times.

8 THE COURT: Right. I'm just worried about AFOSI
9 Detachment 225.

10 THE WITNESS: Yes.

11 MR. JACOB: And, Your Honor, my point was that that's
12 the government's position, and it's an incorrect position
13 based on the testimony and the instructions.

14 MR. STERN: We can clean this up in post-trial
15 briefing as well because we have the depositions already
16 designated and in the record. I don't think it's necessary to
17 belabor the point with this witness.

18 THE COURT: Right. Yeah. So we're here just with
19 this witness. I've asked the questions I think I need out of
20 her. Do you have any further questions for this witness?

21 MR. JACOB: No, Your Honor.

22 THE COURT: Does the government have any further
23 questions from this witness?

24 MR. STERN: No, Your Honor.

25 THE COURT: May she be excused?

1 MR. JACOB: Yes, Your Honor.

2 MR. STERN: Yes, Your Honor.

3 THE COURT: Thank you, ma'am. You're excused.

4 THE WITNESS: Thank you. Thank you.

5 THE COURT: So 11:37. What do you-all want to do?

6 Do you want to start your next witness? You want to break for
7 lunch?

8 MR. ALSAFFAR: I think it would make sense to break
9 for lunch. This is the start of the remote witnesses, Your
10 Honor. And it probably -- I believe the tech staff would like
11 to make sure that we've got everything going. And we can use
12 that time.

13 THE COURT: Okay.

14 MR. ALSAFFAR: If that's okay, Your Honor.

15 THE COURT: Yeah. That's fine with me. So he is by
16 Zoom.

17 How long do you think this witness is going to be taking?

18 MR. ALSAFFAR: This is going to be the last witness
19 of the day by agreement with the government.

20 THE COURT: Right.

21 MR. ALSAFFAR: And it's an expert witness. So I
22 think it'll be a few hours. But we will be done with this
23 witness today, I believe.

24 THE COURT: Okay. So...

25 MR. ALSAFFAR: Don't want to commit --

1 THE COURT: 11:00, basically --

2 MR. JACOB: Come on, Paul. You can commit.

3 THE COURT: It's 11:40. Is 12:30 enough time for
4 everyone? 12:30.

5 MR. ALSAFFAR: Oh, yes, Your Honor. Thank you.

6 THE COURT: So let's resume by Zoom at 12:30.

7 *(Recess)*

8 *(Change in reporter)*

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1 (Change in reporter.)

2 THE COURT: Your next witness.

3 MR. ALSAFFAR: Thank you, your Honor. Plaintiffs
4 call, via remote, Colonel Larry Youngner.

5 (LARRY YOUNGNER, having been duly sworn, testified as
6 follows:)

7 THE COURT: You may continue.

8 MR. ALSAFFAR: Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MR. ALSAFFAR:

11 Q. Colonel, first of all, if you don't mind, I'm just going
12 to do a little technology check, because you do have the honor
13 of being our first remote witness in this trial.

14 So can you -- first of all, can you hear me okay?

15 A. Yes, I can.

16 Q. Okay. Can you see us okay?

17 A. Yes, sir. I have four -- actually, let me check this
18 again, if I've got this maximized.

19 Yes, I have a view of the courthouse, of the government
20 table, the plaintiffs' table, and then myself.

21 Q. Okay. Well, that should do it. That should do it.

22 Colonel, would you mind stating your name for the record.

23 A. Sure. Larry Douglas Youngner Jr., Colonel, United States
24 Air Force, retired.

25 Q. Colonel, I'd like to take the judge through a little bit

1 about your background. I won't go through all of it, because
2 I know it's extensive, but I would like to highlight some key
3 points.

4 MR. ALSAFFAR: And, Your Honor, Colonel Youngner's CV
5 has been admitted into evidence as JEX 614.

6 THE COURT: Thank you.

7 MR. ALSAFFAR: And I've also provided you with his
8 witness notebook on the bench, Your Honor.

9 BY MR. ALSAFFAR:

10 Q. Colonel, tell us a little bit about your educational
11 background.

12 A. Yes. I attended the University of Georgia for
13 undergraduate in 1983. That same year, I was commissioned as
14 an infantry officer in the Army Reserve, and I drilled with a
15 reserve unit while on educational delay to attend law school
16 at the University of Georgia.

17 My next degree was earned in 1986 with a jurist doctorate
18 from the University of Georgia. Related to that, I was able
19 to take the bar as a third-year student in February, under
20 Georgia rules at the time. And I passed the bar prior to
21 graduation from law school that May of 1986, and then I
22 entered active duty.

23 Back to education, I obtained a LLIM degree from the
24 Army -- we call it the Army JAG. So it's now the Judge
25 Advocate General's Legal Center and School. It's an

1 ABA-accredited law school co-located with the University of
2 Virginia. That was 1998. My LL.M. was in military law with a
3 specialty in international operations law.

4 The last educational experience I had was at National
5 Defense University where I obtained a master's degree in
6 national resource strategy. It's now called the Eisenhower
7 School. It used to be called the Industrial College of the
8 Armed Forces. And that was in 2006.

9 Q. And, Colonel, since we're remote and you're the first
10 witness, I'm just going to test your screen to make sure that
11 you can see the documents okay.

12 And while you were talking about your background, I put up
13 a part of your CV, which is JEX 614.

14 Can you see that okay? Is that clear to you?

15 A. Yes, sir. I saw a page pop-up, and then I saw a block
16 expand while I was answering your question, sir.

17 Q. Okay. Thank you.

18 And we can take that -- we can take that down. Thank you
19 very much.

20 How many years did you serve in the military again?

21 A. Just at 31 years, from June of 1983 until I retired in
22 July of 2014. Six of those years were in the Army, just over
23 six. And just under 25, about 24 1/2, were in the Air Force.

24 The last 24 1/2 was as an Air Force judge advocate. I was
25 an active member of the State Bar of Georgia since 1986, but I

1 was not practicing as an attorney from 1986 through 1989. I
2 did not begin my legal practice in earnest until 1989 as an
3 Air Force judge advocate.

4 Q. Thank you, Colonel. And just to make things, hopefully, a
5 little smoother, every once in a while, I might put my hand up
6 like that. And if I do that, I may just be cueing you real
7 quick, if you could stop and let me ask a question or try to
8 break it up a little bit.

9 With this remote system, it's really hard for us to read
10 each other's cues. So I'm not trying to be rude when I do
11 that, but I thought that might be helpful for you.

12 Is that okay?

13 A. Yes, sir.

14 Q. All right.

15 A. Yes, sir.

16 Q. In your 24 1/2 years of service -- thank you for your
17 service, by the way.

18 In your 24 1/2 years of service for the Air Force as a JAG
19 officer, about how many court-martials did you personally, as
20 legal counsel, complete?

21 A. All total, 40 courts-martial. As lead counsel, I want to
22 say 36. The first four cases, I was, if you will, second
23 chair to a more senior attorney while I -- we had to get
24 qualified.

25 So I participated in 40. To answer your question

1 precisely, as lead counsel, 36 of those 40.

2 Q. And how many courts-martial -- well, let me ask you this.
3 I didn't ask you this about command.

4 Did you ever serve in the command structure, at the
5 command level with the SJA, which is the judge advocate's
6 office for the Air Force?

7 A. Yes. I was the staff judge advocate several times in my
8 career from insulation level up to the major command level.

9 Q. How many --

10 A. So I'd have to -- yes, sir.

11 Q. Oh, I'm sorry. I was just going to ask you just
12 approximately, if you know, how many courts-martials as a
13 command SJA did you oversee and supervise and -- supervise
14 while you were in the Air Force?

15 A. In the supervisory capacity, well over 300. I believe it
16 was around 390, 396. It's in my CV and report.

17 Q. Okay. As part of your job as both a JAG officer in the
18 Air Force as well as your 300 to 400 supervisory
19 courts-martials, was it part of your job to regularly review
20 security forces instructions and Air Force OSI instructions
21 during your career?

22 A. We would review those instructions for compliance, mainly
23 as issues developed in a case. If we spotted an issue, what
24 we really dug into -- so the short answer is yes, we would
25 review those.

1 We would dig deeper if we saw we had a problem on a case
2 or a potential problem being able -- as a prosecutor, we want
3 to make sure we could handle all the elements of the offense,
4 that we had investigative sufficiency from either OSI or a
5 security forces office of investigations, depending upon which
6 one of the two agencies were doing the investigation.

7 But, yes, we would absolutely review OSI Manual 71-121.
8 The security forces had what they call a 31 series of AFIs
9 that governed security force matters.

10 And where we really got into the heart of it was on
11 actually digging into the case files as a prosecutor or as a
12 defense counsel.

13 Q. This case, as you know, involves security forces
14 instructions in the 31 table and the AFOSI security
15 instructions as well as the DODI.

16 Are those the types of instructions -- those specifically
17 as well -- that you would regularly review for investigative
18 case file sufficiency in your 30 -- almost 25 years in the
19 Air Force?

20 A. Yes, sir. We would review those. The DODIG instructions
21 would depend upon what type of investigation they were
22 conducting. There was a unit compliance inspection. I
23 believe it was 9201, and then 301 was the series for actual IG
24 investigations for fraud, waste, and abuse into a particular
25 matter.

1 That would have been -- so, anyway, yes, sir.

2 And there were DOD equivalents, but I focused mainly on
3 the Air Force instructions.

4 Q. Okay. Did you also have occasion -- did the Air Force ask
5 you also to serve as a teacher to the AFOSI Academy at any
6 time?

7 A. Yes. When I was an area defense counsel and then later as
8 a circuit defense counsel -- the OSI Academy used to be at
9 Bolling Air Force Base before they ultimately went to the
10 Federal Law Enforcement Training Center down in Brunswick,
11 Georgia.

12 So I would conduct a class and then follow it up with a
13 mock trial. Where, as a defense counsel, I would
14 cross-examine OSI agent trainees. And then we'd do a debrief
15 afterwards to talk about what they could expect when they
16 testify for the first time.

17 It was to give them comfortable with having to come into
18 court, be sworn in, and answer questions on both direct exam
19 and cross-exam.

20 So, yes, sir, I did that several times while I was an area
21 defense counsel out at Andrews Air Force Base. And then it
22 continued when I was at Bolling as a next-level-up circuit
23 defense counsel, we called it at that time.

24 Q. Would you mind just providing the Court just a very quick
25 summary of the various command posts where you would advise

LARRY YOUNGNER - DIRECT

1 AFOSI and security forces personnel on investigative
2 sufficiency in criminal investigations, the various posts
3 around the world that you've done that?

4 A. Sure. So working on the prosecution side at Bolling Air
5 Force Base as a lead counsel, trial counsel; then at
6 Rhein-Main Air Base in Germany as the deputy staff judge
7 advocate for a few months, then as the staff judge advocate;
8 at Seymour Johnson Air Force Base in Goldsboro, North
9 Carolina; while on deployment in Sarajevo; prior to that, in
10 Bosnia; and while deployed to Iraq in 2003, where I was a
11 staff judge advocate.

12 And then moving up at the next level was what we call a
13 numbered Air Force, at Ninth Air Force. So there I was
14 reviewing -- there, I was working more with the management
15 level. So we would talk to the field investigative region a
16 good bit.

17 So let me stop at that point.

18 I continued to work with OSI at Hurlburt Field as the
19 Air Force Special Operations Command staff judge advocate.
20 But, again, that was at a higher level or a more serious type
21 of investigation.

22 I really worked very closely with the DetCo or the
23 detachment commander of an Air Force Office of Special
24 Investigations detachment for their superintendent, which was
25 their senior enlisted supervisor. I worked with them most

LARRY YOUNGNER - DIRECT

1 closely at Rhein-Main Air Base, at the 4th Fighter Wing at
2 Seymour Johnson Air Force Base in North Carolina, and then as
3 an initial trial counsel at Bolling Air Force Base.

4 Q. When you say you worked with DetCo and superintendents,
5 just so that we understand -- and I apologize if I don't, but
6 I want to sure we understand the terminology.

7 DetCo would be a detachment commander for a particular
8 detachment at an installation like Holloman Air Force Base?

9 A. Yes. The distinction -- and there is a difference. But
10 the DetCo is a commissioned officer; whereas, the
11 superintendent is a -- is usually a senior NCO, though there
12 could also be a GS, a senior civilian -- GS, say, 13 or 14.

13 In fact, for a while at Seymour Johnson, we had a GS-14,
14 who was a retired senior NCO who then got hired back by OSI
15 and worked as a very competent superintendent.

16 Q. Can I ask you now about a different area of experience
17 that you had in the Air Force?

18 A. Sure. Of course.

19 Q. Did you have any experience with advising or working with
20 inspector general investigations while in the Air Force?

21 A. Yes. And it falls parallel track, if you will. We try
22 not to cross the streams between IG investigations and
23 criminal investigations; though, it is quite often that an IG
24 investigation -- because they typically will get into fraud,
25 waste, or abuse of authority. And it is not unusual for an IG

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1 investigation to result when it's completed if substantiated
2 findings exist in a criminal case.

3 So back to your question. The IG work at base level at
4 Bolling was to mainly to review for legal sufficiency the
5 reported investigation that the IG was conducting. And I
6 accomplished that or I supervised as a staff judge advocate a
7 subordinate -- you know, a major or a captain -- who was
8 conducting that.

9 I reviewed their legal sufficiency. And at the higher
10 level, I had a major or lieutenant colonel draft that, say,
11 for example, at Air Force Special Operations Command at
12 Hurlburt Field, Florida.

13 But before it went into our commanding general, I read
14 through it and made sure it was legally sufficient. And if it
15 wasn't -- and on one occasion, we sent something back for
16 reinvestigation.

17 And I don't want to get into the nuts and bolts of it, but
18 I did do that every time I served as a staff judge advocate.
19 It's just the scope of the investigation was often larger.

20 I'll give you one example. At Hurlburt Field, there was
21 an allegation that the 1st Special Operations Wing had some
22 senior personnel that were taking extended brass --
23 105-millimeter Howitzer shells from our AC-130 gunships. And
24 they were basically selling the brass for profit instead of
25 turning it into the Defense Reutilization and Marketing

1 Office.

2 So if we were going to look at such a serious accusation
3 against both military and contractors, we needed to make sure
4 that the i's were dotted, t's were crossed, so to speak.

5 So was there investigative sufficiency? Did it meet the
6 burden of proof in the case? Was there credible evidence to a
7 preponderance, in that standard? It wasn't a criminal case at
8 that point.

9 Q. And did you advise IG -- or sorry -- inspector generals
10 investigations at a variety of level of commands in the
11 Air Force?

12 A. Yes. I also -- at the Headquarters U.S. Air Force, my
13 final assignment, I was the chief of staff of the Air Force
14 JAG corps. And in that capacity, there were opportunities to
15 advise the IG either on -- we would review AFI regulatory
16 changes. So that was more of an administrative review.

17 And then occasionally there would be a case that we would
18 coordinate on. One example at the Headquarters Air Force
19 level was how to approach an alleged cheating scandal at the
20 OSI -- excuse me, at the U.S. Air Force Academy. And the
21 second one also involved an alleged cheating scandal among
22 nuclear surety officers.

23 Anyway, so those are cases that we worked with staff. So
24 the IG -- staff IG, the Secretary of the Air Force Inspector
25 General is a three-star position at the Headquarters

LARRY YOUNGNER - DIRECT

1 Air Force. Underneath staff IG is both the inspection piece
2 of this and OSI.

3 So Headquarters Air Force OSI is a subordinate unit to
4 that three-star general. So at that level, we would advise
5 SAF IG where we -- what's the choice of forum for
6 investigation; should you keep this in IG channels, or should
7 you send it to OSI?

8 And that's the kind of advice I would give at the
9 air staff level in 2013 and 2014.

10 Q. Thank you, Colonel.

11 And your current practice -- your current private
12 practice, what does that focus on?

13 A. Currently, I am focused on military courts-martial
14 defense, national security clearance matters, and boards for
15 correction of records for either an inequity or an injustice
16 in -- identified in mainly officers' records, so officer grade
17 determinations and so forth. That's what I'm currently doing.

18 When I retired in 2014, I did join a firm. And with that
19 firm, I became a managing partner. So I had both supervisory
20 duties -- much like being an SJA again -- as well as consults
21 for the clients. And then I defended -- I then did three
22 court-martial defense cases as a civilian private practice
23 attorney between 2014 and 2020.

24 Q. Colonel, as part of your education and your Air Force
25 training, your Air Force service as well as your Air Force

1 experience, did you regularly encounter, evaluate, and analyze
2 DOD instructions, Air Force instructions, security forces
3 instructions, IG investigations, IG reports relating to
4 criminal investigations?

5 A. Yes, sir.

6 Q. As part of your education, Air Force training, Air Force
7 service, and experience, did you encounter and analyze
8 instructions that are — that are forming the basis of this
9 case, DODI 5505.11, Air Force Instruction 71-121, and
10 Air Force Security Forces Instruction 31-205 and 206?

11 A. Yes, sir. I actually think it's OSI Manual 71-121. But,
12 yes, sir, I did. And related handbooks and instructions
13 within OSI.

14 Q. Thank you. Thank you.

15 As part of your education, Air Force training, Air Force
16 service, and experience, did you evaluate and analyze the
17 compliance requirements for Air Force criminal investigations,
18 inspector general investigations, and the consequences of
19 those compliance failures?

20 A. Yes, sir. Primarily on cases that we were reviewing for
21 investigative sufficiency or legal sufficiency. But then
22 also, just from a broader perspective, you had to make sure
23 that if, say, there was an IG investigation that you followed
24 up and complied with the findings and recommendations that you
25 agreed to.

1 Q. And turning to this case and the opinions that you formed
2 in this case, did you apply the same methodology, the same
3 rigor, the same process that you applied in your 24 1/2 years
4 of Air Force experience investigating and working and
5 prosecuting and defending and supervising Air Force criminal
6 investigations?

7 A. Yes, sir, the same rigor and the same methodology.

8 Q. And in forming those conclusions, did you arrive at your
9 conclusion within a reasonable degree of certainty within your
10 field of expertise?

11 A. Yes. Yes, I did.

12 Q. Can you -- and I -- I know that we have asked you to
13 review tens and tens of thousands of documents in this case.

14 But if you don't mind, can you provide just a sort of
15 bullet-point list of the types of documents and information
16 that you reviewed in forming your conclusions in this case?

17 A. Yes, sir. So to begin with, I reviewed all the DODIG
18 reports that had been provided to me. I reviewed depositions
19 of all the Air Force personnel, to include -- well, let's see.
20 There were case agents, supervisors, commanders. There were
21 designated representatives from agencies like at NICS or for
22 the Air Force. I think Colonel Ford represented security
23 forces, for example.

24 But basically every witness deposition and all of the
25 associated exhibits that were related to that deposition. So

1 if Special Agent Holz, for example, is called as a witness, I
2 looked at every exhibit that was produced as part of that.

3 As far as files, that included the Det 22 -- the OSI
4 Detachment 225 at Holloman had an investigative file. The
5 security forces -- the 49th Security Forces Squadron had their
6 files. The Logistics Readiness Squadron, the 49th LRS, had
7 a -- what we call a PIF, a personnel information file.
8 Basically, it's a list of issues typically that concerned
9 Devin Kelley.

10 Let's see. I looked at the Texas Ranger Snyder
11 deposition, all of his files, which were extensive.

12 There were DOD -- I mentioned the reports, but there were
13 instructions from DOD, Air Force, Air Force OSI. And then I
14 think the last area would be the defense expert reports.
15 Typically, there was a report and a supplemental report for
16 each of their experts, I believe. I think there were five in
17 total.

18 Q. Colonel, the type of information that you just went
19 through -- and including the full breadth of the information
20 you actually did review that I know is detailed in your
21 report -- is this the type of information and data an expert
22 in your field would reasonably rely upon in forming their
23 conclusions in cases?

24 A. Yes, sir, it is. You want to look at the collective
25 facts. You want to look at the evidence. You want to look at

1 the rules and regulations that were applied.

2 MR. ALSAFFAR: Your Honor, we'd like to offer
3 Colonel Youngner as an expert in Air Force criminal
4 investigations, IG investigations, and oversight within the
5 Air Force, Air Force protocols in criminal investigations and
6 SJA responsibilities.

7 THE COURT: Any objection?

8 MS. CHRISTILLES: Your Honor, we don't object to
9 Colonel Youngner testifying on matters concerning Air Force
10 protocols and staff judge advocate responsibilities. To the
11 extent that Colonel Youngner will provide testimony outside of
12 those areas of expertise, we would object, as fully briefed in
13 the government's motion to exclude, which is at Docket 352.
14 And we're basing that on the report and supplemental report of
15 Colonel Youngner.

16 So at this point, Your Honor, I think that the best
17 way to proceed is to not voir dire the witness but to let
18 counsel proceed and then allow us to cross-examine the witness
19 on his qualifications, unless Your Honor would prefer voir
20 dire at this point.

21 THE COURT: No. So I'm ready to rule on that. The
22 motion -- the government's motion is denied. Colonel Youngner
23 is recognized as an expert in those three fields.

24 However, on the government's many motions -- or many
25 objections as to ultimate conclusions of law that

1 Colonel Youngner has expressed, I'll exclude those ultimate
2 conclusions as I review his reports. And I'll entertain any
3 objections he makes during his testimony today if it arises in
4 that area.

5 MR. ALSAFFAR: We will follow that closely. Thank
6 you, your Honor.

7 BY MR. ALSAFFAR:

8 Q. Okay. Colonel, I'd like to now start digging into -- into
9 the Devin Kelley case and your opinions in the case.

10 And if you don't mind just briefly providing us a little
11 lit of background in sort of how this all started in terms of
12 the DOD and Air Force recording -- sorry -- reporting
13 requirements related to fingerprint submission and criminal
14 history or also referred to as final disposition reporting.

15 A. Yes, sir. So I -- well, sir, I hate to tell you what time
16 it is by how to build a clock, and so I apologize to the
17 Court. And please stop me if I go too far on this.

18 It starts with the Gun Control Act of 1968. Congress
19 recognized that we needed a comprehensive scheme to ban
20 prohibited persons from obtaining, possessing, transferring,
21 selling firearms.

22 The next major muscle movement was what I'll call
23 colloquially the Brady Act. I believe it's the Handgun
24 Violence Protection Act. And basically that required use of
25 NICS. And government agencies, to include the DOD and the

1 U.S. Air Force, were required to submit data to the FBI
2 National Instant Criminal Background Check System.

3 And then the third major muscle movement was the
4 Lautenberg Amendment, which focused on domestic violence and
5 adding them under 18 U.S. Code 922, I believe (g), there's a
6 category for as low as a misdemeanor-level domestic violence
7 offense.

8 My understanding is that the intent of Congress was to
9 further protect those, you know, victims of domestic violence
10 and to prevent future offenders from obtaining a weapon.

11 MR. ALSAFFAR: Okay.

12 THE WITNESS: I see counsel stood up.

13 MS. CHRISTILLES: Your Honor, I would just object to
14 Colonel Youngner testifying about any of the federal laws.
15 Again, he's been qualified in Air Force protocols and
16 responsibilities.

17 THE COURT: So the two go in tandem. But at this
18 point, he's just reciting what laws have already passed. I
19 can read the congressional intent by reading the 922 language
20 myself.

21 MS. CHRISTILLES: Yes, Your Honor.

22 THE COURT: So let's move him along.

23 MR. ALSAFFAR: We are. A brief summary, Your Honor.

24 BY MR. ALSAFFAR:

25 Q. I'd like, Colonel, to sort of in that context relating to

1 the DOD IG history as it relates to this case -- and what I'm
2 talking about is the -- and I don't want to go -- we've
3 already gone -- established, and it's not in dispute, about
4 what those reports say and what they do.

5 But just by way of background in terms of framing the
6 issue that I want to talk to you about today, which is the
7 supervisory issues and responsibilities, if we could just
8 briefly -- if I could just show you -- well, before I show you
9 this.

10 Just generally -- just generally, what was the -- in your
11 opinion, what was the purpose of the various DODIG, inspector
12 general, reports regarding the Air Force's failures over the
13 decades to report fingerprint submissions and criminal history
14 data like they did in this case?

15 A. So the purpose was to look at compliance with the
16 duty-to-report criminal history data. Those three legislative
17 acts that I talked about required fingerprint data on an
18 FD-249 and a final disposition report on a Form R-84.

19 And the question was: Was the OSI and the security
20 forces, where required under the law and under the
21 implementing DOD Instruction 5505.11 and the Air Force
22 instructions, were they compliant?

23 And the gist of those reports were they were not complying
24 or there were misses. In fact, at one point -- and that
25 started in 1997. There was a major --

1 Q. Let me stop you since we're talking about -- and I'm going
2 to show JEX 14.

3 And, Colonel, whenever I say -- and I apologize. I should
4 have told you this. Whenever I say "JEX," that is an exhibit
5 number. That means that the exhibit is already part of
6 evidence. It's been admitted into evidence, just so you
7 understand the terminology.

8 I think you've been working with Bates numbers for a long
9 time --

10 A. Right.

11 Q. -- but we're now transitioning to trial exhibit numbers.
12 I'm showing you JEX, since you mentioned it, 14.

13 And is that the 1997 IG report you just referenced?

14 A. It is. I believe it's the one that Ms. Eleanor Hill, as
15 the DODIG, complied with the requirement -- the congressional
16 requirement to do this report.

17 Q. Okay. And what was the -- just a quick summary. We'll
18 just say what was the ultimate conclusion in terms of the
19 Air Force's failure rate dating back to 1997 in reporting
20 criminal fingerprint history and criminal conviction history?

21 A. Around -- well, first of all, the discovery was made that
22 defense criminal investigating office agencies, organizations
23 such as OSI, CID for the Army, and NCIS were reporting. But
24 they were missing, in the Air Force, around 35 to 40 percent,
25 around 38 percent, of their fingerprints, and I believe about

1 50 percent of the final disposition reports. And those
2 findings were published in there.

3 The other major, you know, lightbulb that went off here
4 was that, you know, law enforcement organizations that would
5 also take fingerprints weren't submitting anything or found
6 disposition reports. By that, I mean the military police, the
7 security forces, and the Navy shore patrols.

8 Q. I want to ask you a quick question, because it was brought
9 up with one of the witnesses this morning for the FBI. And I
10 don't know, Colonel, when you were preparing for this, if you
11 were able to see.

12 But were you able to see the FBI deputy director testimony
13 this morning?

14 A. I probably caught about ten minutes of, I believe,
15 Ms. Del Greco's testimony.

16 Q. That's right.

17 A. But that's all that I --

18 Q. And you reviewed her deposition testimony; correct?

19 A. Oh yes, I did.

20 Q. The reason I asked you is because I wanted to ask you
21 about something that came up, and that was regarding the
22 security forces.

23 Because you mentioned in 1997, the inspector general
24 pointed out that the military law enforcement organizations,
25 which include the security forces, not just OSI -- but the

1 security forces were also failing at a high rate to report
2 this criminal data.

3 Is that a fair summary?

4 A. Yes, sir. That's a fair summary.

5 Q. All right. And then after that, after 1997, at that point
6 were the security forces specifically -- or tell us -- tell me
7 what the security forces specifically did to get roped into
8 the mandatory instruction and compliance requirements to
9 report this data to the FBI?

10 A. Well, the short answer is Ms. Hill, the DODIG at the time,
11 in coordination with the secretary of defense and the service
12 secretaries, agreed to promulgate a new instruction that would
13 require all the law enforcement organizations to submit when
14 the trigger events occur, if you will, when the criteria is
15 met, submit fingerprints and final disposition reports.

16 Q. Okay. I want to fast-forward -- so that -- and that
17 applied to both -- did I hear you correctly? -- both OSI
18 detachments in the Air Force and security forces as well?

19 A. At that point, yes, sir.

20 Q. Okay. So I want to fast-forward to about -- I was told
21 there would be no math -- about 17 years, 2014, and show you
22 Joint Exhibit 111.

23 And if we go to -- while I'm finding the page -- I
24 apologize.

25 Colonel, can you tell us what the conclusions were related

1 to the Air Force reporting criminal data for the last 10 years
2 to the FBI and the 10 years prior to this report?

3 A. The gist of that, as I recall, is about 10 years' worth of
4 data had not made its way to NICS. The discovery here -- the
5 next lightbulb to go off was just because you submitted
6 something to DIBRS, the Defense Incident-Based Reporting
7 System -- I apologize for the acronyms -- that -- that data
8 didn't make it to the FBI.

9 And I believe the OSI commander at the time -- and the
10 bottom line is the Air Force agreed with the findings and
11 recommendations to fix this. One of the fixes the Air Force
12 put in was a checklist that would become mandatory for use, at
13 least within OSI. And my understanding is security forces
14 would be implementing an instruction change in the 31 series
15 for investigative processes as well.

16 Your question about --

17 Q. Well, let me -- I think you answered it. And we're
18 showing the conclusion up on the screen.

19 Can you see it there, Colonel?

20 A. Yes, sir.

21 Q. Okay. So we talked about 1997, Air Force is being told
22 they're failing at a 38 to 50 percent rate for this data.

23 Fast-forward 17 years, they're being told, for the last
24 10 years, we're still not getting this stuff to the FBI.

25 I'd like to now go to the following year, 2015, which is

1 JEX 1.

2 Can you see that? Can you tell us what that is?

3 A. Yes. So it's another DODIG investigation, specifically on
4 compliance with criminal history data reporting requirements.
5 That would be the fingerprint cards and the final disposition
6 reports and look at all the services, both their OSI, if you
7 will, for the Air Force and security forces office of
8 investigation.

9 Q. So in 2015 -- let's talk about just the Air Force --

10 A. Yes, sir.

11 Q. -- the failure rate on submission of fingerprint data to
12 the FBI. I'm going to show you page 13 of JEX 1.

13 A. Okay.

14 Q. And what was the conclusion on the failure rate for
15 Air Force fingerprint analysis in 2015?

16 A. Sure. What you're looking at there, you know, shows
17 approximately a 30 percent failure rate on the fingerprint
18 submission data.

19 Q. Okay. And let's go to page, JEX, 16. This is regarding
20 final disposition report failures, which would be -- that's
21 criminal conviction information; is that right, Colonel?

22 A. Right. Well, yeah. That was final disposition of a case.
23 So whatever that -- I mean, it could have been an acquittal.
24 But in most instances, there's a high rate of conviction.

25 So -- and it was about the same -- oh, there it is. So

1 you're looking at, again, about 30 percent, maybe slightly
2 higher.

3 Q. All right. So at the point of the -- of the Devin Kelley
4 investigation in the mid-2000s, going forward, how would you
5 describe the Air Force's compliance with the mandatory
6 requirements to submit fingerprint data to the FBI as well as
7 criminal history data?

8 And what I mean by "how would you describe it," was it
9 tracking closely? Was it way off? Was it systemic? How
10 would you describe it?

11 A. Well, I've described it in my report as a systemic
12 failure. It varies. And it varies between OSI and security
13 forces. There were times when OSI would improve, and then
14 there are times when they would not improve. And that was
15 born out, frankly, all the way through the 2018 report, which
16 we haven't talked about, and the task force that OSI created
17 on criminal history data.

18 Q. Well, I want to --

19 THE COURT: One second.

20 MR. ALSAFFAR: Oh, I'm sorry. I didn't hear
21 anything.

22 MS. CHRISTILLES: Your Honor, it sounds like
23 plaintiffs' counsel is going through the issue of duty. I
24 think the Court has already ruled on that.

25 MR. ALSAFFAR: If I may respond, Your Honor.

1 We're not going to address this in terms of duty
2 because, obviously, the Court has already ruled on this. This
3 is actually just going directly into the scope of supervisory
4 awareness and how that failure to grapple with the facts that
5 were going on fed down to the supervisory level.

6 THE COURT: That's the only way I'm receiving this.

7 MR. ALSAFFAR: Okay. Thank you, your Honor.

8 BY MR. ALSAFFAR:

9 Q. Because of what was mentioned this morning from the FBI
10 deputy director, Del Greco, I wanted to just show you the IG
11 report of 2017, which has been admitted as Joint Exhibit
12 Number 2. And what I'm talking about, Colonel, is the
13 security forces.

14 The security forces were not -- were they ever exempt
15 after 1997 from reporting final disposition reports when they
16 were informed in writing of a final disposition report
17 relating to military personnel that they were part of the
18 investigation on?

19 A. Short answer is no, they were not exempt. The longer
20 answer is you may have investigative responsibility that's
21 shared, or you may even have two separate offenses.

22 In my experience, I've had a military criminal accused who
23 was being investigated by OSI for certain offenses, because
24 there is a regulatory split between types of cases that OSI
25 will take -- regulatory within the Air Force and security

1 forces.

2 We preferred, as staff judge advocates, to have one agency
3 handle everything. But it is -- it has happened that at times
4 both will investigate the same person for different offenses,
5 and both will continue to have an obligation to submit
6 fingerprint data if the trigger requirements criteria for
7 submission are met. And both could have a requirement to
8 submit a final disposition report again if those requirements
9 are met.

10 And I would -- well, no, I'll stop there. So that answers
11 your question.

12 Q. In this 2017 report -- first of all, what data years were
13 they actually evaluating, if you know?

14 A. Yeah, I do know. I'd have to check my notes again for the
15 specific dates, but it was sometime in 2015 -- I want to say
16 October -- to approximately December of 2016.

17 Q. What -- just to wrap this up.

18 What was the security force -- the DODIG conclusion about
19 the security forces', specifically, failure rate in this
20 report to submit criminal history data and final disposition
21 reports that they're aware of?

22 A. I think they were hitting about 60 percent noncompliance.

23 Q. All right. Now -- and let's -- just to be clear, let's
24 show you page -- this is Joint Exhibit 2 that's in front of
25 you, but let's go to page 39. I think you actually remembered

1 correctly, but let's just show you page 39 from the IG report
2 relating specifically to the security forces, that finding.

3 Do you see it there?

4 A. Yes, sir, that's it. Yeah, 93. Okay.

5 Q. So the IG was telling the security forces that not only
6 were you failing at a 60 percent clip to submit criminal
7 history data but you were failing at a 60 percent clip to
8 submit fingerprint cards too?

9 A. As I recall, that year, it was the identical number of
10 both fingerprints and FDRs.

11 MR. ALSAFFAR: Okay. You can take it down. Thank
12 you.

13 BY MR. ALSAFFAR:

14 Q. Now, going back now to this case. You know, these -- all
15 of these various IG investigations reports over the prior
16 25-plus years -- when I say "prior," I mean to the years prior
17 to this shooting.

18 In terms of supervising agents on the ground, can you
19 explain, based on your review of this case and your experience
20 working with IG investigators yourself -- investigations
21 yourself, why is it that these IG reports never got pushed
22 down to the Detachment 225 and the 49th Security Forces Wing
23 at Holloman Air Force Base where Devin Kelley was?

24 A. Assuming that they weren't pushed down -- I don't know
25 that they weren't. One answer immediately is they were

1 ignored; they were pushed, and it's just there was a bigger
2 concern.

3 The more direct answer, I believe, is a human factor. And
4 that's the -- I'm sorry. I see the counsel stood up.

5 MS. CHRISTILLES: Objection. Speculation, Your
6 Honor.

7 THE COURT: Yeah. Has he done any independent
8 investigation on any of this?

9 MR. ALSAFFAR: Not independent. Just the records of
10 the case and the outside -- and, of course, the IG
11 investigations, Your Honor.

12 THE COURT: So he's just repeating the IG's reports
13 that are already in evidence?

14 MR. ALSAFFAR: No, I don't think he's repeating. No,
15 no. We're actually going to get into specifically why it went
16 down to the detachment level.

17 THE COURT: What I'm trying to get at is how does he
18 know any of this? So he doesn't have personal knowledge.

19 MR. ALSAFFAR: Of course not. Yes, he was not there.
20 He's an expert reviewing the records, yes.

21 THE COURT: That's what I'm trying to get at. There
22 is underlying evidence that's supporting his statements?

23 MR. ALSAFFAR: Yes. Yes.

24 THE COURT: Go ahead.

25 MR. ALSAFFAR: I'm sorry. I misunderstood.

1 BY MR. ALSAFFAR:

2 Q. All right. Now, when we're talking about this supervisory
3 chain to get down to the supervisors at the detachment
4 level -- and I want to ask you about the Region 2 level just
5 as it relates to the supervisory failures in this case. I
6 don't want to ask you about what responsibilities Region 2
7 had, anything like that, just -- or duties. I'm asking about
8 how this supervisory chain may not or may have failed.

9 First of all, are you familiar with Region 2 level, and
10 what -- can you tell us what that is?

11 A. Yes. There was a Field Investigative Region 2, which was
12 responsible for multiple installations, to include Holloman
13 Air Force Base --

14 Q. And who was --

15 A. -- at Detachment 225.

16 Q. I'm sorry. I didn't mean to interrupt.

17 Who was the Region 2 commander responsible -- the
18 supervisory commander at the time of the Devin Kelley
19 investigations?

20 A. I'm trying to remember if it was Colonel Hudson or --
21 there was also another deposition by another colonel who I
22 believe is his deputy, a female colonel. But they expressed
23 opinions about this, and so did others that I read. So I --

24 Q. Well, let me ask you about Colonel Hudson, who was -- you
25 got that correctly.

1 Did you review Colonel Hudson's deposition?

2 A. I did.

3 Q. And in terms of what we're discussing about, about these
4 sort of 25-year failures in the Air Force to correct these the
5 issues that are -- had happened in the Devin Kelley
6 investigation, what did Colonel Hudson say about his awareness
7 to provide the IG information to supervisors at Detachment 225
8 and security -- Detachment 225?

9 A. Just that he wasn't aware of that requirement until after
10 the Devin Kelley shooting.

11 Q. Okay.

12 A. And that they can read, you know, as far as the
13 requirement to follow a checklist. Another agent said that.

14 So back to your threshold question before the objection,
15 there was a -- the Court can assess what the attitude was of
16 the supervisory agents to explain why this wasn't either taken
17 seriously or wasn't pushed down, but there was ignorance at
18 FIR 2 of the --

19 Q. Let me stop you. You said -- and anytime I hear
20 terminology that I want to be clear, I'll interrupt you. And
21 I don't mean to be rude.

22 A. Yes, sir.

23 Q. I just want to make sure -- you said there were ignorance
24 at FIR 2.

25 Are you referring, when you say "FIR," to Region 2

1 command?

2 A. Yes, Field Investigative Region Number 2 of the OSI, yes,
3 sir.

4 Q. Okay. So you said you reviewed Colonel Hudson's
5 deposition, who was the AFOSI Region 2 commander.

6 You did review that particular deposition. You said that
7 he was unaware of these IG investigations until after
8 Devin Kelley committed the shooting?

9 A. As I recall.

10 Q. How would that affect the supervisory --

11 THE COURT: One second.

12 MS. CHRISTILLES: Your Honor, I thought that
13 Mr. Alsaffar was trying to get some background on supervision.
14 Your Honor has already ruled on the supervisory duties with
15 respect to the region, and the -- I believe the only issue
16 before this Court is supervision at Det 225.

17 So I let Mr. Alsaffar go, as I thought we were
18 getting background, but I believe we're going into the issue
19 of supervision at the region level, which has already been
20 ruled on by this Court.

21 MR. ALSAFFAR: We are not, Your Honor. I am
22 explicitly not addressing whether or not they had a legal
23 failure or a duty failure.

24 The question is a factual one. How did this happen?
25 It's not only Detachment 225. They keep trying to limit it.

1 It's -- now we've learned it's actually security forces as
2 well involved in this case, all at Holloman Air Force Base.

3 But the question is -- this isn't about legal duty of
4 supervisors for Region 2. This is about how -- how did
5 Holloman Air Force Base supervisors have no idea about these
6 rules and regulations that they had to have?

7 And it is relevant to understand that this happened
8 at more than just one level. So it wasn't just the local
9 level. Supervisors at local can't do their job if supervisors
10 above them don't even know if there's a problem that exists.

11 THE COURT: That's overruled. You can continue.

12 BY MR. ALSAFFAR:

13 Q. I won't belabor this point because I think you just
14 pointed out the major problem, Colonel, which was the Region 2
15 commander didn't even know this was a problem.

16 Is that a fair summary of Colonel Hudson?

17 A. Yes, sir.

18 Q. Okay.

19 A. Yes, sir.

20 Q. So let's go down to -- I'm going to move down into command
21 levels. We talked about IG telling the various command
22 levels, the Region 2 supervisors getting that information down
23 to the local. I'd like to talk about the local supervisory,
24 and this is in the AFOSI department first.

25 So I want to talk about OSI first, and then we'll talk

1 about the security forces on Holloman Air Force Base.

2 Are you tracking that?

3 A. I'm tracking, yes, sir.

4 Q. Okay. Let's first talk about Detachment 225, the OSI
5 detachment.

6 First, what's the DODI instruction, the Department of
7 Defense instruction, that specifically relates to AFOSI
8 fingerprint submission and data?

9 A. Well, there's two. The DOD is 5505.11, and the OSI manual
10 is 71-121.

11 Q. I don't want to go through all of this. The Court has
12 been highly, highly educated about all these instructions. I
13 just want to kind of get to the heart of those sections in
14 terms of the supervisory level --

15 A. Sure.

16 Q. -- so that we can talk about that specific one.

17 But let's show JEX Number 8, which is the first one you
18 mentioned, DODI 5505.11, page -- let's just show page 1 so we
19 know it's the instruction.

20 Do you see that?

21 A. I do see it.

22 Q. Okay. And if we could just go ahead and skip to page 2.
23 And if we could highlight paragraph 4.

24 All right. Now, just very quickly, just to orient
25 ourselves a little bit, when we say "Department of Defense

1 instruction," what does the Department of Defense include when
2 it's referring to law enforcement organizations?

3 Is it just OSI folks, or is it more than that?

4 A. Well, the distinction is DCIOs are defense criminal
5 investigation organizations. That would be OSI, NCIS. And
6 DOD law enforcement organizations are their police arm, the
7 security forces, the military police, and the shore patrol.

8 Q. And I don't mean to be basic, but does this mean that this
9 Department of Defense mandatory instruction also applies to
10 OSI and security forces?

11 A. Yes, it does.

12 Q. Okay. And is there anything in the Department of Defense
13 instruction that says that security forces can ignore their
14 mandatory obligations if they independently determine, "Nah,
15 this isn't my case. I only touched it for a little while.
16 It's not my case anymore"?

17 Anything like this in this mandatory instruction?

18 A. I would say not if they independently determined that.
19 There is, I believe, either in this instruction or a related
20 one, the ability for one organization to take investigative
21 lead.

22 But, again, there's no get-out-of-the-responsibility
23 exception for either OSI or security forces when the criteria
24 applies for them to submit fingerprints or final disposition
25 reporting information.

1 Q. Let's go to page 6, just to make sure that for the rest of
2 the time we're talking about this, we're oriented. And I want
3 to highlight Article 128 for you, which is paragraph 33. It
4 says "assault."

5 A. Yes.

6 Q. This part of the DODI instruction -- and I believe we'll
7 show you the Air Force one too.

8 Can you tell us the significance of this qualifying
9 offense, what that means?

10 A. Well, Article 128 is of the Uniform Code of Military
11 Justice. That's Title 10 U.S. Code, Section 928.

12 There are a variety of offenses in the manual for
13 court-martial. There is also an accompanying table of maximum
14 punishment for the variety of offenses, roughly 18. Three of
15 them are punishable by less than a year. The other 15 or more
16 are punishable by a year or more.

17 So Article 128 is a qualifying offense that requires
18 submission of fingerprints if you have probable cause to
19 believe that someone has committed that offense. That's the
20 significance there.

21 Subsequent to that, if there is a final disposition that
22 requires a -- that is a conviction -- I'm sorry. I'll stop.

23 Q. No. No. Because I want to talk about -- let's go to
24 page 10, because you were talking about that specifically,
25 just so that we can see the requirement in writing for

1 military subjects.

2 So if we go to page -- JEX 8, page 10 and paragraph 1 and
3 paragraph 3.

4 This is the instruction that applies to military subjects
5 like Devin Kelley; is that correct?

6 A. That's correct.

7 Q. All right. And if you look at -- we're going to highlight
8 both of them for you so you can see both of them at the same
9 time.

10 If you look at paragraph 1, again, that relates to both
11 OSI and security forces; correct?

12 A. That's correct.

13 Q. And what is the mandatory instruction for reporting -- for
14 reporting final disposition or conviction? Let's just say
15 it's conviction data for assault, like in this case.

16 What's the reporting requirements for both OSI and
17 security forces?

18 A. On the final disposition piece?

19 Q. Yes.

20 A. Okay. On the R-84 final disposition, they've got a 15-day
21 time line to submit the FDR report after that has been
22 communicated to the OSI or security forces.

23 Q. Okay. And when was Devin Kelley convicted of his
24 qualifying assault charges?

25 A. It was November -- I believe November 7th of 2012.

1 Q. All right. So within 15 days after that or shortly after
2 that, upon receipt from both Air Force and security forces,
3 that data should have gone to the FBI; is that right?

4 A. Approximately the 22nd of November 2012.

5 Q. All right. And we know that did not happen; right?

6 A. That is correct. Though, I believe -- and I know the
7 parties have stipulated to this, so the Court can look at
8 that.

9 But there was a -- part of the requirement to be
10 completely clear is, once this information is communicated to
11 the parties, I believe -- or, excuse me, the law enforcement
12 entities. So security forces had that information on the
13 7th of November 2012. I believe the trigger for -- or the
14 criteria for OSI was when they received the general
15 court-martial-convening authority's action on the sentence.

16 So -- and that did not happen until, I believe, a month --
17 just over a month later, around the middle of December 2012.
18 And that, again, is -- both parties can look at the
19 stipulation there as to those details.

20 Q. Okay. Well, let's talk about the Air Force instruction
21 very quickly, and I want to focus on -- and what I'm talking
22 about -- when I say "Air Force instruction," is it okay if you
23 understand that I'm referring to 71-121?

24 A. Yes, sir. I can understand that.

25 Q. Okay. And I'd like to jump to that instruction that

1 specifically relates to supervisory monthly reviews and then
2 supervisory reviews for what you've termed "investigative
3 sufficiency."

4 A. Yes, sir.

5 Q. You mentioned earlier in your testimony about your
6 extensive experience in 25 years working with the Air Force
7 and the IG in the Air Force and the criminal law enforcement
8 organizations that you had -- you regularly dealt with
9 investigative sufficiency.

10 Did I -- in case files. Did I hear that correctly?

11 A. Yes, sir.

12 Q. Okay. Would investigative sufficiency include -- and I'm
13 referring to the -- these instructions, the AFI instructions.

14 Would they include the review of fingerprint data and
15 criminal history data to ensure those were sufficiently
16 complied with?

17 A. Short answer is yes, it would, because the criteria for
18 submission of fingerprints, you know, is establishment of
19 probable cause. And there's a checklist to make sure you have
20 investigative sufficiency.

21 Included on that checklist is the fingerprint requirement.
22 And for case closure, the final disposition report submission.

23 So it's not just administrative. It's actually
24 substantive for having investigative sufficiency, that you had
25 probable cause, that you submitted the fingerprints. I mean,

1 these are, you know, lightbulbs popping off in the brain of
2 the case agent and the supervisor saying, "Hey, have we done
3 everything?"

4 Q. And if we can --

5 THE COURT: One second.

6 MS. CHRISTILLES: Objection. Speculation.

7 THE COURT: That's overruled.

8 BY MR. ALSAFFAR:

9 Q. If we could look at page 51 of -- I'm sorry, JEX 4,
10 page 51. I believe this is Section 4.24.31. I hope I got
11 that sequence right. So this is page 30 -- I'm sorry --
12 page 51, please.

13 And this is the section I want to talk to you about that I
14 just mentioned about supervisory.

15 Do you remember the monthly review requirements?

16 While we're showing this to you, Colonel, can you just
17 tell me what your understanding is of this mandatory
18 instruction as it relates to supervisory monthly reviews at
19 Holloman Air Force Base during the Devin Kelley investigation
20 and what that -- what this required them to do?

21 A. Well, it's a -- to be pristine, you would check all
22 aspects of investigative sufficiency up to that point in the
23 case. And, you know, if I am certain I've complied with
24 something, I don't have to review it, necessarily, but I want
25 to look at -- I would want -- I'm trying to be careful about

1 what I assess an ordinarily reasonably prudent OSI agent and
2 supervisor would do, not what I would do as a staff judge
3 advocate.

4 So as a staff judge advocate, we look at a case file. And
5 we're looking for problems, for gaps, seams, issues if I'm
6 prosecuting a case. Frankly, I do the same if I'm defending a
7 case. What did they miss? Setting that aside, that's the
8 context I bring to this.

9 Now, as a prudent OSI agent, as a supervisor, I really
10 want to make sure that all the elements of the offense are
11 met; that the -- I've got evidence to establish; I've followed
12 my investigative leads; that if I've established probable
13 cause, I've either done it on my own or I've got the SJA's
14 advice.

15 That should immediately trigger in my mind the
16 probable-cause piece. Get fingerprints. You know, two sets;
17 one for the file, one for NICS. And, you know, those are the
18 things you're doing.

19 THE COURT: Yeah. So let's stop here. One, he's not
20 being responsive to your question. I think he went off
21 completely differently.

22 THE WITNESS: Sorry.

23 THE COURT: And, two, we really need to go to Q and A
24 and avoid the long narratives.

25 MR. ALSAFFAR: That's my fault. I will correct that,

1 Your Honor. I apologize.

2 BY MR. ALSAFFAR:

3 Q. Colonel, that's my fault. And I'll try to break these up
4 a little bit more to make it a little quicker. And I know
5 you've never served as an expert before, and so that's my
6 responsibility. So I apologize.

7 I'm showing you 4.24.1.3.

8 Is that the mandatory Air Force instruction that was in
9 place during Devin Kelley's investigation that required
10 monthly reviews by the supervisors at Detachment 225?

11 A. Yes, sir.

12 Q. Okay. Have you had a chance to review the deposition
13 testimony of the supervisory agents, Bustillo and -- as well
14 as the case agent, Mills, that worked on this case, the
15 Devin Kelley case?

16 A. Yes, sir. Mills and, I believe, Holz too.

17 Q. Right. And just to make it quick, did both Bustillo and,
18 let's say, Mills as well, who worked on Devin Kelley's case,
19 agree that this instruction required them to have monthly
20 reviews and that as part of those monthly supervisory reviews,
21 they were supposed to go over the fingerprint submission
22 and -- I'm sorry.

23 The investigative sufficiency requirement would include
24 fingerprint and final disposition information?

25 A. Yes. It would include fingerprints and then, once ready,

1 final disposition report.

2 Q. Okay. I want to show you page 80 of Joint Exhibit 4.

3 Actually, let's skip that. We've already talked about
4 this.

5 Let's go to page 33, which is the -- relates to the close
6 file checklist that you just mentioned.

7 Do you remember mentioning that?

8 A. Yes, sir.

9 Q. Okay. And I want to show you Section 3.16.4.

10 Now, does this specifically address leadership
11 responsibility, supervisory responsibility?

12 A. Yes. Right at the beginning.

13 Q. Okay. And what does unit leadership mean?

14 A. I take that as the superintendent or DetCo.

15 Q. And you had mentioned that you had worked with
16 superintendents in DetCos as part of your career in the
17 Air Force. You know, "superintendent" may mean something to
18 somebody else.

19 But in the Air Force parlance, in Detachment 225, was
20 superintendent a supervisory position reviewing criminal
21 investigations?

22 A. Yes.

23 Q. Okay. And "det commander," does that stand for detachment
24 commander?

25 A. Yes, it does.

1 Q. All right. And I want to show you, on this mandatory
2 instruction page -- Joint Exhibit 4, page 1, actually. And if
3 we just go to the first page of Joint Exhibit Number 4.

4 And if you look down towards the middle, does this
5 instruction also define for us "unit leadership" and what that
6 means? If we go down to the -- yeah, the bottom half there.

7 Do you see the term "unit leadership"?

8 A. It does.

9 Q. And you mentioned that -- you had mentioned commander
10 already.

11 What is the SAC?

12 A. Typically, the SAC is the detachment commander, but it can
13 also be the superintendent on certain units.

14 Q. Well, let's look at that close file checklist that the
15 instruction said that unit leadership must use in these
16 reviews and -- of their case files.

17 Let's go to -- we're still in Joint Exhibit Number 4, and
18 let's go to page 159 through -60. Thank you.

19 Is this the close file checklist that you were referring
20 to?

21 A. Yes, sir.

22 Q. Okay. And can you tell the Court what -- what are the
23 supervisor's responsibility, just specifically relating to
24 this checklist, relating to fingerprint submission and final
25 disposition or criminal history data?

1 A. Going back to look through the tab where it required it.

2 But to answer your question, I believe at page 160,
3 blocks 17 and 18 require them to indicate whether that has
4 been submitted or not or is not applicable.

5 Q. Can I ask you -- and if we could show 17 and 18.

6 So these specific issues that we're talking about in
7 Devin Kelley's case, the fingerprints and the FDR, is it --
8 why is that the Air Force -- these instructions are very long.
9 They always are. Just -- you know, we're used to that.
10 They're long instructions.

11 Why is it, at the end of the day, for their supervisors,
12 does the Air Force give them a two-page checklist? What's the
13 purpose of that?

14 A. I mean culturally, the Air Force has had a mentality of
15 what gets put on a checklist gets checked, gets inspected, and
16 gets complied with. So the purpose of putting it on the
17 checklist is to comply it.

18 And I don't mean to be flippant, but -- I don't want to
19 say "dumb it down," but that's what immediately comes to mind.
20 Keep it simple. And these are the key things that you must do
21 to have investigative sufficiency, get all of this done.

22 So before you close it, make sure you physically put eyes
23 on each of these requirements and answer one of the three
24 blocks.

25 Q. Is one of the purposes, as you said, keep-it-simple

1 checklist relating to these issues that we're talking about
2 here -- is one of the purposes to ensure that somebody doesn't
3 come in the detachments at Holloman and say, "You know what?
4 These instructions are so complicated. I can't possibly
5 follow this stuff. It's hard to follow. I don't know what to
6 do."

7 Is that one of the purposes of these checklists?

8 MS. CHRISTILLES: Objection. Leading.

9 THE COURT: Sustained.

10 BY MR. ALSAFFAR:

11 Q. What is one of the purposes of these checklists?

12 A. So you have a fairly lengthy regulation, and this is a
13 control measure. It's a check, if you will, on compliance.

14 It's a tool to be used by the case agent and supervisors.
15 The case agent, to make sure it's sufficient; the supervisor
16 to, again, make sure it's sufficient in a supervisory capacity
17 at that local level. And then they have a -- when they close
18 it and archive it, they have a separate checklist too.

19 Q. So weren't there two checklists in this case for Holloman
20 Air Force Base to simply follow these rules?

21 A. Yes. There is the file closure, and then there is the --
22 well, there's the investigative sufficiency checklist, and
23 then there's a supervisory checklist to use as well.

24 Q. Let's look at that one. So just to be clear for the
25 Court, this one that we just showed you relates to -- at the

1 end of the case file, when it's ready to be closed, a
2 supervisor is supposed to come in and use this one?

3 A. That's my understanding, yes, sir.

4 Q. Okay. And then you mentioned that there's another one, an
5 investigative -- supervisory investigative sufficiency
6 checklist.

7 I would like to show that to the Court and to you as well,
8 which is page 174 of JEX -- I'm sorry, it's not page 174. I
9 apologize. It's page 307.

10 You're already ahead of me. Thank you, Shawn (phonetic).

11 And this is the first page.

12 Is this the supervisory investigative sufficiency list
13 that you were talking about?

14 A. Short answer, yes.

15 Q. Okay. And if we could go to the -- 309 through 310, I
16 believe is the -- that relates to the fingerprint submission
17 and the R-84 or -- when we say "R-84," what does that mean?

18 A. That's the final disposition report.

19 Q. All right. So when we talk about criminal history data,
20 when we talk about final disposition reports, when we hear the
21 word "R-84" -- which we heard a lot this morning -- we are
22 talking about the information related to the criminal
23 conviction or the acquittal; correct?

24 A. Right. That's correct.

25 Q. All right. So what does this supervisory investigative

1 sufficiency checklist in mandatory instruction 71-121 say
2 about those two issues, fingerprints and final disposition
3 reports?

4 A. Well, if you go to page 309 at block 22, along with the
5 ones you've already highlighted at 53 and 54, it wants to make
6 sure that you have -- yes, you've done this; no, you haven't;
7 or it's not applicable. And when it's not applicable, I
8 understand they often enter a note in an internal data page,
9 or IDP, explaining why it was not.

10 Q. All right. And we're about to talk about what you just
11 mentioned, the internal data page or reviewer notes.

12 Does that sound familiar? Did you look at those in this
13 case?

14 A. I did.

15 Q. And I want to stick here with this investigative
16 sufficiency checklist.

17 You remember we talked about the instruction that said
18 you're supposed to -- these supervisors are supposed to have
19 monthly meetings to go over the investigative sufficiency.

20 Do you recall that?

21 A. Yes, sir.

22 Q. And approximately how many months are we talking about
23 that the Devin Kelley file -- the life of the Devin Kelley
24 file was?

25 A. 15 to 17 months. I'd have to go back and do the math

1 here. I know there were at least 15 --

2 Q. You're right. You're right.

3 A. Let me rephrase that. Yes, 15 to 17 months.

4 Q. Okay. And so at each of these monthly meetings, was the
5 supervisory agent at Detachment 225 supposed to have this
6 checklist with them and look at the three to four different
7 parts of the checklist that actually reference the fingerprint
8 and criminal history data?

9 A. Yeah. I assess a reasonably prudent agent, as a
10 supervisor, would do that.

11 Q. And this may be an obvious statement, but was that ever
12 done in all these monthly reviews as it related to the
13 Devin Kelley case at Holloman Air Force Base, even with a
14 checklist?

15 A. The short answer, no, it was not. I'm trying to remember
16 which report indicated that it might have been pencil-whipped
17 to close it. But, no, it was not.

18 Q. And when you say it "might have been pencil-whipped,"
19 you're talking about the checklist "might have been
20 pencil-whipped," what does that mean, "pencil-whipped"?

21 A. To me, that means they marked it without actually putting
22 eyes on the final disposition report or eyes on the
23 fingerprint and the submission to NICS of those required
24 documents.

25 Q. All right.

1 A. So before you would mark it onto the checklist, you would
2 and the want to confirm that it was done, not make an
3 assumption.

4 Q. All right. And does that mean that just because you check
5 it off, you actually have to do it?

6 A. Yes.

7 Q. Okay. I'd like to talk about what the case agents the
8 opportunities -- the supervisory opportunities that the SAICs,
9 the superintendents, the commanders had at Holloman Air Force
10 Base to actually check the Devin Kelley file and ensure that
11 the information in there was properly submitted.

12 Is it okay if we transition to that?

13 A. It is.

14 I'm older in years, and it would be -- if appropriate, is
15 it okay if we ask for just a very short comfort break?

16 MR. ALSAFFAR: Your Honor, it has been a hour and
17 15 minutes. Is that okay?

18 THE COURT: Yes. Let's take 15.

19 MR. ALSAFFAR: Thank you, your Honor.

20 (Recess.)

21 THE COURT: So before we resume with questions, let's
22 just do cleanup here.

23 So when I admitted exhibits on our first day of
24 trial, I was assuming Joint Exhibit 1 through 803 were just
25 chronologically in order, but apparently they're not.

1 And so I believe the correct ruling is Joint
2 Exhibit 1 to Joint Exhibit 86 are admitted. There is no Joint
3 Exhibit 87 through 109. Joint Exhibit 110 to Joint
4 Exhibit 749 are admitted. There is no Joint Exhibit 750
5 through 798. With regard to Joint Exhibit 799, I did not
6 indicate that as admitted.

7 What are your notes?

8 MR. ALSAFFAR: My notes have --

9 THE COURT: Oh, that would have been part of the
10 global, right. Yeah. So 799, then, is admitted. There is no
11 800. And then 801 through 803 are admitted.

12 So with that cleanup, let's continue.

13 MR. ALSAFFAR: Would you like me to proceed, Your
14 Honor?

15 THE COURT: Yes.

16 MR. ALSAFFAR: Thank you, your Honor.

17 BY MR. ALSAFFAR:

18 Q. Colonel Youngner, can you hear me okay?

19 A. Yes, sir, I can.

20 Q. Can you see me okay?

21 A. Yes, sir, I can.

22 Q. All right. And I just want to remind you again that if
23 you see me put the stop-sign hand on, I apologize. I'm not
24 trying to be rude to you, Colonel, but I'm just trying to find
25 a better way to communicate on this connection. Okay?

1 A. Yes, sir. And I also understand that I'm still under
2 oath.

3 Q. Thank you. Okay. Colonel, can you please -- we were
4 transitioning to talk specifically about the supervisory
5 reviews and the number of reviews that were done on
6 Devin Kelley's case file.

7 Do you recall Special Agent in Charge Vince Bustillo's
8 testimony on that matter?

9 A. I do.

10 Q. Okay. And in addition to that, after reviewing the
11 requirements of the instruction that we just went over in
12 detail, along with the depositions of the various supervisory
13 case agents in this case, I'd like to break these numbers down
14 a little bit.

15 You've already told us 15 monthly reviews are required.
16 And did the case agents at Detachment 225 also agree with
17 that?

18 A. Yes, they did.

19 Q. All right. And were there also weekly reviews by the
20 supervisors on the case files?

21 A. Yes, sir, there were.

22 Q. As part of those weekly reviews, would they have also been
23 required?

24 And I'm talking about the supervisory agents in charge,
25 the superintendents, the supervisory folks at Detachment 225.

1 Were they also required during those weekly case meetings
2 to review investigative sufficiency items in Devin Kelley's
3 file?

4 A. Yes. That's the whole purpose of the weekly review is
5 investigative sufficiency and progress.

6 Q. So if we add the 15 that they said they had every month on
7 Devin Kelley's file and we add the weekly supervisory case
8 meetings reviewing his file for fingerprints and criminal
9 history data information, how many does that add up to?

10 A. 75.

11 Q. All right. And I want to make sure I heard you correctly.
12 Did you say 75?

13 A. Yes, I did, 75.

14 Q. All right. Now, by the way, the head SJA -- or one of the
15 SJAs at the time of the Devin Kelley investigation, what was
16 his name again?

17 A. It was Lieutenant Colonel Tullos and then later Owen.

18 Q. Did he also agree with that assessment that 75 supervisory
19 reviews were done -- or should have been done on the
20 Devin Kelley case file?

21 A. As I recall, yes.

22 Q. Okay. I want to now show you the -- another element
23 that -- of supervisory review that relates to these
24 investigative sufficiency requirements, and I want to turn
25 your attention to the instruction again, 71-121?

1 A. Yes.

2 Q. Again, that's Joint Exhibit Number 4, and I want to draw
3 your attention to page 51 of Joint Exhibit 4. So it's 4-51.

4 And tell me when you can see it on your screen.

5 A. All I see is --

6 Q. Don't worry. I'll maximize it. I just want to make sure
7 that it's -- I always check when I do these remote depositions
8 or testimony because I want to make sure that you're seeing
9 something. I can make it better. I just want to make sure
10 you're seeing it.

11 A. Got it.

12 Q. Okay. And I want to draw your attention to
13 Section 4.24.1.3 again, the first paragraph. If we could --
14 and I'll try to highlight it for you to make it easier.

15 If we can just look at the first sentence -- highlight the
16 first sentence, from case file to retention.

17 A. Yes.

18 Q. I'm sorry. The second sentence as well. That's my fault.

19 So we've already talked about the case file needing a
20 monthly review, but what I want to ask you about is the second
21 sentence of this mandatory instruction.

22 "This review will occur from the date the allegation or
23 complaint was received" --

24 So what date would that be in Devin Kelley's file,
25 approximately?

1 A. The 9th of June 2011, I believe, was when they first
2 interviewed Devin Kelley and Tessa Kelley.

3 Q. And then it says "until closed and the AFOSI Form 2 is
4 forwarded to headquarters for retention."

5 What does that mean?

6 A. They have a closure form and the case summary, I believe.
7 I'd have to go back and look up the index of the OSI forms.

8 But the bottom line is this is submitted, and that's
9 reflected in their Investigative Information Management
10 System, or I2MS, as well.

11 Q. All right. And I want to look at that specifically. But
12 when this mandatory instruction says that you're supposed to
13 look at it not only monthly until -- from the time you open it
14 to close it, but also until it is forwarded to headquarters
15 for retention, is that what's referred to as archiving the
16 file?

17 A. Yes. That's archiving the file. And you would not
18 archive it until you completed that closure checklist as well.

19 Q. And that closure checklist you're talking about is the
20 attachment -- the close file checklist that we saw earlier;
21 correct?

22 A. Yes, sir.

23 Q. All right. So you would do that checklist not only at
24 closing but at archive retention state as well.

25 Is that what you're saying?

1 A. Yes. You would include that, make sure it's there for the
2 archive record.

3 Q. Okay. So if I can show you that date in this case -- and
4 we have an audit trail record. That's Joint Exhibit 19.

5 Okay. And it's page 1. And what I'd actually like to do is
6 focus on these two -- on two dates.

7 Let me start with the "submit for closure."

8 What date is that?

9 A. That is the 14th of December 2012.

10 Q. And I apologize --

11 A. And that --

12 Q. I apologize I didn't get this on the record, but are we
13 looking at the Devin Kelley case file right now in terms of
14 this document?

15 A. Yes.

16 Q. All right. So remember the mandatory instruction said,
17 you know, you've got to do these monthly reviews from the time
18 you open the case file until you close it.

19 Is that this time? The closure is 12/14/2012?

20 A. That is correct.

21 Q. All right. I want you to turn your attention to the
22 bottom of this paragraph.

23 You see that bottom date -- and we can highlight it,
24 Shawn. I apologize I didn't highlight it.

25 It says, "Send to archive."

1 Do you see that?

2 A. I do see that.

3 Q. Do you remember in the instruction -- the mandatory
4 instruction we just showed you, there was -- it said, you
5 know, do these monthly reviews all the way through archiving.

6 Do you remember that?

7 A. Right until that point, and the Form 2 gets forwarded.

8 Q. All right. So what's the archival date of this file in
9 this case?

10 A. It is the 10th of April 2013.

11 Q. Was Lyle Bankhead a supervisory agent at Holloman Air
12 Force Base?

13 A. Yes, he was.

14 Q. All right. Did the supervisory agent at Holloman Air
15 Force Base pencil-whip this investigative closure checklist
16 that you talked about at this moment in time, 4/10/2013?

17 MS. CHRISTILLES: Objection. Speculation.

18 MR. ALSAFFAR: I don't think so, Your Honor.

19 THE COURT: Well, I'm not sure he can say it was
20 "pencil-whipped." He can say a different word, but...

21 MR. ALSAFFAR: I'll do that.

22 BY MR. ALSAFFAR:

23 Q. Colonel, did Lyle Bankhead actually -- at the archival
24 stage, did he actually send the fingerprints of Devin Kelley
25 and conviction history to the FBI?

1 A. As I reviewed the record and the case file for OSI and the
2 depositions, he did not, because the NICS did not receive it
3 and there -- they did not receive the fingerprints or the
4 final disposition report, which, if he had actually checked
5 the file and checked I2MS and confirmed that they had been
6 submitted before he checked off on the closure list, he would
7 have seen that they had not, and he would have to make sure
8 that was accomplished at that time. So no.

9 Q. And I want to show the Court the actual list and why I
10 mentioned that term that you used earlier.

11 I want to show Joint Exhibit 22. This is the close
12 investigation file checklist for Devin Kelley. This is Joint
13 Exhibit Number 22, if we could look at page 4.

14 And if you look at the very last item, 32, it is checked
15 that the close investigation file checklist was followed; is
16 that right?

17 A. Yes, it is.

18 Q. All right. And even though it was checked, it was not
19 done. It was just checked.

20 Is that fair to say?

21 A. Yes.

22 Q. And if you look at paragraph 17 and 18 of this close
23 investigation checklist for Devin Kelley, what does that say?

24 A. Nothing. It doesn't indicate compliance or noncompliance.
25 It's blank.

1 Q. And despite not checking that they had actually done the
2 fingerprint and conviction report for Devin Kelley, they
3 checked at Detachment 225 that they completed the whole
4 checklist.

5 Is that what we're reading?

6 A. That's correct.

7 Q. Okay. Now, I hate to state the obvious, but does that
8 comply with the mandatory instructions for supervisors at
9 Detachment 225?

10 A. No, sir, it does not.

11 Q. All right. Now, let me go back, if we don't mind -- I
12 don't mean to whiplash you too much, Colonel, but if we can go
13 back to Joint Exhibit Number 4, page 51, that we had that
14 talked about -- I'm sorry, not Joint Exhibit 4, Joint
15 Exhibit 19 that showed the archival date.

16 Can you see that okay, Colonel?

17 A. I can. It was the April 10, 2013, date.

18 Q. All right. Now, you remember a few minutes ago, based on
19 the testimony of the actual case agents on the Devin Kelley
20 case, that we added up 75 monthly and weekly reviews in the
21 Devin Kelley case file should have included looking over this
22 mandatory requirement.

23 Do you remember that discussion?

24 A. Yes, sir.

25 Q. Now, there's more that they should have done; isn't that

1 right?

2 From the time of closure to the time of archive, there was
3 more time and opportunity for them to do their supervisory
4 monthly reviews. Is that fair to say?

5 A. As I understand --

6 Q. Let me rephrase the question.

7 A. To answer your question --

8 Q. Sorry. Did you understand my question?

9 A. I'd rather you rephrase it to make sure I'm clear.

10 Q. Okay. The mandatory instruction, 71-121, required that
11 monthly reviews by supervisory -- you know, investigative case
12 sufficiency reviews be conducted from -- not just stopped at
13 closure but all the way of archival of the case file; is that
14 right?

15 A. That's right, yes, sir.

16 Q. Okay. So how many more months or more monthly reviews,
17 between the date of closure of Devin Kelley's file and the
18 date of archival, should the Holloman Air Force Base
19 supervisory agents have conducted?

20 A. Approximately four more monthly reviews --

21 Q. All right.

22 A. -- if you look at, you know, December to April.

23 Q. Okay. So that would take the number to about 79 monthly
24 and weekly supervisory investigative case sufficiency reviews
25 that should have been done on Devin Kelley's file?

1 A. Yes, sir.

2 Q. Okay. Now, I want to talk about something a little bit
3 different, not just monthly reviews that should have been done
4 and the number.

5 But I want to actually talk about how many times that the
6 Devin Kelley case file was contacted or looked at by various
7 agents, including supervisory agents, at Holloman Air Force
8 Base and Detachment 225.

9 Does that make sense, what I'm asking you?

10 A. Yes, sir, it does.

11 Q. Okay. And were you able to review documents that were
12 produced by government in this case that allowed us to
13 actually analyze or allowed you to analyze and review how many
14 times the supervisory agents and case agents were accessing
15 and looking at and -- Devin Kelley's case file for
16 investigative case sufficiency?

17 A. Yes, sir, I was. There were two files. One very large;
18 the other, a little bit smaller.

19 Q. Okay. I'd like to talk about that. Let's talk about that
20 first one. I believe it's Joint Exhibit 348.

21 I'm not going to blow this up because there's a lot of
22 information. This is an Excel native file that's had to be
23 converted. So it's got a lot of information on it, and it's
24 not easy to see.

25 But can you just tell us what this document is?

1 A. It's referred to as an internal data page summary. The
2 acronym is IDP, india-delta-papa. And it contains internal
3 data that agents would note on a case file.

4 And so when the agents -- if you look at it from left to
5 right, it shows the date of a contact. And it shows, you
6 know, the substance of that, the person on the -- who touched
7 it on the right, and then whether they opened or locked the
8 case file when they were done.

9 Q. Okay. And we just -- if we could go back to that
10 highlighted example that you just blew up.

11 Thank you, Shawn.

12 Just to orient the Court, this is a good -- this is an
13 example of -- those agents that you see on the right, Hoy,
14 Harper, Meusburger, those are all supervisory case agents
15 touching this file; right?

16 A. Those are -- there is one subordinate agent who touched it
17 in addition to them, yes, sir.

18 Q. Okay. And this is Devin Kelley's file; correct?

19 A. Yes, it is.

20 Q. All right. So were you able to look at this file and just
21 simply conduct an account of how many times this IDP reviewer
22 note file showed supervisory agents as well as case agents
23 contacting -- having contact and review for investigative
24 sufficiency of Devin Kelley's file?

25 A. Yes, I did.

LARRY YOUNGNER - DIRECT

1 Q. All right. I'm going to ask you -- can you tell me --
2 tell the Court how many times, based on JEX 348,
3 Detachment 225 supervisory agents, as well as the case agents
4 under, them contacted Devin Kelley's file?

5 A. I counted 53 contacts during that time period.

6 Q. Okay. I want to now show you another document. We were
7 able to -- were you able to look at an audit trail document
8 that was produced by the government that showed every single
9 time, in addition to the IDP and reviewer notes we see here,
10 but also every single time a Detachment 225 supervisory agent
11 or case agent contacted Devin Kelley's file?

12 A. Yes, sir. I believe that was the 37-or-so-page document.

13 Q. All right. Well, let's put up that document. That's
14 JEX 349.

15 And, first, can you just confirm that this is -- yeah,
16 let's highlight a few lines just so we can see what this is.

17 A. That appears to be the Devin Kelley summary that I
18 reviewed. It is the Devin Kelley summary that I reviewed.

19 And from -- just to orient the Court, from left to right,
20 it's got the agents' name abbreviation, a type of contact
21 done. And then to the right, a date/time stamp of when they
22 posted an entry.

23 This would, I understand, be in, again, I2MS, the OSI's
24 Investigative Information Management System.

25 Q. All right. What I'd like you to do is -- if you could,

1 for me, I'd like to go through each year.

2 Summarize for the Court how many opportunities -- missed
3 opportunities the Air Force had in Devin Kelley's file to fix
4 any data corrections or problems with investigative
5 sufficiency, starting with the 2011 time frame, obviously,
6 when the case was opened.

7 So what I'd like to do is -- if you could -- if you could,
8 count for us and -- can --

9 MS. CHRISTILLES: Your Honor.

10 MR. ALSAFFAR: Can you hear me okay?

11 THE WITNESS: I can hear you okay, but I think you
12 have an objection, if I may be quiet until that's --

13 MR. ALSAFFAR: Sure. Sure.

14 MS. CHRISTILLES: Your Honor, I apologize. It took
15 me a minute to rereview Colonel Youngner's expert report, and
16 I did not find anywhere in his expert report where he analyzes
17 what he is now referring to as missed opportunities where case
18 agents touched the file.

19 And, therefore, I will object as this is outside of
20 Colonel Youngner's expert report and supplemental report.

21 MR. ALSAFFAR: Your Honor, that's not correct.

22 His -- both his initial report and supplemental report, which
23 you have, extensively talk about the various supervisory
24 misses, the various opportunities, the dates, et cetera.

25 This is actually just counting, simple math. That's

1 all this is. He spent pages and pages talking about
2 supervisory negligence. I think they're just really objecting
3 to our simple addition.

4 THE COURT: But the addition is getting redundant
5 now.

6 So you've already talked about 79 missed monthly
7 contacts. Joint exhibit 348 already has 53. And then I'm not
8 sure what you're going to say now that 349 has.

9 But at some point, in all your math, you're going to
10 have to discount because, in some of those monthly contacts --
11 in 348, you're saying there was 53 missed contacts, but I'm
12 not going to go through a whole math exercise to see, well,
13 did that fall within the period of June 9, 2011, to
14 December 14, 2012? And so did that monthly contact constitute
15 a contact on this graph?

16 I get your point, and let's move on.

17 MR. ALSAFFAR: Okay. We can do that, Your Honor. No
18 problem.

19 Your Honor, is it okay if I just get on the record
20 the total? One question on the total?

21 THE COURT: Just ask him one question on what he
22 thinks the total is for 349.

23 MR. ALSAFFAR: Thank you, your Honor.

24 BY MR. ALSAFFAR:

25 Q. And, Colonel, what we're going to do is -- if I can just

1 ask you one simple question, based on your review of both
2 these documents and your review of the record case file -- not
3 double-counting either, not counting the stuff that was also
4 included on 348 -- how many opportunities and contacts did the
5 detachment -- just the Detachment 225 supervisory case agents
6 have with Devin Kelley's file?

7 A. I counted 103, and that was just by the day. Just to be
8 very brief on the methodology, I didn't double-, triple-, or
9 quadruple-count contacts. So if Boyd touched it one day and
10 did ten things, I only counted that as one touch or one
11 contact.

12 But the answer, again, is 130 total. And that divided
13 into approximately, I believe, 96 touches or contacts by
14 supervisors and 34, if I -- I'd have to go back and check my
15 math -- subordinate agent contacts.

16 Q. So a vast majority of those contacts with Devin Kelley's
17 file over its lifetime were actually supervisory agents at
18 Detachment 225?

19 A. Over the entire lifetime of both documents, it was just
20 under 70 percent. And for that 349 JEX, it was 75 percent.

21 Q. Okay.

22 MS. CHRISTILLES: And, Your Honor, I'd just renew our
23 objection. Again, I looked through that report. None of that
24 analysis is in the report.

25 THE COURT: Yeah.

1 MS. CHRISTILLES: He talks about missed
2 opportunities, but this is not discussed in his report.

3 THE COURT: All I'm going to take out of this is
4 there was numerous contacts and numerous opportunities for the
5 Air Force, through its supervisory agents, to see that
6 mistakes -- that some things weren't done and weren't
7 corrected.

8 MR. ALSAFFAR: Thank you, your Honor.

9 THE COURT: Got it.

10 BY MR. ALSAFFAR:

11 Q. Now, you remember earlier when we talked about the
12 inspector general reports that were just sort of related to
13 the entire Air Force issues with these submission of
14 fingerprints and criminal history data that covered the entire
15 Air Force.

16 Do you remember those reports?

17 A. Yes, I do.

18 Q. Did the Air Force inspector general also specifically look
19 at Detachment 225 -- at Holloman Air Force Base's compliance
20 rate with fingerprint submission and criminal history data?

21 A. Yes, after the Devin Kelley shooting.

22 Q. I want to show you JEX 432.

23 And, Colonel, this is one of the documents you reviewed.
24 This is the -- specifically the Air Force's inspector general,
25 not the DOD, but the Air Force inspector general.

1 Do you see that?

2 A. Yes, I do.

3 Q. And I'd like to show you page 18. And if we could --
4 sorry. If we could highlight -- I believe it's in the first
5 paragraph. Actually, the next one, where it starts with
6 "After the shooting tragedy." Thank you.

7 What was the Detachment 225 failure rate? So specifically
8 Detachment 225's failure rate for reporting qualified
9 fingerprint data and qualified criminal history data?

10 A. It reflects a 43 percent noncompliance.

11 Q. Was Holloman Air Force Base's 43 percent failure rate
12 higher than the overall national average failure rate for
13 these items?

14 A. Yes. That summary is in that same paragraph, and it
15 reflected the whole rate being below the Air Force average in
16 the last sentence.

17 Q. I want to switch gears now to the security forces issue.
18 And I won't take too much time on this one, but we need to
19 talk about the security forces department or the security
20 forces element of Holloman Air Force Base.

21 So we had OSI, we also had security forces that were
22 involved in the Devin Kelley case; is that correct?

23 A. Yes, sir.

24 Q. And I want to show you JEX 11, which is the mandatory
25 instruction for the security forces, specifically.

1 Did you have an opportunity to review this in forming your
2 opinions in this case?

3 A. Yes, I did have an opportunity to review that instruction.

4 Q. All right. And I won't belabor the point, but let me ask
5 you to get right to the heart of the matter.

6 Remember how we showed you the overall Department of
7 Defense instruction. We talked about 5505.11 had the
8 mandatory reporting requirements for both OSI and security
9 forces.

10 Do you remember that?

11 A. Yes, sir.

12 Q. Bottom line, did the Air Force create a security forces
13 instruction that contradicted the superior DODI instruction on
14 fingerprint and criminal history data reporting?

15 A. They did, and that was later corrected.

16 Q. And that contradiction actually existed in the security
17 forces at the time that Devin Kelley's case was being handled
18 by the security forces; is that correct?

19 A. Yes.

20 Q. All right. And what did Colonel Ford, who was the
21 handpicked corporate representative to represent the Air Force
22 in the litigation, the security forces representative, what
23 did he have to say about this conflict and whose
24 responsibility it was to resolve it?

25 A. He indicated that -- where he worked on the air staff. I

1 believe it was Lieutenant General Reno who was responsible
2 ultimately for approving the regulation and that, once that
3 had been caught, it was correct.

4 Q. And that wasn't corrected in time for the Devin Kelley
5 security forces investigation, was it?

6 A. No, it was not.

7 Q. And I believe you said it was Lieutenant General Reno in
8 the Air Force who was responsible for this failure to follow
9 the mandatory instruction?

10 A. Yes, the deputy chief of staff. A4/7 is the designation.
11 But, ultimately, that general officer was responsible for
12 security forces within the entire Air Force as far as policy
13 and regulations.

14 Q. All right. And just so it's clear, Lieutenant General
15 Reno, who was responsible for creating this conflict in the
16 mandatory instructions for the security forces, I mean, she's
17 not a person that's actually responsible for reporting any
18 data to NICS; right? She's not a person who does that?

19 A. Short answer, no, she's not. She's responsible for
20 setting the rule set that the subordinates who are responsible
21 must follow.

22 Q. Now to be clear, at some point in time, the --
23 Devin Kelley was in jail at the Air Force? He was in
24 confinement; right?

25 A. Right.

1 Q. And which department was responsible for the confinement
2 facility at Holloman Air Force Base? Was it OSI, or was it
3 security?

4 A. At Holloman Air Force Base, it was the security force --
5 it was the 49th Security Forces Squadron's correctional
6 division. And the AFI that governed their rule set was AFI --
7 Air Force Instruction 31-205, which I also reviewed.

8 Q. And you remember the Air Force inspector general report we
9 just showed you that related to this case specifically.

10 What did they have to say about the security forces'
11 obligation to mandatorily report at Holloman Air Force Base
12 security forces the conviction and fingerprint information on
13 Devin Kelley?

14 A. The DODIG concluded that the Security Forces Squadron did
15 have an obligation under the instructions to submit the final
16 disposition report data, and that obligation was independent
17 of the OSI obligation.

18 In fact, the security forces' obligation predated by about
19 a month the OSI obligation to submit the FDR, the final
20 disposition report.

21 Q. All right. So when we're looking at -- you know, we
22 talked about the OSI file having almost, like, 79 monthly
23 review requirements and weekly review requirements, the
24 hundred-plus contacts of Devin Kelley's file by the OSI.

25 There was also a security forces independent obligation to

1 add on to that, is that fair to say, at Holloman Air Force
2 Base?

3 A. Yes, sir.

4 Q. So that number goes up, doesn't it?

5 A. As far as the -- there were four obligations found that
6 OSI had. There were two obligations security forces had. So
7 the number goes up to six, as far as the -- I mean, I don't --
8 as far as those obligations. And then as far as the total
9 contacts, yes, there was a separate list of contacts and time
10 elapsed for security forces.

11 Q. And who was the -- is there -- this -- this may seem
12 obvious again, and I apologize.

13 But is there a supervisory officer at the confinement
14 facility who was responsible for submitting this information
15 on Devin Kelley?

16 A. Ultimately, it is the squadron commander -- I believe
17 Lieutenant Colonel Boyd's responsibility. But at most
18 Air Force installations, there is a noncommissioned officer in
19 charge of the confinement facility.

20 It's typically a technical sergeant, sometimes a staff
21 sergeant, an enlisted noncommissioned officer who is trained
22 on confinement duties and responsibilities. And that is the
23 person who would typically -- unless they have some local rule
24 that's different. Under the AFI 31-205, that confinement
25 facility NCO would complete that paperwork, submission of the

1 FDR to NICS.

2 Q. So I want to break this down a little bit.

3 On the security forces side of detachment -- I'm sorry,
4 Holloman Air Force Base security forces offices, Lieutenant
5 Commander Boyd was the security forces commander ultimately
6 responsible for submitting and ensuring that Devin Kelley --

7 A. And --

8 Q. Let me finish.

9 A. Please?

10 Q. -- for submitting and ensuring that Devin Kelley's
11 information was sent to the FBI?

12 A. Lieutenant Colonel Boyd would be the commander responsible
13 of the 49th Security Forces Squadron, the person responsible
14 for supervising that submission.

15 Q. And then you also mentioned that there was a
16 noncommissioned officer at the security forces confinement
17 facility as well that was a -- is that -- is the document --
18 if the judge says "NCOIC" at the confinement facility, is that
19 the noncommissioned officer you're referring to?

20 A. Yes, the noncommissioned officer in charge. And I put
21 that acronym, I believe, in any acronym list.

22 Q. Okay. In your report?

23 A. Yes, sir.

24 Q. Okay. And so that's -- the NCOIC at the security forces
25 confinement facility is another supervisory agent within the

1 security forces side that had a -- that had a responsibility
2 but did not ultimately submit Devin Kelley's conviction or
3 fingerprint information to the FBI?

4 A. I would assess they are a supervisory law enforcement
5 official in charge of corrections. They were not agents.

6 Q. Thank you.

7 A. A minor point. Not to quibble. But different role and
8 mission, sir.

9 Q. No, no. That's okay, and I appreciate it. And if I say
10 something incorrect, please tell me.

11 A. Yes, sir.

12 Q. How many -- I just want to talk about the time for -- real
13 quickly.

14 How many days did the Air Force have from the first time
15 the inspector general told them that this was a major problem,
16 submitting fingerprints and criminal history data on these
17 convicts and these dangerous people -- how many days from the
18 1997 report passed for them to try to correct it?

19 A. Well over 7,500 days. I don't have the number at the top
20 of my brain, but it was over 7,500 days between. I did a date
21 elapse between when that report got published and the 5th of
22 November of 2017. Not counting the 5th of November, it was
23 over 7,500 days of awareness that this is an issue for
24 security forces and OSI.

25 Q. About how many days did the Air Force have from the time

1 that Devin Kelley's case file was closed to correct this
2 problem before the -- from the time it was closed to the day
3 of the shooting?

4 A. Not archived but closed?

5 Q. Yes, sir.

6 A. Because this happened at different times.

7 The -- I believe it was -- I'm trying to go back to when
8 it was closed. I believe they closed it -- I know they
9 archived it in April of '13. I'd have to go back to that
10 chart you were looking at.

11 It was about 1,600 days from archive. And then from
12 closure, I believe that was four months earlier.

13 Q. Yes.

14 A. So 120 would be about 17 -- 1,750 days to comply.

15 Q. Devin Kelley purchased his AR-15 at a federally -- a
16 firearm-licensed dealer after passing a NICS background check;
17 is that correct?

18 A. That's correct, sir.

19 Q. First of all, simple, simple question:

20 Would Devin Kelley have had the AR-15 that he used to kill
21 26 people and injure 22 more if the Air Force submitted his
22 fingerprint and criminal history data to the FBI?

23 THE COURT: Your objection?

24 MS. CHRISTILLES: Objection, your Honor. It calls
25 for a legal conclusion.

1 MR. ALSAFFAR: That's a factual question, Your Honor.

2 THE COURT: So it's a factual question. We've heard
3 it plenty of times. And so it goes with the caveat, assuming
4 the FFL actually complied with the law, would he have had the
5 weapon.

6 MR. ALSAFFAR: Okay.

7 THE COURT: Go ahead.

8 BY MR. ALSAFFAR:

9 Q. Colonel Youngner, I want you to assume for me, based on --
10 well, I don't think we have to assume.

11 The Academy store that sold the AR-15 did submit his
12 information to the FBI, did they not?

13 A. Yes, they did.

14 THE COURT: The assumption would have been that they
15 actually would have sold it no matter what the circumstances
16 were. We really don't know; right?

17 MR. ALSAFFAR: Of course. Of course.

18 THE COURT: But with all that, we've heard this
19 plenty of times. Go ahead and ask the question. Let's get
20 the answer.

21 MR. ALSAFFAR: Thank you, Your Honor.

22 MS. CHRISTILLES: Your Honor?

23 THE COURT: Yeah.

24 MS. CHRISTILLES: May I be heard?

25 THE COURT: Yes.

1 MS. CHRISTILLES: I will also object because
2 plaintiff has proffered Colonel Youngner as an expert in Air
3 Force protocols. I think whether or not he would have been
4 able to buy a weapon at Academy is far outside of what the
5 plaintiffs have submitted him for as an expert.

6 THE COURT: That's fair enough.

7 You know, so the other part about all this too, as to
8 many of the objections on his testimony as an expert, I mean,
9 this is not a trial to the jury. It's a trial to the bench.

10 And, frankly, I know to discount testimony as I see
11 fit. And so I can take in whatever and disregard whatever.
12 And so I take -- I'm letting lots of this in. It doesn't mean
13 I'm going to give it actually any credence whatsoever,
14 especially as it impinges on legal conclusions.

15 But that said, you know, this is outside now the
16 lines of the testimony that he was proffered for.

17 So any other questions?

18 MR. ALSAFFAR: Yes, I do, Your Honor.

19 THE COURT: Go ahead.

20 BY MR. ALSAFFAR:

21 Q. Okay. I want to now turn to the case file itself and what
22 the Air Force knew about Devin Kelley's character and what
23 they knew about his violent tendencies and his actual violent
24 acts prior to them failing to submit his fingerprints and his
25 conviction to the FBI. Okay?

1 A. Okay.

2 Q. And I think you've already said that you had an ample
3 opportunity to have, in fact, as you stated in your report,
4 detailed the various instances in which the Air Force
5 documented a variety of violent acts and threats that
6 Devin Kelley made the Air Force aware of while he was there.

7 Do you recall that?

8 A. Yes, I do.

9 Q. Okay. What I'd like to do is just to take the Court
10 through some of those, and I'd like to start with one of
11 Devin Kelley's Air Force files, if we could.

12 So I'd like to look first at Joint Exhibit 21, page 4.

13 Have you had a chance -- this was one of the reports that
14 you reviewed in forming your opinions on what the Air Force
15 knew about Devin Kelley's violence; correct?

16 A. Yes. I recall that is the expulsion or barment order.

17 Q. Okay. We're looking at a document dated March 27th, 2013.
18 And I want to highlight in the first paragraph the statement
19 that says, "Due to Kelley" -- if we look down in paragraph 2,
20 it starts with "Due to Kelley's."

21 Thank you. That's all right.

22 A. Yes.

23 Q. And if you look toward the bottom of that paragraph.

24 A. Yes.

25 Q. All right. Now, in March 2013, the Air Force was aware

1 that Devin Kelley had an extensive record of violence;
2 correct?

3 A. This summarizes it, yes.

4 Q. He was directing death threats towards not just his
5 domestic partner but his leadership in the Air Force; is that
6 right?

7 A. That's correct.

8 Q. And at this point in time, March 2013, what was the
9 Air Force saying in this letter about whether or not it was --
10 the Air Force was safe from Devin Kelley at Holloman Air Force
11 Base?

12 A. This was -- the Air Force was requesting -- his leadership
13 was requesting he be barred from the base because he presented
14 a threat to the leadership and to public safety on the
15 installation of Holloman Air Force Base.

16 Q. Now, the next paragraph, paragraph 3. So we're talking
17 about in March 27th, 2003 -- 2013, sorry. Paragraph 3, the
18 very first paragraph there, "AB Kelley."

19 The Air Force -- what is the Air Force reporting about
20 Devin Kelley's mental health situation?

21 A. Well, they are describing conduct that also reflects
22 severe mental health problems, and then they're describing the
23 evidence to support that below.

24 Q. Did you have a chance to review as well his multiple
25 mental health facility stays while he was at the Air Force?

1 A. Yes. Two at Peak, a civilian facility for behavioral
2 health counseling that was off the installation.

3 Q. Okay. And so this severe mental health decline was
4 apparent, in March of 2013, to the Air Force; is that right?

5 A. It was summarized in '13. It was apparent prior to that,
6 as described in the document itself when he was taken to Peak.
7 This was -- this document was written prior to his release
8 from confinement to bar him from the installation.

9 Q. And at this point in time, March 27th, 2013, we're talking
10 about after he's been convicted, after he's served his time,
11 and he's, essentially, a free person; is that correct?

12 A. Well, he's about to be put on appellate leave and released
13 from confinement, which started his pretrial confinement and
14 continued until he served his sentence.

15 Q. So even after he served his sentence and he was about to
16 be a free man, the Air Force had determined that his mental
17 health problems are so severe and his threats of violence are
18 so dangerous that he was too dangerous to the entire Air Force
19 base of Holloman Air Force Base ever to be allowed to enter
20 ever again.

21 Is that fair to say?

22 A. That was the request. And the decision was made a few
23 days later by the installation commander to bar him, based on
24 what's here as well as some additional threats that had been
25 communicated.

1 Q. All right.

2 A. I think they're described elsewhere in this letter.

3 Q. Now, the next sentence says that he open -- in
4 paragraph 3, it says, "He openly carried a firearm on Holloman
5 Air Force Base and placed a weapon to his wife's head."

6 Do you know who that wife is?

7 A. Tessa, his first wife.

8 Q. Were you able to listen to Danielle Kelley's testimony in
9 trial?

10 A. I was.

11 Q. Okay.

12 A. Yes, I did.

13 Q. Was this similar domestic violence conduct to what he did
14 to Danielle?

15 A. I assess it -- I'm sorry. The counsel has raised an
16 objection.

17 THE COURT: Yeah.

18 MS. CHRISTILLES: Objection, Your Honor. That's
19 outside his expertise. Similar domestic violence conduct, I
20 don't see how that relates to Air Force protocol.

21 MR. ALSAFFAR: I'll rephrase.

22 BY MR. ALSAFFAR:

23 Q. Let me ask it this way, Colonel.

24 Based on your review of the entire file, did Tessa Kelley
25 get a gun pointed to her head by Devin Kelley in 2012-2013?

1 A. Yes.

2 Q. All right. Based on your review of the testimony and
3 depositions, did Danielle Kelley get a gun pointed to her head
4 by Devin Kelley?

5 MS. CHRISTILLES: Objection, Your Honor. He's
6 leading the witness here.

7 THE COURT: That's sustained.

8 BY MR. ALSAFFAR:

9 Q. All right. Can you tell us whether or not Danielle Kelley
10 had a gun pointed to her head by Devin Kelley?

11 A. Yes. I understand that from her depositions and from her
12 testimony earlier this week.

13 Q. Now, if you look down in paragraph B -- oh, by the way,
14 before I do that, I didn't show you the next page, page 5.

15 If we could look at the signature page, the bottom blue
16 signature page. The bottom blue signature page. Thank you.

17 Who is this that's making this report from the Air Force?

18 A. So that is a captain who works for the staff judge
19 advocate within the 49th Wing staff judge advocate's office.
20 And so it appears he reviewed the work of either a paralegal
21 or law clerk civilian and forwarded this to the installation
22 commander based upon his legal review.

23 Q. It's an Air Force government lawyer; right?

24 A. Yes, that's correct.

25 Q. Let's look at what the government Air Force lawyer said in

1 paragraph B about Devin Kelley. If you look under B, it's
2 March 2013, "Additional evidence," that sentence.

3 A. Yes.

4 Q. The Air Force attorney states, "Additional evidence of
5 Kelley's high-risk, unpredictable, and criminal behavior
6 includes his history of mental health issues, his
7 preoccupation with weapons, his verbal declaration that he's
8 contemplated offensive attack strategies on both Air Force
9 personnel and organizations, including leadership and security
10 forces."

11 I want to stop right there.

12 What — "offensive attack strategies," what does that mean
13 to you?

14 A. He's looking for a way to harm someone offensively or
15 aggressively.

16 Q. And is it — based on this review in 2013, is the
17 Air Force saying that his offensive attack strategies are not
18 limited to people in his family or domestic situations;
19 they're other people?

20 A. There's also the unit, the leadership. And so his unit
21 and his unit leadership.

22 Q. We're talking about mass violence here; is that right?

23 MS. CHRISTILLES: Objection, Your Honor. Leading.

24 THE COURT: That's sustained.

25

1 BY MR. ALSAFFAR:

2 Q. Can you tell us whether or not this is, in your view, what
3 we're talking about, mass violence?

4 A. To the extent he was focused on larger organizations and
5 units, yes, I would assess it was. And that is also based on
6 my having read what Devin Kelley reportedly told supervisors
7 about how he would approach them if he had a shotgun, he'd go
8 in and shoot the place up, et cetera.

9 Q. Okay. We'll look at that, but let's finish with this
10 document, the next -- 21, page 5.

11 Actually, let's get to the recommendation part from this
12 Air Force lawyer. If we look down under paragraph 5,
13 "AB Kelley has."

14 The government attorney here states that "AB Kelley has a
15 well-documented history of making threats of physical
16 violence, researching methods of carrying out violence, and a
17 conviction for assaulting his wife and stepson."

18 What does that sound like to you?

19 A. I assess that as a factual predicate for the decision to
20 bar them, that this person has demonstrated violence as
21 evidenced by these matters that are noted above.

22 Q. And did your independent review of this file indicate that
23 Devin Kelley had and was researching methods of carrying out
24 violence?

25 A. Yes. He had, both at Peak and elsewhere.

1 Q. And would that include thinking through and planning
2 through acts of mass violence while he was at the Air Force?

3 A. As far as assessing how he would go about doing something,
4 I don't have the details other than the summaries,
5 particularly from Peak, and conversations he had with
6 supervisors at the 49th Logistics Readiness Squadron.

7 Q. All right. Well, let's actually look at that planning and
8 researching that he did related to that issue while he was in
9 the Air Force.

10 Let's look at document JEX 21, page 6. It's a new
11 document. This is a few days later from another commander.
12 And let's look at the second page -- I'm sorry, page 7, so we
13 can orient the Court.

14 This is signed by Andrew Croft, Colonel, Air Force
15 Commander.

16 Do you see that?

17 A. Yes, I do.

18 Q. Okay. And if we can look on the first page again, what is
19 this the Court's looking at?

20 A. That is the order approving the request, which was the
21 document you showed me previously. It's an order to not --
22 it's to basically bar Devin Kelley from entering or reentering
23 Holloman Air Force Base indefinitely.

24 Q. Let's look at the first -- keep that up -- the first
25 sentence there and -- starting with "You had repeatedly."

1 Now, this is addressed to Devin Kelley.

2 The "you" here is Devin Kelley; is that right?

3 A. That's correct.

4 Q. All right. Devin Kelley "had repeatedly threatened the
5 lives of United States Air Force leadership."

6 Do you see that?

7 A. Yes.

8 Q. So at this point, was the Air Force aware that
9 Devin Kelley was threatening, not just one, but multiple lives
10 of United States Air Force personnel?

11 A. That is correct.

12 Q. And then you remember how you talked about you viewed
13 documents regarding Devin Kelley's planning about violence.
14 And I want to show you that in this document.

15 It's the same paragraph. Sorry. Same paragraph.

16 A. Yep.

17 Q. Bottom of the paragraph starting with "During." Can you
18 read today out loud to the Court.

19 A. "During your hospitalization at the Peak, you had searched
20 the internet" --

21 And I'm going to have to change my view. I blocked -- the
22 Court view on the right is blocking the entire thing for me.
23 So bear with me.

24 Q. That's okay?

25 A. Let's see if that does it. Okay.

1 "During your hospitalization at the Peak, you had searched
2 the internet on a computer for body armor and purchasing of
3 weapons."

4 So that suggested to me that he was -- you know, a tactic,
5 technique, or procedure he wanted was use of body armor in
6 engaging in potential violence.

7 MS. CHRISTILLES: Objection to that opinion, Your
8 Honor.

9 THE COURT: So he's basically just restating what's
10 already in the record, so I can read documents for myself.

11 MR. ALSAFFAR: Okay.

12 BY MR. ALSAFFAR:

13 Q. How many times did Devin Kelley threaten mass violence
14 that the Air Force was aware of at various times during his
15 stay at Holloman Air Force Base?

16 A. Immediately, three come to mind. I'd have to go through
17 the record and count it. You know, the instances where he
18 told a -- his wife, "If I had a shotgun, I'd go in and shoot
19 them all up" is what he told Tessa.

20 The threats made at Peak, I believe. And then the third
21 was prior to release.

22 I guess a fourth was when he told a former supervisor --
23 he communicated to Master Sergeant Bizzack threats, but I
24 don't know if that was just one or a large group of leadership
25 or former leadership.

1 But there were several, three or more, that the Air Force
2 was aware of.

3 Q. All right. So the Air Force was aware of multiple
4 occasions that they could reasonably anticipate that that is
5 the kind of person that might engage in mass shootings because
6 he threatened it multiple times?

7 MS. CHRISTILLES: Objection, your Honor. Calls for a
8 legal conclusion.

9 THE COURT: So it's actually asking him to speculate.
10 So he's not a psychiatrist or a psychologist, and so you're
11 asking him to speculate as to whether or not Colonel Youngner
12 thinks he would commit mass shootings. That's beyond his
13 scope.

14 MR. ALSAFFAR: All right.

15 BY MR. ALSAFFAR:

16 Q. So at least on three occasions, Devin Kelley threatened to
17 commit mass shootings while he was in the Air Force, and the
18 Air Force was aware of it.

19 Is that a fair summary?

20 A. Yes.

21 Q. They also learned something else about Devin Kelley.

22 In addition to his abuse of Tessa Kelley and the kind of
23 abuse he had with Tessa Kelley, did they also discover -- and
24 then in addition to his mental health -- severe mental health
25 problems and his threats of mass shooting violence on multiple

1 occasions, did they also discover something else about his
2 past and violence as well?

3 A. Well, I mean, they also had the assault upon his
4 stepson --

5 Q. Oh, right. Right.

6 A. -- in addition to Tessa Kelley and --

7 Q. What I'm referring to is, as part of the OSI
8 investigation, did the Air Force learn about other acts of
9 violence that he had committed against other women?

10 A. They did. When they did their research, OSI, in their
11 investigation, found that there was some preservice drug use
12 that they discovered. And there was also a -- I believe --
13 I'm trying to remember how many. There was at least one
14 instance of an alleged, I'll call it, sexual assault on a
15 dating interest prior to his enlisting.

16 THE COURT: Let me make sure I've got the time line
17 on this right.

18 Is this stuff that the Air Force learned after the
19 shooting, or are you talking about --

20 MR. ALSAFFAR: No. This is what they learned before
21 he was convicted and had on their system every day prior to
22 his conviction all the way up to the shooting, and I'll make
23 that clear on the record. I apologize. That's my fault.

24 THE COURT: I was getting lost on what you were
25 talking about.

1 MR. ALSAFFAR: I'm going to show you the documents,
2 Your Honor, real quick. Let's start with the first time. And
3 this, Your Honor, is June 18th, 2012.

4 BY MR. ALSAFFAR:

5 Q. The OSI -- Detachment 225 -- and this is JEX 22, page 63.

6 I apologize in advance, Colonel, for the nature of this,
7 what the Air Force learned about Devin Kelley in 2012 and the
8 nature of what they learned, but I think it's very important
9 for the Court to understand the degree and extent of it. So
10 I'm just giving you fair warning, and I know you've reviewed
11 this.

12 Okay. This is June 18th, 2012. This is part of the
13 Air Force's investigation of Devin Kelley. Fair?

14 A. Yes.

15 Q. And just to orient the Court as well, just for the record,
16 if you look on the very bottom, the special agent that's
17 investigating this is Yonaton Holz.

18 Do you see that?

19 A. I do.

20 Q. Let's go back to the main body of the paragraph. And we
21 have redacted the name, so I'm just going to say "victim."

22 Okay, Colonel?

23 A. Yes.

24 Q. I'm going to highlight for you, because you were asking --
25 you said there were several events, but you were asking to

1 look at the document.

2 On June 18th, 2012, Mr. Holz spoke with the victim and
3 states, "Victim met subject Kelley in 2005 while she was in
4 the seventh grade in New Braunfels."

5 See that?

6 A. Yes, I do.

7 Q. Next sentence, "Victim dated subject D. Kelley for
8 approximately eight months but terminated the relationship due
9 to constant verbal and sexual abuse by subject Kelley."

10 A. Yes, I read that.

11 Q. "Victim tried to end the relationship numerous times, but
12 subject Kelley would state he would kill himself if she did."

13 Do you see that?

14 A. Yes, sir.

15 Q. "Subject Kelley told victim he would kill himself
16 approximately five to eight times throughout the relationship.
17 Subject Kelley made her do things no seventh grader should.
18 Subject Kelley would force victim to give him oral sex by
19 pushing her head down to his groin. Subject Kelley would also
20 force victim to masturbate him."

21 So the Air Force was aware of this on June 8th, 2012,
22 about the nature, degree, and depth of Devin Kelley's
23 problems.

24 Is that fair to say?

25 A. Yes. About five months --

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1 MS. CHRISTILLES: Objection, Your Honor.

2 THE WITNESS: -- before the prosecution and
3 conviction.

4 THE COURT: What's your objection?

5 MS. CHRISTILLES: Counsel is testifying and leading,
6 nature, depth.

7 Is there a question or --

8 MR. ALSAFFAR: There was a question.

9 THE COURT: So I understood the question. The
10 question was, was the Air Force aware of the fact that he
11 was -- he, in 2005, was engaged in a sexual relationship with
12 an underage girl and that Kelley said he would kill himself if
13 she attempted to end the relationship and that the government
14 knew that as of June of 2012.

15 So, yeah, I understood the question.

16 My question is how old was Kelley in 2005?

17 MR. ALSAFFAR: He was 15. He was born in 1991, Your
18 Honor -- 14. 14.

19 THE COURT: So Kelley, at that age -- at that time,
20 is underage himself?

21 MR. ALSAFFAR: Yes, Your Honor.

22 THE COURT: Okay. Thank you.

23 MS. CHRISTILLES: Your Honor, to that point, I would
24 object to relevance of this.

25 THE COURT: So that's overruled.

1 BY MR. ALSAFFAR:

2 Q. Okay. Let's go to the next one.

3 Was there another victim that the Air Force learned about
4 of Devin Kelley?

5 A. I believe so, yes.

6 MR. ALSAFFAR: Let's go to JEX 22, page 65.

7 And, Your Honor, just to orient you, this is the same
8 Detachment 225 agent, but it's two days later. It's
9 June 20th, 2012.

10 And if we could, again, just blow up the main
11 paragraph, and we'll highlight it for you.

12 BY MR. ALSAFFAR:

13 Q. On June 20th -- sorry, June 20th, 2012, Special Agent Holz
14 interviewed victim. Victim met subject Kelley approximately
15 five years ago at church.

16 So five years prior to 2012, what year would that be,
17 Colonel?

18 A. 2007.

19 Q. So "Victim was 14 years old at the time, and they began
20 dating. Victim stated subject Kelley was the one that pursued
21 the relationship."

22 Go down a couple more lines.

23 "Victim explained Devin Kelley made her do things no
24 seventh grader should be doing at their age. Victim felt her
25 relationship with subject Kelley was sexually and emotionally

1 abusive.

2 "Subject Kelley sexually abused victim approximately four
3 to five times after they broke up. Subject Kelley would force
4 victim to masturbate him by using verbal abuse to control her.

5 "Subject Kelley would often tell victim she was not good
6 at anything but 'sucking dick.'"

7 I apologize for the language. That's in the record.

8 "Subject Kelley would begin to breathe heavy on the phone
9 and would ask victim to play along. Victim found the act
10 disgusting and would hang up the phone. Subject Kelley would
11 sometimes call victim and hide the fact that he was
12 masturbating from her."

13 Few more lines down.

14 Special Agent Holz notes that "Subject Kelley pulled his
15 penis out of his pants and began masturbating and asked victim
16 to lift her shirt so he could see her breasts. Victim refused
17 to comply with subject Kelley's demands. Subject Kelley
18 climaxed quickly on his hands and rubbed his semen on victim's
19 stomach after lifting her shirt up."

20 Do you see that?

21 A. Yes, I do.

22 Q. Okay. So the Air Force was aware of this conduct of
23 Devin Kelley on June 20th, 2012, on another victim?

24 A. Correct. Yes, they were aware.

25 Q. All right. I want to show you a third victim that the

1 Air Force was aware of prior to the shooting and prior to his
2 release from Holloman Air Force Base.

3 I'm going to show you JEX 22, page 67.

4 And, Your Honor, to orient to you again, it's the same
5 case agent, Holz. It's a few days later, June 26th, 2012.

6 I'm going to highlight the first paragraph. Just the
7 first half of that paragraph.

8 Shawn, that should be enough. Thank you.

9 Again, you reviewed this in forming your opinions in this
10 case, did you not, Colonel Youngner —

11 A. I did.

12 Q. — about what the Air Force was aware of about his
13 conduct; correct?

14 A. Right. The other investigative leads that the agents
15 followed up on in developing the case file prior to the
16 court-martial.

17 Q. Okay. On June — I'm reading from JEX 22.

18 "On June 26th, Special Agent Holz interviewed victim.
19 Victim met subject Kelley and began dating him during her
20 freshman year of high school in 2008. Victim and subject
21 D. Kelley ended the relationship because they constantly
22 fought and subject Kelley moved to enlist in the Air Force.

23 "Victim described her relationship as violent and
24 aggressive. Victim and subject Kelley would often strike each
25 other if one or the other said something to infuriate the

1 other."

2 A few lines down.

3 "Subject Kelley forcefully took victim's sexual virginity.
4 Victim was 16 years old at the time and did not know what to
5 do in regards to having sex with subject D. Kelley. Victim
6 tried pushing subject Kelley away, but subject Kelley was
7 stronger than she was. Subject Kelley inserted his penis into
8 victim's vagina and penetrated her hymen."

9 Is this excessively violent conduct by Devin Kelley that
10 the Air Force was aware of?

11 A. This is conduct the Air Force was aware of, the sexual
12 violence.

13 Q. Is it heinous violence?

14 MS. CHRISTILLES: Objection, Your Honor.

15 THE COURT: That's beyond his -- next question.

16 Sustained.

17 BY MR. ALSAFFAR:

18 Q. Let me show you a mental health record that was part of
19 the Devin Kelley file and what the -- what you reviewed and
20 what the Air Force was aware of prior to releasing him and
21 prior to the shooting.

22 It's JEX 22, and it's page 591.

23 Now, you recall that -- and the date on this is April 26,
24 2011, but I believe that it was just a typo by the mental
25 health facility. It's 2012.

1 But you reviewed this document as part of your review of
2 the Devin Kelley case file; correct?

3 A. I did. And I also noted the date stamp at the bottom
4 indicated a 2012 date.

5 Q. Yeah. In fact, let's just be clear, because I want the
6 Court to understand exactly where this document is coming
7 from.

8 If we actually look at JEX 22, page 590.

9 This document I'm about to show you is from the AFOSI
10 April 26th, 2012, case file on Devin Kelley; is that right?

11 A. That's correct.

12 Q. Okay. If we could skip to 22, 592.

13 You're aware that this facility and that the Air Force was
14 aware that he had actually had some pretty extensive mental
15 health testing and behavioral testing done while he was at
16 Holloman Air Force Base and that the Air Force was aware of;
17 is that true?

18 A. That's true.

19 Q. Okay. And I --

20 A. It's reflected here.

21 Q. And I want to show you that that's what's reflected here.

22 After their testing of his mental health while he was in
23 the Air Force, what was the conclusion under "control scale"
24 for Devin Kelley?

25 A. This reflects that maximum risk range that put him at the

1 98th percentile of being controlling, and it describes what
2 that definition means beyond that.

3 Q. Let me highlight the middle down in that same paragraph,
4 "This person's."

5 Do you see that?

6 A. Yes.

7 Q. Can you read that sentence for the Court, please.

8 A. "This person's significant other may be held in bondage
9 through intimidation and raw violence."

10 Q. So the Air Force, in April 2012, was aware that
11 Devin Kelley and was maximum risk range of control and a
12 maximum risk range for raw violence; is that right?

13 A. That's correct. That's elsewhere.

14 Q. In the same document, he had some more testing done, and
15 it has some conclusions from that behavioral testing under
16 "violence scale."

17 It's a test for violence scale that the Air Force was
18 aware of; is that correct?

19 A. That's correct. And, again, he was a high-risk assessment
20 at the maximum risk range.

21 Q. Well, I want to be clear. It wasn't high risk; it was
22 maximum risk range.

23 Is that what the record shows?

24 A. Right. I mean, it says both. But, yes, maximum risk
25 range in bold, and risk percentile is 93. And his pattern on

1 the scale is in the high risk, 90 to 100 percentile range, at
2 93. And it goes on to describe that.

3 Q. If we look under high-risk scores, which is what his score
4 is, what did the Air Force learn about his mental health risk
5 in April 2012 from his testing?

6 A. It described that he can be hostile, he can be violent, he
7 can be dangerous and should be considered dangerous.

8 Q. Let's look at another conclusion that this mental health
9 testing determined for Devin Kelley when he was in the
10 Air Force and that the Air Force learned about him the end of
11 April 2012.

12 And it's on page -- it's JEX 22, page 593.

13 If we look under the category of "stress coping scale,"
14 what did the Air Force learn about Devin Kelley's mental
15 health status in terms of coping with stress? What range did
16 he score on?

17 A. Again, in the maximum risk range, which indicated he had a
18 poor ability -- inability, if you will, to cope with stress.
19 And it describes how that contributes to his impaired
20 adjustment.

21 Q. How did the mental health testing that the Air Force was
22 aware of in April 2012 categorize the level of this
23 adjustment, this impairment?

24 A. Again, in the high-risk range.

25 Q. And what did they conclude about -- it's highlighted

1 there. Can you read that into the record.

2 MS. CHRISTILLES: Your Honor.

3 THE WITNESS: "Stress or this person's inability to
4 cope with" --

5 THE COURT: One second.

6 THE WITNESS: Please. I'm sorry.

7 MR. ALSAFFAR: That's okay.

8 MS. CHRISTILLES: I'm going to object.

9 Colonel Youngner is simply reading from the record. He has
10 not been qualified as a medical provider, a mental health
11 professional, or any such qualifications that would qualify
12 him to read through these mental health records.

13 THE COURT: That's overruled. But I'm not taking any
14 of his testimony as him giving any expert testimony on that
15 fact. I'm limiting it solely to what Detachment 225 knew on
16 or about April 26th, 2012, about Devin Kelley's mental health.

17 MR. ALSAFFAR: That's right, Your Honor. In what we
18 do, we'll limit it to that.

19 BY MR. ALSAFFAR:

20 Q. You were in the middle of finishing reading that into the
21 record, Colonel, starting with "Stress."

22 A. I'll start over.

23 "Stress or this person's inability to cope with stress is
24 contributing to a seriously impaired adjustment."

25 Q. So this -- you remember the first page of this document we

1 showed you was the AFOSI Detachment 225 coversheet showing
2 that Agent Holz obtained this record.

3 Do you remember that?

4 A. I do.

5 Q. When we were talking earlier about the supervisory
6 contacts -- you know, the 130, 180-plus contacts of this
7 file -- at some point in time, from April 2012 all the way to
8 November 5th, 2017 -- or let's -- let me rephrase that.

9 At some point in time, from April 2012 to archival of this
10 file, this information that we just read about his mental
11 health impairment and testing was available to the supervisory
12 agents every single time they touched this file.

13 Is that fair to say, based on your review?

14 A. Yes, because Holz put it in the file, and they had to
15 review it -- well, it was available for their review, yes.

16 Q. And I know it seems simple. But when we were talking
17 about investigative case sufficiency and we were showing the
18 judge -- the Court the audit trails that showed access to the
19 file, what we're looking at that is file.

20 Is that fair to say?

21 A. That's correct. It's the investigative file. Then it
22 goes into the report of investigation.

23 Q. And I'm sorry if this seems obvious, because you did this
24 a lot in the Air Force, but most of us did not.

25 When you -- because I didn't ask this on those questions.

1 When we went through the rapes of these minor girls with
2 Devin Kelley that the Air Force was aware of, were those
3 violent acts in the file every single time from those dates of
4 June 2012 until case archival for all those supervisory agents
5 at Detachment 225 to review and look at?

6 A. They should have been put in the file on the date of the
7 report that Agent Holz or the case agent developed the lead.
8 So I believe that's correct, yes. It was available for their
9 review.

10 Q. Okay.

11 A. And -- well, yes. That's all. I'm sorry.

12 Q. That's okay. I want to -- I'm close to wrapping up here,
13 Colonel.

14 I want to talk about -- a little bit earlier, we talked
15 about why this had happened in terms of the supervisory
16 misses, and we had spoken about Colonel Hudson and then
17 Commander Boyd.

18 I want to show you -- did you review -- I'm sorry. I
19 think you said you did.

20 But did you review the -- one of the supervisory agents in
21 charge, Vince Bustillo's, deposition; correct?

22 A. I did, yes.

23 Q. And he was one of the supervisory agents who was
24 responsible for reviewing Devin Kelley's case files as well;
25 correct?

1 A. Yes, sir.

2 Q. Okay. And did he provide -- I want to show you a clip
3 from his testimony and ask you -- relating to this issue of
4 supervisory review.

5 If we could play Bustillo's deposition, page 120, line 14
6 through line 121. It's a short clip, page 121, line 4. So
7 page 120, line --

8 (Clip was played.)

9 MS. CHRISTILLES: Your Honor.

10 THE COURT: Stop it. Yes?

11 MS. CHRISTILLES: I'm just trying to verify whether
12 or not this video has actually been admitted.

13 MR. ALSAFFAR: It has. Your Honor, everything we're
14 playing is only something that's already been preadmitted.

15 THE COURT: So what is this number?

16 MR. ALSAFFAR: Let me find the exhibit number, Your
17 Honor. I believe it's 3 -- trying to make sure I don't give
18 you the ECF file number versus the joint exhibit number. I'm
19 giving you the ECF file number. It's Plaintiffs' 93.

20 THE COURT: This is Plaintiffs' 93?

21 MR. ALSAFFAR: Yes, Your Honor. These were admitted,
22 I think, on day one.

23 THE COURT: Plaintiffs' 93, trial deposition
24 designations of Yonaton Holz?

25 MR. ALSAFFAR: Oh, no. This is Bustillo. Sorry.

1 It's Plaintiffs' 88, Your Honor. I apologize.

2 THE COURT: 88 has been admitted, plaintiffs' trial
3 deposition testimony trial of Vince Bustillo.

4 MS. CHRISTILLES: By video, Your Honor?

5 MR. ALSAFFAR: Yes. I believe this is one of our
6 video -- I don't think that matters, Your Honor. It's
7 testimony.

8 THE COURT: I mean, just -- there's nothing in the
9 video that's not in the deposition transcript; right?

10 MR. ALSAFFAR: That's right.

11 THE COURT: Go ahead.

12 MR. ALSAFFAR: Thank you.

13 (Clip was played.)

14 MR. ALSAFFAR: Start over. Thank you.

15 (Clip was played.)

16 BY MR. ALSAFFAR:

17 Q. Colonel, is it acceptable for a reasonably prudent
18 supervisory agent to supervise his agents with a "they know
19 how to read" mentality at Detachment 225?

20 A. I assess that it is not. The description just given by
21 former Special Agent Bustillo is not consistent with, frankly,
22 Air Force instructions or policy on leadership. And an
23 ordinary, reasonably prudent supervisor would not expect your
24 agents to just do it for themselves and not be led. They need
25 to be led.

1 That's the whole point of having a special agent in charge
2 or a superintendent or a detachment commander is to emphasize
3 the significant items both for investigative sufficiency but
4 also policies that are pushed down from DODIG or the secretary
5 of the Air Force or others. At that time, sexual assault was
6 a very important policy matter.

7 THE COURT: He's gone beyond the question.

8 MR. ALSAFFAR: I agree with the judge. I just put my
9 hand up.

10 Thank you, your Honor.

11 THE WITNESS: I apologize.

12 BY MR. ALSAFFAR:

13 Q. That's okay.

14 SAIC Bustillo also said, "I shouldn't have to lead."

15 Is that reasonably prudent for a supervising agent at
16 Detachment 225 regarding these instructions for fingerprint
17 and conviction data to supervise by saying, "I shouldn't have
18 to lead"?

19 Is that -- you can answer.

20 MS. CHRISTILLES: Your Honor, objection. That wasn't
21 in the video. He's talking about supervisory duties in
22 general.

23 THE COURT: So he said, "I shouldn't have to lead."
24 And then he talked about minute details.

25 So I don't think he said he shouldn't lead at all,

1 but he qualified it as to minute details.

2 So do you want to rephrase your question?

3 MR. ALSAFFAR: You bet. You bet.

4 Thank you, Your Honor.

5 BY MR. ALSAFFAR:

6 Q. Well, first of all, are -- fingerprint submissions and
7 criminal history data, should that be considered a minute
8 detail by a supervisory agent?

9 A. I assess that it's -- because it is on the checklist for
10 supervisors, it's not a minor point. And so, no, it's not a
11 minute detail, or else the OSI wouldn't have put it on that
12 very important checklist -- both checklists.

13 So I disagree with that characterization. It is an
14 important detail, not a minor detail.

15 MR. ALSAFFAR: Your Honor, is it okay if I have a
16 five-minute break just to go over -- I think we're concluding
17 here, but I just want to make sure and confer with my counsel.

18 THE COURT: Can we get through cross by today?

19 MS. CHRISTILLES: Your Honor, I don't even know what
20 time it is.

21 THE COURT: It's 3:20.

22 MS. CHRISTILLES: I'm not going to promise, Your
23 Honor, I will get through my entire cross today. I can
24 certainly start, but I think it might take a couple of hours.

25 THE COURT: Okay. Let's take a ten-minute break.

1 (Recess.)

2 MR. ALSAFFAR: Just a couple more questions, and I'll
3 be done. May I proceed?

4 THE COURT: Yes.

5 BY MR. ALSAFFAR:

6 Q. Colonel, can you see me? Can you hear me?

7 A. I can hear you and see you, yes, sir.

8 Q. Thank you, sir.

9 Okay. We were talking about April 2012 and some of those
10 records in the case file. I want to show you Joint Exhibit
11 Number 9.

12 A. Okay.

13 MR. ALSAFFAR: And just show the first -- let's just
14 jump straight to it, Joint Exhibit 9, page 3. We'll put that
15 up on the screen for you.

16 THE WITNESS: Yes, sir.

17 MR. ALSAFFAR: Joint Exhibit 9. Thank you.

18 BY MR. ALSAFFAR:

19 Q. If you look at the bottom paragraph there, can you read
20 that.

21 This states that May 14th-15th, 2012, so about two weeks
22 after that last mental health record, Holloman Air Force Base
23 High Risk for Violence Response Team convened to discuss
24 Kelley's mental health concerns.

25 Do you know what a High Risk for Violence Response Team

1 is?

2 A. Yes. It's a multidiscipline team on an Air Force
3 installation involving typically mental health, unit
4 commander, legal, and other services or helping organizations
5 that are involved with care for airmen on an installation.

6 Q. Okay. And the high risk for violence team -- let me
7 reread this.

8 "Kelley's squadron leadership" -- what does "squadron
9 leadership" mean?

10 A. It typically means the commander and the first sergeant,
11 maybe their section supervisor as well. So the lieutenant
12 colonel or major, as a commander, and then a first sergeant or
13 senior noncommissioned officer.

14 Q. "Kelley's squadron leadership and his mental health
15 providers feel that he is a major threat to commit an act of
16 violence, and is currently institutionalized for mental and
17 emotional instability."

18 So that was a couple of weeks after the last document I
19 show you regarding his mental health test; correct?

20 A. I'd have to compare them. But, yes, I recall that it was
21 around that same time.

22 Q. I want to show you one of the actual records for this High
23 Risk for Violence Response Team.

24 This is JEX Number 365, and it's page 150. If we could
25 highlight that whole top section and just pull that up for the

1 colonel.

2 What's the date of this letter -- I'm sorry, this record?

3 First of all, can you tell us what the date is and what
4 record it's from?

5 A. Yes. It's dated 30 May 2012, and family advocacy
6 office -- typically, family advocacy convenes the High Risk
7 for Violence, you know, Response Team. So it's under their
8 auspices. They often fall under the medical group.

9 Q. This record from Devin Kelley's Holloman Air Force Base
10 records states that HRVRT held -- is that -- what is HRVRT?

11 A. High Risk for Violence Response Team.

12 Q. Okay. "High Risk for Violence Response Team held at the
13 request of the FAO."

14 What is FAO?

15 A. Family advocacy office.

16 Q. Okay. I'm going to skip to the next sentence. It says,
17 "The meeting included ADMs CC" --

18 What does that mean?

19 A. The active duty member's commander. So ADM, active duty
20 member. CC is an Air Force abbreviation for commander.

21 Q. -- "first sergeant, SF" --

22 What does SF stand for?

23 A. Security forces representative, someone from the
24 49th Security Forces Squadron.

25 Q. -- "OSI" --

1 What does that stand for?

2 A. Office of Special Investigations would have been Det 225
3 at Holloman.

4 Q. -- "JAG" --

5 What does that stand for?

6 A. The judge advocate general office at Holloman.

7 Q. -- "TM" --

8 Do you know what that stand for?

9 A. I believe it stands for transportation management, but I'm
10 not clear on that. So I would have to --

11 Q. Was Devin Kelley in the Logistics Readiness Squadron or
12 traffic --

13 A. He was in the Logistics Readiness Squadron, and traffic
14 management was a subordinate section. So that's what I recall
15 from my military experience. That's what I would assume "TM"
16 means, without asking anybody about this particular meeting.

17 Q. So this meeting -- this High Risk for Violence Response
18 Team included several supervisory members of the Air Force,
19 including his direct command and security forces and OSI;
20 correct?

21 A. That's correct.

22 Q. All right. Next sentence, "It was determined by security
23 forces and OSI that ADM" --

24 And "ADM" is Devin Kelley; right?

25 A. Right, the active duty member, in this case, is referring

1 to Devin Kelley.

2 Q. "It was determined by security forces and OSI that ADM is
3 a danger to the community given his past statements and
4 possibly a danger to FM/W."

5 What does "FM/W" means, if you know?

6 A. So to family members. And I assume "W" was wife.

7 Q. So May 30th of 2012, the Air Force held in a High Risk for
8 Violence Response Team on Devin Kelley and determined that he
9 was a danger to the community -- security forces and OSI
10 determined he was a danger both to the community generally and
11 to his specific domestic partner.

12 Is that fair to say?

13 A. Yes.

14 Q. And it also concluded that Devin Kelley -- the Air Force
15 concluded that Devin Kelley, in May of 2012, was also a danger
16 to family as well; correct?

17 A. Yes, that's --

18 MS. CHRISTILLES: Objection, Your Honor. Leading the
19 witness, but...

20 THE COURT: That's sustained.

21 BY MR. ALSAFFAR:

22 Q. Did the Air Force High Risk for Violence Response Team
23 determine that Devin Kelley, on May 13th, 2012, was also a
24 danger to his family?

25 A. That's the plain meaning, yes, of that sentence.

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1 Q. As trial counsel, you are the judge advocate meeting with
2 the case agent to go over the case file; correct?

3 A. Yes, ma'am, that's correct.

4 Q. But your job title at that time was not actually trial
5 counsel, was it?

6 A. It wasn't because the -- again, no, it wasn't, to answer
7 your question.

8 Q. In fact, you were the chief of claims?

9 A. I was the chief of claims, initially. And then I went
10 through other assignments while I was also serving as a trial
11 counsel.

12 The Air Force approaches this practice different than the
13 other services, but I don't want to -- I'm sorry. I'll stop
14 right there. I answered your question.

15 Q. That's right. You worked on environmental law, labor law,
16 and claims.

17 Those were your prime duties; correct?

18 A. When I wasn't doing a court-martial. When we were doing a
19 court-martial, that case took priority over the -- if you
20 will, the assigned duty you had.

21 But, yes, ma'am, my primary duty on my officer evaluation
22 reports was as initially chief of claims and then, I believe,
23 chief of labor and environmental law during that two-year
24 period.

25 Q. And during that two-year period, you only tried about four

1 court-martials as second chair; correct?

2 A. I'd have to go back and look at the count, but it was
3 somewhere in that range of four to six. There were also some
4 discharge board proceedings.

5 So, yes, ma'am, that's a fair, you know, summary. It's in
6 the ballpark.

7 Q. So three or four cases where you were working with OSI
8 agents going over their case file?

9 A. Yes, ma'am. But also there were cases that were disposed
10 of alternately where I worked pretty closely with OSI in where
11 a decision was made not to take it to a court-martial but an
12 alternate disposition.

13 So there were probably another -- about twice that --
14 about, I'd say, eight cases that I worked with them pretty
15 closely, four of them went to court-martial.

16 Q. Fair to say, though, you weren't worked with OSI case
17 agents on a daily basis?

18 A. At that time in my career, not on a daily basis. I was
19 when I was on a court -- even that, no, I can't say daily. It
20 peaked -- it ebbed and flowed depending upon where we were on
21 preparing for trial.

22 Q. Okay. In 1991, you transitioned over to the role of area
23 defense counsel?

24 A. Yes, ma'am.

25 Q. In your position as a defense counsel, you're defending

1 airmen excused of either misconduct or a crime; correct?

2 A. Yes.

3 Q. As a defense attorney, you certainly weren't meeting with
4 OSI agents to help them develop the legal sufficiency of their
5 case; correct?

6 A. That's correct. I was doing just the opposite. I was
7 challenging their investigative sufficiency.

8 Q. In 1992, you became a circuit defense counsel?

9 A. Yes, ma'am.

10 Q. Held that position for two years?

11 A. Yes, ma'am.

12 Q. As a circuit defense counsel, you certainly weren't
13 working with OSI agents to develop the legal sufficiency of
14 their case; correct?

15 A. Again, that's correct. I was just questioning their
16 challenging the legal sufficiency as I reviewed a case for
17 defense.

18 Q. So you wouldn't have been looking through their case file
19 for fingerprints; correct?

20 A. Actually, I -- in general, that's correct. I looked
21 through their case file as a defense counsel for gaps in the
22 elements-of-proof worksheet. If, however, I see that they
23 didn't have probable cause -- and this occurred on a couple of
24 instances -- or they made mistakes with the constitutional
25 rights of an accused, then we'd use that at trial to either

1 suppress evidence or take other actions or to pursue alternate
2 dispositions.

3 So we did review the entire case file. And if I saw an
4 error -- I will tell you I never saw missing fingerprints in
5 those cases that I reviewed.

6 Q. Okay. And I think that was my question, whether or not
7 you were looking for fingerprints in the OSI case file.

8 A. It would be -- I was looking at it overall. I was not
9 going into it just to look for fingerprints. I was going into
10 it to look for overall investigative sufficiency, but that
11 would include fingerprints, on occasion.

12 Q. Okay. And we'll talk a little bit more about that in a
13 moment.

14 A. Yes, ma'am.

15 Q. In 1994, you became a deputy SJA; correct?

16 A. Yes, ma'am.

17 Q. Held that position for six months?

18 A. Yes, ma'am.

19 Q. As a deputy SJA, you're second in the supervisory chain of
20 the judge advocates assigned to the office; correct?

21 A. That's correct.

22 Q. You have a whole host of duties as a deputy SJA; correct?

23 A. To some extent; though, my case was unique. But overall,
24 that's correct, in general, for the Air Force.

25 But that was not the case for me. And I can explain why,

1 if you want to know.

2 Q. Well, I think you tried a couple of cases as deputy SJA,
3 primarily because you had a leftover defense case; correct?

4 A. As a deputy SJA, I tried -- I prosecuted three general
5 courts-martial at Rein-Main Air Base where I was extensively
6 working with the OSI agents, as described before.

7 I also had a major negligent homicide case with the
8 Blackhawk shoot-down that I was defending. So that's why I
9 didn't start out as the staff judge advocate for six months
10 because I was toggling between one case as a defense counsel.

11 And the other three cases at Rein-Main were as a
12 prosecutor. So I was traveling back to the States for the
13 defense counsel role.

14 Q. Okay. And then after six months, you transitioned into
15 the staff judge advocate role?

16 A. Yes, ma'am, that's correct.

17 Q. As a staff judge advocate, you are no longer trying the
18 cases; correct?

19 A. That's correct, yes, ma'am.

20 Q. In fact, you no longer sit down with the case agents to
21 discuss the legal sufficiency of their case file?

22 A. No, ma'am, that's not true, especially at a small
23 installation line Rein-Main. At one point, we were down to
24 three judge advocates there. They were looking to downsize
25 and then close the base.

1 So long story made short is we would sit down and do a
2 cops-and-robbers meeting with the OSI, and usually the --
3 well, and we would do a status and discipline meeting
4 involving OSI and security forces.

5 So those two meetings were opportunities for us to work,
6 though, the status and discipline wasn't the detail that you
7 were just asking about. But the cops-and-robbers meeting, we
8 called it, we would get into investigative sufficiency. And
9 it would be myself and the security forces squadron commander
10 and the OSI det commander or superintendent along with
11 supporting staff.

12 And that was an important meeting for us. It varied from
13 installation to once a week to once a month. I'd say, on
14 average, it was more like once a month.

15 Q. Okay. At the cops-and-robbers meeting, though, OSI
16 doesn't bring their entire case file, do they?

17 A. Unless there was one that was a command emphasis item,
18 they do not. That's correct.

19 Q. Now, when we're talking about an OSI file, they might have
20 the report of investigation; correct?

21 A. It depends on what they want to bring. They would have
22 the report of investigation, if it's completed. They would
23 have agents' notes. There's typically a six-part folder on
24 the hard -- I'm dating myself now, but -- so it really
25 depended upon what the command was interested in talking about

1 or the -- for cops-and-robbers, what they wanted to compare
2 and get into.

3 If we had a court-martial coming up, we might spend more
4 time on that. And what I would do then is I had the trial
5 counsel with me. And, frankly, we had this management
6 meeting, and then I would back off and let the trial --
7 literally sometimes leave so the trial counsel could stay
8 there and work with the OSI agent.

9 Anyway, I don't want to go explaining too much. I just
10 want to make sure I'm responsive to your questions.

11 Q. So it's your testimony that during a cops-and-robbers
12 meeting, OSI would bring their entire case file, to include
13 their agent notes and the file with the fingerprints in it?

14 A. It is -- so every time, no. On occasion, possibly. I
15 would say it is more likely than not they would not bring the
16 entire case file.

17 But if we were -- I don't want to get off on war stories
18 or anecdotes to save the Court's time. But I can think of
19 specific examples where we would bring the entire case file
20 because we had an issue. And so to pursue that issue, it was
21 a good use of our time to work out the concerns between the
22 prosecution team and the investigative team.

23 There might be a confidential source that they don't want
24 to reveal to us who we want to interview. And if we're going
25 to get the successful drug prosecution done, I need my trial

1 counsel to be able to talk to the confidential source.

2 And so those were the kind of issues we'd hammer out at
3 some of these meetings, and they would bring the whole file.

4 Q. Do you recall telling us during your depositions that it
5 was like pulling teeth to get the entire OSI case file?

6 A. It often was, especially as you're a junior trial counsel.
7 You might be able to sit down with an agent, but that was --
8 there was a love-hate relationship at times between the SJA's
9 office and the OSI office, even though we're all on the same
10 team.

11 Q. In fact, there's also a healthy tension between the
12 prosecutors, or the trial counsel, and the staff judge
13 advocate at the case; correct?

14 A. Hmm. I don't know that I would describe it that way.
15 There can be.

16 I mean, clearly, the staff judge advocate is their rater,
17 their supervisor. So in that regard, there might be some
18 discomfort when you ask tough questions of a subordinate about
19 have you -- you know, why don't you -- I use an
20 elements-of-proof checklist with my attorneys. And if they
21 haven't completed that trial brief, that checklist, they're
22 going to get some hard questions.

23 So that, I think, would be fair to characterize as,
24 perhaps, tense.

25 Q. Colonel Youngner, didn't you actually say in your

1 deposition, "In fact, because you are advising command, there
2 is often a healthy tension between the prosecutor and the
3 staff judge advocate looking at a case and the case agents"?

4 A. Yes. Describing the tension between the JA side, on one
5 hand, and the case agents, on the other.

6 So I think it depends on where you put the comma in that
7 clause, but I was putting the SJA and the prosecutor together
8 on one side, the OSI agents on the other.

9 Q. So there's a healthy tension with the case agents?

10 A. Yeah, I think there can be. And then with the DetCo or
11 superintendent who wants to -- you know, we're each kind of
12 protecting our rice bowl of our subordinates. And where we
13 break down those barriers and have good working relationships,
14 we get a lot more done. And we were able to do that
15 effectively, for example, at Rein -- well, at other
16 installations. I'll just stop there.

17 Q. But you couldn't be thoroughly involved in the case, as
18 the SJA, because you would eventually have to write the staff
19 judge advocate's recommendation for the commander; correct?

20 A. Yes, ma'am, that's -- I could not try the case. In fact,
21 it got to the point where I realized my limitations, so I
22 would not sit in and observe the court-martial because I found
23 myself wanting to get up and object. And, you know, I can't
24 run it for them.

25 So I left them alone to do their job and trusted they were

1 prepared, and it was just more appropriate that way.

2 Q. Because you had to write that staff judge advocate
3 recommendation; correct?

4 A. Well, you have to objectively assess everything in there
5 when you write that recommendation, yes, ma'am.

6 And so the military justice system does have a unique role
7 where the staff judge advocate recommends to the convening
8 authority, initially, whether to prefer or refer the charges
9 to begin with. Then when the whole case is done, makes a
10 recommendation as to disposition, which is the staff judge
11 advocate recommendation that you're referring to.

12 And, you know, there are instances where you may recommend
13 a disposition that is, perhaps, more lenient than what was
14 decided at the trial.

15 Q. So it's safe to say that after 1994, you never held a
16 position as a trial counsel again in the military; correct?

17 A. I believe that's correct, yes, ma'am. And --

18 Q. And the --

19 A. I'm sorry.

20 Q. And the NICS system became operational in 1998; correct?

21 A. As I understand the Brady Act, it was implemented after
22 that was passed, yes, ma'am.

23 Q. During your career, you have never been involved in a case
24 where someone who was prohibited from purchasing firearms was,
25 nonetheless, able to purchase firearms; correct?

1 A. I believe that's correct. One caveat to that. I did
2 represent, in my civilian practice, someone who was registered
3 as a firearms offender. It was the Williams trial, if you
4 look at that in my CV. That's since I retired in 2014.

5 He was convicted of rape, and we were able to secure an
6 acquittal on appeal and then at retrial. And I did advise him
7 on how to proceed with basically getting -- actually getting
8 untitled and removed from the database. So that's the only
9 instance I've had prior to -- in this area prior to being an
10 expert for the plaintiffs in this case.

11 Q. And I think that's a good point, Colonel Youngner.

12 That instance where you were trying to get your client
13 removed from the NICS database, that was the first experience
14 you'd ever had reviewing any of the regulations dealing with
15 the Air Force or the DOD's responsibility to submit criminal
16 history data before this case; correct?

17 A. Not exactly. Just from a broad-brush perspective, as we
18 had -- so we would do annual continuing legal education for
19 staff judge advocates. I also attended a staff judge advocate
20 course and then taught at it later.

21 So these requirements -- for example, you'll see on the
22 charge sheet -- well, excuse me -- on the report or result of
23 trial for Devin Kelley DNA processing required, domestic
24 violence offense.

25 So there were -- under Air Force Instruction 51-201, which

1 is the Administration of Military Justice, there would have
2 been changes in effect requiring compliance with these
3 reporting requirements. There was, again, in this case
4 some -- so let me stop and answer your question.

5 I did have exposure to these regulations and requirements
6 in my capacity as a supervisory staff judge advocate. Though,
7 as I -- I don't want to overstate my credentials. I just want
8 to make it clear that as a supervisory SJA, I made sure my
9 NCOs were following checklists at the general court-martial
10 convening authority level.

11 So at 9th Air Force, for example, or at the Air Force
12 Special Operations Command, I would review all general
13 court-martials and do the SJA recommendation. I would have to
14 check our checklist and do those -- kind of make sure we
15 complied with these requirements.

16 The JAG corps didn't have that requirement to submit the
17 data, but it was -- it was something I was aware of, at least
18 in my role as a staff judge advocate, of these requirements.
19 But I was not responsible for submitting that data. And so I
20 was not into the details of who had to submit it when, but I
21 was familiar with the regulations.

22 Q. Nor were you extremely -- I'm going to quote you --
23 extremely familiar with DODI 5505.11 before this case;
24 correct?

25 A. That's correct, yes, ma'am.

1 Q. In fact, the first time you actually familiarized yourself
2 with that publication was in preparation for this case?

3 A. I don't agree with that. I'm pretty certain -- and check
4 what I've said in the deposition before.

5 But I recall having been familiar with the DOD -- just
6 generally about DIBRS, in particular, as a requirement and a
7 program. And, frankly, when I was at AFCENT, we began to do
8 biometric data on overseas installations.

9 And so there was some question about what we could collect
10 on civilian employees, particularly third-country nationals
11 overseas. And so I was aware, but for different reasons,
12 of -- generally of the DOD instruction.

13 Q. Okay.

14 A. But I don't want to -- I wasn't intimately familiar with
15 it. No, ma'am, not like I am now with having prepared for
16 this.

17 Q. All right. You also talked about AFOSI Manual 71-121;
18 correct?

19 A. Yes, ma'am.

20 Q. During your time in the Air Force, you were not familiar
21 with any of the written OSI policies and procedures; correct?

22 A. I was not given -- I can't -- no, that's too broad of a --
23 you know, not familiar with any? I was rarely able to obtain
24 a complete copy -- I don't know that I ever obtained a
25 complete copy of those instructions or handbooks, ma'am.

1 However, as issues came up on cases, we would be given
2 access to certain matters. And we would also have to
3 coordinate, as staff judge advocates, with the OSI staff judge
4 advocate. So there was actually a JAG at Headquarters OSI in
5 Quantico who we would talk to.

6 Again, if we had any problem with getting a confidential
7 informant disclosed or if we had some discovery concerns
8 working with the OSI agents. Then we would get into a
9 back-and-forth about what we were allowed to see and know.

10 But to be clear, I wasn't fully aware of those
11 instructions on the OSI side. I knew they existed. I didn't
12 have the full contents of those.

13 Q. Because those publications are restricted-access items?

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

15 Q. In fact, when you were in the Air Force, it took a court
16 order to obtain part of those AFOSI manuals or instructions?

17 A. Almost always, yes, ma'am.

18 Q. And you mentioned OSI JA.

19 You never worked for OSI JA, did you?

20 A. No, ma'am, I did not.

21 Q. So it's fair to say you did not review all of AFOSI
22 Manual 71-121 during your time in the Air Force?

23 A. That's true, yes, ma'am.

24 Q. The first time you've ever read through that whole manual
25 was for this case?

1 A. Yes, ma'am. In the last two years, since late December, I
2 believe, 2019, January 2020.

3 Q. You've never been an OSI agent?

4 A. That's correct, I have not.

5 Q. You've never attended the OSI training school; correct?

6 A. Only as adjunct faculty.

7 Q. Okay. And let's talk a little bit about your role.

8 You weren't part of the permanent faculty at FLETC, were
9 you?

10 A. No, ma'am. And this was actually at Bolling, before the
11 OSI Academy moved to the Federal Law Enforcement Training
12 Center in Brunswick.

13 Q. Okay. You'd go down there and teach a course on trial
14 skills; correct?

15 A. Yes, ma'am. I was adjunct faculty at Bolling Air Force
16 Base before they relocated for those years that I was as an
17 area defense counsel that you talked about before and as a
18 circuit defense counsel.

19 Q. So when you were teaching at -- the OSI agents, you were
20 there in your capacity as a defense counsel?

21 A. Yes, ma'am.

22 Q. So you weren't teaching them about their requirements for
23 submission of fingerprints?

24 A. That's right. I was not.

25 Q. In your OSI -- or in your military career, you never

1 supervised OSI personnel?

2 A. No, ma'am, I did not supervise OSI personnel. I worked
3 with their DetCo and superintendent, but I did not directly
4 supervise them. We did provide guidance on case
5 investigations, but I did not supervise them.

6 Q. You were never part of a security forces squadron?

7 A. I was when I deployed to Iraq. I was part of the
8 820th Security Forces Group and the 822nd Security Forces
9 Squadron in 2013 when we went to Talil Air Base. So I
10 actually deployed as security forces.

11 Again, I was attached to them for the deployment, but my
12 role there was -- to be clear, was not as a law enforcement
13 person. I was the legal adviser to the staff judge advocate
14 for that deployment embedded with the 822nd Security Forces
15 Squadron and the 820th Security Forces Group. They were out
16 of Moody Air Force Base, Georgia. And we went to Talil in
17 Al Nasiriyah, Iraq, in 2003.

18 Q. But you were not a security forces --

19 A. I was not credentialed as a security forces law
20 enforcement officer, no, ma'am.

21 Q. Never attended any of the security forces training;
22 correct?

23 A. That's correct, yes, ma'am.

24 Q. Colonel Youngner, I want to go through some of what
25 plaintiffs' counsel went through with you on AFOSI

1 Manual 71-121. Okay?

2 A. Yes, ma'am.

3 Q. Plaintiffs showed you -- and that's JEX 4.

4 A. Yes, ma'am.

5 Q. Go down to paragraph 4.24.1.3, page 51.

6 Okay. And so this is the paragraph that -- 424.1.3, the
7 case file.

8 This is the paragraph that plaintiffs' counsel is talking
9 to you about; correct?

10 A. Yes, ma'am. It was one of them.

11 Q. Okay. And this is talking about the monthly reviews;
12 correct?

13 A. Yes, ma'am.

14 Q. And at the bottom of that, it says, "The case agent and
15 supervisory or senior agent will ensure every case file is
16 reviewed monthly to ensure investigative sufficiency progress
17 and data integrity between the ROI and activity narrative and
18 note fields." Correct?

19 A. Yes, ma'am.

20 Q. I want to skip down to paragraph 4.24.4. It's on the same
21 page.

22 And it says, "Use the AFOSI investigative sufficiency
23 checklist at Attachment 7" --

24 Do you remember looking at Attachment 7 with plaintiffs'
25 counsel?

1 A. Yes, ma'am, I do.

2 Q. -- "or a more comprehensive checklist, such as a region
3 case review checklist as a guide for reviews."

4 Do you see that language there, Colonel?

5 A. Yes, ma'am.

6 Q. Then it says in that highlighted portion, "Merely use it
7 as a guide for discussion during the review."

8 Do you see that, Colonel?

9 A. Yes, ma'am, I absolutely do.

10 Q. In your experience reviewing Air Force policies, is that
11 language mandatory to use Attachment 7?

12 A. Ma'am, it is not mandatory. It is telling the reader that
13 this is a guide. And the fact that they offer that or a more
14 comprehensive checklist -- you know, my understanding is the
15 Air Force offers a checklist because they really want you to
16 use it. Usually, we come up with a checklist when we've
17 identified a problem in the Air Force.

18 So to fix that problem, we now have a checklist for you to
19 follow. So a prudent person would use that checklist to make
20 sure they get it right. But it is not mandatory, to be more
21 precise to your question.

22 Q. So it would be within the discretion of the supervisor
23 whether or not to use Attachment 7; correct?

24 A. Per this section, yes, ma'am.

25 Q. Now, you talked about, with plaintiffs' counsel, weekly

1 reviews; correct?

2 A. Monthly and weekly reviews, yes, ma'am.

3 Q. Can you point me to the portion of this manual or any
4 AFOSI regulation that requires a mandatory weekly review of
5 the file?

6 A. No, ma'am. I believe the only thing I could point to
7 would be monthly reviews. I do recall witnesses testifying
8 about weekly reviews, but I don't recall a point in this
9 manual that says anything other than monthly reviews once it's
10 been opened.

11 Q. So doing a weekly review would be at the discretion of the
12 supervisor?

13 A. Yes, ma'am. Or the case agent themselves, if they wanted to
14 be, you know, diligent.

15 Q. Now, I want to talk about -- I think you mentioned this
16 earlier when we were talking about you reviewing the
17 investigative sufficiency of the file. Can we move to that.

18 A. Yes, ma'am.

19 Q. As a judge advocate.

20 A. Now, you are talking about the Kelley file in particular?

21 Q. No, Colonel Youngner. I'm just talking about your
22 experience as a judge advocate reviewing with case agents the
23 legal sufficiency of the file.

24 A. Yes, ma'am.

25 Q. Okay. Now, when you're reviewing -- in your Air Force

1 career, when you were reviewing the legal sufficiency of the
2 file, you can't ever remember asking agents if they had
3 submitted fingerprints, can you?

4 A. I cannot remember that, ma'am.

5 Q. You were just discussing with the agents what information
6 they would need to prove their case?

7 A. The focus was on the elements-of-proof worksheet, you
8 know, witnesses and evidence needed to prove that case. And
9 then if there were questions over rights advisements or
10 probable cause, we would discuss those.

11 Q. Sure. But nothing about fingerprints?

12 A. As I recall -- frankly, I remember the very first time I
13 went down to the det at Bolling and we had the folder. I
14 didn't know there was a thing called case notes, and they
15 explained that to me. And that very first time, I actually
16 saw a fingerprint card.

17 And that predates the NICS requirement, but -- so it was
18 kind of cool to me, as a young captain JAG, to see just what
19 all went into, frankly, the really hard work that a good OSI
20 agent does to put that file together. So I have seen them
21 before, coincidentally. But that didn't cause me, at that
22 stage of my career, as a captain, to say, "Oh, don't forget
23 about these fingerprints." And, frankly, timing-wise, that
24 was in the early 90's.

25 Q. Nor did you discuss fingerprint submission with security

1 forces personnel; correct?

2 A. No, ma'am. That's correct.

3 Q. It's not something you would do with security forces?

4 A. As a staff judge advocate, no, unless there was some --
5 you know, if we had any -- so short answer is no. Unless
6 there was some reason to, no, there would not.

7 Q. Now, I want to talk a little bit about security forces'
8 responsibilities to submit final disposition reports. Okay?

9 A. Yes, ma'am.

10 Q. And you said this a couple of times when you were talking
11 to plaintiffs, and so I just want to clear this up.

12 A. Certainly.

13 Q. You were talking about investigative responsibility.

14 Do you remember that topic?

15 A. Generally, yes.

16 Q. Okay. And you said that, generally, one agency had
17 investigative responsibility for the case; correct?

18 A. Yes, I did.

19 Q. You've reviewed the Kelley case; correct?

20 A. Yes, I have.

21 Q. And you know that SF, security forces, did some
22 investigation on an alleged assault of Tessa Kelley; correct?

23 A. That's correct.

24 Q. And that investigation resulted in a letter of reprimand;
25 correct?

1 A. I'm aware of that. That was from February 2012, if I'm
2 not mistaken.

3 Q. And a letter of reprimand is not a criminal action;
4 correct?

5 A. It's an administrative sanction. It's an unfavorable
6 information file matter.

7 Q. Not a criminal action?

8 A. No. It's to reflect the conduct. The conduct that
9 it's -- it's basically a censure, a reprimand. And it's based
10 on typically some type of either poor performance or
11 misconduct. So there was misconduct. There was a criminal
12 act. It's just it wasn't a sentence or a conviction. It was
13 simply an administrative sanction for the criminal act cited
14 in that -- and a very low-level slap on the wrist, if you
15 will, as how I would describe that. It's certainly not a
16 conviction.

17 Q. And then OSI did what you would characterize as a separate
18 investigation on domestic abuse concerning Tessa Kelley;
19 correct?

20 A. That predated it in June of 2011, prior to the security
21 forces doing their separate incident. So OSI took the
22 fingerprints in '11. The security forces did not take
23 fingerprints in February of '12 -- 2012.

24 Q. And I'm not talking about fingerprints.

25 I'm asking did OSI conduct its own separate investigation

1 on domestic violence regarding Tessa Kelley?

2 A. Yes, ma'am.

3 Q. Okay. And that also included the allegation of the
4 assault on the stepson; correct?

5 A. Ultimately, it did. Yes, ma'am.

6 Q. And that investigation resulted in a court-martial;
7 correct?

8 A. That's correct.

9 Q. And that court-martial -- after that court-martial, there
10 was a final disposition report; correct?

11 A. Yes. There were two opportunities for final disposition
12 reports.

13 Q. Colonel Youngner, I'm not asking about opportunities.

14 All I'm asking is, at the end of that court-martial, there
15 is a result of trial that's a final disposition report;
16 correct?

17 A. There are -- is a report, a result of trial. And there
18 are two final disposition reports in the Kelley case.

19 Q. Okay. And on that report of result of trial, there's a
20 distribution list; correct?

21 A. That's correct.

22 Q. Ten entities on there, isn't there?

23 A. I'd have to count the number, but it sounds right.

24 Q. Not all of those entities have a requirement to submit
25 that report; correct?

1 A. Yeah. The only two that have a requirement are the
2 security forces confinement facility supervisors and the OSI.
3 The rest of them do not have a requirement.

4 Q. And the only reason that security forces has the
5 responsibility is because there was confinement; correct?

6 A. That's correct. For AFI 31-, I believe it's 205.

7 Q. Okay. So they don't have an independent responsibility
8 just because the investigation of the assault of Tessa Kelley
9 resulted in a court-martial conviction; correct?

10 A. I disagree. They have an independent responsibility
11 through their own instruction, AFI 31-205, that requires them
12 to because of the confinement and the nature of the offenses
13 that led to that confinement being subject to punishment
14 beyond a year and domestic violence.

15 Q. But because of the confinement, security forces has --

16 A. Yes. Absolutely.

17 Q. Okay.

18 A. Absolutely.

19 Q. OSI has the responsibility because they were the lead
20 investigative agency; correct?

21 A. That's correct, yes, ma'am.

22 Q. Okay. So the reason that there's the responsibility to
23 submit that final disposition report -- it's two different
24 reasons; correct?

25 A. That's correct. Absolutely. Yes, ma'am.

1 Q. Okay. So if security forces -- if Devin Kelley had not
2 been sentenced to confinement, hypothetically, after this
3 court-martial, he just got a bad conduct discharge, he had not
4 been sentenced to confinement, security forces wouldn't have
5 had a responsibility to submit the report; correct?

6 A. I believe you are correct there. The only question I have
7 on this case is, because he was in pretrial confinement, you
8 know, would there have -- I would have to go back and check
9 31-205 to see what is the criteria requiring submission when
10 someone is convicted but not sentenced to any more
11 confinement.

12 Because there could be a judge -- I've seen cases where
13 the pretrial confinement period was long enough to satisfy the
14 sentence to confinement, so to get a bad conduct discharge and
15 no additional time.

16 But back to your hypothetical, I could imagine -- and I
17 believe there could be a scenario where there wouldn't have
18 been an independent security forces requirement, but those
19 aren't the facts of this case. The facts of this case are
20 there was an independent requirement.

21 Q. Because of the confinement?

22 A. Yes, ma'am.

23 Q. Okay. Not because security forces had investigated some
24 abuse of Tessa Kelley that resulted in an LOR?

25 A. No. The issue with security forces had to deal with

1 fingerprints as the second prong. And I'll leave that to
2 y'all to -- let me stop there. Yes, ma'am.

3 Q. Okay. Now, you talked a little bit about -- while we're
4 on the subject of security forces -- the DODIG report that
5 indicated that security forces only had a 64 percent
6 completion rate or submission of final disposition reports;
7 correct?

8 Do you remember talking about the DODIG report, JEX 1,
9 with plaintiffs' counsel?

10 MR. ALSAFFAR: Objection, Your Honor. It's just --
11 counsel is misstating the evidence. It's 60 percent failure
12 rate, not compliance rate in that report.

13 THE COURT: You can clean that up.

14 Go ahead.

15 BY MS. CHRISTILLES:

16 Q. Colonel Youngner, do you remember talking about the
17 compliance rate of security forces, as referenced in that
18 DODIG report?

19 A. Yes, ma'am, I do remember that. I think it was the 2017
20 report.

21 Q. Sure. Do you remember what OSI's compliance rate was in
22 that report?

23 A. It was much higher. They had about a 88, an 87-or-so
24 percent compliance. They were missing 12 or 13 percent.

25 So the aggregate for the Air Force was what you had, the

1 high 60 percent number for too, but that was mainly because of
2 security forces.

3 Q. So if we look at JEX 1 at page 31.

4 I won't make you guess on what that compliance rate was.
5 Just take a look.

6 A. Okay.

7 Q. So, Colonel Youngner, if you look at the bottom of that
8 document, which is part of JEX 1 which plaintiffs' counsel
9 showed you.

10 A. Right.

11 Q. It looks like a 93.86 percent success rate for
12 fingerprints and 93.48 percent success rate for final
13 dispositions; correct?

14 A. Yes, that's correct.

15 Q. Okay. Let's talk a little bit about the evidence you did
16 review for this Kelley case -- or for the Kelley case.

17 Okay, Colonel Youngner?

18 A. Certainly. Yes, ma'am.

19 Q. Okay. Sorry. Plaintiffs' counsel was getting up, and I
20 thought he was going to object to me.

21 MR. ALSAFFAR: Sorry. I'm just grabbing a binder.

22 BY MS. CHRISTILLES:

23 Q. All right. I want to go back to what plaintiffs' counsel
24 talked to you about.

25 They talked to you about information that was in a barment

1 letter; correct?

2 A. Yes, ma'am. The recommendation and then two days later --
3 I think it was the 29th of March '13, the barment letter, the
4 actual order.

5 Q. And it talked about in there some alleged threats to
6 leadership; correct?

7 A. Yes, ma'am.

8 Q. And I think that you indicated that there were four
9 instances of threats to leadership?

10 A. Well, there were -- I think the question, as I recall,
11 included threats known by leadership. Some were to leadership
12 and some were to a former supervisor. The last one I recall
13 was communicated Master Sergeant Bizzack, and it was after
14 Kelley had separated.

15 But on the barment letter, there were threats
16 communicated, I believe, to -- so, yes, to answer your
17 question, there were probably three, I think, while he was
18 still on active duty that were known at the time of that
19 barment letter, to the best of my recollection.

20 Q. He told his wife, correct, that he -- if he had a shotgun,
21 he would shoot his leadership, allegedly?

22 A. Yes.

23 Q. And at the time, that was Tessa Kelley, correct?

24 A. That's correct, yes, ma'am.

25 Q. So that was a communication to his wife?

1 A. Yes, ma'am, that's correct.

2 Q. Okay.

3 A. And I don't know if she then communicated that to -- or
4 when she would have passed that on to the OSI agents, I
5 believe, in the case.

6 Q. And then you referenced some alleged threats to Master
7 Sergeant Bizzack; is that correct?

8 A. Well, it was passed on to Sergeant Master Bizzack. I'm
9 trying to remember if it was Ms. Rowe. But it was another --
10 it was a supervisor who then passed that on. There was also,
11 I believe, a Sergeant Edwards who he may have discussed some
12 concerns with.

13 But, again, I'm trying to keep the date -- I'd have to go
14 back and review my report or other matters to find those
15 specific instances.

16 And then I don't know what was communicated out of Peak to
17 the leadership, but the letter -- the barment letter that you
18 oriented me to cited the nature of the threats, and I'm trying
19 to recall what I reviewed.

20 Those seem to sick out in my mind, those three.

21 Q. Okay. Well, let's take a look at the statement of
22 Ms. Rowe that she made after the shooting, and that's JEX 511.

23 I'm just trying to get up here so we can blow it up for
24 you.

25 A. Yes, ma'am.

1 MS. CHRISTILLES: It's the second paragraph there.

2 BY MS. CHRISTILLES:

3 Q. Ms. Rowe says she first meets Kelley in 2010. Upon
4 meeting Kelley, she immediately thought he was odd and even
5 told co-workers they needed to keep an eye on him because he's
6 the type of guy who will come to shoot us.

7 Do you remember viewing that statement?

8 A. I do, yes, ma'am.

9 Q. Did you review any statements from Ms. Rowe in the OSI
10 investigative report?

11 A. I'd have to -- I'd have to go back and look at that. I
12 just don't recall. So I don't recall. I may have, but this
13 may -- I just -- I'm not certain. So since I'm not certain, I
14 can't confirm that I did.

15 Q. So Ms. Rowe opines after the shooting -- or states to
16 investigators after the shooting -- and I can pull up the date
17 on this, if you'd like.

18 But she tells investigators after the shooting that she
19 told co-workers they needed to keep an eye on him because he's
20 the type of guy who will come shoot us; correct?

21 A. That's correct. So before the shooting, while he was on
22 active duty, she informed co-workers of this concern. But
23 there was no evidence of her, that I'm aware of, filing a --
24 you know, she didn't go report it to OSI or to security forces
25 but, she did alert her co-workers.

1 Q. And it was because she had a feeling; correct?

2 A. That's what she said, yes, ma'am.

3 Q. No actual threat from Mr. Kelley -- from Devin Kelley?

4 A. At that point, no, ma'am.

5 Q. Okay. Any threatening messages to Ms. Rowe were well
6 after Devin Kelley had left the Air Force; correct?

7 A. I believe so. Yeah, she --

8 Q. Well --

9 A. I'm sorry. Please.

10 Q. No. Go ahead.

11 A. I don't want to speculate again or try to -- I don't want
12 to confuse Rowe and Edwards and who deserves a dirt ending or
13 something like that, words to that effect. So I think it's in
14 the record and --

15 Q. Well, we can look down at Ms. Rowe's statement, those last
16 couple of paragraphs.

17 A. Right.

18 Q. It indicates, in May of 2017, Rowe received a second
19 Facebook message from Kelley.

20 That would have been after Devin Kelley had left the
21 Air Force; correct?

22 A. Right. And I guess there were -- and above that is some
23 concerns communicated to Bizzack as well. So yes, ma'am.

24 Q. And you talk about Master Sergeant Bizzack as well.

25 Let's look at JEX 517.

1 And according to Master Sergeant Bizzack, he had a gut
2 feeling that if there were ever going to be someone who would
3 shoot up the shop, it would be him?

4 A. Yes, ma'am.

5 Q. Stating there was something that was off about him;
6 correct?

7 A. That's -- yes, ma'am, that's right.

8 Q. And this was in a statement that he gave to investigators
9 after the shooting; correct?

10 A. That's correct, ma'am. Any actions he would have taken at
11 the time would have been in the PIF, the personnel information
12 file. And that's a separate document that OSI did have as
13 part of their investigation.

14 And that covers, like you mentioned, that letter of
15 reprimand from before. There are other lists of actions taken
16 to reflect the misconduct of Devin Kelley, at least prior to
17 the court-martial in that PIF.

18 Q. That's right. Actually, Ms. Rowe gave Devin Kelley
19 multiple letters of counseling and multiple letters of
20 reprimand; correct?

21 A. There were unfavorable information letters throughout
22 that, along with letters from more senior leaders within the
23 squadron.

24 Q. You wouldn't consider an administrative action as a
25 positive thing for an airman, would you?

1 A. Oh, those are not -- those are adverse administrative
2 actions. There are positive ones. But most everything -- I
3 don't recall seeing any positive administrative action on the
4 two pages of the PIF for Airman Basic Devin Kelley when I
5 reviewed it. And there were multiple -- anyway, I hope that
6 answers your question.

7 Q. So it's fair so say that Ms. Rowe took some unfavorable
8 actions against Kelley while he was in the Air Force; correct?

9 A. Yes, she did.

10 Q. And you did mention Jessika Edwards; right?

11 A. I did.

12 Q. Now, any statements made to Jessika Edwards were after she
13 had left the Air Force; correct?

14 A. As I recall, yes, ma'am.

15 Q. Okay. So those wouldn't have been known to an Air Force
16 employee; correct?

17 A. I don't believe so, unless she communicated it. And so it
18 would not.

19 Q. Okay. You didn't see any evidence in your review of the
20 file that Jessika Edwards communicated those things to anyone
21 in the Air Force, did you?

22 A. I did not, that I can recall. I believe she did not.

23 Q. When reviewing the file, do you recall any firsthand
24 statements from anyone where Devin Kelley threatened to shoot
25 them or shoot up the squadron?

1 A. The -- Tessa Kelley is the immediate one that comes to
2 mind. And beyond that, I don't believe that his research at
3 Peak was communicating a threat. So that would be the --
4 right now, the direct communication was to his wife, Tessa
5 Kelley.

6 Q. Now, you talked a little bit with plaintiffs' counsel
7 about some of the things in the OSI file regarding sexual
8 assaults; correct?

9 A. Yes, they were reviewed by counsel.

10 Q. Colonel Youngner, you haven't done any independent
11 research on whether or not sexual assault would lead to a mass
12 shooting, have you?

13 A. I have not done that type of research.

14 MS. CHRISTILLES: Your Honor, may I have five
15 minutes?

16 THE COURT: Yes. So while we're on break -- and I'm
17 not sure if this is going to influence you asking more
18 questions -- but I'm now, frankly, confused.

19 You've asked a number of questions suggesting that
20 there was no evidence before the Air Force. And I'm wondering
21 then if there was no evidence, pursuant to your argument, how
22 was it that the Air Force is writing on March 27th, 2013, that
23 he's got severe mental health problems, violent and dangerous
24 behavior, and well-documented history of making threats?

25 The commander issues that order on March 29th, giving

1 an order of expulsion and ordering him not to enter the base.
2 And then on April 26th, a year earlier, the Air Force's
3 assessment, which OSI is present for, gives him all those
4 ratings on his rage and violence score.

5 So I'm, frankly, confused about the argument of
6 there's no evidence before the Air Force.

7 And then the other question I'm wondering about is,
8 if I understand your argument right, you're saying that the
9 only entity that had an obligation to forward the final
10 determination report was the 49th Squadron because they were
11 in charge of the brig.

12 Is that your argument?

13 MS. CHRISTILLES: No, Your Honor. And I was trying
14 to clean that up a little bit, because I think it got
15 confused.

16 THE COURT: So I am confused, just to let you know.

17 MS. CHRISTILLES: Sure.

18 THE COURT: So I need you to clean up for me -- what
19 is your argument? Who had the -- from your perspective, I
20 think I'm hearing sole responsibility. So I need that cleaned
21 up.

22 And then the last point I'm confused about was, so
23 somewhere in this -- and I was looking for it, and I can't
24 find it now -- I thought there was a requirement by either the
25 49th or the OSI that, upon probable cause, they should have

1 issued the fingerprint -- forwarded the fingerprints.

2 And so, I mean, based upon all these requests for
3 expulsion and the commander's order not to enter, I mean,
4 wasn't that probable cause?

5 MS. CHRISTILLES: Your Honor, if I may.

6 THE COURT: Yeah.

7 MS. CHRISTILLES: I'm going to start with what I
8 think is the easiest one: the final disposition after
9 court-martial.

10 OSI did have a requirement to submit the final
11 disposition. It was based on the fact that they were the
12 investigative agency handling that case.

13 Because Devin Kelley was also sentenced to
14 confinement, we have stipulated that security forces also had
15 a duty because of the confinement. But security forces didn't
16 also have a duty because they had investigated him. And I
17 think that -- and it may be my confusion with what I hear
18 plaintiffs saying, but what I thought I heard plaintiffs
19 arguing was that OSI had a duty to send it in because they
20 were the investigative agency, but so did security forces.

21 And, Your Honor, I think Colonel Youngner has cleared
22 that up for us. That's not true.

23 OSI had to submit it because they were the
24 investigative agency. Security forces had to submit it simply
25 because they were the confinement facility.

1 THE COURT: And didn't security forces, though, also
2 have a requirement to submit the fingerprint card earlier?

3 MS. CHRISTILLES: And, sir, I can -- Your Honor, I
4 can cover that, if you would like. It's separate from the
5 final disposition report.

6 THE COURT: Right. And I understand that.

7 MS. CHRISTILLES: The final disposition report is
8 actually what results in the denial. The probable cause
9 fingerprint submission will not result in a denial, which is
10 what I think --

11 THE COURT: But won't it result in a delay?

12 MS. CHRISTILLES: It may, Your Honor. It may.

13 THE COURT: Okay. Thank you for putting me back on
14 track because I was losing sight of the argument.

15 Okay. Let's -- well, it's 4:34. How much more do
16 you have with him?

17 MS. CHRISTILLES: If we could take five minutes, I
18 can give you an accurate assessment, Your Honor.

19 THE COURT: Okay. Let's take five.

20 (Recess.)

21 THE COURT: Do you have other questions?

22 MS. CHRISTILLES: I just have a couple, Your Honor.

23 But before we proceed, I just -- one more thing on
24 the security forces thing. There's been testimony about these
25 missed opportunities, and one of those was security forces

1 collecting the fingerprints in February, which is what Your
2 Honor was alluding to.

3 It's the government's position that for purposes of
4 proximate cause, that couldn't have been the proximate cause
5 because it would have never resulted in a denial. And so
6 that's why the --

7 THE COURT: I thought I'd just give you advance
8 warning of a question I have. It could have potentially
9 resulted in a delay. And so the delay could have potentially
10 put the FBI on notice that, hey, maybe we need to check
11 further. And they could have found the conviction.

12 I mean, that's one potential route that this could
13 have led to; right?

14 MS. CHRISTILLES: Except that, Your Honor --

15 THE COURT: And so I don't mean to engage in argument
16 right now.

17 MS. CHRISTILLES: Sure.

18 THE COURT: I just want to give you fair warning
19 about what's popping into my head so you all can be prepared
20 to respond to it.

21 MS. CHRISTILLES: Yes, Your Honor. And we can more
22 fully brief on once it goes in as probable cause and then
23 there's no final disposition, what happens to it.

24 THE COURT: And I generally -- I would never do this
25 in front of a jury. But since this is just a bench trial, as

1 questions arise, I'm going to give both sides fair notice
2 about what questions are going through my mind.

3 MS. CHRISTILLES: Yes, your Honor.

4 MR. ALSAFFAR: Appreciate it.

5 MS. CHRISTILLES: That may be more appropriately
6 briefed or handled with a different witness. I don't think
7 that Colonel Youngner is qualified to answer that.

8 MR. JACOB: And Your Honor, just to be clear, we
9 disagree with that assessment.

10 THE COURT: I knew you would.

11 MR. JACOB: Yeah.

12 THE COURT: Anything further for Colonel Youngner?

13 MS. CHRISTILLES: I do just have a couple more
14 questions, Your Honor.

15 THE COURT: Go ahead.

16 BY MS. CHRISTILLES:

17 Q. Colonel Youngner, we were talking about -- or, actually,
18 you were talked about plaintiffs about the case agents
19 touching the file; correct? Do you remember that?

20 A. I do recall that, yes.

21 Q. And they showed you an Excel spreadsheet with a bunch of
22 different lines on it, and it would say "locked" or "opened."
23 Correct?

24 A. There were two of those, yes. It was JEX 348 and JEX 349.
25 Yes, ma'am.

1 Q. That would have been the electronic file that they were
2 closing and opening; correct?

3 A. That's correct, yes, ma'am.

4 Q. And the fingerprints for Devin Kelley were hard copy;
5 correct?

6 A. Those fingerprints were hard copy, and -- but, you know --
7 yes, ma'am, to answer your question.

8 Q. So they wouldn't have been in the electronic file;
9 correct?

10 A. The fingerprints would not have been in the electronic
11 file.

12 Q. Okay. And you aren't aware of any regulation that
13 requires a case agent, every time they touch a file
14 electronically, to verify that hard-copy fingerprints have
15 been submitted; correct?

16 A. Every time they do it, that would not be a requirement,
17 only when they are running the two checklists, which, you
18 know, you could do IDP -- excuse me, an internal data page
19 note or -- about what you've accomplished or you could do an
20 I2MS entry as well.

21 Anyway, I'll just leave it at that.

22 Q. And there is no requirement that makes it mandatory for a
23 supervisor to, every time they electronically touch that file,
24 to determine that the fingerprints have been submitted?

25 A. No. It's just an opportunity. It's not a requirement.

1 It's an opportunity.

2 Q. It's an opportunity? Nothing mandatory?

3 A. The only -- again, it's -- there's nothing mandatory in
4 making an electronic note that requires checking for
5 fingerprints or FDR every time, that's correct.

6 MS. CHRISTILLES: I'll pass the witness, Your Honor.

7 THE COURT: Any redirect?

8 MR. ALSAFFAR: Very brief, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. ALSAFFAR:

11 Q. On that last point, Colonel Youngner, that the
12 U.S. attorney was asking you about, there's -- the agents and
13 the supervisor is required to document electronically whether
14 they submitted the fingerprints or conviction when it's a
15 qualifying offense; is that correct?

16 A. So I'm going to ask you, sir -- I'm sorry. I'm having a
17 little trouble hearing you.

18 Q. I didn't have my mic on. That's my fault.

19 A. Okay.

20 Q. Responding to what the U.S. attorney just said, the
21 supervisory agents and the case agents are required to
22 electronically -- in the electronic file, document their
23 submission of fingerprints and convictions when it's a
24 qualifying offense.

25 That's required to be put into the electronic file, isn't

1 it?

2 A. Ultimately, there is a requirement to note that, and
3 that's a separate question than what defense counsel had
4 asked.

5 So, yes, sir, there is an electronic requirement, but --
6 to be clear on both. So there's a requirement to note that.
7 And then whether there's a requirement to look at it each
8 time, no, there's an opportunity to correct your problems each
9 time.

10 Q. And that mandatory instruction that talks about the
11 mandatory monthly reviews, that's Section 71-121 -- and I
12 believe that's Section 4.24.1.3 -- let me pull it up for you.

13 It's Joint Exhibit Number 4, page 51, real quickly.

14 When the U.S. attorney was asking you these questions, she
15 didn't show you this part of that mandatory section that dealt
16 with the monthly case reviews, so I want to show it to you.

17 Just give us a second. It's Joint Exhibit 4 and page 51.
18 It's just not showing on the screen. That's all. That's
19 okay. That's all right.

20 If we could just narrow it on 4.24.1.3, the case file
21 review, page 51. That's JX 5. You've just got the wrong
22 number up. It's JX 4. It's Joint Exhibit 4, page 51. There
23 you go. Thank you. That's okay.

24 What is one of the -- if you look at "for example," what
25 is one of the examples the mandatory instruction is showing

1 relating to these mandatory monthly reviews?

2 A. This references the final disposition report Form R-84.

3 Q. Okay. And you were asked about this -- the checklist.

4 The checklist isn't mandatory rule; the mandatory rule is
5 the actual rule.

6 Does that make sense?

7 A. In other words, the mandatory rule is what's required to
8 be submitted. The checklist is a tool to make sure you comply
9 with that.

10 In fact, OSI developed a checklist, in part, in response
11 to the DODIG reports. That was in one of the reports. It
12 made it clear that, "Hey, we're just getting ahead of this.
13 We're going to fix it." And OSI demonstrated some success,
14 though -- anyway, I'll just leave it at that.

15 Q. Right. After the -- in the 2017 report.

16 But what I want to ask you about regarding that checklist
17 part that you were asked about on cross-examination is -- is
18 that -- well, first of all, just to be clear, the checklist
19 actually has the required submission fingerprints and
20 convictions; right? It's on the checklist; right?

21 A. Those are on the checklist; in fact, in a couple places on
22 one of them.

23 Q. Well, let's just assume this. Let's assume it wasn't on
24 the checklist. And the checklist is just a guide anyway. And
25 let's just assume they just forgot to put it on the checklist.

1 Would that absolve the Air Force of the mandatory
2 instruction that says you still have to submit fingerprints
3 and convictions?

4 A. No. There was still the requirement.

5 Q. Okay. The U.S. attorney had asked you and showed you
6 about the Air Force, in 2017, sort of finally getting up to
7 speed and having a better success rate on this issue that had
8 plagued it for 30 years, the compliance rate -- or at least on
9 the OSI side. Not on the security forces side, but the OSI
10 side.

11 Do you remember that?

12 A. That's correct.

13 Q. All right. And I want to show you plaintiffs' -- I'm
14 sorry not plaintiffs' exhibit -- Joint Exhibit 433. Start
15 with page 1.

16 The Air Force actually conducted a review of what the
17 consequences were of their failures over that time period,
18 1998 through present; correct?

19 THE COURT: One second.

20 THE WITNESS: That's correct.

21 MS. CHRISTILLES: Your Honor, objection. That's
22 outside the scope of cross-examination.

23 THE COURT: Sustained.

24 MR. ALSAFFAR: Okay.

25 Can we show Joint Exhibit 173, page 1 and 2. It's

1 just a two-page document.

2 BY MR. ALSAFFAR:

3 Q. And do you remember when Ms. Christilles was asking you
4 about Ms. Rowe, and she was showing you another statement from
5 the FBI summary of her statement from the FBI?

6 Do you remember that?

7 A. I do recall that, yes.

8 Q. I'm showing you Joint Exhibit 173.

9 Can I see where the highlights are? Thank you.

10 I'm showing you Joint Exhibit 173, which was -- this was
11 the one you were referring to with the U.S. attorney when you
12 were talking about what you reviewed for your report; correct?

13 A. Right. This was one of the documents that was also
14 referenced in the personnel information file of Airman Kelley
15 when he was in the Air Force.

16 Q. And this was actually the Department of Defense's
17 investigation interview with Ms. Rowe; right?

18 A. Yes. That's my understanding.

19 Q. And I'm showing you -- under the paragraph "interview," if
20 you can highlight that for the colonel.

21 This is where Ms. Rowe states that she was the supervisor
22 in 2010.

23 Do you see that?

24 A. Yes.

25 Q. And then little bit down, she says, "After that point" --

1 so when she was supervising Mr. Kelley, she began to observe
2 behavior issues with him or red flags.

3 Do you see that?

4 A. I do.

5 Q. And so she's reporting -- is she reporting these red flags
6 that she was noticing while she was supervising him prior to
7 his release from the Air Force?

8 A. Right. And those are the -- so this document wasn't in
9 the PIF, to be clear about what I said before. But the
10 actions she took about it were reflected in that personnel
11 information file.

12 Q. And a little further down, she states her uneasiness
13 regarding Devin Kelley resulted in her telling her supervisor,
14 Master Sergeant Troy Bizzack, "We need to watch this guy
15 because he's the kind of person who will come and shoot
16 everybody"?

17 A. Yes.

18 Q. Okay. And so she was --

19 A. That's what she said.

20 Q. And then if you go a little bit down on page 2, just the
21 next page, the top paragraph starting with "Rowe said." This
22 is Ms. Rowe reporting about her time in the Air Force when
23 Devin Kelley there was.

24 She stated -- Rowe said that "All of the supervisors in
25 her shop were concerned that Kelley had firearms. This

1 included the unit secretary, Master Sergeant Bizzack, Sergeant
2 Lindemann, and Captain Elizabeth Nugent."

3 Do you see that?

4 A. I do see that, yes.

5 Q. Those are multiple service supervisors she was reporting
6 to while she was in the Air Force prior to the shooting;
7 correct?

8 A. That's correct.

9 MR. ALSAFFAR: Pass the witness, Your Honor.

10 THE COURT: Anything else?

11 RECROSS-EXAMINATION

12 BY MS. CHRISTILLES:

13 Q. Just to clarify a couple of those with Ms. Rowe's
14 statements.

15 Plaintiffs' counsel asked you about actions in the PIFs
16 with regard to the red flags.

17 Do you remember that question?

18 A. Yes, ma'am. However, I'm having a little more trouble
19 hearing you as well.

20 Q. That's because Mr. Alsaffar and I don't know how to turn
21 our microphones on.

22 THE COURT: You're going to be speaking out of this
23 microphone, so if you'll just pull this one.

24 MS. CHRISTILLES: Yes, Your Honor. I didn't have it
25 on, which might be the problem.

1 BY MS. CHRISTILLES:

2 Q. You hear me now, Colonel Youngner?

3 A. I can, yes, ma'am.

4 Q. Great.

5 Mr. Alsaffar had asked you about actions in the PIF with
6 regard to the red flags; correct?

7 A. In general, yes, regarding Ms. Rowe.

8 Q. You don't remember seeing anything in the PIF about
9 actions taken because Devin Kelley had threatened to shoot his
10 supervisors; correct?

11 A. I don't recall direct threats to supervisors. I can't
12 remember if there were -- there may have been an entry after
13 the Peak incident where he was researching some matters there.

14 So -- but, again, the researching body armor and tactics,
15 techniques, procedures that may have been one entry in the
16 PIF. But the threat that he made -- or communicated to his
17 wife and the concerns that Ms. Rowe had, I did not see those
18 reflected in a letter of reprimand or admonishment or
19 counseling or in the high-risk violence response teams. And
20 then there were a couple other areas entered.

21 So, no, I don't recall that specifically.

22 MS. CHRISTILLES: Nothing further, Your Honor.

23 THE COURT: Anything else?

24 MR. ALSAFFAR: No, Your Honor.

25 THE COURT: Can this witness be excused?

1 MR. ALSAFFAR: Yes, Your Honor.

2 MS. CHRISTILLES: Yes, Your Honor.

3 THE COURT: Thank you, Colonel Youngner.

4 THE WITNESS: Yes, Your Honor. Thank you, sir.

5 THE COURT: So we will resume at 9:00. Thank you for
6 keeping us to the schedule, and so we are on schedule. We'll
7 resume at 9:00 with the next set of witnesses by Zoom.

8 I hope I don't jinx us by saying this, but I've been
9 asked to be part of a judge presentation to speak to federal
10 and state judges about what technology is working and not
11 working. Knock on wood, this seems to be working.

12 MR. ALSAFFAR: Except for the mic buttons.

13 THE COURT: So the request is -- and I guess it's of
14 your IT guy, along with Daniel -- can you all provide me a
15 short summary of what equipment we have in here?

16 MR. ALSAFFAR: Yeah.

17 THE COURT: So I know what to pass on to my
18 colleagues, saying what equipment seems to be working.

19 I just need a couple of pages. I don't need
20 paragraphs of that too. What the make and model of your
21 camera is and all of that. That's what I'm sort of looking
22 for. I don't know if that's your equipment, or is this the
23 court equipment? This is not my courtroom, usually.

24 MR. ALSAFFAR: That's the court's.

25 THE COURT: It's the court's?

1 So you might want to talk to Daniel about how does he
2 hook that up to Zoom. I'd probably need an explanation of
3 that.

4 MR. ALSAFFAR: Be glad to.

5 THE COURT: And so thank you.

6 MR. ALSAFFAR: Judge, when do you need it by?

7 THE COURT: Oh, two weeks. I mean, I'm just -- so
8 it's a thought that hit me. I've been invited to the program.
9 And so all of a sudden, I thought let me make the request as
10 I'm thinking about this.

11 MR. ALSAFFAR: Will do.

12 THE COURT: Anything else we need to take up before
13 we adjourn for today?

14 MR. ALSAFFAR: I don't have anything.

15 Paul, are you good?

16 MR. STERN: Good.

17 MR. ALSAFFAR: Okay.

18 THE COURT: You're welcome to leave your stuff here.
19 This courtroom will be locked up. Or you can take what you
20 want to take.

21 We're adjourned.

22 MR. ALSAFFAR: Thank you, Your Honor.

23 (Proceedings continued in progress.)

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2 I certify that the foregoing is a correct transcript from
3 the record of proceedings in the above-entitled matter. I
4 further certify that the transcript fees and format comply
5 with those prescribed by the Court and the Judicial Conference
6 of the United States.

7
8 Date: 04/09/2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
 .
 PLAINTIFFS, .
 vs. . DOCKET NO. 5:18-CV-555-XR
 .
 UNITED STATES OF AMERICA, .
 .
 DEFENDANT. .
 .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 12, 2021

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SAN ANTONIO, TEXAS

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1 *(San Antonio, Texas; April 12, 2021, at 8:59 a.m., in open*
2 *court.)*

3 THE COURT: Thank you. Please be seated.

4 Good morning. Well, I'm on -- I'm on mute. Let's try
5 again. Here we go.

6 Good morning. We'll resume with 18-civil-555. I remind
7 all counsel, parties, witnesses, participants, and members of
8 the public that this is a formal proceeding and that they
9 should behave at all times as if they were present in the
10 courtroom.

11 The standing order of the San Antonio Division of the
12 Western District of Texas on remote access to court
13 proceedings remains in effect.

14 Photography, recording, or streaming of this proceeding,
15 by any means, is strictly prohibited. Though this proceeding
16 is open to the public, technological restraints require that
17 members of the general public request access the courtroom
18 deputy to participate remotely. Those granted approval to
19 participate remotely must not forward the electronic link to
20 nonparticipating colleagues or persons and must not post the
21 link on any public forum.

22 As with all proceedings, violation of these instructions
23 are subject to contempt proceedings. Accordingly, please
24 exercise proper decorum at all times.

25 Good morning. And with that, we'll begin your next

1 witness, please.

2 MR. STERN: Your Honor, I think there's a few
3 housekeeping matters to take care of --

4 THE COURT: Okay.

5 MR. STERN: -- first.

6 The government is going to withdraw Daniel Breyer from its
7 witness list. The government can move up Stephen Barborini to
8 Tuesday or leave him on Wednesday. However, it leaves
9 somewhat of a gap either Tuesday afternoon or Wednesday
10 afternoon.

11 And so we'll defer to the Court on how to handle its own
12 schedule.

13 THE COURT: Let's get through today, and we'll see
14 where we land.

15 MR. STERN: Fair enough.

16 THE COURT: Yes, sir?

17 MR. ALSAFFAR: That's it, Your Honor.

18 THE COURT: Good enough.

19 Your next witness.

20 MR. STERN: One other minor issue, and that is
21 Dr. Fox is going to be appearing in person, if that's okay
22 with Your Honor.

23 THE COURT: Yes.

24 MR. STERN: And that would be Friday.

25 THE COURT: Thank you.

1 MR. STERN: Thank you.

2 MR. ALSAFFAR: Nothing from us, Your Honor.

3 THE COURT: Your next witness.

4 MR. JACOB: Your Honor, plaintiff calls Jon Rymer to
5 the stand via remote.

6 THE CLERK: Mr. Rymer, if you'll raise your right
7 hand, please.

8 *(The oath was administered)*

9 THE CLERK: Thank you.

10 JON RYMER, PLAINTIFFS' WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MR. JACOB:

13 Q. Mr. Rymer, thank you for appearing.

14 Can you -- first, can you hear me okay?

15 A. Yes, sir, I can.

16 Q. Okay. Would you mind, then, introducing yourself to the
17 Court, please.

18 A. Yes. My name is Jon Rymer. I am -- was formerly the
19 inspector general at the Department of Defense from 2013 to
20 2016. Prior to that, I was the inspector general at the
21 Federal Deposit Insurance Corporation from 2006 to 2013. And
22 I spent almost a year as the interim inspector general at the
23 Securities and Exchange Commission.

24 Q. And what is your current occupation, sir?

25 A. Currently, I am working as an independent consultant to

1 two firms that do auditing and financial assurance work for
2 the federal government.

3 Q. Okay. Let me show you Joint Exhibit 615, which has been
4 entered in as your CV.

5 First -- I know it may appear a little blurry, but can you
6 see the document, Joint Exhibit 615, on your screen, sir?

7 A. Yes, sir, I can.

8 Q. And are you able to read it?

9 A. Yes, I can.

10 Q. And is Joint Exhibit 615, your CV, accurately fleshing out
11 your experience and credentials in this case?

12 A. Yes, it is. It does.

13 Q. Let me go through a couple of areas in your CV. And I
14 want to show you page 3 of Joint Exhibit 615.

15 And can you first describe for the Court your educational
16 background, please.

17 A. Yes, sir. I have a bachelor's of arts from the University
18 of Tennessee. My major was economics with a minor in Asian
19 studies. And a few years later, I completed a master of
20 business administration at the University of Arkansas at
21 Little Rock.

22 In terms of -- shall I proceed?

23 Q. Well, yes. And the next area I wanted to ask you about is
24 any notable awards or recognition that you've received in
25 your -- your career.

1 A. Yes, sir. I would say the most significant are listed
2 here. I was named distinguished alumnus at the University of
3 Arkansas at Little Rock. I received Distinguished Leadership
4 Award from the Association of Government Accountants. The
5 Institute of Internal Auditors recognized me as an -- one of
6 the top 15 most influential auditors in the federal
7 government.

8 Q. And what -- I'm sorry, sir.

9 What about your medal for distinguished service? Could
10 you describe that, please.

11 A. Yes, sir. The two medals that I think I cited on here
12 and -- one was the Army Legion of Merit, and that was really a
13 capstone of work for my 33 years as an active and reserve
14 soldier in the United States Army. And the other is the
15 Distinguished Public Service Medal awarded by the Secretary of
16 Defense for my service when I was the IG at DoD.

17 Q. Okay. Let me take you to page 2 of your CV, and I want
18 to -- you mentioned your service in the Army.

19 First, thank you for your service.

20 And -- but, second, could you describe for the Court your
21 experience in the Army, briefly?

22 A. Yes, sir. I initially enlisted as a cryptologic linguist
23 and was -- spent a year at the national -- at the Defense
24 Language Institute learning Vietnamese, later spent time at
25 Goodfellow Air Force Base at the Air Force's School of

1 Cryptology and then later served in a military intelligence
2 battalion in the 2nd Armored Division at Fort Hood for the
3 remainder of my active duty service.

4 After that, I returned to Tennessee, to Knoxville,
5 finishing my degree and also continuing to serve in the Army
6 Reserve as an instructor. And then had stints both in the
7 National Guard as a senior intelligence analyst and first
8 sergeant in a company and as a sergeant -- operations sergeant
9 major in an armored battalion. And then two stints -- three
10 stints -- excuse me -- as a command sergeant major in National
11 Guard units and later in Army Reserve units.

12 Q. Okay.

13 A. And I was mobilized on two occasions; one in support of
14 Operation Desert Storm in 1990, and the second in 2004.

15 Q. And I notice here that you attended the U.S. Army
16 Inspector General School. Could you tell us a little bit
17 about that, please.

18 A. Yes, sir. Not long after I was appointed inspector
19 general of the -- of the FDIC, I requested to attend, and the
20 Army granted the Inspector General -- the Army's Inspector
21 General course at Fort Belvoir. And I completed that course
22 in late 2006.

23 Q. Okay. And I understand that -- you told us that you
24 served as inspector general for various capacities in the
25 federal government.

1 Do you remember that testimony, sir?

2 A. Yes, sir, I do.

3 Q. And to be clear, is that a position or positions that
4 were -- required you to be appointed by the President of the
5 United States and confirmed by the Congress?

6 A. More specifically, appointed by the President and
7 confirmed by the Senate.

8 Q. Senate. Yes, sir.

9 And I want to -- you said that there were two inspector
10 general roles -- two roles that you were particularly involved
11 in?

12 A. Well, let me -- let me go back and clarify the one
13 statement I made. I was appointed by President Bush as the
14 inspector general of the FDIC and then later by
15 President Obama as the inspector general of the DoD.

16 My interim appointment at the -- the work that I did at
17 Securities and Exchange Commission, that was just -- I was not
18 confirmed -- was not nominated or confirmed. That's a
19 nominated -- or a position that does not require a nomination.
20 It was only a temporary position.

21 Q. Okay.

22 A. And I'm sorry. Could you state your question again.

23 Q. Yeah. And I guess that leads me to my very next question,
24 is what -- could you briefly describe the role of an inspector
25 general.

1 A. The inspector general -- the way I describe it to folks
2 that are not familiar at all, many people would be first
3 familiar with perhaps what an internal audit function is in a
4 corporate enterprise.

5 So the inspector general has that responsibility, to
6 ensure that the operations of a particular organization are in
7 compliance with laws, rules, regulations, and its own
8 policies, as well as the organization should -- the inspector
9 general would attempt to determine or would determine whether
10 or not the organization was operating efficiently and
11 effectively.

12 Now, that's a general description of internal auditing.

13 More broadly than that, the inspector general has that
14 responsibility in a federal agency, plus the responsibility of
15 essentially being a senior internal investigator over any
16 criminal matters or administrative matters in the
17 organization.

18 The inspector general also has responsibility to review
19 instructions or regulations that the organization is
20 influencing that may have an impact on investigations or audit
21 activities.

22 Q. And --

23 A. So, in short, the -- the broader term that many people in
24 the federal government are familiar with for IG
25 responsibilities is to detect waste, fraud, and abuse in the

1 operations of a particular agency.

2 Q. Does the inspector general have oversight roles?

3 A. The inspector general's only direct oversight is to those
4 folks of that organization that is organic to the -- to the
5 office of inspector general.

6 In other words, the folks that -- in the case of the
7 DoD IG, I was the inspector general there. That was an
8 organization of about 1,600 employees and a \$300 million
9 budget. My -- or my supervisory responsibility or directed
10 responsibility, if you will, were only -- it only concerned
11 those people that were organic, those 1,600 folks that were in
12 the organization.

13 Q. Okay.

14 A. The IG's role relative to the rest of the Department of
15 Defense, using that example, would be to find instances of
16 waste, fraud, or abuse in the operations or criminal activity
17 within the operations of the -- of the Department of Defense,
18 make the appropriate leader -- make the appropriate leaders in
19 the organization aware of it and recommend particular
20 remediation, plans, or programs to fix whatever was found, and
21 then monitor those -- monitor whatever those remediation plans
22 were to see that they become -- that they're -- that they're
23 enforced or put into place.

24 Q. Okay. Well, let me take you to Joint Exhibit 615 and
25 page 1 of your CV, and focus on what you mentioned -- your

1 role as inspector general of the United States Department of
2 Defense.

3 You should see that on your screen shortly.

4 A. Yes, sir, I do.

5 Q. How many investigations did you conduct or were you
6 involved in in your roles as inspector general, both in the
7 Department of Defense and in the FDIC?

8 A. Well, in terms of the number of -- you know, the rough
9 number I remember looking at recently, one of the semiannual
10 reports that I sent to Congress in 2015, I think, listed the
11 number as -- if I could just look at a piece of paper from
12 that report. It was --

13 MR. STERN: Objection. Can we at least get an
14 understanding of what --

15 THE WITNESS: About 150 investigations.

16 THE COURT: One second, sir.

17 THE WITNESS: I'm sorry.

18 THE COURT: One second.

19 MR. STERN: It's unclear to the United States what
20 Mr. Rymer's even looking at right now.

21 THE COURT: Mr. Rymer, what are you looking right
22 now?

23 THE WITNESS: I looked at, sir, a piece of paper --
24 an excerpt from the Department of Defense semiannual report,
25 dated October 1st through March 31st, 2015.

1 MR. STERN: Yeah. I don't believe this is an exhibit
2 in this --

3 THE WITNESS: I'm sorry. If I shouldn't be looking
4 at it, I won't look at it any further. I apologize.

5 THE COURT: So I think we're still trying to prove
6 him up as an expert, and so there's no need for him to be
7 looking at extrinsic reports at this stage.

8 MR. JACOB: You're right, Your Honor. I was just
9 asking his background.

10 THE COURT: Oh.

11 So, Mr. Rymer, if you will avoid looking at that report
12 for now. Let's just continue with your background.

13 That's sustained.

14 THE WITNESS: Yes, sir. My apologies.

15 BY MR. JACOB:

16 Q. Mr. Rymer, could you tell the Court how many
17 investigations that you've been involved in over the course of
18 your career as an inspector general, both in the Department of
19 Defense and FDIC.

20 A. I would say several hundred, sir, just to be --

21 Q. And specifically -- and specific to your role as inspector
22 general of the Department of Defense, have you conducted
23 investigations into the military branches?

24 A. Well, the organization that I supervise conducted --

25 Q. Yes.

1 A. -- investigations into the military branches, yes, sir.

2 Q. And can you give the Court some examples of the types of
3 investigations that the inspector general conducted into the
4 military branches while you were inspector general of the
5 Department of Defense?

6 A. Well, most typically, the Department of Defense inspector
7 general -- within the Office of Inspector General, there is a
8 group called the Defense Criminal Investigative -- the Defense
9 Criminal Investigations.

10 And that organization of about 500 or so employees, mostly
11 criminal investigators, the general focus was on -- much of
12 that focus was on procurement fraud and essentially
13 white-collar investigations about how either procurement -- or
14 how money is spent or, perhaps, improperly spent -- excuse
15 me -- within the Department of Defense.

16 Q. Okay. Let me take down your CV for a second and talk to
17 you about your role as inspector general.

18 In that role, did you familiarize yourself with the
19 various instructions and processes that apply to the inspector
20 general and his office?

21 A. Yes, sir, I did.

22 Q. And did you familiar -- do you have a familiarity and
23 expertise in that process of investigating and oversight that
24 the inspector general's office provides the U.S. government
25 and DoD, in particular?

1 A. Yes, sir. And I would say more broadly -- within the
2 inspector general community or profession, I would say more
3 broadly than just investigations. I had to be familiar with
4 how investigations are conducted, evaluations, audits.
5 They're all -- they're all processes supporting each of those.

6 So investigation is a particular discipline within the
7 IG -- within an IG's operation. But I was familiar with
8 investigations and familiar with valuations, and particularly
9 familiar with the structure and requirements of federal
10 audits.

11 MR. JACOB: Okay. Your Honor, at this time,
12 plaintiffs offer Mr. Rymer as an expert in the inspector
13 general process as well as the government oversight
14 procedures.

15 MR. STERN: We do object and look forward to the
16 opportunity voir dire this witness, Your Honor.

17 THE COURT: You can attempt to do it now.

18 MR. STERN: Thank you.

19 **VOIR DIRE EXAMINATION**

20 BY MR. STERN:

21 Q. Mr. Rymer, good morning, sir.

22 A. Good morning.

23 Q. Can you hear me okay?

24 A. You're a little bit soft, but I think I can make it out.

25 Yes, sir.

1 Q. I'll try to speak up. How about this? Can you hear me
2 better?

3 A. That's better. Thank you.

4 Q. Thank you.

5 Mr. Rymer, you are an accountant; correct?

6 A. Yes, sir. I would prefer the title "auditor." But yes,
7 sir.

8 Q. I'll give you "auditor." Sure.

9 You're an auditor?

10 A. That's one of the things I've done in my career, yes, sir.

11 Q. Okay. Well, if we take a look at Joint Exhibit 615, the
12 summary, it starts out "Financial services and auditing
13 professional with over nine years of experience as an
14 inspector general in the federal government, over seven years
15 as a director at a Big Four accounting firm, and over 15 years
16 of experience in the banking industry."

17 Did I read that correctly?

18 A. Yes, sir. That's correct.

19 Q. So your experience is in banking and financial services?

20 A. My civilian experience, yes, sir.

21 Q. Okay. It continues, "Served on a number of federal boards
22 and committees, principally concerned with financial oversight
23 and accounting and auditing guidance and standards."

24 Did I read that correctly?

25 A. Yes, sir.

1 Q. So, again, the primary concern on the boards that you
2 served on were financial oversight and accounting and
3 auditing?

4 A. Yes, sir. That's correct.

5 Q. Again, it continues, "Testified on multiple occasions
6 before the United States Congress on auditing and inspector
7 general issues"?

8 A. Yes, sir. That's correct.

9 Q. So your principle concern is with financial oversight,
10 accounting, auditing, guidance, and standards; is that
11 correct?

12 A. That's my principal experience, yes, sir.

13 Q. Okay. And your current position is with Lynch
14 Consultants?

15 A. I'm a -- I'm now a contractor for Lynch Consultants, yes,
16 sir.

17 Q. And if we look down at the bottom half of 615, under
18 principle of Lynch Consultants, "Responsible for leading
19 multiple audit and accounting support engagements at federal
20 agency clients."

21 Did I read that correctly?

22 A. Yes, sir, you did.

23 Q. Sir, you are not a criminologist?

24 A. No, sir, I'm not.

25 Q. You're not a forensic neuropsychiatrist?

1 A. No, sir.

2 Q. You're not an epidemiologist?

3 A. No, sir.

4 Q. You have no expertise in federal or state regulation of
5 firearms?

6 MR. JACOB: We're not offering him for an expert in
7 any of these areas.

8 THE COURT: Yeah. I don't understand the
9 epidemiology one, in particular.

10 MR. STERN: Well, I don't understand what exactly
11 expertise they are offering him for, then. There's no
12 question about the procedures for creating an IG report at
13 issue in this case.

14 MR. JACOB: Absolutely.

15 MR. STERN: They're simply trying to use his title as
16 the former Department of Defense inspector general to bolster
17 the underlying findings of an IG report.

18 But as I was about to go into, he has no direct experience
19 actually investigating DCIOs, MCIOs. He has no personal
20 experience actually reviewing any of the material that
21 undergirds any of the IG reports.

22 He simply was the head of an oversight entity without
23 really knowing the nuts and bolts of these investigations
24 themselves. And that's what I was going to get into.

25 MR. JACOB: Your Honor, that goes to the weight that

1 Your Honor places on his testimony, not its admissibility.
2 And we do dispute the characterizations that the government
3 has asserted.

4 The government is disputing what their own inspector
5 general has found in various reports. And so we are allowed
6 to explore the reliability of those opinions and those
7 findings with a person like Mr. Rymer, who has over -- or
8 nearly ten years of experience as an inspector general.

9 MR. STERN: But that's just it, Your Honor. He's
10 actually not here to testify about the substance of the IG
11 reports. They offered him as an expert on the IG's policies
12 and protocols for creating these reports.

13 We don't dispute that the IG has set guidance for how they
14 create these reports. But if he can't testify regarding the
15 substance of them, then his testimony is meaningless and is
16 only trying to serve to bolster the IG reports, in and of
17 themselves.

18 THE COURT: So give me just a handful of exemplar
19 questions you intend to ask him.

20 MR. JACOB: Sure. A prime example, Your Honor, is
21 the government has disputed when and where the probable cause
22 arose, the types of investigations that the IG conducted into
23 probable cause.

24 And the areas that I intend to explore with Mr. Rymer is
25 the processes in place with the inspector general and whether

1 those processes result in reliable conclusions by an inspector
2 general in the various reports that are at issue in this case
3 and that the government disputes.

4 MR. STERN: That's like saying a police department
5 has policies and procedures for making probable cause
6 determinations which wouldn't necessarily go to the nuts and
7 bolts of whether probable cause actually exists at any given
8 time.

9 I mean, again, they're just trying to use the stature of
10 this witness to bolster the underlying substance of a DoD IG
11 report.

12 THE COURT: But doesn't that happen all the time in
13 1983 cases, for example? The policeman who's charged with
14 excessive force will bring some kind of chief of police,
15 retired, to testify that "Oh, no, this place had policies,
16 procedures. This is" -- so why isn't it similar to that?

17 MR. STERN: Because they've already done that with
18 Colonel Youngner. And to the extent Colonel Youngner can
19 actually speak about the Air Force's instructions, manuals,
20 and so on and so forth, we didn't dispute that he had
21 expertise in that narrow field.

22 But here, with regards to the DoD IG, they produced 500
23 reports on various topics throughout the years. He couldn't
24 possibly know the underlying -- not just the underlying
25 substance of when there was probable cause in any given

1 moment, but even the underlying policies and procedures that
2 the -- that the Air Force -- either the Office of Inspector
3 General -- I'm sorry -- the Office of Special Investigations
4 or the Security Forces Squadron relied on to make those
5 determinations.

6 It's simply too -- it's too wide of a scope, that the
7 DoD IG has, to be able to make any type of expertise -- to
8 provide any expertise on these issues.

9 MR. JACOB: But he's very familiar with the methods
10 that the DoD IG uses, and can tell us whether those methods,
11 as applied to the particular reports in this case, did result
12 in reliable conclusions.

13 MR. STERN: No more so than Your Honor can read the
14 instruction manuals himself and make those determinations.

15 THE COURT: Yeah. So this all goes to the weight.
16 Mr. Rymer led and was the inspector general for the Department
17 of Defense. He was awarded high honors for that. So we now
18 can't claim, as the government, "Well, he knows nothing."
19 That's kind of inconsistent.

20 But to the extent that, you know, this does go to the
21 weight, I'll see what weight, if any, I attribute to any of
22 the opinions he may render.

23 Do you want to continue to challenge him or --

24 MR. STERN: We'll do it on cross, then, Your Honor.

25 THE COURT: Thank you.

1 MR. STERN: Thank you.

2 THE COURT: So he's recognized as an expert on IG
3 practices and protocols.

4 Your questions now?

5 DIRECT EXAMINATION (CONTINUED)

6 BY MR. JACOB:

7 Q. Mr. Rymer, can you hear me again?

8 A. Yes, I can.

9 Q. Okay. Mr. Rymer, I want to start out by talking to you a
10 little bit about the background of the inspector general and
11 specifically ask you what the mission of the DoD IG -- or DoD
12 inspector general is.

13 A. Well, the mission, in a thumbnail, would be to find waste,
14 fraud, and abuse in the programs and operations of the
15 Department of Defense.

16 Q. Okay. And can you briefly describe the powers the IG has
17 in accomplishing that mission?

18 A. Well, the IG has unlimited access to all books and records
19 of the Department of Defense and has subpoena authority, has
20 testimonial subpoena authority as well, to reach, say, retired
21 members of the department. So the IG has broad authority to
22 seek out facts and information within the Department of
23 Defense.

24 Q. Okay. And let me take you now to this case, in
25 particular. And can you briefly describe what you were asked

1 to do in this case.

2 A. Well, what the Office of Inspector General was asked to do
3 after the tragedy and -- the shootings at Sutherland Springs,
4 the secretary of defense asked the IG to determine whether or
5 not there was -- there was immediate concern, I think, during
6 the -- once the investigation began, the day of the shooting,
7 that the Air Force had not forwarded criminal history
8 information, specifically disposition of Kelley's -- of
9 Kelley's court-martial, nor several occurrences where the
10 Air Force had collected Kelley's fingerprints.

11 It was the belief and summary of the IG that those should
12 have been forwarded to the FBI, and they were not. That was a
13 concern that the secretary of defense had. And the secretary
14 of defense directed that the Office of Inspector General
15 conduct an investigation or an evaluation of the circumstances
16 around whether or not those fingerprints and final disposition
17 information was given to the FBI.

18 Q. Okay. And can you describe the types of documents you
19 reviewed in your review of this case.

20 A. Well, the documents that I reviewed were several IG
21 reports, several -- to get a sense of the accuracy of those
22 reports, several depositions of informations -- of individuals
23 that were interviewed by the IG. And then refamiliarized
24 myself with a number of standards regarding the requirements
25 around a -- the requirements around the production of an

1 evaluation report, which this one is -- meets those standards.
2 The -- and I refamiliarized myself with the -- and certainly
3 spent time reviewing the IG Act.

4 But, in summary, that's what I -- what I looked at.

5 Q. Okay. And particularly concerning the 2018 DoD IG report
6 that you mentioned into the Air Force's failure to submit
7 Devin Kelley's criminal history to the FBI, did you also
8 review the underlying documents that were reviewed by the
9 DoD IG in that report?

10 A. Well, I don't -- I don't recall documents. I do -- well,
11 in a sense, the documents, being depositions, sworn testimony
12 by many of the agents involved, yes, sir, I did.

13 Q. Okay. And we'll go through the -- each -- the report and
14 some of the documents to identify them, in particular.

15 But in your review and reaching your report in this case,
16 do you believe you had sufficient information and evidence to
17 reach reliable opinions on the inspector general process that
18 resulted in the reports that you mentioned to the Court just
19 now?

20 A. Yes, sir.

21 Q. Okay. And what I want to do, just to signpost for you, is
22 I want to get to the Devin Kelley report, but I want to give
23 just a brief background of a couple of the DoD IG inspector
24 general reports that were issued prior to the Devin Kelley
25 report.

1 And let me do that by showing you, first, Joint
2 Exhibit 14, page 1.

3 And, Mr. Rymer, have you seen Joint Exhibit 14 before?

4 A. Yes, sir, I have.

5 Q. And can you tell the Court what Joint Exhibit 14 is.

6 A. Well, I believe what you have on the screen is a cover
7 page from a DoD IG report that was issued, I believe, in 1997.
8 And it concerns criminal history data reporting and the
9 submission of criminal history from the defense criminal
10 investigative organizations to the FBI.

11 Q. Okay. Let me show you page 3 of Joint Exhibit 14.

12 And I'll zoom in to it -- if you can zoom back out
13 please -- and zoom in to the entire executive summary portion
14 for us.

15 A. Yes, sir, I see that.

16 Q. And I'm going to provide you the executive summary here.

17 First, could you tell us why the DoD IG is investigating
18 and reporting in 1997 on DoD's criminal history submissions to
19 the FBI?

20 A. Yes, sir, I can. I would go back -- would go back to the
21 Inspector General Act in terms of -- to give you an
22 explanation why I believe this report was done originally.

23 The Inspector General Act says that the DoD IG is one of
24 the few policy responsibilities that the IG has, and that is
25 to set Department of Defense policy regarding criminal

1 investigations. And so that authority, I believe, resulted in
2 a -- in a memo in -- I believe it was 1987 to determine
3 whether -- how often the DCIOs were actually submitting
4 information to the FBI. And I don't have the numbers in front
5 of me, but the compliance rate was very low.

6 The IG believed it was in the best interest of both the
7 Department of Defense and for -- and for public safety that it
8 was important to forward to the FBI, for inclusion in the
9 national criminal database, information about crimes that had
10 been committed by service members.

11 Q. Okay.

12 A. Okay. So that was the foundation of the 1987 memo.

13 And the IG followed up in 1997 with this -- with this
14 report, again, finding that there were -- there was
15 significant noncompliance with criminal history data reporting
16 to the FBI.

17 I think, in sum, this report also -- this -- it
18 recommended that the -- in addition to the criminal
19 investigative organizations, that, essentially, the military
20 police functions within each of the services also began
21 criminal history data reporting.

22 Q. Okay. Mr. Rymer --

23 A. And the foundation of -- I'm sorry.

24 Q. Let me just break that up. And you gave us a lot, so I
25 need to kind of focus you a little bit and ask you some more

1 specific questions.

2 First of all, you used phrases like the "DCIOs." And I
3 see on the screen "MCIOs" is another acronym that the
4 government is using.

5 First, can you just tell us what a DCIO and an MCIO is.

6 A. Well, DCIO is defense criminal investigative -- defense
7 criminal investigation organization.

8 And what was your second question?

9 Q. And what is an MCIO?

10 A. Military criminal -- I use the term MP. But essentially,
11 that's the police function within each of the departments.

12 And I'm sorry. I'm a -- I was a career soldier. So I use
13 the term M -- "military police," and they're called different
14 things in the other services. But essentially to take that
15 military police -- military -- that responsibility to report,
16 to that police function within the -- within the services as
17 well.

18 Q. So with regard to the -- we're here about the Air Force.

19 With regard to the Air Force, the military police would be
20 currently known as the security forces?

21 A. Yes, the security forces, yes, sir.

22 Q. And would the Air Force Office of -- Office of Special
23 Investigations be covered by this report, Joint Exhibit 14, as
24 well?

25 A. Yes. The Air Force Office of Special Investigation was

1 a -- is a defense criminal investigative organization.

2 Q. Okay. So the next question I want to direct you to is,
3 are you familiar with NICS, the National Instant Criminal
4 Background Search system?

5 A. Yes, sir.

6 Q. Okay. And do you know when NICS was established?

7 A. It was sometime, I believe -- I believe, in the 1990s,
8 and -- I believe in 1993 timeframe, something like that.

9 Q. And do you know when NICS reporting began with the
10 criminal investigative organizations in DoD?

11 A. I believe that would have been, sir, after the Brady Act
12 or the Brady Act amendments. And so that would have been
13 sometime during -- in the 1990s.

14 Q. Would it have been after this report?

15 A. No. It would have been, I believe, before this report --
16 I believe, the dates.

17 Q. Well, let me ask you this: With regard to -- you told the
18 Court earlier that in 1987, the Air Force issued an
19 instruction to start reporting criminal history to the FBI.

20 Do you remember that testimony, sir?

21 A. Yes.

22 Q. And then you said in 1997, so ten years after the issuance
23 of that report, the DoD IG came out with this inspector
24 general's report concerning the reporting of criminal history
25 to the FBI.

1 Do you remember that testimony, sir?

2 A. Yes. Yes.

3 Q. Could you tell us, beyond reporting to NICS, is there any
4 reasons why the DoD IG is concerned with criminal -- the
5 military organization's criminal history reporting to the FBI?

6 A. Well, I think the view -- and I certainly support this
7 view -- that criminal history reporting to the FBI essentially
8 expands the effectiveness of law enforcement and gives -- by
9 supporting the national criminal database, in my view, makes
10 law enforcement more effective.

11 So I think it's certainly in the interest of the
12 Department of Defense and ultimately in the national interest
13 to have a law enforcement function that is as -- that is as
14 effective as possible. And by not reporting criminal history
15 data consistently to the FBI, I believe that a significant
16 portion of criminal activity would not have been included in
17 the national crime data.

18 Q. In 1997, was the Air Force aware of these problems, as
19 reported by the Department of Defense inspector general?

20 A. They would have been aware -- they certainly would have
21 been aware in the sense that the inspector general -- the
22 Department of Defense inspector general, certainly from the
23 work beginning back in the late '80s to 1987 work,
24 continuing through this report, for a couple of reasons.

25 One, let me say that this particular report was -- this

1 particular 1997 report was -- was completed due to a -- due
2 to -- or due to a requirement in the National Defense
3 Authorization Act in 1996 that the secretary of defense review
4 compliance with criminal history data reporting. So the
5 secretary of defense directed the DoD IG to complete this
6 report.

7 So this report -- although the earlier instances may have
8 been at the discretion and direction of the DoD IG and their
9 authority under the IG Act for the 1987 work, the 1997 work
10 was a result of a -- was the result of the defense criminal --
11 or I'm sorry -- was the result of the NDAA, the National
12 Defense Authorization Act.

13 Q. Did the Air Force review these findings in Joint
14 Exhibit 14 and notify the IG that they were going to fix
15 these -- the issues?

16 A. Yes, sir. As I recall, the Air Force -- the Air Force did
17 not object to -- did not -- the Air Force concurred with the
18 findings and indicated that they would begin a process to
19 improve compliance. Yes, sir.

20 Q. Okay. And following this 1997 report, are you aware of
21 any other reports the DoD IG has issued concerning
22 fingerprints and final disposition submissions to the FBI?

23 A. Yes, sir. There was a -- I think the next report was --
24 specifically about fingerprints and final disposition reports
25 was the 2015 report that followed up on this 1997 report. And

1 I think -- although there was some improvement, I think there
2 was still significant noncompliance with the criminal history
3 data reporting.

4 And in a -- not referring to the -- any paperwork, I would
5 say that the number was still then in the 30, 32 percent
6 range, as I recall.

7 Q. Well, Mr. Rymer, let me show you that report. We can look
8 at it briefly. I want to show you Joint Exhibit 1, which has
9 been previously admitted into evidence.

10 Can you identify Joint Exhibit 1, sir?

11 A. Yes, sir. That's the report I was referring to.

12 Q. Okay. Let me show you page 3 of Joint Exhibit 1. And,
13 first, I want to sort of zoom in on the "Objective" section.

14 Do you see the column labeled "Objective"?

15 A. Yes, sir.

16 Q. Could you tell the Court what the objective of the DoD IG
17 in Joint Exhibit 1 is, briefly?

18 A. Well, as I said a moment ago, the objective would be to
19 determine compliance with criminal history data reporting to
20 the FBI and to see where that compliance stands. And the
21 method used here was a sampling process.

22 But as you can see, I think this goes through in some
23 detail how each of the -- each of the services were complying
24 or not complying with criminal history data reporting
25 requirements.

1 Q. And you said the method that the IG uses in Joint
2 Exhibit 1 is a sampling process.

3 What time frame are they sampling?

4 A. -- the interview. But I think in this case and -- or in
5 this particular report, there were, in this case, I think, a
6 sample of 1,102 case files from Army, Navy, Air Force, Marine
7 Corps. And you can see there the numbers. I'm not sure it's
8 necessary that I read them. But you can see that a
9 significant sample was taken, and the results of the sample
10 were, there was noncompliance.

11 Again, I don't think this excerpt shows it, but I think --

12 Q. Yeah.

13 A. -- in the 30 percent range, as I recall, for the
14 Department of the Air Force of noncompliance.

15 Q. Well, sir, let me ask you this -- and we'll get to those
16 specific findings in one second -- but it says that the sample
17 was taken of qualifying offenses between June 1, 2010, and
18 October 31st, 2012.

19 Do you see that, sir?

20 A. Yes, sir, I do.

21 Q. And if Devin Kelley's conviction was in November 7th of
22 2012, does that sample cover Devin Kelley's conviction?

23 A. No, sir. It does not.

24 Q. Okay. So let's look at the findings and talk about that
25 in more particular, then. And I want to show you actually

1 Joint Exhibit 1, page 13 and 16.

2 And there are a couple of graphs on pages 13 and 16
3 concerning the Air Force fingerprint submission data and
4 criminal history data that I want to look at in particular.

5 So let me display both of those pages, Joint Exhibit --
6 Joint Exhibit 1, pages 13 and 16 together.

7 First, Mr. Rymer, are you able to see the graph concerning
8 the Air Force's fingerprint submissions?

9 A. Yes, sir, I am.

10 Q. And if we could just make that portion a little bit bigger
11 for Mr. Rymer, please.

12 TECHNOLOGY SPECIALIST: Bottom left?

13 MR. JACOB: Yes.

14 And then if we could also pull out the Air Force's final
15 disposition graph.

16 BY MR. JACOB:

17 Q. And, Mr. Rymer, if you could explain to the Court what
18 we're looking at from pages 13 and 16 of Joint Exhibit 1.

19 A. Well, this -- of the total sample, I think, that we read a
20 moment ago, of 1,100 or so cases that were reviewed, this
21 would be -- the sample pertaining to the Air Force would have
22 been about 358 cases, and the -- you can see the totals there
23 of fingerprint -- 248 of the cases, fingerprints were found.
24 And in -- and in 110, they were not.

25 Q. Okay. So if I'm understanding you correctly, the DoD IG

1 is looking at 358 qualifying cases in that sampling period
2 from the Air Force. Is that fair?

3 A. Yes.

4 Q. And of those cases, 113 final dispositions were not
5 submitted and 111 -- or sorry, 110 fingerprints were not
6 submitted to the FBI?

7 A. Yes.

8 Q. Okay. Before an IG reaches a finding or reviews documents
9 and concludes there's missing submissions, does the Air Force
10 have an opportunity to review drafts of reports and
11 conclusions such as this?

12 A. Yes, sir, they do. Number one, to explain a little
13 broader, the Air Force would have been involved in this data
14 collection initially. This is not done -- well, the Air Force
15 would have been involved in the data collection.

16 And then once the -- a draft report is prepared, the
17 Air Force, as a subject of the report, would have had an
18 opportunity to comment on the report or correct any mistakes
19 that they saw in the report before the report is issued and
20 final.

21 Q. Okay. So as a part of the IG report-issuing process, the
22 agency itself has input into the report?

23 A. Well, in this case, the agency -- well, the data belongs
24 to the Air Force. So in the sense that the inspector general
25 requested data from the Air Force, the Air Force would assist

1 in collecting that data for the -- for the inspector general.
2 And then once the inspector general -- the Department of
3 Defense inspector general reviewed the data, the Air Force
4 would have the opportunity to point out any errors or missing
5 data or any significant problems with the report.

6 Q. Okay. And you said that the Air Force would then also
7 have an opportunity to comment on the recommendations?

8 A. Yes, they would.

9 Q. Okay. Let me take you --

10 A. Uh-huh.

11 Q. Let me take you to page 18 of Joint Exhibit 1 and show you
12 some of these comments. And I want to blow up both the
13 recommendation and the Air Force comments and the IG response
14 to the Air Force comments.

15 Okay. And can you tell the Court what we're seeing on
16 page 18 of Joint Exhibit 1.

17 A. Well, you would be seeing, number one, one of the
18 recommendations -- and I don't remember in this particular
19 report how many there were. But an evaluation such as this
20 would result in a number of recommendations for process
21 improvement directed to the service secretaries.

22 In this recommendation, that -- this recommendation was
23 that the Air Force take prompt corrective action to ensure
24 that all future arrestees and convicted offenders conform with
25 the applicable DoD instruction, which is DoD 5505.11.

1 And I think the phrase below or the next section
2 "Air Force comments: The Air Force agreed with our
3 recommendation and our response," meaning the DoD's response.
4 "Comments from the Air Force addressed all specifics of the
5 recommendation. No further comments are required."

6 So what that says to me is the Air Force agreed with the
7 recommendations; set forth specific remedies, if you will, to
8 cure the problems that were identified by the DoD inspector
9 general. And the DoD inspector general accepted that
10 remediation -- or those -- accepted the steps that the
11 Air Force planned to take to fix the problem.

12 Q. And this report, Joint Exhibit 1, was issued in 2015.

13 Who was the DoD inspector general in 2015?

14 A. I was, sir.

15 Q. Okay. And earlier we talked about how the specific sample
16 set that this inspector general's report reviewed did not --
17 was not -- or Devin Kelley's conviction fell out of that
18 specific sample set.

19 But does this recommendation make it clear to the
20 Air Force that there was an ongoing problem with the failure
21 to submit criminal history to the FBI?

22 MR. STERN: Objection, Your Honor. The Court's
23 already ruled on this issue. We've both briefed it -- both
24 parties briefed it at summary judgment. The Court has already
25 ruled that the Air Force adoption of the IG recommendations

1 did not -- did not include the requirement to submit Devin
2 Kelley's criminal history information. This has already been
3 adjudicated and now is outside the scope of the -- what's left
4 for this trial.

5 MR. JACOB: My question was about the Air Force's
6 awareness of the ongoing obligation, and that goes directly to
7 the knowledge and foreseeability the Air Force had.

8 The United States is disputing that this document made the
9 Air Force aware and reinforced the notion that they need to
10 submit criminal history to the FBI, and this is the IG
11 testifying about that very point.

12 THE COURT: Yeah. That's overruled.

13 BY MR. JACOB:

14 Q. Mr. Rymer, let me ask my question to you one more time.

15 Earlier we discussed how the -- Devin Kelley's conviction
16 fell outside of the specific sample set that JEX 1 examined.

17 But my question to you is, does Recommendation 2, not
18 concerning the specific sample set but the more broader
19 recommendation, make the Air Force aware of its ongoing
20 obligation to report and fix criminal history reporting to the
21 FBI?

22 A. Yes, sir. I believe it clearly makes the Air Force aware.

23 Q. Okay. And I want to -- I want to play for you a clip
24 that -- of evidence that's already been entered, and then come
25 back to this report.

1 I want to play for you Joint Exhibit 628 from 1 hour
2 54 minutes and 47 seconds to 1 hour 55 minutes and 7 seconds,
3 and then ask you a question about that. Okay?

4 A. Yes, sir.

5 *(Playing video)*

6 MR. JACOB: Okay. We can play that one more time.

7 *(Playing video)*.

8 BY MR. JACOB:

9 Q. Can you tell us who that is on the video, Mr. Rymer?

10 A. Yes, sir. That's Glenn Fine. I believe he was the acting
11 inspector general of the Department of Defense. That probably
12 would have been a hearing in 2017, I believe.

13 Mr. Fine was originally -- I brought Mr. Fine to DoD as
14 my -- as the deputy inspector general in 2015. So when I left
15 the department in 2006, he became the acting inspector
16 general.

17 Q. Okay. Let me take down the video now and then ask you
18 this question.

19 If the Air Force, in this litigation, disagrees with you
20 and Mr. Fine on this -- these recommendations and whether they
21 made the Air Force aware of their ongoing problem to report
22 and fix criminal history, how would you respond to that?

23 MR. STERN: Objection. Speculation. Outside the
24 scope of his expertise.

25 MR. JACOB: I'm asking him how he would respond to

1 this issue.

2 THE COURT: Yeah. That's overruled.

3 BY MR. JACOB:

4 Q. Sir, Mr. Rymer, how would you respond to the Air Force in
5 this litigation taking a different position than it did when
6 this report was issued?

7 A. Well, I would be, frankly, disappointed if that's what had
8 happened. The -- if that's what happened. My view, it was
9 very clear the Air Force agreed with the findings and
10 recommendations of the report and the -- and I want to go back
11 to this notion of how aware the Air Force would have been
12 about this.

13 I mean, the information contained in that report would
14 have been part of what would have been gathered with the
15 assistance of the inspector general function within the
16 Department of the Air Force. That's routine for the DoD
17 inspector general. When they're reaching out for information
18 from the services, it is done through the IG mechanism, if you
19 will, in each of -- in each of the services.

20 In this case, I would also like to point out that this
21 level of awareness for the Air Force would be, I think,
22 particularly high because of the organization structure of the
23 Department of the Air Force relative to its defense criminal
24 investigative function.

25 The defense criminal investigative function in the Army

1 and the Navy, for example, are independent of the inspector
2 general function -- or the inspector general within each of
3 those services. That's not the case in the Air Force. The
4 Air Force Office of Special Investigations is an
5 organizational entity under the command and control of the
6 inspector general of the Air Force.

7 Q. Okay.

8 A. And that's unique for the three services.

9 Q. If I can try to understand and break down that testimony
10 briefly.

11 With regard to the Air Force, who is the inspector general
12 of the Air Force?

13 A. The inspector general of the Air Force would be a
14 three-star officer. And at the time, I think it was General
15 Biscone. I'm not certain who the inspector general is today.

16 But it's a -- it's a three-star position that would report
17 to the chief of staff of the Air Force. In other words,
18 essentially the military commander of the Air Force --

19 Q. Okay.

20 A. -- would be the inspector general's boss, if you will.

21 Q. Does the inspector general of the Air Force hold any
22 positions or any hats -- wear any hats other than just the
23 inspector general of the Air Force?

24 A. Well, in addition to being the inspector general, the
25 inspector general of the Air Force is also the commanding

1 general responsible for the Air Force Office of Special
2 Investigations.

3 Q. Okay. And this goes back to the question of the
4 Air Force's knowledge of the problems.

5 If the DoD IG is telling the Air Force inspector general
6 that there is a significant problem with reporting criminal
7 history to the FBI in the Office of Special Investigations,
8 are they directly telling the commander -- the chain of
9 command of the office of inspector -- of Special
10 Investigations of that problem?

11 A. Yes. Yes, sir. I believe they would be.

12 Q. And so the command structure -- the supervisory command
13 structure of the Office of Special Investigations would have
14 specific knowledge and direct knowledge of what the DoD IG is
15 reporting in the 1997 and the 2015 IG reports?

16 A. Yes, sir. I believe so.

17 Q. Okay. So with that background, let's look now at Joint
18 Exhibit 3. And I want you to identify -- I'm going to show
19 you the first page of Joint Exhibit 3, and I want you to
20 identify it for us. Okay?

21 Are you seeing Joint Exhibit 3 on your screen, sir?

22 A. Yes, sir, I do.

23 Q. Could you identify for the Court what Joint Exhibit 3 is.

24 A. Yes, sir. This would have been the report prepared by the
25 Office of Inspector General of the Department of Defense at

1 the request or direction of the secretary of defense to
2 determine if and how there was a failure by the Air Force to
3 submit Devin Kelley's criminal history to the FBI.

4 Q. Okay. And what I want to do for the Court, just so you're
5 aware of where I want to go, is I want to show the processes
6 the inspector general uses to lead to the findings that it
7 does in a report such as Joint Exhibit 3.

8 But I don't want to belabor the point and go through every
9 single finding and talk about each one. So if you think it
10 would be helpful, what I would like to do, sir, is look at one
11 or two findings and talk to you about how an inspector general
12 reaches those findings and whether those findings can be
13 reliable, in your opinion.

14 Do you think that would be helpful, sir?

15 A. Yes, sir.

16 Q. Okay. Let me show you page 66 of Joint Exhibit 3. And
17 we'll zoom in to that first part. And I'll represent to you
18 this is a finding concerning the first missed opportunity to
19 submit fingerprints. And if we could just zoom in to the
20 entire first section. Yes.

21 This is the -- Joint Exhibit 3, page 66, is the beginning
22 of the IG's section on the first missed opportunity to submit
23 Devin Kelley's fingerprints, from June 9th, 2011.

24 Do you see that on your screen?

25 A. Yes, sir.

1 Q. Now, in talking about a finding like this, could you
2 briefly describe to the Court the types of information the
3 inspector general's office relies upon in reaching a finding
4 such as this.

5 A. Well, certainly, they would rely on documentary
6 information. That would be any files or written information
7 about the Kelley investigation that the U.S. -- that the
8 Air Force had, the inspector general would have reviewed.

9 And then they would have conducted -- and I believe this
10 particular section goes through some detail about the
11 particular interviews with the case agents and the supervisors
12 involved in this case.

13 So the DoD IG would have reviewed documentary evidence and
14 testimonial evidence -- or actually conducted interviews in
15 this regard to make this determination.

16 Q. Okay. And let's look -- well, let me ask you this: You
17 know, the office of DoD IG, I assume, is not an expert on the
18 specific subject matters that they investigate, necessarily?

19 A. Well, I would -- I would -- I would back up just a moment.

20 The team that conducted or produced this particular report
21 would have been a multidisciplinary team. And it would have
22 contained evaluators, most likely auditors, administrative
23 investigators, and certainly criminal investigators, would
24 have all been part of the team developing this report.

25 So your question is -- if your statement was that the IG

1 would -- the IG's expertise would not necessarily include
2 criminal investigation or criminal investigation techniques, I
3 would -- I would disagree with that.

4 I'm certain, if -- I'm certain that the -- well, let me --
5 let me back up and say reports of -- like this that were
6 prepared during my tenure would have included a team that
7 included criminal investigators that were experienced --
8 experienced in conducting criminal investigations.

9 Q. And that's exactly what I was getting at, sir.

10 Does the IG's office, when they conduct an investigation
11 like this, have access to the lawyers, legal staff, criminal
12 investigators -- really, the subject matter experts -- that
13 allows them to reach conclusions such as the one that it
14 reached in Joint Exhibit 3, page 66?

15 A. Yes, sir, they do.

16 Q. Okay. Let me show you, then, another example finding.
17 And I will show you page 98 of Joint Exhibit 3. 98. And
18 we'll zoom in to the -- really, the first and a half of the
19 second paragraph under "3. AFOSI operations tempo." Yes.

20 And, sir, I'll just represent to you here that the IG here
21 is looking at various investigations at -- specifically at
22 Detachment 225. And the question the IG is posing is whether
23 the failure to submit Devin Kelley's fingerprints is an
24 isolated incident or a systemic problem at this time.

25 My question to you, sir, is when -- is the DoD IG's

1 examination into systemic problems something that the DoD IG
2 regularly conducts?

3 A. Well, the systemic problem in terms of -- had certainly
4 been pointed out in the 2015 report. So "regularly conducts,"
5 the IG would have been -- and did, I think, in 2017 conduct a
6 followup to the 2015 report.

7 So in terms of identifying a systemic problem like the
8 failure to report criminal history data, the IG identified it,
9 and the IG did follow up on it.

10 Q. Okay. And similar to how we talked about the 2015 report,
11 when they're looking at 84 investigations and -- open
12 investigations and 70 closed investigations during the Devin
13 Kelley -- at Detachment 225, where are they getting that data
14 from?

15 A. Well, they would -- they would probably be getting that
16 data from the Defense Information -- DIBRS, Defense
17 Information -- and I don't remember -- DIBRS. And I never can
18 remember that without looking at my notes.

19 But there's -- and also by "we examined 70 closed
20 investigations for fingerprint cards," I would say here, that
21 to me would read, they examined the case files of 70 closed
22 investigations.

23 Q. So would that be something that the Air Force would be
24 cooperating with the IG, to provide them that data?

25 A. Yes.

1 Q. Okay. Let me show you Joint Exhibit 27, page 1. And I'm
2 going to zoom in to the highlighted portion of Joint
3 Exhibit 27.

4 And can you identify for us what you're seeing in terms of
5 Joint Exhibit 27, page 1.

6 A. Yes. This is the -- this is the response by the Air Force
7 to the Office of Inspector General's data call, if you will,
8 the information that the Department of Defense inspector
9 general requested from the Department of the Air Force.

10 Q. Okay. And so we have some background and we're aware of
11 what we're looking at, the DoD IG is asking the Air Force to
12 provide information concerning the Devin Kelley
13 failure-to-submit report; is that correct?

14 A. Yes, sir.

15 Q. Okay. And is this the type of information DoD IG -- or
16 inspector generals rely upon in their investigations?

17 A. Yes, sir.

18 Q. Okay.

19 A. One type, yes, sir.

20 Q. Yes. Absolutely.

21 Let me show you page 2 of Joint Exhibit 27 -- sorry,
22 page 2. And I'll zoom in on page 2.

23 And you can see the date of this report and that it
24 concerns Mr. Kelley; right?

25 A. Yes, sir.

1 Q. And, here, I want to point out, who is the IG -- the
2 Air Force IG that is providing and signing off on this report?

3 A. Well, this -- I believe -- this is Colonel Zoerlein,
4 AFOSI IG investigating officer. So he was part of the -- from
5 this signature block, I would surmise that he is the IG -- the
6 Air Force IG's investigating officer within the Air Force
7 Office of Security Investigations.

8 Q. Okay. So does this go back to how you were discussing
9 earlier that the Air Force IG wears the AFOSI command hat as
10 well, that the Air Force IG is in the chain of command for the
11 Air Force Office of Special Investigations?

12 A. Yes, it does.

13 Q. Okay. Let me go to page 62 of this document. And I'm
14 just going to zoom in on the first part, which says
15 "Findings."

16 First of all, you've reviewed this document. Is that
17 fair?

18 A. Yes. Uh-huh.

19 Q. Is it fair to say that this -- in Joint Exhibit 27, the
20 Air Force IG reaches conclusions similar to the conclusions
21 that the DoD IG reached in the Devin Kelley matter?

22 A. As I recall, yes, sir.

23 MR. JACOB: Okay. And if we can zoom back out,
24 please, to page -- and this is page 62.

25

1 BY MR. JACOB:

2 Q. And I'll represent to you, pages 62 to 69 of Joint
3 Exhibit 27 are redacted in this litigation.

4 When the DoD IG receives documents and findings such as
5 this, do they receive a redacted version or an unredacted
6 version?

7 A. I never recall a data request from the services that
8 included redacted information like this.

9 Q. Okay. So if the Air Force provides the DoD IG redacted
10 information, say, on probable cause, does the DoD IG have the
11 power or authority to request the underlying information from
12 the service branches?

13 A. Yes, sir.

14 Q. And could you describe that power of authority.

15 A. Well, that is described -- or is in the Inspector General
16 Act, that the inspector general of any agency has access to
17 all the records of the agency; in this case, all the records
18 of the Department of Defense.

19 Q. Okay.

20 A. There is a caveat -- there is a caveat in the IG Act
21 regarding national security items, that at the discretion of
22 the secretary of defense, some of that information can be
23 withheld. But information like this regarding an
24 investigation, I find it would -- all I can say is, I've never
25 seen a report from one of the services to the IG that

1 contained redactions like this.

2 Q. So if the Air Force disagreed with any findings or
3 conclusions that the DoD IG reaches in a draft report, would
4 that be noted by the DoD IG?

5 A. Yes. If there were -- if there were -- I think in some of
6 these reports, there were a couple of instances -- the
7 Air Force, first of all, in the reports that I reviewed,
8 agreed with the findings and recommendations or, in one case,
9 used the word "concurred" with the findings and
10 recommendations.

11 Q. Yeah.

12 A. There were examples -- I'm sure that everyone has read
13 these reports. And you all see a couple of examples where
14 the -- one example, in particular, where the Navy disagreed
15 and explained why they disagreed.

16 So that's typically how it would occur. If there is
17 disagreement, the report is submitted in draft form to the
18 subject organization. And they have the opportunity to review
19 it and come to their own conclusions about whether or not they
20 agree with the findings, whether there's problems with the
21 information in the report, or whether they disagree with the
22 recommendations or the path that the IG is suggesting for
23 remediation.

24 Q. Okay.

25 A. So, yes, there is an avenue set forth in the -- in the

1 policies and procedures regarding how these reports are
2 developed for the subject of the report to respond to either
3 inaccurate information or to disagree with recommendations
4 made by the agency IG, which, in this case, would be the
5 DoD IG.

6 Q. Are you aware whether the DoD IG in the Devin Kelley
7 report that we were discussing previously noted in any fashion
8 that the Air Force disagreed with any findings, including the
9 probable cause findings that the DoD IG reached?

10 A. No. As I recall, the Air Force concurred with all the
11 findings that the IG reached.

12 Q. Okay. Let me show you page 70 of Joint Exhibit 27. And I
13 want to show you, first, that first finding.

14 It says, "Improper indexing was a widespread problem in
15 AFOSI at the time of the Devin Kelley investigation."

16 Do you see that?

17 A. Yes, sir.

18 Q. So is it fair to say that the Air Force IG is agreeing
19 with the DoD IG's conclusion regarding the systemic nature of
20 this problem?

21 A. Yes, sir. I think the word "widespread" would imply it's
22 a systemic problem, yes, sir.

23 Q. Okay. Let me zoom out and show you the third finding of
24 the Air Force IG.

25 Here, the Air Force IG is saying, "Command policy and

1 training appeared adequate, but key Detachment 225 personnel
2 did not know/understand AFOSI policy with regard to indexing."

3 Is that a similar finding that the -- the DoD IG had?

4 A. Yes, sir, it is.

5 Q. Okay. Let me -- let me take down Joint Exhibit 27 and ask
6 you a few follow-up questions.

7 Like I said at the beginning of this conversation, instead
8 of going through each of the findings of the DoD IG, I want to
9 talk to you about the specific findings and ask you, to a
10 reasonable degree of certainty, have you reached conclusions
11 on the reliability of the reports issued by the various IG's
12 in this case?

13 A. Yes, I have.

14 Q. Were their evidence-collection methods reasonable?

15 A. Yes, sir. They -- everything that I've -- that I
16 reviewed -- and I principally relied on both reports and then
17 the depositions that I read and then my understanding of the
18 standards that were in place for production of such reports.
19 The Council of the Inspectors General on Integrity and
20 Efficiency promulgates standards on how these reports are to
21 be constructed.

22 The CIGIE, if you will, or Council of Inspectors General,
23 also -- in addition to publishing standards on how the reports
24 are to be put together, they also have a peer-review process
25 where the control environment under which the reports were

1 produced is examined and tested. I reviewed the peer-review
2 report for the Office of Inspector General for the period in
3 question when these reports were -- the period in which these
4 reports were prepared.

5 That peer-review report was prepared by the inspector
6 general of the Department of Health and Human Services, and
7 the Department of Health and Human Services IG determined that
8 the DoD IG evaluation process was sufficient, and essentially
9 passed them. The -- the Health and Human Services IG wrote a
10 report that indicated that the DoD IG had passed the -- trying
11 the peer review for that period -- covering that particular
12 period.

13 Q. Mr. Rymer, did you find, to a reasonable degree of
14 certainty, that the inspector general, in issuing these
15 reports that we discussed, had sufficient information to reach
16 reliable conclusions?

17 A. Yes, sir, I did.

18 Q. To a reasonable degree of certainty, were the conclusions
19 and the findings in the IG reports, that you reviewed, the
20 product of reliable methods and principles?

21 A. Yes, sir. Again, based on the -- based on my reading of
22 the report and my reading of the peer review and my
23 understanding of the standards, there -- the report complied
24 with the standards. The standards complied with the -- or the
25 report complied with the DoD standards, and those DoD

1 standards complied with the CIGIE standards or the
2 government-wide standards regarding the production of
3 evaluation reports.

4 Q. And does compliance with the standards mean a reliable end
5 product?

6 A. Yes, sir. That's the intent. The standards are to -- are
7 in place to produce a product that can be relied upon, both by
8 the public and the Congress.

9 MR. JACOB: Your Honor, we pass the witness.

10 THE COURT: Let's go ahead and take a ten-minute
11 break.

12 *(Recess)*

13 *(Open court)*

14 THE COURT: Thank you. Please be seated.
15 Your cross.

16 CROSS-EXAMINATION

17 BY MR. STERN:

18 Q. Mr. Rymer, good morning again, sir.

19 THE CLERK: Excuse me.

20 BY MR. STERN:

21 Q. Mr. Rymer, good morning, sir.

22 A. Yes, sir. Thank you.

23 Q. Can you hear me okay?

24 A. Yes, sir, I can.

25 Q. Thank you.

1 As you may recall, my name is Paul Stern. I'm an attorney
2 with the United States Department of Justice.

3 Thank you for your time today.

4 A. Yes, Mr. Stern.

5 Q. Just a few questions, sir.

6 The DoD Office of Inspector General produces somewhere
7 around 500 reports, investigations, evaluations, audits in any
8 given year. Is that fair?

9 A. Somewhere around, yes, sir. That's correct.

10 Q. I believe you spoke with Mr. Jacob about a few of those
11 reports, and so I'd like to discuss them.

12 If we could start at Joint Exhibit 14. I believe this was
13 the IG report from 1997 that was referred to?

14 A. Yes, sir.

15 Q. Are you aware that the NICS did not start in operation
16 until November 1998?

17 A. I was a little foggy on the date. But, yes, sir, I agree
18 with you. Yes, sir.

19 Q. Okay. So this report predates the operation of NICS?

20 A. Yes, sir, it does.

21 Q. In fact, if we look at page 3, when we look at "Evaluation
22 Objectives," as Mr. Jacob noted, "The primary objective was to
23 evaluate whether DCIOs are reporting criminal history data to
24 the FBI in compliance with DoD Criminal Investigations Policy
25 Memorandum Number 10" or CPM Number 10.

1 Did I read that correctly?

2 A. Yes, sir. And it goes on to say that those requirements,
3 I think, became effective in March 1987. Yes, sir.

4 Q. That's correct.

5 In fact, if we take a look at page 8 of this report. Take
6 a look at the bottom portion -- little bit lower.

7 It reads, "United States Code, Title 28, Section 534,
8 states, the Attorney General shall acquire, collect, classify
9 and preserve criminal history information, and shall exchange
10 such records and information with other law enforcement
11 officials."

12 Did I read that correctly?

13 A. Yes, sir.

14 Q. And then, "The Criminal Information Services Division,
15 Federal Bureau of Investigation, is designed for complying and
16 disseminating criminal history record information."

17 Is that correct?

18 A. "Is designated for complying and disseminating," yes, sir.

19 Q. I'm sorry. Thank you. "Designated for complying and
20 disseminating criminal history record information."

21 So this is saying the obligations stemmed from
22 28 U.S.C. 534; is that correct?

23 A. Yes, sir.

24 Q. Is that Uniform Code of -- I'm sorry. The Uniform Crime
25 Reporting Act?

1 A. Yes.

2 Q. And then if we look at the next page, the first part talks
3 about the CFR as it relates to the Uniform Crime Reporting
4 Act?

5 A. Yes.

6 Q. And that the agencies are now to submit fingerprints and
7 final dispositions as a result of the Uniform Crime Reporting
8 Act; correct?

9 A. Yes.

10 Q. And then to start the next paragraph, "On March 25th,
11 1987, the deputy inspector general, Department of Defense,
12 issued Criminal Investigation Policy Memorandum Number 10" or
13 CPM Number 10, "criminal history data reporting requirements."

14 Did I read that correctly?

15 A. Yes, sir. Yes, sir.

16 Q. So essentially, the requirement to submit fingerprints and
17 final dispositions derived from the Uniform Crime Reporting
18 Act; correct?

19 A. Yes.

20 Q. And in order to give guidance to DCIOs, the deputy
21 inspector general issued CPM Number 10?

22 A. Yes, sir.

23 Q. Let's take a look at page 53. And this is the Air Force's
24 response to this IG report.

25 It's pretty blurry, so if we can blow up the portion that

1 says, "We concur with your findings on noncompliance." Thank
2 you.

3 It reads, in part, "We concur with your findings of
4 noncompliance. The Air Force Office of Special Investigations
5 (AFOSI) has been working on this issue since its March 1993
6 evaluation of required documentation in AFOSI investigative
7 files."

8 Did I read that correctly?

9 A. Yes, sir.

10 Q. So -- so essentially, the Air Force Office of Special --
11 of Special Investigations was aware of CPM Number 10 and had
12 actually evaluated itself as early as March 1993?

13 A. Yes, sir.

14 Q. It goes on to read, a little bit lower down, "DoD IG's
15 recent evaluation report found that high noncompliance levels
16 occurred -- between CPM 10 lacks adequate procedural guidance.
17 AFOSI found a similar problem with its implementing regulation
18 (AFOSI Regulation 124-102). To remedy that problem, HQ AFOSI
19 issued clarifying guidance on 13 Nov" -- or November -- "1995
20 requiring AFOSI special agents to coordinate with installation
21 staff judge advocates" -- or SJA -- "to determine the best
22 time to fingerprint subjects of a criminal investigation."

23 Did I read that correctly?

24 A. Yes, sir, you did.

25 Q. Okay. So essentially, this is saying AFOSI recognized the

1 problem within CPM Number 10 and took its own steps to remedy
2 the issue by establishing its own policies. Is that fair?

3 A. Yes, sir.

4 Q. Looking at the next page, it reads, "We concur with the
5 recommendation that procedure guidance found in DoD IG's
6 14 November '96 memorandum to the military departments will be
7 used until a new DoD instruction is developed.

8 "Please note that AFOSI already has a more restrictive
9 policy implemented" that suggests -- "than that suggested in
10 the 14 November 1996 memorandum. We do not believe it prudent
11 at this time to relax or change our requirements, which
12 presently appear to be working well."

13 Did I read that correctly?

14 A. Yes, sir, you did.

15 Q. So this is saying that AFOSI already recognized the
16 problem and had devised more restrictive obligations than the
17 DoD Office of Inspector General had devised; correct?

18 A. Yes, sir. That's what it said. Yes, sir.

19 Q. And they themselves thought it prudent not to relax or
20 change those more restrictive requirements at the time?

21 A. Yes, sir.

22 Q. In fact, their own policies at the time became the genesis
23 for DoD Instruction 5505.11, did it not?

24 A. I don't know that, sir.

25 Q. Okay. If we look at page 19.

1 Let me ask you this: Are you aware that the Department of
2 Defense Office of -- it's fine.

3 Sir, let me ask it this way: Are you aware that the DoD
4 Office of Inspector General concurred with the fully
5 responsive comments by the Air Force office of inspector --
6 Office of Special Investigations?

7 A. Could you show that in the report, sir? It should --

8 Q. I am trying.

9 A. I'm sorry. I understand we're having maybe a technical
10 issue. But I would -- I would say, I would find it unusual
11 that the DoD IG would say they concur. And that may be the
12 word they use, but I think most typically it would be the IG
13 accepts the response of the Air Force, and no further action
14 is required.

15 Now, that's typical. I don't remember how it's worded
16 specifically in this report.

17 Q. Fair enough, sir. And I think you're right.

18 If we look at the first line of the evaluation response,
19 "We consider the Army and the Air Force comments fully
20 responsive."

21 A. Yes, sir.

22 Q. So it's fair to say that AFOSI's comments to the DoD OIG
23 were deemed fully responsive?

24 A. Yes, sir.

25 Q. Fair enough.

1 Let's look at the next report that was referenced, and
2 that's Joint Exhibit 1.

3 This is the evaluation of Department of Defense compliance
4 with criminal history data reporting requirements; correct?

5 A. Yes, sir.

6 Q. You already spoke to plaintiffs' counsel about this
7 report, so we don't have to go to great length.

8 But you were the IG at the time of this report?

9 A. Yes, sir, I was.

10 Q. You weren't directly involved with any of the underlying
11 investigation that led to this report; correct?

12 A. I'm sorry. I didn't hear the first part of your question.

13 Q. You were not directly involved with any of the
14 investigation that led to this report; correct?

15 A. That's correct, sir. Yes.

16 Q. You didn't -- you didn't conduct any of the interviews
17 that led to this report?

18 A. No, sir.

19 Q. You didn't obtain any of the material yourself?

20 A. No, sir.

21 Q. Okay. In fact, if we look at the signature page on this
22 report. Right there.

23 A. Yes, sir.

24 Q. That is not your signature on this report; correct?

25 A. No, sir. That's Randy Stone. Randolph Stone was a direct

1 subordinate of mine, the deputy inspector general of policy
2 and oversight.

3 Q. So you might have reviewed a summary of this report, but
4 not the report itself. Is that fair?

5 A. That's correct, sir.

6 Q. Okay. If we take a look at page 3 of this report. Take a
7 look at the "Objective." And I believe you already addressed
8 this with plaintiffs' counsel, but I want to make sure we're
9 very clear about the issue here.

10 The range of the -- of the sample size, as you suggested
11 previously, was between June 1, 2010, and October 31st, 2012;
12 correct?

13 A. Yes, sir. That's correct.

14 Q. And as you already testified, Devin Kelley was not
15 convicted within that time period?

16 A. He was convicted, I believe, in November 2012, sir.

17 Q. That's correct.

18 So not in this time period; correct?

19 A. That's correct, sir, yes.

20 Q. So as a result, you acknowledge that Kelley's file would
21 not have been part of the sample study by the IG in this
22 report?

23 A. Yes, sir. That's correct.

24 Q. Thank you.

25 And looking at the "Findings" section, the first part, it

1 shows an aggregate of noncompliance for Navy, Air Force, and
2 Marines; correct?

3 A. Yes, sir. That's correct.

4 Q. That's -- the first part being aggregate for fingerprints,
5 and the second part being an aggregate for a final
6 disposition?

7 A. Yes.

8 Q. And in their "Recommendations" section, the first part,
9 "We recommend the secretaries of the Navy and Air Force take
10 prompt action to submit the missing 304 fingerprints and 334
11 final disposition reports to the FBI for inclusion into
12 IAFIS."

13 Do you know what IAFIS is?

14 A. Sir, there would be an abbreviation index at the back of
15 the report. I would just have to refer to that.

16 Q. But you don't know offhand?

17 A. Not offhand. I don't remember. It's been five years
18 since I was the IG.

19 Q. Sure.

20 So this report is saying, within the sample size, certain
21 fingerprints and final dispositions were deemed to be missing;
22 correct?

23 A. Yes, sir.

24 Q. And as a result, these missing fingerprints and final
25 dispositions within that sample size -- or the sample period

1 should be submitted?

2 A. That's correct.

3 Q. Correct.

4 And, again, that didn't include Devin Kelley's?

5 A. That's correct.

6 Q. Right.

7 Then the second recommendation, "In addition, we recommend
8 the secretaries of the Navy and Air Force take prompt action
9 to ensure fingerprints and final disposition reports for
10 future arrestees and convicted offenders conform to Department
11 of Defense Instruction 5505.11, Fingerprint Card and Final
12 Disposition Report Submission Requirements."

13 Did I read that correctly?

14 A. Yes, sir, you did.

15 Q. And this report was issued February of 2015; correct?

16 A. Yes, sir. That's right.

17 Q. So this recommendation here would have been
18 forward-looking; isn't that correct?

19 A. Yes, sir, it was.

20 Q. And, again, Devin Kelley was convicted before
21 February 2015?

22 A. Yes, sir. That's correct.

23 Q. Okay. Now, I want to take a look at AFOSI's -- and by
24 "AFOSI," do you appreciate that I'm referring to the Air Force
25 Office of Special Investigations?

1 A. Yes, sir. I understand that.

2 Q. Do you mind if I use "AFOSI" for short?

3 A. No, sir. That'd be fine.

4 Q. I appreciate that.

5 Let's take a look at the recommendation -- I'm sorry --
6 the response by AFOSI to these recommendations. Let's take a
7 look at page 31, please. If we could blow up the portion that
8 says, "AFOSI was tasked with validating 271 service members."
9 Thank you.

10 If we cut to the bottom portion of this paragraph, it
11 reads, "However, AFOSI correctly submitted 245 out of 261
12 fingerprints and 244 out of 261 final dispositions to
13 IAFIS" -- or IAFIS, IAFIS -- "which reflected a 93.86 percent
14 success rate for fingerprints and a 93.48 percent success rate
15 for final dispositions."

16 Did I read that correctly?

17 A. Yes, sir.

18 Q. So, in other words, AFOSI told the inspector general in
19 2015 that it was complying at rate of 94 percent, roughly, for
20 compliance with fingerprint cards and final dispositions;
21 correct?

22 A. No, sir. I don't think that's what that's saying.

23 Q. That is --

24 A. Well, if I could maybe explain. And maybe I'm wrong. But
25 the -- AFOSI was tasked with validating 271 member service

1 criminal histories. My assumption would be, reading that,
2 that those 271 were in the -- were part of the 1,100 sample
3 that was the foundation for this report.

4 So to say that they're in compliance with 93 percent
5 success rate for final disposition reports, I think that
6 93 percent success rate would be 93 percent of the 271 service
7 member criminal histories that were in the original sample.

8 Q. Well, that's exactly right --

9 A. Not overall -- not overall 93 percent success rate.

10 Q. But we're looking at the point in time; correct?

11 In 2015, the Department of Defense Office of Inspector
12 General conducts an evaluation based on a sample size;
13 correct?

14 A. Yes, sir. Yes, sir.

15 Q. And based on that sample size, AFOSI determined that they
16 had a 94 percent compliance rate; correct?

17 A. Could you give me a second, sir, to look at it in just a
18 little bit more detail.

19 Yes, sir, I believe that's correct.

20 Q. Okay. And the recommendation from this report, being
21 forward-looking, asks for better compliance with future --
22 concerning future arrestees; correct?

23 A. Yes, sir.

24 Q. Okay. So to be clear, it did not require a comprehensive
25 review of all criminal history data being reported, going back

1 to 1997, did it?

2 A. No, sir. It did not.

3 Q. Now, I want to discuss one last report with you, and that
4 is Joint Exhibit 2, DoD IG 2018-035.

5 If we look at the date on this report, it's December 4,
6 2017. That's approximately one month after the shooting;
7 correct?

8 A. Yes, sir. I believe that's correct.

9 Q. If we look at the "Objective" section on page 3, the
10 objective -- "The objective of our evaluation was to determine
11 whether all military services law enforcement organizations
12 (LEOs) had submitted fingerprint cards and final disposition
13 reports for military service members convicted by
14 court-martial of qualifying offenses, as required by DoD
15 instruction."

16 Did I read that correctly?

17 A. Yes, sir.

18 Q. If we look down to the chart on the first page here, the
19 DoD Office of Inspector General found that AFOSI had a
20 98 percent compliance rate for fingerprint card submission;
21 correct?

22 A. Yes, sir. Yes, sir.

23 Q. For fingerprint card. Okay. We'll get to the final
24 disposition as well, because final disposition, the DoD Office
25 of Inspector General found that AFOSI, again, had a 98 percent

1 compliance rate?

2 A. Yes, sir.

3 Q. And if we look at the recommendation by the IG in this
4 report -- and that's on page 4 -- this recommendation reads,
5 in part, "Immediately perform a comprehensive review of their
6 criminal investigative databases and files to ensure that all
7 required fingerprint cards and final disposition reports for
8 disqualifying offenses at least to 1998 have been submitted to
9 FBI CJIS in compliance with DoD and FBI requirements."

10 Did I read that correctly?

11 A. Yes, sir.

12 Q. So here, despite AFOSI's 98 percent compliance rate, the
13 IG, one month after the shooting, recommends that the
14 secretaries of Army, Navy, and Air Force, as well as the
15 undersecretary of defense for intelligence and the deputy
16 chief management officer, that they perform comprehensive
17 reviews going all the way back to 1998; correct?

18 A. Yes, sir.

19 Q. Okay. But prior to the shooting, such a comprehensive
20 audit or review was not required or even recommended in either
21 of the two IG reports already reviewed; isn't that correct?

22 A. Yes, sir.

23 Q. I believe Mr. -- plaintiffs' counsel used the word "aware"
24 when it comes to the 2015 IG report.

25 Is it your expert opinion that the 1997 IG report and the

1 2015 report made the Air Force aware of its requirements to
2 submit disqualifying information to CJIS?

3 A. Yes, sir.

4 Q. And that they didn't prioritize that obligation?

5 A. Well, I think if we had a noncompliance rate at that time
6 in the 30 percent range, there were certainly -- it should
7 have -- in my view, should have been higher, yes, sir.

8 So whether or not they didn't put the right -- the
9 emphasis that I would recommend on it, that seemed obvious to
10 me, sir, yes.

11 Q. So, again, AFOSI had approximately a 94 percent compliance
12 rate; correct?

13 A. A 94 percent compliance rate? I think that was in the
14 2017 report.

15 Q. The 2015 report that we already looked at?

16 A. 2015 report, yes.

17 Q. Okay. But in your estimation, it should have been higher;
18 correct? Is that your testimony today?

19 A. Well, I'm sorry. You've lost me, sir. I'm not -- I'm not
20 following you. If you could -- if you could restate that.
21 I'm sorry. I lost track there.

22 Q. AFOSI was found to have a 94 percent compliance rate in
23 the 2015 report; correct?

24 A. Yes.

25 Q. And it's your testimony -- is it your testimony that AFOSI

1 didn't prioritize the submission of fingerprints and final
2 dispositions sufficiently?

3 A. Well, I think the evidence shows, sir, that there -- when
4 you say "didn't," you don't specify period of time. But
5 certainly in the '97 report, the 2015 report, there were
6 opportunities for improvement, yes, sir.

7 Q. Opportunities for improvement. Is that fair?

8 A. Yes, sir.

9 Q. Thank you.

10 MR. STERN: No further questions, Your Honor.

11 THE COURT: Any redirect?

12 MR. JACOB: Yes, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. JACOB:

15 Q. Mr. Rymer, let me -- can you hear me?

16 A. No, sir, I can't.

17 Q. Can you hear me better now?

18 A. Yes, sir.

19 Q. Okay. Mr. Stern discussed with you how the IG
20 investigations, in your opinion, didn't recommend fixing or
21 submitting Devin Kelley's criminal history.

22 Do you remember that conversation?

23 A. Yes, sir. I think Mr. Stern -- or I think I answered
24 Mr. Stern by saying that the -- that the Devin Kelley
25 conviction was outside of the sample period. Yes, sir.

1 Q. Right.

2 But did the Air Force have an ongoing obligation to submit
3 the missing criminal history of Mr. Kelley?

4 A. I think, in order to be in compliance with its own
5 regulation and the DoD regulation, yes, it did.

6 Q. And Mr. Stern showed you numbers on the percentage of the
7 AFOSI reporting.

8 Did he show you numbers on the percentage of security
9 forces reporting?

10 A. I think it was on the chart, but I don't think he
11 mentioned it, no, sir.

12 Q. Okay. And specifically, I want to look at the raw
13 numbers. If I can show you Joint Exhibit 433, page 5.

14 And I'll represent to you, this is an exhibit that has
15 been entered into evidence, and I want to show you the results
16 of the task force on correcting the problems following the
17 Sutherland Springs shooting.

18 MR. STERN: Objection, Your Honor. This is beyond
19 the scope of Mr. Rymer's report. He did not actually
20 reference the NCIC indexing task force in his report, nor has
21 plaintiffs' counsel alluded to it during their direct.

22 MR. JACOB: Mr. Stern, however, did show the
23 percentage numbers, trying to minimize the size of the
24 problem, when this document shows that they had 73 -- over
25 7,300 missing fingerprints and final dispositions from the

1 Air Force itself.

2 MR. STERN: To be quite clear, the United States is
3 not making that argument.

4 What we are saying is, at the time that the IG reports
5 were produced, the AFOSI -- the Air Force, in general, was
6 only aware of that which they're being told at the time.
7 These type of subsequent remedial measures are not only
8 inappropriate under tort law to consider, but they skew the
9 entirety of what was being known -- what was being told to the
10 Air Force at the time those previous IG reports were created.

11 MR. JACOB: Your Honor, this is admitted evidence.

12 MR. STERN: -- bias here.

13 MR. JACOB: This is admitted evidence. Their
14 objection to subsequent remedial measures is long past.

15 THE COURT: Yeah. So --

16 MR. STERN: That's a legal argument that has never
17 been waived. Just because --

18 THE COURT: That doesn't go back to the underlying
19 objection of whether or not he was designated to talk about
20 the indexing task force. So that is sustained.

21 Next question.

22 MR. JACOB: Yes, Your Honor.

23 BY MR. JACOB:

24 Q. Mr. Rymer, Mr. Stern discussed with you that, in response
25 to these IG reports, the Air Force provided a response.

1 Do you recall that conversation?

2 A. Yes, sir.

3 Q. And he pointed out, the DoD considers the Air Force
4 response or the Air Force comments as being responsive; right?

5 A. Yes, sir.

6 Q. And to be clear, the DoD IG did not concur with the
7 Air Force response.

8 That's not what those documents said; right?

9 A. Well, I think -- I think the word was "accepted." I don't
10 think they used the word "concur," no, sir.

11 Q. Okay. Is there -- is there a difference between
12 responding to the recommendation -- being responsive to the
13 recommendation and actually implementing and responding and
14 fixing the problems the recommendation highlights?

15 A. Well, most typically, in an evaluation report or an audit
16 report like this, the IG would accept the concurrence or
17 acceptance of the -- of the subject of the audit or
18 evaluation, and then that would also include a remediation
19 plan that the IG would have the opportunity to review.

20 And then as the remediation plan is executed, the IG
21 might -- would be taking steps to ensure that the plan is
22 executed as it was originally presented.

23 But, yes, sir, there is a fair amount of follow-up --
24 excuse me -- to -- once the report -- once the recommendation
25 is accepted by the subject of the evaluation, the remediation

1 process begins. That remediation plan is submitted to the IG
2 and then monitored by the IG. Yes, sir.

3 MR. JACOB: Okay. Pass the witness, Your Honor.

4 THE COURT: Anything else?

5 MR. STERN: Very briefly, Your Honor.

6 RECROSS-EXAMINATION

7 BY MR. STERN:

8 Q. Plaintiffs' counsel just referred to security forces
9 investigation.

10 In your report, you noted that Devin Kelley was subject to
11 two law enforcement investigations; one led by 49th Security
12 Forces at Holloman Air Force Base, the other led by the
13 Air Force Office of Special Investigations Detachment 225;
14 correct?

15 A. Yes, sir. That's right.

16 Q. So you recognize that those were two separate, independent
17 investigations?

18 A. Yes, sir, I would.

19 Q. Are you aware that the security forces investigations
20 resulted in a letter of reprimand?

21 A. A letter of reprimand to whom, sir? One of the
22 investigating officials?

23 Q. To Devin Kelley.

24 A. Well, yes, sir. I believe there were a number of
25 disciplinary actions, but I believe that was one, yes, sir.

1 Q. But I'm referring to the investigation starting
2 November 17th, 2012, that led to a letter of reprimand that
3 concluded the security forces investigation of Devin Kelley?

4 A. Yes, sir. I believe that's correct. Yes, sir.

5 Q. Okay. And as a result of that letter of reprimand, the
6 final disposition of that investigation would have needed to
7 be submitted to the FBI; correct?

8 A. Would you -- I didn't understand. Did you say "would" or
9 "would not" have been submitted?

10 Q. "Would have."

11 Let me try this another way. Let's take a look at Joint
12 Exhibit 8. This is Department of Defense Instruction --

13 MR. JACOB: Your Honor, I apologize. This is beyond
14 the scope.

15 MR. STERN: Look, to the -- to the extent that
16 plaintiffs are arguing that the security forces' failures to
17 submit fingerprints and final dispositions is relevant, as
18 it's articulated in the IG reports, our argument has always
19 been that the security force investigation could not be the
20 proximate cause of plaintiffs' injuries because the security
21 forces investigation ended in a letter of reprimand.

22 As a result, even if the fingerprints needed to be
23 submitted at the time -- probable cause, the final
24 disposition, i.e., the letter of reprimand, would also have
25 needed to be submitted to close the loop on that

1 investigation.

2 Because the letter of reprimand was not a prohibiter under
3 the Gun Control Act, Kelley would not have been prohibited,
4 based on that investigation. And as a result, it could not be
5 the proximate cause of plaintiffs' injuries.

6 MR. JACOB: Your Honor -- and they may have another
7 witness to talk about that. But this testimony with this
8 witness is beyond the scope of redirect examination.

9 MR. STERN: Then, I would ask to strike the comments
10 regarding the security forces' failure to submit fingerprints
11 and final disposition, as articulated in the DoD IG reports.

12 THE COURT: The objection's overruled.

13 You can continue.

14 MR. STERN: Thank you.

15 BY MR. STERN:

16 Q. If we look at Enclosure 3 in this instruction.

17 Sir, looking at this instruction, it reads, in part,
18 "Within 15 calendar days after final disposition of military
19 judicial or nonjudicial proceedings or the approval of a
20 request for discharge, retirement, or resignation in lieu of
21 court-martial, disposition information shall be reported by
22 the DCIO or other DoD law enforcement organizations under the
23 R-84 or an electronic data transfer equivalent if it has not
24 already been reported on an FD-249."

25 Page 10. Mr. Rymer, I apologize. I believe it's

1 Enclosure 4. So we're taking a look at this.

2 It states that, "Within 15 calendar days after final
3 disposition of military judicial or nonjudicial proceedings or
4 the approval of a request for discharge, retirement, or
5 resignation in lieu of court-martial, disposition information
6 shall be reported by the DCIO or other DoD law enforcement
7 organization on the R-84 or an electronic data transfer
8 equivalent, if it has not already been reported on an FD-249."

9 Did I read that correctly?

10 A. Yes, sir.

11 Q. So if a security forces investigation ended in a letter of
12 reprimand -- and you acknowledge that a letter of reprimand is
13 a nonjudicial proceeding; correct?

14 A. Yes, sir.

15 Q. Then they -- then security forces would have needed to
16 submit an R-84 to CJIS within 15 days after that letter of
17 reprimand; correct?

18 A. According to this, yes, sir.

19 Q. Thank you.

20 MR. STERN: No further questions, Your Honor.

21 THE COURT: Anything else?

22 MR. JACOB: No, Your Honor.

23 May this witness be excused?

24 THE COURT: Any further need for this witness?

25 MR. STERN: No need, Your Honor.

1 THE COURT: Thank you, Mr. Rymer. You're excused.

2 THE WITNESS: Thank you, sir.

3 THE COURT: And your next witness.

4 MR. JACOB: Yes, Your Honor. If we may have five
5 minutes to get him connected and test.

6 THE COURT: And that'll be Daniel Webster?

7 MR. JACOB: Yes, sir.

8 THE COURT: Let's go ahead and take a five-minute
9 break.

10 *(Recess)*

11 *(Open court)*

12 THE COURT: Thank you. Please be seated.

13 MR. JACOB: Your Honor, plaintiffs call Daniel
14 Webster.

15 THE CLERK: Mr. Webster, if you'll raise your right
16 hand, please.

17 Mr. Webster, if you'll raise your right hand.

18 MR. JACOB: Mr. Webster, can you hear us?

19 THE WITNESS: Yeah, I can hear you.

20 THE CLERK: Mr. Webster, will you raise your right
21 hand, please, so I can swear you in.

22 *(The oath was administered)*

23

24

25

1 DANIEL WEBSTER, PLAINTIFFS' WITNESS, SWORN

2 DIRECT EXAMINATION

3 BY MR. JACOB:

4 Q. Sir, would you introduce yourself to the Court, please.

5 A. Sure. My name's Daniel Webster.

6 Q. And who is your employer?

7 A. Johns Hopkins University.

8 Q. And what do you do for a living?

9 A. I'm a professor in the Department of Health Policy in the
10 School of Public Health. I teach graduate courses on violence
11 prevention, research methods. And I conduct research. Most
12 of that research is focused on the problem of gun violence and
13 what to do about it.

14 Q. Okay. And I want to go into that background in a little
15 bit of detail.

16 But, first, could you tell us, do you have an official
17 title at Johns Hopkins?

18 A. Sure. My official title is Bloomberg professor of
19 American health in violence prevention, and I'm a tenured
20 professor.

21 Q. And is Johns Hopkins School of Public Health a ranked
22 school of public health?

23 A. Yes, it is. We're ranked number one.

24 Q. And let me show you your CV, Joint Exhibit 316 [sic], and
25 talk -- take you through that, if you wouldn't mind.

1 A. Okay. Sure.

2 Q. First of all, do you see Joint Exhibit 316 on your screen?

3 A. Yes.

4 Q. And is Joint Exhibit 316 a copy of your CV?

5 A. Yes, it is.

6 Q. You've reviewed this CD. Is that -- CV. Is that fair?

7 A. Sure. Yes.

8 Q. And is Joint Exhibit 613 accurately fleshing out your
9 experience, your credentials, education, training?

10 A. Yes, it is.

11 Q. Okay. First, could you describe for us briefly -- and
12 I'll zoom in on your education and training -- your
13 educational background.

14 A. Sure. I have a bachelor's degree in psychology from
15 University of Northern Colorado. I have a master's in public
16 health degree from University of Michigan, completed in 1985.
17 And then I got my doctorate of science degree from the same
18 department I now teach in, at the Johns Hopkins School of
19 Public Health in 1991.

20 Q. Okay. And I apologize if this question sounds very basic.

21 But could you tell us what public health is, the study of
22 public health?

23 A. Okay. That's actually sort of challenging because public
24 health is pretty massive.

25 But, generally, the field of public health, of course, is

1 interested in not only the health and safety of individuals,
2 but of populations. So the field is very vast. It's a very
3 multi-disciplined field.

4 The way I characterize public health is, it's a field
5 focused on solving problems relevant to our health and safety.
6 And, of course, that's very broad, but that's truly what
7 public health is. And my focus has been on policies -- health
8 policies that impact the health of populations.

9 Q. Okay. And today, in your career, do you have a specific
10 focus inside of public health, an area that you specialize in?

11 A. Yes. For the past thirty years, my focus has been on the
12 prevention of gun violence, including suicide, unintentional
13 shootings as well. I also have subarea of focus in issues
14 relevant to drug and alcohol policy as well.

15 Q. Okay. And is public health a field of epidemiology?

16 A. Epidemiology is a foundation upon which most of public
17 health is based. It is -- it is where we begin to understand
18 the nature of the problem, who's affected by it, the scope of
19 it, and understand causal factors related to the health
20 conditions that we're studying and trying to impact.

21 Q. Okay. And so what I'd like to do for the Court is show
22 the Court how you got from your various degrees, your
23 master's, doctor's, and bachelor's, to your current role.

24 Could you tell the Court where you started your career.

25 A. Sure. After I got my bachelor's degree, shortly

1 thereafter, I became a social worker for the Department of
2 Social Services in the Commonwealth of Kentucky where my role
3 was to mostly investigate child abuse and neglect.

4 I also was involved in supervision of some juveniles who
5 had gotten into trouble. And occasionally, I also dealt with
6 broader family violence issues in my role.

7 Q. And was that a fairly hands-on role?

8 A. Very directly hands-on, yes.

9 Q. Okay.

10 A. I went into homes in the county that I worked in, worked
11 directly with the -- with the families and other agencies that
12 were relevant to the situation going on, whether it was
13 schools or hospitals or the court systems.

14 Q. Okay. And after your role as a social worker, following
15 your degree in -- where did you go?

16 A. I went to University of Michigan to get my master's of
17 public health. It was there that I began to focus more on
18 injury and violence prevention and -- yeah.

19 Q. Do you -- let me show you page 22 of your CV, Joint
20 Exhibit 316 -- or 613. I apologize.

21 A. Okay.

22 Q. Since your educational -- since you received your master's
23 and then your doctorate of science in these fields, have you
24 taught these areas?

25 A. Yeah. I actually developed the first course in an

1 accredited school of public health on violence prevention. So
2 I was very much involved in the foundation of understanding
3 violence through a public health lens as a public health
4 problem. I've also taught courses in research methodology.

5 What's not on this is a brand-new course I'm teaching now,
6 a problem-solving course focused on gun violence.

7 Q. And could you describe what you mean by "a problem-solving
8 course" on gun violence?

9 A. Sure. So this is a course that takes graduate students
10 through the entire process, from gathering data, to understand
11 the nature and scope of the problem, who is impacted,
12 developing conceptual models of that problem and logic models
13 for various strategies to address it, to formally reviewing
14 and synthesizing evidence on intervention models that --
15 excuse me -- that impact the nature of gun violence that
16 you're focused on and even carries through into understanding
17 key issues relevant to implementation.

18 This covers not only the passage and enforcement of laws,
19 but it also covers programmatic interventions in communities.

20 Q. Okay. And you said over the course of your 30 years that
21 you've been working on this particular area, the touching on
22 gun violence prevention and policy. Over that time has
23 your -- how do you divide your time between teaching versus
24 research or other activities?

25 A. Yeah. I would say that roughly 75 percent of my time is

1 focused on research, and the other 25 percent is focused on
2 teaching, advising, mentoring graduate students.

3 Q. Over the course of your career, how many students have you
4 taught, advised, mentored in these areas?

5 A. Yeah, that's hard. So as far as doctoral students, I've
6 probably advised and have close working relationships with
7 about a dozen such students. I've trained many of the top --
8 or leading researchers in this field.

9 I also have mentored roughly 50 master's students, many of
10 whom focused in some, shape, or form on violence prevention
11 and often very specifically on gun violence. Then, of course,
12 I taught, I don't know how many people over those years. A
13 lot.

14 Q. Do you testify before legislatures on these issues?

15 A. Yes. Occasionally, I do testify at state legislatures and
16 in Congress.

17 Q. Are you invited to testify?

18 A. Sometimes, yes. That's more commonly the scenario.

19 I'm pretty busy. So the nature of my research -- there is
20 often legislative things going on all the time. And I, of
21 course, don't have time to testify on all of those cases. But
22 occasionally, I'm asked, based upon the nature of the bill and
23 the research that I've done on the topic.

24 Q. Are you invited to provide presentations or educational
25 materials outside of your work with Johns Hopkins concerning

1 the topics of gun violence prevention and all of the issues in
2 that area?

3 A. Yes, quite frequently. I've given many invited talks and
4 lectures at universities across the country. More than I
5 could count.

6 Q. Are we talking, you know, dozens or hundreds? What's --

7 A. Oh, so in a typical year, I'm probably giving four,
8 five -- about four lectures at other universities or -- and
9 then in addition to that, there are other meetings and
10 convenings of other professional organizations; like the
11 National Academy of Sciences, for example. So --

12 Q. Yeah. Can you give me an example of a few universities
13 that you have lectured at or have invited you to lecture?

14 A. Oh, sure. So I've given lectures at Harvard, Penn,
15 Columbia -- let's see -- Oregon Health Sciences, Ohio State,
16 Michigan.

17 Q. How about the University of Texas?

18 A. University of Texas? I'm trying to think if I've done
19 them. I'm not sure if I have or not.

20 Q. Okay. Let me turn your attention to your -- the
21 "Publications" area of your CV. And I want to show you
22 page 8 --

23 A. Sure.

24 Q. -- of Joint Exhibit 613.

25 A. Uh-huh.

1 Q. And, first of all, that's just the beginning portion of
2 your publications. Is that fair to say?

3 A. Yeah. That's the most recent ones. And this is what I
4 believe I submitted in March or something of --

5 Q. Is --

6 A. -- the prior year.

7 Q. Sure.

8 Can you tell the Court how many peer-reviewed publications
9 you have to your name?

10 A. I think I have approximately 140.

11 Q. Do you have publications in other journals beyond just
12 peer-reviewed publications?

13 A. Yeah, occasionally. Most of my work is peer-reviewed
14 publications. Occasionally, I will write op-eds in, you know,
15 *Washington Post* and other news outlets of that type.

16 And, occasionally, I'm also invited by journals to write
17 special commentaries on the issue of gun violence and its
18 prevention.

19 Q. Have you published -- and if we can zoom back out to your
20 full CV.

21 Have you published in the areas of gun violence and gun
22 violence prevention?

23 A. Yes. I would estimate -- I haven't broken this down, but
24 I would estimate probably three-quarters, if not more, of my
25 publications are on the topic of gun violence and its

1 prevention.

2 Q. What about domestic violence? Have you published or
3 studied that area?

4 A. Yes, I have. I actually designed and was the second
5 author of a very important study on risk and protective
6 factors for intimate partner homicide. I believe it actually
7 might be the most commonly cited study in the field of
8 domestic violence research, as important ramifications for
9 understanding how we address this important problem of
10 domestic homicide.

11 Q. And when you say "most commonly cited study," how many
12 citations are we talking about?

13 A. I don't know off the top of my head. There was an article
14 that came out within the past year that sort of summarized
15 some of these things.

16 Some researchers track these things almost obsessively. I
17 don't. I know it's a commonly cited thing. But in a
18 publication that came out recently, I saw that it was -- it
19 was the number one.

20 Q. Can you tell the Court why you study domestic violence in
21 the context of gun violence prevention?

22 A. Yeah. I guess the answer to that question is twofold.

23 One is it's just an important form of gun violence. It
24 also is a type of gun violence that I think perhaps we have
25 more opportunities to intervene with policy and other

1 interventions.

2 The other thing I would say, the important reason to
3 understand and study connections between domestic violence and
4 firearms, in particular, is that many people who -- the people
5 who commit the most severe forms of domestic violence in
6 intimate partner violence, including those involving firearms,
7 are rarely only violent within that context. They more
8 commonly are violent outside of that intimate partner or
9 family context.

10 And so understanding and zeroing in on such individuals,
11 you have a potential to address not only the problem of
12 domestic homicide but also other acts of violence that
13 individuals with histories of domestic violence might commit.

14 Q. Okay. And we'll definitely get into that later in our
15 conversation.

16 But first, with regard to the research that you've
17 published over the course of your 30 years, how is that
18 research typically funded?

19 A. Most of my research has been funded by private
20 foundations. I've also received grants from the Centers for
21 Disease Control and Prevention to study strategies to
22 prevent -- to prevent youth homicide and youth violence. I've
23 had three different CDC grants covering five years --
24 five-year grants, for example.

25 I've had some NIJ grant funding; although, not

1 particularly recently. And some of my research has been
2 funded sort of in partnerships with law enforcement agencies
3 through U.S. DOJ grant funding from the Bureau of Justice
4 Assistance.

5 Q. Okay. Let me take down Joint Exhibit 613, so we can talk
6 more directly with you.

7 Are you familiar with the concept of research as applied
8 to individuals versus theoretical research?

9 A. Sure. Well, I'm not sure what you mean by "theoretical
10 research." So you're going to have to be more specific about
11 that.

12 Q. Yeah. What I want to talk about is the applied aspect of
13 your -- of research.

14 Is the research studies that you perform applied to
15 specific individuals or more broad -- broader than that?

16 A. Well, I've conducted two kinds of research. Some of the
17 research that I've done of the nature that I was describing
18 earlier where we're understanding risk and protective factors
19 for lethal outcomes in the context of domestic violence, those
20 are individual-level studies that were interested in all the
21 individual factors going on so that we can predict outcomes
22 and ideally try to intervene before the bad outcomes occur.

23 But a lot of my research focuses at the population level.
24 So the units of analysis that we're studying could be
25 counties, cities, or states and what policies they've applied

1 to address problems relevant to violence and, particularly,
2 gun violence.

3 Q. Have you studied the concept of risk among individuals in
4 that type of population and specifically domestic violence and
5 gun violence individuals?

6 A. Yes, absolutely. The foundational study that I was
7 referring to earlier with the -- it was 11 major cities,
8 geographically diverse across the United States, focused --
9 looking at -- actually, there were three categories.

10 There were intimate partner homicides, another category
11 that were either near -- sometimes we call them near homicides
12 or attempted homicides. These were very serious assaults that
13 people were lucky to survive. And then the other category
14 were the nonfatal cases where we identified those individuals
15 through random-digit-dial surveys in communities to identify
16 women who were either in physically abusive relationships or
17 recently out of them.

18 That study was designed very specifically to understand
19 these individual risks, and it was the foundation upon which
20 two different tools that are commonly used across the
21 United States, and I think actually beyond, one called the
22 danger assessment tool. I believe it's 22 items designed to
23 predict how dangerous someone is, particularly with lethal
24 outcomes. And then a somewhat shorter tool used in the field
25 by -- often by law enforcement and -- or occasionally in

1 clinical contexts, shorter survey designed to do the same kind
2 of thing of sort of sort and identify those at the highest
3 risk for committing lethal acts of violence.

4 Q. And could you explain to the Court your role in creating
5 these tools, such as the danger assessment tool and the second
6 high-risk individual tool?

7 A. Sure. So the -- it was based upon, you know, a design of
8 an initial study, a design that in epidemiology we refer to as
9 a case control study.

10 The cases are the outcome of interest in this case,
11 intimate partner homicides. And the controls were people in
12 very similar circumstances who had, you know, not been killed
13 in their relationship, that also had physical violence.

14 So part of it is the design, just -- by the way, I mean,
15 in an ideal world, if you had unlimited time and money --
16 which we never do, of course -- you would just study entire
17 populations and sort these risk factors out. But, of course,
18 you need to be more efficient. And a common way that
19 epidemiologists do that is through a case control design.

20 We then -- in terms of assessing risk for something like
21 the danger assessment or lethality assessment tool, it's based
22 upon a set of weights, which set of factors are most
23 predictive of elevated risk, in this case, for the outcome of
24 domestic homicides.

25 So the factors, such as the abuser's possession of a

1 weapon, which we found to elevate risk more than any other
2 independent risk factor -- so those -- the weights of how much
3 these conditions, in a sense, either increase or decrease risk
4 are factored in the overall danger score or lethality score.

5 Q. And what kind of organizations or institutions use your --
6 the tools that you design -- the danger assessment tool, the
7 high-risk individual assessment tool -- in their day-to-day
8 lives?

9 A. So I want to give credit where credit is due. My
10 colleague, Jacquelyn Campbell, is the primary author of the
11 danger assessment and developed a lot of the underlying
12 theory. And then we worked together on some of the research.
13 So I just want to make sure I'm giving the appropriate credit.

14 But in terms -- to answer your question, these are tools
15 that are used in law enforcement agencies, probably in every
16 single state by now. I know, not that long ago, it was
17 40-some states were using the tool.

18 It's a tool that's used in programs that serve victims of
19 domestic violence for emergency shelter and other types of
20 services. It's used by legal clinics that serve that same
21 population, and it's also used by health professionals who
22 encounter and treat and try to provide assistance to patients
23 who come in with that type of history of domestic violence.

24 Q. And is the tools that you and your colleague, Ms. -- or
25 Dr. Campbell, developed used on an individual-by-individual

1 basis, or is it a broader tool?

2 A. Individual basis, yeah. I mean, you cannot calculate with
3 great precision, of course, it across whole populations.

4 So the tool is designed, based upon the underlying study,
5 to look at the individual set of factors going on for that --
6 in that individual's case.

7 Q. And have subsequent studies borne out the reliability of
8 these danger assessment tools that you and Dr. Campbell
9 designed?

10 A. Well, there are other studies that look at risk factors
11 for lethal outcomes. They don't always cover every single
12 thing that's in the danger assessment. But there's
13 independent research support for the key factors that are
14 included there, such as history of strangulation -- or
15 sometimes the victims use the word "choking"; "he choked
16 me" -- threats with a weapon and the presence -- the abuser's
17 ownership of a weapon.

18 A lot of those factors have also been studied and
19 corroborated, I guess, in prior -- in other studies.

20 Q. Okay.

21 MR. JACOB: Your Honor, at this time, we offer
22 Dr. Webster in epidemiology, gun violence policy and
23 prevention and public health policy.

24 MS. KRIEGER: No objection.

25 THE COURT: Y'all need to be more specific in

1 objections. Is there --

2 MS. KRIEGER: I said, "No objection."

3 THE COURT: No objection. Okay. Thank you. All I
4 heard was "objection."

5 MS. KRIEGER: I apologize. I apologize, sir.

6 No objection.

7 THE COURT: The doctor's recognized as an expert as
8 such.

9 BY MR. JACOB:

10 Q. Dr. Webster, I want to shift gears a little bit and talk
11 about this particular case. Could you tell the Court what you
12 were asked to do in this case.

13 A. Yeah. So I was asked to look at the set of facts and
14 provide my assessment of whether it was foreseeable that
15 Mr. Kelley, Devin Kelley, could commit serious acts of
16 violence, to examine what happened or didn't happen with
17 respect to his prior history, criminal history, and the
18 records involved, and draw upon both my own research but other
19 research to provide an assessment whether this is -- this was
20 basically something that could have been prevented.

21 Q. And we'll get to that in detail, but I know -- I
22 understand that you've reviewed thousands, probably, pages of
23 documents in this case.

24 Would you mind giving the Court a brief overview of the
25 types of information that you reviewed in this case.

1 A. Sure. So I reviewed files from the investigations of
2 domestic violence, the interviews of Air Force personnel who
3 were Devin Patrick's supervisors. I reviewed interview
4 documentation from interviews with Devin Kelley's father and
5 family members connected to Tessa and Danielle, his first and
6 second wife.

7 I'm trying to remember what else I reviewed now.

8 Q. Well, if I can ask you about some categories.

9 A. Yeah.

10 Q. First of all, I assume in your day-to-day practice, you
11 review studies that are directly applicable to these types of
12 issues that we're about to discuss?

13 A. Oh, yes.

14 Q. Did you review mental health records of Devin Kelley?

15 A. Yes, I did.

16 Q. What about post-shooting investigations in this case?

17 And when I refer to "shooting," I mean the Sutherland
18 Springs shooting in November of 2017.

19 A. Yeah. So what I particularly remember and keyed in on was
20 the assessment when he was involuntarily hospitalized due to
21 some mental breakdowns and an assessment of depression,
22 suicidality, antisocial behavior disorder. That -- those
23 were, I think, particularly key and important, as well as a
24 very direct assessment of his danger to others at that time.

25 Q. And what about depositions in this case?

1 Did you review depositions of the various witnesses
2 involved in this case that were taken?

3 A. Yes.

4 Q. And trial testimony?

5 We've had the testimony of Danielle Smith; Michelle
6 Shields; and Mr. and Mrs. Kelley, the parents of Devin Kelley.

7 Did you review that testimony?

8 A. Yes.

9 Q. And more broadly speaking, was this case -- your
10 involvement in this case, the first time you had heard about
11 the Sutherland Springs shooting?

12 A. Oh, no. Of course, you know, I study gun violence. This
13 was a major event. So I was -- I definitely followed what was
14 in the news as information came out about it.

15 Q. Okay. And could you briefly describe to the Court when
16 the first time -- and the circumstances surrounding the first
17 time you heard about this particular case?

18 A. Yeah. So, you know, I remember, as more information came
19 out about, you know, why -- you know, why would someone come
20 to a church and commit this act of violence?

21 Most commonly, in any shooting, but particularly in mass
22 shootings, this is not random. Targets are not random. There
23 are, of course, exceptions, but usually they're motivated.
24 They're motivated by a sense of grievance and anger towards
25 someone or some set of individuals.

1 So as it became, you know, more known about his spouse's
2 family's connections to that church and Danielle Kelley's own
3 connections to that church as being a very important place for
4 her, in my mind, I understood this as, again, something that
5 was very much a family domestic violence-oriented and
6 motivated attack.

7 It is something -- again, there's too many cases to count
8 in which very deadly shootings are motivated by these -- you
9 know, intense emotions and grievance -- feelings of grievance,
10 to intimate partners, in particular. So that is what struck
11 me about this case in particular, and just also discussing
12 this among my colleagues, who, you know, share a similar
13 interest in understanding gun violence, what motivates it.

14 Q. So when you learned about this case, did you learn about
15 it through your job as a gun violence prevention researcher
16 and professor at Johns Hopkins?

17 A. Well, I didn't undertake a separate study of this
18 particular incident. I just -- frankly, I'm often asked to
19 comment on such tragedies in the news media. So I want to
20 become as knowledgeable as I can about the set of facts at
21 play. So --

22 Q. And since that time, have you found out much more
23 particular details about this case than what you learned
24 initially?

25 A. Oh, yeah. Yeah, a lot more. I did not really know

1 Mr. Kelley's -- Devin Kelley's full history. Of course, I did
2 know, because it was a major item -- newsworthy item and also
3 relevant to gun policy, that in his history were these
4 convictions for felony domestic violence that should have
5 prohibited him from purchasing the rifle that he used in this
6 shooting.

7 Q. Okay. And we'll get to that.

8 But before we do, I want to ask you, is your approach to
9 this case and the conclusions that you reached in this case
10 the same approach you take in your day-to-day professional
11 career as a gun violence prevention professor and researcher
12 and scientist?

13 A. So yes and no. Yes, in that I am looking at data and
14 research and trying to draw what I think are the best
15 inferences, most solid inferences from that available
16 research. Usually, my job as a policy researcher, I am not
17 looking at every individual case in the same sort of detailed
18 way as I am now, because usually the level of detail is not,
19 frankly, there to do that.

20 So, you know, more commonly, my research that I do, I am
21 not as in the weeds of all the set of factors at play in going
22 about my research. But, again, this was a different case
23 and --

24 Q. So in this case, would it be fair to say you have more
25 information than you typically have access to in reaching your

1 conclusions?

2 A. Far more, yes.

3 Q. And did you reach your conclusions with the same rigor
4 that you would use in your professional career?

5 A. Yes.

6 Q. Are all of the opinions that you're going to be providing
7 this Court reached to a reasonable degree of certainty?

8 A. What do you mean by "reasonable degree of certainty"?

9 Q. Sure. You know, this is a civil suit, and the opinions
10 you offer have to be to a -- the preponderance of the evidence
11 standard, more likely than not.

12 Are you reaching those -- the opinions that you've reached
13 in this case using that standard?

14 A. Yes.

15 Q. Okay. So the first topic that I'd like to discuss with
16 you is acquisition of firearms by people like Devin Kelley.

17 Is that -- is that a subject that you've studied
18 extensively?

19 A. Yes.

20 Q. And have you published in that area?

21 A. Yes.

22 Q. And can you describe some of the publications.

23 A. Yeah. Maybe the most important and direct one is, again,
24 the study I've referenced a few times now, the risk factors
25 for intimate partner femicide study that I was the second

1 author on, with Dr. Jacquelyn Campbell as the lead, published
2 in *American Journal of Public Health*.

3 There, we studied hundreds of women who were murdered by
4 their either current or former intimate partners, and went and
5 collected data on nonfatal cases in the same cities where
6 these deaths occurred, where these homicides occurred. And
7 the study was a federally-funded study, incredibly
8 comprehensive.

9 It's hard to imagine what risk factor we didn't examine in
10 our study. So it was an incredibly comprehensive set of
11 studies -- or, well, principal study there.

12 As I mentioned, there were two key outcomes we were
13 looking at. We were looking at lethal cases and near-lethal
14 cases. So we also published on the near-lethal cases as well.

15 Q. Okay. And I promise we will get to that study.

16 MR. JACOB: But before we do, Your Honor, it's about
17 noon. I don't know if this is an appropriate time, since
18 we've just finished, sort of, the methodology and we're about
19 to go into the substance, to take a lunch break.

20 I'll defer to the Court and counsel on that.

21 THE COURT: This looks like a good break.

22 I'm just kind of curious, are we going to have available
23 time at the end of the day, or is this witness going to take
24 the whole day?

25 MR. JACOB: In terms -- this is the only witness left

1 for today.

2 THE COURT: Right. Yeah. That's why I'm asking.
3 I'm trying to figure out -- can I do something at 4:00 or not,
4 is what I'm trying to figure out. So what's your estimation?

5 MR. JACOB: If we can take a short lunch --

6 THE COURT: Yeah. If I can squeeze another meeting
7 in, that would be great. But if not, I understand. And so
8 I'm just trying to figure out schedule.

9 Let's take 30 minutes. We'll be back about 12:30,
10 12:35-ish.

11 *(Recess)*

12 *(Change in reporter)*

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DANIEL WEBSTER - DIRECT

1 (Change in reporter.)

2 MR. JACOB: Proceed, Your Honor?

3 THE COURT: Yes.

4 DIRECT EXAMINATION CONT'D.

5 BY MR. JACOB:

6 Q. All right. Dr. Webster, can you hear us?

7 A. Yes.

8 Q. Okay. Now I want to talk to you a little bit about the
9 acquisition of firearms by people like Devin Kelley. And one
10 of the issues that we're dealing with in this case is if the
11 Air Force had exercised reasonable care in collecting and
12 submitting Mr. Kelley's criminal history to the FBI.

13 What I want to know about that particular subject is, is
14 there evidence in your field that individuals like Kelley
15 would be discouraged or deterred from acquiring firearms,
16 altogether, if they had been denied firearms by a FFL, a
17 federal firearms licensee?

18 A. Yes. There are -- there is research evidence to support
19 that. There are at least three that come to mind that are --
20 what I would say are individual-focused as opposed to broad
21 policy-focused, population level.

22 So there's one study. The lead author is Mona Wright
23 along with Drs. Garen Wintemute and Frederick Rivara, that
24 they studied individuals with a history of prior felony
25 arrests; some of whom were convicted and denied when they

1 attempted to purchase firearms, and another group who did not
2 have a disqualifying conviction and, therefore, were allowed
3 to go forward and purchase.

4 Q. Okay.

5 A. In that study, they did find that those -- those who were
6 allowed to purchase after controlling for history -- prior
7 criminal history had an elevated risk for committing both gun
8 and violent offenses.

9 Q. Okay. And I want to --

10 A. And I talked about --

11 Q. Yeah, go ahead.

12 A. Sorry.

13 Q. Yeah, I want to go through those studies. You said the
14 first study was Wright.

15 What were the other two studies that you mentioned?

16 A. Sure. The other two; one, the first author is, again,
17 Dr. Garen Wintemute. This focuses on disqualifying violent
18 misdemeanants. The policy changed in 1990 or '91 -- I can't
19 remember exactly -- in California.

20 Anyway Dr. Wintemute had access to data for people -- from
21 people who were applying to purchase handguns but, before and
22 after that policy change, provided an opportunity to contrast
23 people with, basically, similar prior histories in one portion
24 of time that were allowed to -- they were not denied because
25 they're not disqualified yet and, subsequently, those who were

1 denied.

2 And then finally, there is a study by -- led by
3 Dr. Jeffrey Swanson from Duke University. Here, the study
4 looked at what happened when the State of Connecticut had a
5 policy change and started to submit its records for
6 disqualifying mental health-related events in the State of
7 Connecticut.

8 And what Dr. Swanson and his colleagues found was that
9 when that policy change occurred, by providing those criminal
10 history records made available for background check for
11 firearm purchases, the rate of violent crime among those for
12 whom this was relevant, meaning those who had mental health
13 disqualifiers, their rate of violent offending was basically
14 cut in half as a result of that policy change.

15 So those are the three that I think are probably most on
16 point.

17 Q. Dr. Webster, what I'd like to do with you, then, is first
18 I want to give the Court a preview of that opinion that you
19 hold concerning whether Devin Kelley would have been deterred
20 or discouraged from acquiring firearms altogether.

21 A. Um-hum.

22 Q. And then, second, go into the studies and any other
23 information you used to reach that conclusion.

24 A. Sure.

25 Q. Do you think that would be helpful in understanding your

1 opinions and the underlying science?

2 A. Yes.

3 Q. Okay. So, first, have you reached a conclusion as to
4 whether Devin Kelley would be discouraged or deterred from
5 acquiring firearms altogether if he had been denied at a FFL?

6 A. Yes. I think he would have been discouraged. You never
7 know with 100 percent certainty whether he would have gone on.

8 But the available facts, both from those studies that I
9 mentioned and very specific facts relevant to Devin Kelley,
10 both lead me to believe that he would have been discouraged
11 from accessing the firearms that he used to commit mass murder
12 in Sutherland Springs.

13 Q. Right. And that actually goes to -- my next question is
14 did you reach that opinion to a reasonable degree of
15 certainty, that more-likely-than-not standard that we
16 discussed?

17 A. Yes. Again, I want to stress that when you're trying to
18 predict who is going to commit mass murder, which is a -- not
19 a frequent event, that's hard to do. But what I'm basing my
20 opinion on is that he would have been deterred from serious
21 acts of violence with a gun.

22 The facts available, obviously, are what they are, as they
23 played out, because he did follow through with this particular
24 act.

25 I simply wanted to note that, just because predicting any

1 one single event, particularly an event of this magnitude,
2 would be very difficult. But it was very foreseeable and
3 predictable that Devin Kelley would commit serious acts of
4 violence, and that those acts would be almost certainly lethal
5 if he had access to a firearm.

6 I also base that opinion based upon Mr. Kelley's history
7 with firearms. He clearly had a preference for going to -- to
8 purchase his weapons -- his firearms from federally licensed
9 dealers. That's actually a very logical conclusion or
10 preference.

11 Q. Um-hum.

12 A. When you -- I have studied two direct studies of
13 underground gun market behavior, both of those in Baltimore;
14 one with a youthful sample, mostly ages 15 to 20, and then
15 another adult sample.

16 But in each case, we find that there's great hesitancy to
17 engage in a transaction with a firearm with someone you don't
18 know or trust. And so there's a number of things that come in
19 to play in people's decisions and preferences about if or
20 where they will try to purchase a gun.

21 We know the things that they care about is the reliability
22 of the gun. If you are purchasing from someone who has a
23 licensed business, you know, there are far more safeguards
24 from a quality standpoint than if you just meet some stranger
25 and said, "Hey, do you want to buy this gun?"

1 There's also great risk to a purchaser in the underground
2 gun market because you could show up with money to buy a gun.
3 And, of course, that person has a gun and could simply take
4 your money, could rob you. They could be an informant.

5 There's a variety of reasons why people are reluctant to
6 engage in an underground exchange with someone they don't
7 know.

8 Q. Okay.

9 A. So there may be a lot of guns in a given place. But,
10 really, what is relevant is are they guns and suppliers that
11 that potential purchaser trusts, trusts enough to spend money
12 and potentially risk something if they're going to use a
13 firearm and it's not going to work.

14 Q. Okay. Well, I do want to get to all of that, but if I can
15 just go one step at a time. And what I want to do --

16 A. Sure.

17 Q. -- is start with the studies that you mentioned earlier,
18 the Wright and Wintemute study. So let me do that.

19 Let me show you Plaintiffs' Exhibit 757. And I want to
20 ask you some foundational questions about this study first.

21 First of all, can you identify Plaintiffs' Exhibit 757 for
22 us, please.

23 A. Yes, it's a study by Garen Wintemute and his colleagues on
24 subsequent criminal activity among violent misdemeanants who
25 seek to purchase handguns.

1 Q. What journal is this study published in?

2 A. Journal of American Medical Association, I believe.

3 Q. Is that a reputable journal?

4 A. It's one of -- the most reputable journal in the field of
5 public health and medicine.

6 Q. Okay. Is this article, Plaintiffs' Exhibit 757, a
7 reliable authority in your field?

8 A. Most definitely.

9 Q. Okay.

10 A. It is really hard to get articles published in JAMA.

11 Q. Okay.

12 A. Very, very high bar.

13 Q. Okay. Well, let's look at the abstract and just cover
14 this study briefly. If you could --

15 A. Sure.

16 Q. I'm going to show you the abstract on Plaintiffs'
17 Exhibit 757, and tell us what the objective of this study is.

18 A. Yeah. This study was to determine risk factors for new
19 criminal activity among violent misdemeanants who are seeking
20 to purchase handguns. Again, these are handguns from licensed
21 dealers -- it's not stated there, but that's the nature of
22 this study -- and whether denial of such purchase applications
23 by violent misdemeanants affects their risk for arrest for new
24 crimes they commit, particularly those involving guns or
25 violence.

1 Q. And what did Dr. Wintemute and Dr. Wright discover after
2 studying that issue of whether violent misdemeanants were
3 denied firearms?

4 A. Yeah. What they found was that -- well, actually, when
5 you compare those who were denied their -- when they went to
6 purchase a handgun with those who were allowed to purchase,
7 the purchasers' rate for risk for committing new crimes of
8 violence involving guns were 29 percent higher, with a
9 confidence interval ranging from 4 percent higher to
10 60 percent higher. This relationship -- and I think this is
11 important -- did not hold for commissions of crimes that
12 didn't involve guns or violence.

13 Q. Okay.

14 A. So this wasn't what we would refer to as a selection bias.
15 There's just more criminal offending in one group versus
16 another.

17 This effect of being denied was very specific to the type
18 of events one would hypothesize if denial makes a difference
19 in risk for future commission of acts of violence --

20 Q. Okay.

21 A. -- and those involving guns.

22 Q. And can you tell us how many people did this study
23 examine.

24 A. Yeah. So there were -- let me see. They had follow-up
25 information on 1,654 subjects.

1 Q. Okay.

2 A. Yeah.

3 Q. And could you read for us the conclusion of this study.

4 A. Yeah. The results indicate that denial of handgun
5 purchase to violent misdemeanants is associated with a
6 specific decrease in risk of arrests for new gun and/or
7 violent crimes.

8 Q. Okay. And it uses the phrase "violent misdemeanants."

9 Could you tell us what a violent misdemeanor is, as used
10 in this study?

11 A. Sure. In this study, it means someone who was convicted
12 of a violent crime classified as a misdemeanor as opposed to a
13 felony crime.

14 Q. Okay.

15 A. So, again, based upon California's law in the early '90s,
16 those set of individuals, at least for a period of time, until
17 many years they've demonstrated they haven't committed any
18 other prohibitive offenses, that they're prohibited based upon
19 state law.

20 Q. Are there studies that examine what happens when felons
21 are denied firearms?

22 A. Yes. That's a separate study that I examined. Mona
23 Wright was the lead author of that. Garen Wintemute and
24 Frederick Rivara were coauthors.

25 Q. Okay. Can I show you Plaintiffs' Exhibit 753, please.

1 And can you identify for the Court what Plaintiffs'
2 Exhibit 753 is.

3 A. Yes. It's an article in -- I believe this was published
4 issued in American Journal of Public Health -- yes. Yeah --
5 in 1999. Yeah. Thank you.

6 So what these researchers were able to do is to examine,
7 again, a cohort of two different kinds of individuals, both of
8 whom were -- you know, had --

9 Q. Sure. And, Dr. Webster, before we jump into that, let me
10 just ask you a couple more foundational questions.

11 Is Plaintiffs' Exhibit 753 is a reliable authority in your
12 field?

13 A. Yes.

14 Q. And is the American Journal of Public Health a reputable
15 publication?

16 A. Yes.

17 Q. Okay. With that in mind, let's just take this one step at
18 a time.

19 A. Sure.

20 Q. And I'm going to show you that highlighted portion, and I
21 want you to read that highlighted portion to the Court and
22 then I'd like to discuss it. Okay?

23 A. Okay. I have to adjust something on my screen so I can --
24 part of this is blocking it, so just bear with me just one
25 second.

1 Okay. "We report the results of a cohort study as
2 criminal activity among two groups of persons attempting to
3 purchase handguns in California in 1977. The first group's
4 handgun purchasers were denied as a result of a prior felony
5 conviction. The second group's purchases were approved.
6 Members of this group had prior felony arrests but no felony
7 convictions."

8 Q. Okay.

9 A. "We hypothesized that the risk" --

10 Q. Keep going, please.

11 A. Okay. "We hypothesized that the risk for subsequent
12 criminal activity would be lower for those whose handgun
13 purchases were denied than for those whose purchases were
14 approved."

15 Q. Okay. So in layman's speak, could you explain the
16 hypothesis of this article, Plaintiffs' 753?

17 A. Yeah, I'll do my best. I think what these researchers
18 were trying to do is say let's look at two groups, both with
19 criminal histories. There's a variety of reasons why some
20 might lead to convictions or not. And let's try to adjust for
21 the differences in their criminal histories and determine
22 whether their future offending is different, basically.

23 Q. So if I understand you, does this study examine two groups
24 of individuals; both of which who have a violent gun arrest
25 history?

1 A. They're a broad group. A subset of them, their felony is
2 specific to guns and violence arrest. Not all of them have
3 such an arrest.

4 Q. Okay. So talking about that --

5 A. But they do have felony arrests. Sorry.

6 Q. Yes. So talking about that subset of individuals, is the
7 article dividing that into individuals who subsequently go and
8 purchase a gun and are denied and individuals who subsequently
9 go and purchase a gun and have -- are granted access to that
10 gun?

11 A. That's exactly what this is, yes.

12 Q. And so are Wright and Wintemute examining the reoffending
13 rate of the individuals that are denied versus the reoffending
14 rate -- violent gun violence rate of those who actually are
15 granted access to firearms?

16 A. Yes.

17 Q. So what does that tell us? What could the results of that
18 tell us about an individual like Devin Kelley?

19 A. Well, it would tell us whether -- at least on average in
20 this population, whether denial lowers risk.

21 We don't know for certain whether it would apply exactly
22 in his situation, but in my opinion, I think it would. And I
23 can explain that.

24 Q. Yes?

25 A. That's -- he clearly falls within -- if his case would

1 have been thrown in to the records that Wright, Wintemute, and
2 Rivara were examining in this case, he would be included in
3 this -- he would be included in this cite.

4 Q. Okay. Well, let's take a look at the records. And to do
5 that, I want to show you the second page of Plaintiffs'
6 Exhibit 753. And they have a table, Table 2, that shows us
7 the results.

8 And if you could, take the Court through what we're
9 looking at on Table 2 of Plaintiffs' Exhibit 753.

10 A. Could I ask to start with Table 1? Because I actually
11 think that's foundational.

12 Q. Okay. Well, let's start with Table 1, then.

13 A. Thank you.

14 Q. So what --

15 A. Go ahead. Sorry.

16 Q. No, no. What is Table 1 showing us?

17 A. Yeah. So it is showing the crude and adjusted relative
18 risks for committing criminal activity after an attempt to
19 purchase a handgun, relative to persons whose purchases were
20 denied.

21 Again, I have to adjust my screen a little bit because
22 part of this is blocking. But that's fine.

23 So the top row shows, in essence, accrued relative risk,
24 not adjusting for anything. And there you see -- so the
25 relative risk, if it's 1, means that there's no difference

1 between being denied or purchasing a gun, for example.

2 So the crude relative risk for gun and violent offenses
3 points towards purchase elevating risk, but it is not
4 statistically significant without first adjusting for age or
5 prior weapon and violent arrest charges.

6 So as I look at these data, what I think is most important
7 here is adjusting for prior -- the number of prior weapon or
8 violent arrests. So that -- excuse me -- that third row
9 there, that's focusing on -- the one up even above that too.
10 The last two are relevant.

11 So the first one adjusts for prior weapon or violent
12 arrests, the number of such cases in their history -- criminal
13 histories. And there you see a statistically significant
14 elevated risk for gun offenses and violent offenses if you
15 were allowed to purchase as opposed to being denied. Also
16 true, a very similar relationship based upon the number of
17 prior arrest charges that did not involve a weapon or violent
18 charges.

19 So there, I think, is the most straightforward and
20 fundamental way to look at these -- the difference between
21 these two cohorts; one of which was allowed to purchase, and
22 one of which was denied. And those who were allowed to
23 purchase had a significantly higher rate of offending after
24 you adjust for these prior number of offenses.

25 Q. Okay. And in layman's speak, if we're going back to the

1 two groups, one -- both subset of groups that have a violent
2 offense or gun offense in their past, one group is denied, and
3 the other group is allowed access to the firearm, who commits
4 more firearms-related offenses or violent offenses?

5 A. Those who were allowed to purchase as opposed to those
6 denied.

7 Q. Okay. And I want to look at some of the other text in
8 this article and maybe jump to the -- to some of the
9 conclusions that help us understand this data a little bit.

10 First, the highlight at the bottom, I want to pull that
11 out for you.

12 A. Um-hum. Okay.

13 Q. And could you read that highlighted portion from
14 Plaintiffs' Exhibit 753?

15 A. "Among those with only one prior weapon or violent arrest
16 charge, purchasers were two to four times as likely to be
17 charged with new offenses as those who were denied."

18 Q. Okay. And when they use "violent" or "arrest" -- "violent
19 arrest charge," what do they mean by that?

20 A. Number of arrests that were connected to violent offenses
21 or weapon offenses.

22 Q. Okay. So I guess my question is are we talking about
23 incidents, or what they subsequently go on to get charged
24 with?

25 A. Oh, this elevated risk for what -- are what they

1 ultimately go on to be charged with, after they went to apply
2 to purchase a handgun.

3 Q. Oh.

4 A. I don't know if I'm answering the right question. Sorry.

5 Q. Yeah. I guess what I'm asking is are we talking about --
6 so, for example, among those with one prior weapon or violent
7 arrest charge, would that be -- would that fit Devin Kelley,
8 as we knew him in 2012?

9 A. I think it would. But, honestly, I'm not 100 percent sure
10 based upon how these researchers would classify it.

11 Q. And could you --

12 A. Because -- yeah, sorry.

13 Q. Could you explain that.

14 A. Well, he had one incidence in which he was arrested, but
15 he was subsequently charged with more than one violent crime.

16 So it's not 100 percent clear to me whether this would
17 be -- he would be categorized in this group based upon his
18 arrest, or whether he would have been -- this case would have
19 been classified as -- as -- based upon multiple charges of
20 violence.

21 Q. When epidemiologists do studies like this, do they look at
22 the specifications that prosecutors end up charging an
23 individual, or do they look at individual's incidence of
24 arrest?

25 A. Well, more commonly, we look at incidence of arrest. You

1 know, criminologists or law professors, perhaps, might be more
2 inclined to look at arrest charges.

3 But I think more commonly within the field of
4 epidemiology, we're looking at instances of cases of -- in
5 this case, of arrest. But, again, it's not 100 percent clear
6 from their writing, in my opinion.

7 Q. And let's look back at the broader study. And I want to
8 ask you two more questions about the broader study.

9 A. Okay.

10 Q. In terms of comparing the two groups, that one group of
11 violent felons that are denied weapons versus the group of
12 violent felons that have -- are gained access to weapons, you
13 know, more likely than not, what is your belief in terms of
14 the impact of this study concerning the facts we know about
15 Devin Kelley?

16 A. Yeah. So, to me, this -- what this study says is that
17 clearly there are some individuals with serious violence
18 charges in their history who are deterred from committing
19 future acts of violence when they are denied when they go to
20 purchase a handgun from a licensed dealer.

21 Mr. Kelley, you know, again, within this large cohort,
22 some who -- the group that were denied, some were able to get
23 a gun, and some were not.

24 What I understand about the facts in Mr. Kelley's case,
25 Devin Kelley's case, I'm skeptical about his capacity to

1 get -- to find a trusted supplier and a trusted gun to commit
2 an act of the type that he committed.

3 Q. Okay. And, I guess, that's the next area I want to cover
4 is your scientific basis for those opinions. But before we
5 do, let me cover this last conclusion paragraph that they
6 offer. And that's the second highlight that we have in
7 Plaintiffs' Exhibit 753 on page 2.

8 Could you read the conclusion paragraph to the Court,
9 please.

10 A. Sure. "We do not know whether those denied legal handgun
11 purchase obtained a firearm by other means. But while this
12 policy's immediate objective is to prevent acquisition of
13 handguns by high-risk individuals, its overall goal is to
14 reduce their rate of criminal activity. Our evidence
15 indicates that this occurs."

16 Q. Okay. And --

17 A. So, again, what these researchers are concluding, which is
18 similar -- basically, the same as my own conclusion, which is
19 that this is -- this policy of denying people ability to
20 purchase handguns based upon their criminal convictions does
21 reduce their rate of criminal activity, including offenses
22 with violence that involve violence and/or firearms.

23 Q. Okay. And --

24 A. So -- yeah.

25 Q. And that leads me to the next question, which is did you

1 consider whether Kelley could have gotten firearms from
2 someone other than a federally licensed firearm -- federal
3 firearms licensee?

4 A. Of course. Yes, that's always a possibility.

5 Q. Right. And you previewed that information.

6 But could you tell us what are the factors that deter
7 people from buying guns outside of the an FFL?

8 A. Yeah. I was mentioning this earlier, but I'll go through
9 this.

10 So I think this applies to most products that we might
11 want to purchase, but I think it's particularly important when
12 it comes to firearms that you should be, and many are, quite
13 particular of the quality of the product that they're getting.
14 They want to make sure that it can fire and not jam or
15 whatever because sometimes, of course, their life could depend
16 upon whether the firearm works properly or not.

17 The other reasons include -- and this is something that we
18 found in a study we conducted with youthful offenders in
19 Maryland -- is that they were very reluctant to buy a gun from
20 a stranger because that gun might be used -- might have been
21 used in another crime. And if you're arrested with such a
22 firearm, you could get a lot of unwanted attention from police
23 and prosecutors about your potential connection to serious
24 violent crimes.

25 So, generally, there is a preference for new so-called

1 out-of-the-box guns that you are much more, you know, trusting
2 that, A, they work; B, they haven't been used in violent
3 crimes.

4 Q. Okay.

5 A. The last part -- let me -- if you don't mind --

6 Q. Yeah.

7 A. -- to complete the thought is that there's two things that
8 you're looking for here; you're looking for trust in the
9 product, and you're looking for trust in the supplier or
10 seller of that firearm.

11 And what we've learned in our studies -- and this is
12 consistent with other studies as well -- is that people are
13 very reluctant to purchase firearms from someone they don't
14 know and trust.

15 From what I understand of Mr. Kelley's case, he did not
16 really have an extensive network of friends or family who were
17 willing to buy him a gun or supply him with a gun. And so
18 Mr. Kelley would have been forced to venture out into the
19 rather risky and unpredictable marketplace in which you could
20 get robbed, you could get a bad gun, you could get a gun
21 connected to a prior crime. A whole range of other outcomes
22 that aren't particularly an attractive to you.

23 Q. Okay. So if I understand your testimony correctly,
24 there's sort of three factors that come into play when getting
25 guns outside of an FFL.

1 It's the risk involved, the reliability of the firearms,
2 and the social network of the individual -- the immediate
3 social network of the individual itself.

4 Did I understand you correctly?

5 A. Exactly, yes.

6 Q. So let's take those each at a time.

7 With regard to the risk involved, are there any studies
8 and research on point?

9 A. Well, yes. The one I referred to earlier in our own
10 studies. You can see more broadly -- there's a study that is
11 U.S. Department of Justice study that -- based upon a
12 representative sample of people in state prisons that ask
13 fairly detailed questions about firearm use and acquisition.

14 What you'll find there is that the predominant way in
15 which people acquire guns outside of licensed dealers is from
16 family and friends.

17 There's this other category in the Department of Justice
18 surveys -- the most recent one was 2016 -- that says it's just
19 a rather broad and, as a researcher, a frustrating category of
20 the street. But, again, what we found, at least from our
21 studies -- and there's another study in Chicago with very --
22 basically the same finding, which is, as I was saying, a
23 great, great reluctance to engage with business on buying
24 firearms unless you trust that underground source.

25 Q. Sure.

1 A. So --

2 Q. And have you personally conducted any recently studies --
3 recent studies directly on this issue of acquisition of
4 firearms and underground markets?

5 A. Yes. We published a study recently of people on parole
6 and probation in Baltimore city.

7 Q. And how many people did you survey?

8 A. 200 or -- roughly 200, yeah.

9 Q. And what were the results of your surveys of individuals
10 in Baltimore?

11 A. Well, what we found is something very basic that, frankly,
12 a lot of people don't get and understand, that they believe
13 that, oh, anybody can get a gun anytime they want; it's a
14 piece of cake.

15 Well, we found many people -- again, these were people on
16 parole or probation -- who said they wanted a firearm, but
17 they did not get one. And in many cases, they were not able
18 to get someone to buy a gun for them, again, because there's
19 risk all around here.

20 You need to the convergence of people who are accepting
21 risk on the acquisition and the supply side of this exchange.

22 Q. So are you saying, so in order to get a firearm from an
23 individual outside of the FFL, you're bringing a certain
24 amount of cash to an individual that you know is heavily
25 armed?

1 A. Well, you know --

2 MS. KRIEGER: Objection. Leading.

3 THE WITNESS: -- they at least have one gun.

4 THE COURT: One second. Doctor, one second.

5 MS. KRIEGER: I said, "Objection. Leading."

6 THE COURT: That's sustained.

7 BY MR. JACOB:

8 Q. What are the causes of an individual recognizing risk in
9 an underground gun transaction with a person they are
10 unfamiliar with or do not know?

11 A. Well, as I -- I was saying before that there are multiple
12 risks. I think the most direct risk is that you could be
13 robbed, perhaps shot as well; you're bringing cash, again, to
14 this underground exchange.

15 I mean, that's why underground marketplaces, whether it's
16 drugs or guns or whatever, there's tons of risk there. But
17 when you know the person you're going to engage with, with
18 cash, has a firearm, there is reluctance and there's a risk.
19 And there has to be some assurance that this person thinks
20 they can trust this person with this exchange.

21 Q. Okay. And then --

22 A. And -- go ahead. Sorry.

23 Q. Well, yeah, that leads me to the second factor, the
24 immediate social network.

25 Did you review Mr. Kelley's family testimony in trial

1 today?

2 A. Yeah.

3 Q. And previous last week as well?

4 A. Previous. Previous, yes. Yeah. So my understanding is
5 that his father did not trust Devin Kelley with firearms,
6 would not give him one, would store his guns in a manner --

7 MS. KRIEGER: Objection.

8 THE WITNESS: Sure.

9 MS. KRIEGER: I think he's mischaracterizing
10 Mr. Kelley's testimony that he did not trust Devin Kelley with
11 firearms.

12 THE COURT: You can try to straighten that up on your
13 own cross.

14 BY MR. JACOB:

15 Q. I'm sorry. Dr. Webster, what were you saying about
16 Kelley's parents and wife concerning his access to firearms?

17 A. Well, they were both very concerned about it. I'll leave
18 it at that.

19 Q. Okay. And the other aspect that you mentioned was the
20 reliability of firearms.

21 Is there evidence that Devin Kelley preferred reliable
22 firearms?

23 A. Well, we know that he went to FFL for his purchases. We
24 know that at least one gun that he acquired, he wasn't
25 satisfied with its quality, one that he did not acquire from a

1 FFL, a personal trade, and ended up trading away because it
2 wasn't a good quality gun. So we know that.

3 There's also some references to some Facebook postings
4 that more generally talk about his desire to make sure that he
5 gets a good gun, basically.

6 Q. Sure. And let me show you an example of that, and I want
7 to see if you have an opinion on that.

8 I'm going to show you Joint Exhibit 502, pages 126 and 127
9 together. And you should see that this is a Facebook post by
10 Devin Kelley concerning firearms.

11 A. So can I ask for, like, a 30-second pause because my —
12 this is embarrassing. My dog is scratching at my door, and I
13 don't want him to rip all the paint off here. It will
14 literally only take me 30 seconds. Is that okay?

15 THE COURT: That's fine.

16 THE WITNESS: Sorry.

17 (Pause in proceedings.)

18 THE WITNESS: All right. I'm back.

19 BY MR. JACOB:

20 Q. And I just -- so we're looking at a Joint Exhibit 502,
21 pages 126 and 127. And I want to zoom in to the tile of this
22 Facebook post on Devin Kelley on page 127.

23 A. Okay.

24 Q. Do you see where he says, "I just put on a magwell funnel
25 on the rifle, and while it looks ugly, man, does it

1 dramatically increase the consistency and speed of reloads."

2 Did I read that correctly?

3 A. Yes.

4 Q. Is that evidence that Devin Kelley preferred a reliable
5 firearm?

6 A. Well, I think it's saying two things.

7 One, it's saying that speed of reloads and ammo capacity
8 is important. But, of course, that is, in part, a function of
9 reliability. Because if you're switching magazines and things
10 jam and things like that, it's then -- you know, so it's clear
11 that he is very intent on getting a firearm that he is going
12 to be able to fire a lot of rounds with confidence and speed.

13 Q. And is there evidence that -- well, let me back that up.

14 Do you believe based on the information that you reviewed
15 and the studies and literature that are published in your
16 field, that had he been denied a firearm, more likely than
17 not, he would have been prevented from acquiring a firearm
18 outside of the FFL market?

19 A. I believe so, again, based upon my understanding of how
20 underground markets work, and Mr. Kelley's quite limited
21 options of places he could go to to get a gun.

22 Again, most of these come from friends and family. And I
23 think, you know, just everything I've read about his
24 incredibly troubled history from adolescence to young
25 adulthood, I think people understood that he was troubled.

1 Q. All right. Let me switch gears a little bit and chat with
2 you about the importance of a reporting this criminal history
3 to the NICS system.

4 Can your particular areas of study and expertise in your
5 field help us understand whether the failure to report
6 criminal history to NICS may increase the risk of physical
7 harm to the public or not?

8 A. I think it does, based upon the research that we were just
9 covering, based upon the impact of denial.

10 Q. And have you reached an opinion, to a reasonable degree of
11 certainty, whether the failure to submit criminal history
12 increases the risk of harm to the public?

13 A. Sorry. My connection may have frozen.

14 Q. Oh. Let me reask the question, Dr. Webster.

15 A. I'm sorry.

16 Q. Have you reached an opinion, to a reasonable degree of
17 certainty, as to whether the failure to submit criminal
18 history to the NICS increases the risk of harm to the public?

19 A. Yes.

20 Q. And what is your opinion based on?

21 A. My opinion is based upon the research that you just went
22 over, based upon studies looking at denial of purchase
23 applications with licensed dealers.

24 It's also based upon research, as I was alluding to, that
25 Dr. Jeffrey Swanson led that also demonstrated the importance

1 of availability of records to prevent people with violent
2 histories who -- you know, from accessing firearms, that it
3 cut their rate of violent offending basically in half.

4 So I think there's a number of studies that indicate that,
5 of course, not everyone is deterred. But a sizeable number of
6 people are deterred when they are denied when they go to
7 seek -- to purchase firearms from licensed dealers.

8 Q. And I just want to make sure our record is clear.

9 What is your opinion as to whether the failure to submit
10 Devin Kelley's criminal history to the NICS system increases
11 the risk of harm to the public?

12 A. I think the evidence is quite clear that Mr. Kelley would
13 not have been able to purchase the gun that he used to commit
14 mass murder had the record been submitted.

15 Q. And are there studies or articles published in your field
16 of science that show that missing records from the NICS system
17 actually hurts the, you know, public safety?

18 A. Yes. As I was mentioning a minute ago, from Dr. Swanson's
19 research, I believe I cited the one in Connecticut that
20 verified that finding. I believe he actually has an
21 additional newer study from a Florida population that was
22 similar remarks -- similar findings. Excuse me.

23 So the availability of records is sort of foundational to
24 the whole system. And we've seen that when the system works,
25 it can reduce risk for future offending. But, of course, it's

1 all based upon having the available record.

2 Q. Sure. And I'll represent to you that in evidence today --
3 or evidence in this trial is evidence that the Air Force
4 Office of Special Investigations identified over 7,300 files
5 that should have been reported to the NICS system but was not.

6 MS. KRIEGER: I'm sorry. Objection. I don't think
7 that actually came into evidence. I believe that objection
8 was sustained this morning.

9 MR. JACOB: Your Honor, it's Joint Exhibit 433. It's
10 been admitted into evidence.

11 THE COURT: Yeah. So there's some discussion among
12 the experts about the time frame of those studies. I think
13 those numbers -- the earlier numbers of 294, or something
14 around those figures, was sampling of that overall number.

15 So you can try to clean that up on cross if you want.

16 Go ahead.

17 BY MR. JACOB:

18 Q. Well, let me just be very clear and show you the record
19 itself, so we can be clear as to what we're talking about.

20 A. Sure.

21 Q. I want to show you Joint Exhibit 433.

22 And do you see Joint Exhibit 433, page 1, on your screen,
23 sir?

24 A. Yes.

25 Q. And it is from the headquarters of the Office of Special

1 Investigations.

2 Do you see that?

3 A. Yes.

4 Q. And I'll jump -- I don't want to take too much time, but
5 I'll jump to the conclusion of this study on page 5, and zoom
6 into the summary.

7 So the NCIC indexing task force here, this is -- actually,
8 let me step back.

9 Let me show you page 2 of this document so we have some
10 context and history. Let me show you the overview here.

11 So I'll represent to you, in response to the Sutherland
12 Springs shooting, the Air Force tried to address the failure
13 to submit and find out which files were not submitted to the
14 NICS system following the Sutherland Springs shooting. And we
15 have the overview here, but this page discusses that.

16 Have you reviewed this document, sir?

17 A. Yes.

18 Q. Okay. Let's go to the conclusion then, the summary.

19 And you see here, "Over 21 months and 14 six-week
20 iterations, the task force reviewed 7,300 files and identified
21 over" -- sorry -- "the task force reviewed over 73,000 files
22 and identified over 7,300 files requiring correction."

23 My question to you, Dr. Webster, is the -- you talk about
24 the increased risk to the public from the missing records.

25 This 7,300 missing fingerprints and final dispositions

1 that should have been sent to the FBI by the AFOSI, just
2 AFOSI, but weren't, is that the type of data that increases
3 the risk of harm to the public?

4 A. Yes.

5 Q. Okay. Let me take that down. I want to switch gears
6 again, and now talk to you about your conclusions on the
7 foreseeability of this act.

8 Can your work in gun violence research help us understand
9 whether the danger of future injury might be reasonably
10 anticipated based on the particular circumstances known to the
11 Air Force about Devin Kelley?

12 A. Yes. Devin Kelley -- I mentioned before the research we
13 did to look at risk factors for domestic homicides and the
14 danger assessment.

15 So Mr. Kelley, based upon information the Air Force had,
16 you know, he would check many of the boxes that showed the
17 greatest elevated risk for future lethal violence.

18 And they may or may not have known that research or the
19 danger assessment. Excuse me. But they -- they knew of a
20 very violent past. They knew of specific threats of
21 committing mass shootings, including on the base themselves --
22 itself. They took measures on their end based upon their
23 perception of the riskiness of this individual.

24 So yeah. And even in the pre -- the document relevant to
25 whether he could be released when he was on trial for domestic

1 violence charges, the determination was that was he was too
2 great of a risk, not only of fleeing but also of committing
3 violence.

4 So there was a variety of things that anyone, you know,
5 who is knowledgeable about risk for serious violence -- but
6 particularly the Air Force also knew well before these -- this
7 tragic incident in Sutherland Springs.

8 Q. Well, could you give us examples of the type of risk
9 factors that put an individual at high risk for committing
10 serious acts of violence?

11 A. Sure. The things that stand out to me, in particular, are
12 pointing a loaded gun at the head of his spouse; hyper,
13 hyper-control of his intimate partners, and using violence and
14 intimidation as part of that control; prior strangulation;
15 sexual violence -- a history of sexual violence; obviously,
16 use of -- or excuse me, access to a firearm and -- trying to
17 think.

18 Another, actually, factor that comes into play, but I
19 think this comes into play later, is his abuse of animals.

20 Q. Um-hum.

21 A. But that's -- I think that may be after he was already out
22 of the Air Force where that came to light.

23 But there was a number of things that came to light --
24 child abuse as well, actually, and threatening -- using
25 threats of violence against his partner's child as a way to

1 manipulate and control her.

2 So all of those are signs of great elevated risk. And
3 even within situations in which there is domestic violence of
4 some sort, those behaviors are not normal even within domestic
5 violence. They highlight and distinguish the most lethally
6 violent individuals from those who just sometimes get upset
7 and can't control their emotions or something.

8 His set of behavior, as well as his diagnoses when he was
9 involuntarily hospitalized of antisocial behavior disorder,
10 depression, suicidality, I mean, there are just a host of
11 factors that are quite consistent with future lethal violence.

12 And the new research that's really, I think, telling us a
13 lot more than we used to know specifically about mass
14 violence, he checks many of those boxes as well. The research
15 coming from what's called The Violence Project, a federally
16 funded study of mass shooting events in the United States.

17 Q. And what boxes does Devin Kelley particularly check
18 concerning mass violence?

19 A. History of domestic violence, for one, most important, I
20 think; suicidality; early history of sort of getting into a
21 lot of trouble early in life, you know, as a teen; fascination
22 with firearms; threats of violence.

23 Many of the people who go on to commit such acts
24 previously were telling people they were going to do that,
25 basically.

1 Q. In this case, is there evidence that the Air Force knew
2 that Devin Kelley had threatened a mass violence multiple
3 times?

4 A. My understanding is that's what he told his supervisors,
5 from the documents that I reviewed.

6 Q. And you said that there's a connection between domestic
7 violence and mass shooters.

8 Could you explain what you meant by that.

9 A. Well, some are more direct than others. Some of the mass
10 murder, in essence, is of an intimate partner and often
11 related family members. Other times, it is connected to
12 anyone close to that individual, including that individual
13 that they have the intimate relationship with --

14 Q. Are there studies --

15 A. -- but -- sorry. Just to complete that thought.

16 There are other instances in which people with histories
17 of violence against women commit acts of mass murder.
18 Sometimes they're motivated by, in essence, their
19 frustrations. And it more broadly has to do with women.

20 Q. Well, let me ask you this: Are there studies that support
21 the conclusion that the danger of this type of gun violence
22 may be reasonably anticipated from the circumstances of a
23 domestic violence offender like Devin Kelley?

24 A. Well, he -- he had the risk factors. I'll say that. And
25 he was saying very explicitly intentions of committing

1 violence, including mass violence.

2 So, again, he's checking all the boxes that are apparent,
3 in a lot of cases, of mass violence. Of course, some people
4 blow smoke and whatever, and they don't carry it out.

5 But, again, this -- all the signals in Mr. Kelley's case
6 are really quite strong and severe, in my opinion. And they
7 were severe enough that the Air Force themselves thought
8 themselves to be at risk.

9 So, to me, that said a lot. All the factors and
10 information available to the Air Force at that time were all
11 saying that this is a violent young man who is capable of
12 lethal violence, including mass violence.

13 Q. Okay. And is there a connection between domestic violence
14 and gun violence?

15 A. Quite often, yes. Some people overcompartmentalize
16 domestic violence from other, say, community violence. But
17 when you look at the most violent individuals, they almost
18 never are only violent in one place. They are violent in
19 multiple contexts, and that is what I believe is the case with
20 Mr. Kelley, Devin Kelley.

21 Q. Okay. Well, I want to go through some of these studies.
22 And I think the first study I'd like to look at is the study
23 that you started this discussion with from Campbell.

24 A. Yes.

25 Q. And I'll show you Plaintiffs' Exhibit 754, page 1. And

1 zooming into the first part of that, could you identify
2 Plaintiffs' Exhibit 754, page 1.

3 A. Yes. This is a study published in American Journal of
4 Public Health, "Risk factors for femicide in abusive
5 relationships: Results from a multisite case control study."

6 Q. And let me ask you this: Is this study, Plaintiffs'
7 Exhibit 754, a reliable authority in your field?

8 A. Absolutely.

9 Q. And can you tell us who the second named author in this
10 study is?

11 A. Yes. Myself, Daniel Webster.

12 Q. And focusing on the objectives of this study, can you tell
13 us what the objective of this study is?

14 A. Sure. The principal objective was to draw upon these data
15 from 11 cities to identify risk factors for femicide in
16 abusive relationships. So the context is not all women and
17 what their risks are, but very specifically women who are in
18 or recently out of intimate relationships that involve
19 physical violence.

20 Q. And I think at the beginning of our conversation, you told
21 us that this study was one of the most cited studies in this
22 area.

23 Do you remember that?

24 A. Yes.

25 Q. Can you explain to the Court why Plaintiffs' Exhibit 754

1 is one of the most cited studies in the field?

2 A. You know, I can't get into the heads all the people who
3 are citing it. But, basically, this study did one of the most
4 important things that people wanted to do is really -- we know
5 that domestic violence is, sadly, a very common occurrence.

6 And all sorts of systems -- law enforcement, service
7 providers, health systems -- encounter people who are in these
8 kind of relationships. And researchers and practitioners and
9 people at all levels, policymakers, keenly want to know, well,
10 how do you know the most dangerous situation so that we make
11 sure, from a policy perspective or a service provision
12 perspective or a law enforcement perspective, when it's most
13 important to intervene and with what kind of measures.

14 So that's why I think it's particularly important.
15 Because in all the different studies that are examining this
16 problem, we're answering a really fundamental question
17 relevant to -- both to domestic violence but even more broadly
18 to understanding the connection between availability of
19 firearms and ownership of firearms among people with violent
20 histories.

21 Q. Okay. Could you tell -- could you read the conclusion of
22 this study for us real quickly.

23 A. Yeah. Again, I have to do a little slight adjustment.

24 Yeah, there are identifiable risk factors for intimate
25 partner femicide, yes, basically.

1 Q. And let me show you page 3 of this study real quick.

2 A. Okay.

3 Q. And I want to show you a conclusion or result that you
4 reached.

5 A. Um-hum.

6 MR. JACOB: I'm sorry. I think you've gonna little
7 too far. We're talking about page 3 of Plaintiffs'
8 Exhibit 57 -- 754, yes.

9 BY MR. JACOB:

10 Q. And it's the top column, starting with the paragraph
11 "Incident-level variables" and just that first paragraph.
12 Could you read that first paragraph to us, please.

13 A. "Incident-level variable were added in Model 7. Abuser's
14 use of a gun in the worst incident of abuse was associated
15 with a 41-fold increase in the risk of femicide after control
16 for other risk factors. This effect is apparently mediating
17 the effects of abuser's access to a gun, which was no longer
18 significant. However, previous threats with a weapon
19 continued to be associated with increased femicide risk."

20 Q. Okay. What does it mean when it says that there's a
21 41-fold increase in the risk of femicide when the abuser has
22 an access to guns?

23 A. Well, very specifically, when they use the gun in that
24 most serious incident. So -- and this has been borne out by
25 other studies as well.

1 It just -- it turns out that firearms are a particularly
2 lethal form of violence. And so in the most serious act of
3 violence, which we ask -- in the case of people who were
4 dying, we asked proxies, people who were close to those
5 individuals, information about background. But in the
6 incident level, of course, we had information from police
7 reports as well.

8 So we gather information about the most serious incident
9 of abuse both for cases and controls. And what was in a
10 situation where firearms were involved, those risks
11 elevated -- were greatly different from the most serious of
12 incident of abuse for the controls --

13 Q. So if --

14 A. -- and --

15 Q. I apologize. If I understand what you're saying, are you
16 saying that when a -- there's a history of using a firearm in
17 that relationship, that increases the risk of femicide by
18 41-fold?

19 A. No. So this is actually at the incident level. So if you
20 would back up to Model 7, we did a logical progression,
21 basically, of sets of risk factors that we were looking at.
22 And we looked at -- first we looked at the role of having a
23 gun as a risk factor for lethal outcomes. It was over a
24 fivefold increase of just having a gun.

25 You can have a gun but not use it in a serious act of

1 intimate partner violence. So this 41-fold increase is at the
2 next level, is when you ask people about the most serious
3 incident of intimate partner violence, the ones that involve
4 firearms were the ones that elevated this risk of femicide
5 41 times above not using firearms.

6 Q. Okay. Well, Dr. Webster --

7 A. So, again, it -- again, it just sort of underscores that
8 it can be hard to kill someone with your hands or sometimes
9 even a knife. That a firearm, when it is used, particularly
10 in an intimate partner femicide, is highly lethal.

11 Normally, the circumstances are such that that person
12 cannot escape. They're not -- they can't flee, and often it
13 ends up in a fatal outcome.

14 Q. Well, Dr. Webster, you know, what about the risk to people
15 other than the intimate partner?

16 Are there studies on domestic violence and the risk to
17 people beyond just the intimate partner?

18 A. Yes. I mean, in many instances of intimate partner
19 femicide, others are killed as well. Most commonly, it is
20 family members, but sometimes it is people who just happened
21 to be in the same place or have some connection. It could be
22 co-workers. It could be, you know, somebody, you know, close
23 to that individual in some shape or form.

24 Q. Okay. Well, I'd like to go through two studies that you
25 cited on this particular issue. First, let me show you

1 Plaintiffs' Exhibit 762.

2 And can you identify -- and we'll make it a little bit
3 bigger for you.

4 Can you identify Plaintiffs' Exhibit 762 for us.

5 A. Yes. This is a journal article by Linda Saltzman and
6 colleagues. It's a group from the Centers for Disease Control
7 and Prevention and their center that focuses on injury and
8 violence.

9 This examines "Weapon involvement and injury outcomes in
10 family and intimate assaults."

11 Q. Is that the title of the article?

12 A. Yes.

13 Q. Okay. Is the Saltzman article, which is Plaintiffs'
14 Exhibit 762, a reliability authority in your field?

15 A. Yes, very commonly cited.

16 Q. Do you know the journal that the Saltzman article is
17 published in?

18 A. I think it was JAMA, yeah.

19 Q. Okay. So let's look at the -- yeah, the abstract.

20 Could you tell us the objective of this study, the
21 Saltzman article, Plaintiffs' Exhibit 762.

22 A. Yeah. It is to compare the risk of death and the risk of
23 nonfatal injury during firearm-associated family and intimate
24 partner -- intimate assaults --

25 Q. So --

1 A. -- with the risks compared to when a firearm is not
2 involved, non-firearm-associated events.

3 Q. So is Plaintiffs' 762 looking at more than just the risk
4 to the intimate partner?

5 A. No. It extends out beyond that to family members as well.

6 Q. Okay. And could you briefly describe how they conducted
7 this study and what the results of this study were.

8 A. Yeah. They were looking at police reports in Atlanta,
9 Georgia, looking at reports that police responded to these
10 incidents; wrote up reports of the set of facts involved in
11 both fatal and nonfatal outcomes from these cases.

12 Q. And could you read to us the results of the study first,
13 and then we'll talk about them. Okay?

14 A. Sure. "Firearm associated FIAs" -- again, that's family
15 and intimate assaults -- "were three times more likely to
16 result in death than FIAs involving knives or other cutting
17 instruments, and 23.4 times more likely to result in death
18 than FIAs involving other weapons or bodily force. Overall,
19 firearm-associated FIAs were 12 times more likely to result in
20 death than non-firearm-associated FIAs."

21 Q. So what is the point of this study in terms of its
22 relevance to your conclusions?

23 A. The point of this study really -- it shows that access to
24 a firearm and use of a firearm greatly determines the outcomes
25 of an act of violence, particularly in the context of family

1 and intimate violence.

2 Q. Okay. I want to keep along this -- the theme of not just
3 intimate partners but going beyond that scale and see if
4 domestic violence is connected to deaths beyond the intimate
5 partner. And I want to show you Plaintiffs' Exhibit 758.

6 A. Okay.

7 Q. I'm sorry. Sorry, 785. I apologize.

8 So let me show you page 2 of Plaintiffs' Exhibit 785.

9 A. Um-hum.

10 Q. And I'll just zoom in to the first part, and could you
11 identify the article that you're seeing as Plaintiffs' 785.

12 MS. KRIEGER: Objection. Your Honor, I believe that
13 this study along with several others were part of the opinions
14 that Dr. Webster issued in his supplemental declaration and
15 which Your Honor excluded during our -- in your order
16 following our motion to exclude Dr. Webster.

17 THE COURT: So 785 has not been admitted yet.

18 Your response?

19 MR. JACOB: Well, Your Honor, I was laying foundation
20 for the reliable -- learned treatise exemption to the hearsay
21 rule. But addressing the objection in particular, Your Honor
22 didn't carte blanche exclude all of the studies that the
23 government -- in the supplemental report. Instead, Your Honor
24 delineated it into two specific categories that were
25 admissible that were directly responsive to the issues that

1 the government raised in Dr. Webster's deposition.

2 And this study is directly responsible -- responsive
3 to the issues raised in the depositions.

4 THE COURT: Let me take this one question at a time.
5 Go ahead.

6 MR. JACOB: Yes, Your Honor.

7 BY MR. JACOB:

8 Q. So, Professor -- Dr. Webster, could you identify
9 Plaintiffs' 785 for the Court, please.

10 A. Yes. This is an article from the journal Homicide
11 Studies, 2014, "Patterns of multiple family homicide."

12 Q. And is the article that we are showing you as
13 Plaintiffs' 785 a reliable authority in your field?

14 A. Yes.

15 Q. And can you tell us where this article is published?

16 A. A journal called Homicide Studies. It's a
17 multidisciplinary journal focused, as the name implies, on
18 understanding homicides and lethal violence.

19 Q. Is that an authoritative publication in your field?

20 A. It gets cited it all the time.

21 Q. Okay. I want to talk to you about the specific goals of
22 this study and how you used this study. Okay?

23 A. Sure.

24 Q. First, looking at the abstract, can you tell us what the
25 goal of the study, Plaintiffs' 785, was?

1 A. Yeah. So as this lays out here, the prior research
2 treated multiple family homicide, something called
3 "familicide," as a uniform event, but they want to explore
4 whether there are subtypes of this type of event that could be
5 discerned.

6 Looking at data from supplemental homicidal reports, which
7 is the detailed data collected as part of the FBI's Uniform
8 Crime Reporting system, they coupled that information with
9 data from newspaper -- published in newspaper articles to look
10 at 238 cases in this -- what they refer to as a two-step
11 cluster analysis, showing that there are important
12 subgroups -- in this case, four categories -- based upon age,
13 relationship between the perpetrator and victims, and
14 perpetrator suicide.

15 Q. And what are the four categories of domestic violence
16 offenders that Plaintiffs' 785 discovered?

17 A. One was despondent husbands, spousal revenge, extended
18 parricide, and diffuse conflict.

19 Q. Okay. I want to take a look at the "diffuse conflict"
20 section of this article, and I want to show you Plaintiffs'
21 Exhibit 785, page 12.

22 A. Okay.

23 Q. And we'll zoom in on the "diffuse conflict" section. And,
24 first, could you read the description -- the first sentence,
25 the description of diffuse conflict familicides that were

1 found as a cluster of domestic violence offenses in this
2 study.

3 A. You just want me to read this part?

4 Q. The first sentence, please.

5 A. Okay. "Diffuse conflict familicides represent the
6 second-largest familicide cluster and could be distinguished
7 from the above-mentioned clusters by the diverse constellation
8 of victims ranging from in-laws, uncles, aunts, cousins, and
9 secondary family relations."

10 Q. Okay. And I want to show you one more paragraph from this
11 section, going back out to this page, the very next paragraph.

12 A. Um-hum.

13 Q. And could you read the first two sentences for us, please.

14 A. Sure. "In contrast to earlier research merely focusing on
15 just one type of multiple family homicides, we revealed the
16 existence of four separate groups. What all four familicide
17 categories had in common, other than the defining fact that
18 the victims consist of multiple family members, was the
19 presence of primary and secondary victims."

20 Q. Okay. And I want to stay on this.

21 What is a primary versus secondary victim in domestic
22 violence?

23 A. Well, primary victim is the person you are kind of
24 directing your aggression at. Secondary are those because
25 they have some connection to that primary person, again,

1 someone important to them. Could be a sibling, a parent, you
2 know, any number of relationships, just that they're very
3 close to the primary victim.

4 Q. Okay. And could you read the rest of that paragraph,
5 starting with "secondary victims," into the record, please?

6 A. Sure. Yeah. "Secondary victims were either killed
7 because they were seen as extensions of the primary victim or
8 because of their physical closeness to the primary victims.
9 Arguably, this even accounts for the despondent father who
10 perceives his victims not as extensions of each other but
11 rather as extensions of himself. Such men consider themselves
12 to be the central figure in the lives of their family members
13 and, as such, aim to protect his loved ones by taking them
14 along with his suicide."

15 Q. Okay. Is the data that this study, Plaintiffs' 785, is
16 looking at a small sample set of data?

17 A. I believe there's 238 cases overall that they were
18 analyzing.

19 Q. And was it a very detailed examination?

20 A. Yes, quite detailed.

21 Q. Okay. Let me take that down, and I want to finish off our
22 discussion on this point with how your field defines domestic
23 violence.

24 Does your field limit the definition of domestic violence
25 or a crime of domestic violence to abuse or injury towards

1 only an intimate partner?

2 A. No.

3 Q. How does --

4 A. No.

5 Q. How does your field define a crime of domestic violence?

6 A. Well, most studies that are studying domestic violence,
7 honestly, they're based upon databases like this supplemental
8 homicide report where individuals are categorized.

9 And so "domestic violence" typically means family members
10 broadly or, in some cases, those who are cohabitants, in
11 essence, part of a family unit whether they're actually,
12 technically, family or not.

13 Q. You know, in the studies that we just looked at, we saw
14 that some domestic violence crimes extend beyond the family to
15 people that are in the perpetrator's way or in close proximity
16 to the perpetrator's intended crime.

17 Do you remember that discussion?

18 A. Yes.

19 Q. The fact that people other than family members are injured
20 in the process of a crime of domestic violence, does that make
21 it no longer a crime of domestic violence?

22 A. It depends upon how you're defining it. Again, if you're
23 going to be rigid about categorizations, it depends on the
24 study and how people are defining it.

25 But I think conceptually what's important is the

1 connection to the intimate partner and/or family member. It's
2 all about relationships. And sometimes they're easy to very
3 directly categorize, and sometimes less so.

4 But generally speaking, the phenomenon of interest here is
5 familial and intimate relationships. And, again, there are a
6 subset of individuals of abusers who are hypercontrolling.
7 And, of course, if you are trying to control someone, often
8 that means there are connections to the people who are close
9 to them. Often, they're family members.

10 Q. And I guess getting directly to the point, in your opinion
11 and based on your background, education, training, and
12 experience in this field, was the Sutherland Springs shooting
13 on November 7th, 2017, [verbatim], a crime of domestic
14 violence?

15 A. I think it was motivated by domestic violence, most
16 certainly. And that's, I think, a proper lens to view it.

17 Q. And have you reached a conclusion, to a reasonable degree
18 of probability, as to whether the Sutherland Springs mass
19 shooting on November 7th, 2017, was foreseeable based on what
20 the Air Force knew of Devin Kelley at the time he was in the
21 Air Force?

22 A. Well, again, I guess I'm hesitant to say they would know
23 exactly what was going to happen. That's, frankly,
24 impossible.

25 But I think it is certainly foreseeable, highly

1 foreseeable, that Mr. Kelley could carry out a very serious
2 act of violence, including mass violence. So, again, I don't
3 want to say that they knew that on a particular date and a
4 particular place and so on and so on. I mean, that's
5 impossible.

6 But, again, it's evident to me that his history of severe
7 violence, his history of mental illness connected to
8 violence -- of course, a lot of times, mental illness has
9 nothing to do with violence. But in this case, it clearly,
10 apparently, did. And also his prior threats relevant to mass
11 violence involving firearms.

12 I think all of those are quite, you know, foreseeable that
13 this was an individual who could really carry out really
14 serious acts of violence.

15 Q. And what opinion do you hold, if any, to a reasonable
16 degree of probability, that reporting Devin Kelley's criminal
17 history to the FBI by the Air Force would have prevented the
18 shooting?

19 A. Am I -- I'm sorry. Can you rephrase. I want to make sure
20 I'm just responsive very specifically to what you're asking.

21 Q. Sure. Do you have an opinion as to whether -- to a
22 reasonable degree of probability, whether if the Air Force had
23 reported Devin Kelley criminal history to the NICS, that would
24 have presented Devin Kelley's ability to acquire these
25 firearms that -- and commit the mass shooting on November 7th,

1 2017 -- November 5th? I apologize.

2 A. Yeah, I do.

3 Q. And what is your opinion?

4 A. Yeah. My opinion is that the failure to report those
5 records did allow this to happen, facilitated this outcome.

6 MR. JACOB: Your Honor, at this time, we pass the
7 witness.

8 THE COURT: Thank you.

9 MS. KRIEGER: Your Honor --

10 THE COURT: Let's go ahead and take a ten-minute
11 break.

12 There are two members of the attendees who are
13 raising their hands. To those two people, Mr. Ramsey and
14 Ms. Workman, and Mr. Herrera -- who is a lawyer, I believe --
15 so you can't -- this is a courtroom proceeding. And so like
16 in any courtroom proceeding, the individuals in the gallery
17 would not be allowed to pose questions or ask questions. And
18 so that's the case here as well. So I'll be removing the hand
19 gesture, and that's why.

20 Anything we need to take up at this time before we
21 take a break?

22 MR. STERN: Your Honor, just very briefly, I think
23 it's about 2:00 now. Your Honor suggested you have a meeting
24 at 4:00. As of right now, I believe we only have one witness
25 tomorrow, and I can't promise that we're going to finish up

1 our cross by 4:00. So we ask for the opportunity to maybe
2 call this witness back in, if necessary, tomorrow.

3 THE COURT: So I already told my 4:00 I can't do. So
4 we'll just truck on today. And if this continues to tomorrow
5 morning with Mr. Webster, we'll see. We'll see what headway
6 we make today.

7 MR. STERN: Fair enough.

8 MR. ALSAFFAR: I just want to clarify, because this
9 morning, we were told there were two witnesses tomorrow from
10 the government.

11 MR. STERN: So remember, we removed Mr. Breyer. And
12 then we suggested we can move up Mr. Barborini to Tuesday or
13 leave him on Wednesday. But either way, it will leave one day
14 where we only have one witness.

15 MR. ALSAFFAR: No problem.

16 MR. STERN: That's why I want to know in advance of
17 tomorrow, obviously, whether or not we call to call
18 Mr. Barborini tomorrow. That's why I was suggesting, if we're
19 going to carry Dr. Webster over to tomorrow morning and then
20 we maybe can start our case in chief tomorrow afternoon.

21 But, obviously, I defer to the Court.

22 THE COURT: Well, let's see how we do. We've got
23 three hours here yet, and maybe we can finish off Mr. Webster.

24 Let's take a -- let's be back at 2:15.

25 (Recess.)

1 THE COURT: Cross?

2 MS. KRIEGER: Thank you.

3 CROSS-EXAMINATION

4 BY MS. KRIEGER:

5 Q. Dr. Webster, can you hear me?

6 THE COURT: Dr. Webster, you're on mute. There you
7 go.

8 THE WITNESS: Yes. I can hear you. Sorry.

9 BY MS. KRIEGER:

10 Q. My name is Jocelyn Krieger. I'm an attorney with the
11 United States Department of Justice. I'm representing the
12 government in this case.

13 Now, Dr. Webster, you are, among other things, an expert
14 among gun violence and gun violence prevention; is that right?

15 A. Yes.

16 Q. And epidemiology is your method of studying gun violence
17 and prevention?

18 A. Yes.

19 Q. You're not an expert in psychology; correct?

20 A. No.

21 Q. And you don't -- you said -- you testified earlier that
22 you do not usually look at individual cases as part of your
23 work; correct?

24 A. Actually, I think what I said is that my research involves
25 both some studies that are individual-focused, but many are

1 population-focused.

2 Q. I understand that some of your studies look at risk
3 factors that are associated with individuals, but you
4 generally don't look at specific individual cases as part of
5 your work?

6 A. Well, the individual cases would be part of those
7 individual-level studies --

8 Q. It's not --

9 A. -- of the type that I was talking about earlier with the
10 case control study for intimate partner femicide.

11 Q. Let me put this a different way.

12 It's not the nature of your job to predict individual
13 behavior; correct?

14 A. Well, some of my research is designed with that intent.

15 Q. But you, in your job, do not generally try to predict
16 individual behavior in the future?

17 A. Well, as I said, the reason we do studies of the nature of
18 the risk factors for intimate partner femicide is to predict
19 future risk.

20 Q. Do you recall being deposed in this case?

21 A. Yes.

22 Q. It is your testimony today that part of the nature of your
23 job is to predict individual behavior; is that correct?

24 A. I study a lot of different things, and I use different
25 research designs. Some of my studies are focused on

1 individuals, and those studies are looking at risk factors for
2 future violence.

3 I'm not sure what else to say about that. I'm sorry.

4 Q. I'm just going to show you -- do you recall being deposed
5 in this case?

6 A. Of course.

7 Q. And do you recall being under oath in your deposition?

8 A. Of course.

9 Q. I'm going to show you a page from that deposition. It's
10 Government Exhibit 62, page 59. And let's look at lines 4
11 through 7.

12 Mr. Furman asked you, "I mean, before this case, have you
13 had instances where you had to predict individual behavior."

14 And you responded, "That's not the nature of my job, no."

15 Did I read that correctly?

16 A. Yes.

17 MS. KRIEGER: You can take that down.

18 BY MS. KRIEGER:

19 Q. In your --

20 A. I'm sorry?

21 Q. I'm sorry. I was telling our tech person to take down the
22 exhibit.

23 In your epidemiology work, as you said, you attempt to
24 determine risk factors for people that engage in gun violence
25 or domestic violence?

1 A. Yes.

2 Q. Now, when you're doing these studies, such as the 11-city
3 study that, I think, you've mentioned a couple times, you're
4 looking at cases where someone has already committed violence
5 to determine what factors are associated with that violence;
6 is that right?

7 A. We examine factors that were present before the outcomes,
8 in this case, for intimate partner homicides. The nature of
9 the -- the design of the study is a case control study
10 because, as I was alluding to earlier in my testimony, that it
11 is simply too expensive and too impractical to gather the kind
12 of detailed information relevant to this problem to study --
13 to follow thousands and thousands of people.

14 So what we do is we gather information on cases, in this
15 case, women who were killed by an intimate partner. And then
16 we gather information about the history prior to those events.

17 Q. Right. So you were looking at women who had already been
18 killed and then, going back, looking at the history that
19 occurred prior to that to determine risk factors; correct?

20 A. That's correct.

21 Q. You mentioned briefly when you were talking about your CV
22 that at one point, you were a social worker in Kentucky?

23 A. Yes.

24 Q. And that was from 1982 to 1983; correct?

25 A. Yes.

1 Q. One year?

2 A. I was there for, I think, 20 months. I'm not sure.

3 Q. So a little less than two years?

4 A. Yeah.

5 Q. It was about 38 years ago?

6 A. Um-hum.

7 Q. I just want to ask you for a minute -- can we pull up
8 Docket 206, page 9.

9 And I'll represent to you that this is a pleading that was
10 filed by plaintiffs' counsel in this case.

11 Now, that's you, listed as Number 3; correct?

12 A. That's me.

13 Q. Okay. Can we go to -- I think it's the next page or maybe
14 the page after. Yes.

15 So looking at page -- this page as well as the page
16 afterwards -- Megan, can you just go to the next page too.

17 This is a list of documents that you reviewed prior to
18 writing your report; correct?

19 A. Yes.

20 Q. And then after your report was issued, you reviewed
21 additional documents; correct?

22 A. Yes.

23 Q. You reviewed documents from the Texas Rangers
24 investigation that occurred after the shooting?

25 A. Yes.

1 Q. You reviewed those after you submitted your report?

2 A. I believe so, yes.

3 Q. And then you also later reviewed the deposition of
4 Danielle Kelley; correct?

5 A. That's correct.

6 Q. And at some later point, you also reviewed the
7 depositions, I'm guessing, of Michelle Shields, Michael
8 Kelley, and Rebecca Kelley?

9 A. Yes.

10 Q. And none of those documents or depositions changed any of
11 your opinions from your original report?

12 A. No.

13 Q. You just spoke with plaintiffs' counsel about some of
14 those opinions. I just want to take a look at a few of them.

15 Pull up the report on page 14.

16 And it is your opinion — sorry. I'm trying to — it's
17 hard to see.

18 Starting with, "It is more likely than not."

19 Do you see that?

20 A. I'm trying to find where you're at on the page. Sorry.

21 Q. Yeah, I'm trying to make it bigger for you. There we go.

22 A. Oh, okay.

23 Q. Your opinion in your report was stated as "It is more
24 likely than not, based on the above research and my

25 background, had the United States Air Force or Department of

1 Defense reported the relevant disqualifying information
2 concerning Devin Kelley to the FBI, that would have prevented
3 Kelley's ability to purchase firearms and his ability to kill
4 26 people at the First Baptist Church of Sutherland Springs."

5 Did I read that correctly?

6 A. Yes.

7 MS. KRIEGER: You can take that down.

8 BY MS. KRIEGER:

9 Q. After you provided this report, you were deposed; correct?

10 A. Yes.

11 Q. And after your deposition, the United States filed a
12 motion to exclude your testimony?

13 A. Yes.

14 Q. And in response to that motion, you submitted a
15 supplemental declaration; correct?

16 A. Correct.

17 MS. KRIEGER: Let's pull up the supplemental
18 declaration, page 2, paragraph -- I believe it's paragraph 4.

19 BY MS. KRIEGER:

20 Q. Now, here, you stated -- in your second question, you
21 stated that your "report and testimony answer the specific
22 causation question in this case, if the United States had
23 followed the law, whether that would have prevented
24 Devin Kelley from acquiring the firearms he used in the
25 Sutherland Springs shooting."

1 Did I read that correctly?

2 A. Yes.

3 Q. It's a little bit different; right?

4 A. I'm not sure what you mean.

5 Q. Initially, your opinion was that if the -- Kelley's
6 information had been submitted to NICS, it would have
7 prevented Kelley's ability to purchase firearms. And your
8 later opinion is that it would have prevented Kelley from
9 getting the firearms that he used; is that correct?

10 A. Yeah. That would include the firearms that he used in
11 this Sutherland Springs shooting.

12 MS. KRIEGER: Pull that down.

13 BY MS. KRIEGER:

14 Q. Now, you relied on quite a few studies in both your report
15 and supplemental declaration; correct?

16 A. Correct.

17 Q. And we've already seen a number of them today, and you
18 agreed that those were all reliable authorities; right?

19 A. Yes.

20 Q. Do you agree that all of the studies you cite in your
21 report are reliable authorities?

22 A. Yes.

23 Q. We can look at a couple of them.

24 Several of these studies actually state that people who
25 are prohibited from owning firearms commonly acquire firearms

1 without background checks; isn't that correct?

2 A. Yes.

3 Q. Okay. Let's look at the study -- you mentioned this a
4 couple times -- the study by Jeffrey Swanson, "Preventing gun
5 violence involving people with serious mental illness." It's
6 PEX 782.

7 A. Um-hum.

8 MS. KRIEGER: And let's turn to page 13, and it's
9 going to actually be going on to page 14. Pull out the
10 bottom -- that bottom paragraph there.

11 BY MS. KRIEGER:

12 Q. I assume it's Dr. Swanson states, "Considering our study
13 population as a whole, we find little evidence that the Brady
14 Act prohibitions serve to reduce the risk of violent crime.
15 Indeed, having a gun disqualifying criminal record serves as a
16 marker for significantly" -- pull up the top of the
17 paragraph -- "significantly increased risk of committing a
18 future violent crime.

19 "To the extent that guns were involved in the commission
20 of these crimes by people who could not legally buy a gun, it
21 is clear that perpetrators did not need to patronize a
22 federally licensed gun dealer and undergo a background check.
23 Other ways, means, and suppliers abound for those willing to
24 exploit them."

25 Did I read that correctly?

1 A. Yes.

2 MS. KRIEGER: And then turning to page 18. Should be
3 on line -- yes, top, first full paragraph.

4 BY MS. KRIEGER:

5 Q. It says, "Our study results suggest that among people with
6 mental illness who have a history of criminal offending and
7 involvement with the justice system, existing law and policy
8 designed to prevent access to firearms through federally
9 licensed gun dealers is likely to be of limited
10 effectiveness."

11 Did I read that correctly?

12 A. Yes.

13 Q. In your report, you also referred to several studies by
14 Garen Wintemute. But I'm just, right now, going to talk about
15 the one titled "Background checks for firearm purchases:
16 Problems and recommendations to improve effectiveness."

17 It's PEX 765.

18 Let's go to page -- do you recognize this document?

19 A. Yes.

20 Q. This is a document that you cite in your report?

21 A. Yes.

22 Q. And you consider Garen Wintemute to be a reliable
23 authority?

24 A. Most definitely.

25 MS. KRIEGER: Let's look at page 2, at the top of

1 column 2, the second column there.

2 BY MS. KRIEGER:

3 Q. It says, "About 22 percent of all firearm transfers in the
4 United States proceed without background checks."

5 Did I read that correctly?

6 A. Yes.

7 Q. And then the next paragraph, "For a prohibited person or a
8 purchaser with criminal intent, a private-party transaction is
9 essential. Not surprisingly, the vast majority, about
10 90 percent, of firearms used in crime are obtained through
11 transactions that do not involve background checks."

12 Did I read that correctly?

13 A. Yes.

14 Q. You also cite to a study by April Zeoli and Jennifer
15 Paruk. It's entitled "Potential to prevent mass shootings
16 through domestic firearms restrictions."

17 And that's from Criminology & Public Policy; correct?

18 A. That's correct.

19 MS. KRIEGER: It's PEX 750.

20 BY MS. KRIEGER:

21 Q. You were actually an advisory to Dr. Zeoli, weren't you?

22 A. Yes, I was.

23 Q. You would agree that she's a reliable authority?

24 A. Yes.

25 MS. KRIEGER: Let's turn to page 14.

1 BY MS. KRIEGER:

2 Q. It starts with "it may be possible." Do you see where
3 that is?

4 Sorry. I'm going to call out the section.

5 "It may be possible, however, for the disqualified
6 individual to purchase a firearm without a background check.
7 Private sellers in many states are not legally required to
8 perform background checks to sell their firearms."

9 Did I read that correctly?

10 A. Yes.

11 Q. You yourself have also stated that 80 percent of firearms
12 acquired for criminal purposes are acquired through
13 private-party transfers; is that correct?

14 A. Yes.

15 Q. In some states -- you can take that down.

16 In some states, private sales do actually require
17 background checks; right?

18 A. Yes.

19 Q. That's not the case in Texas, is it?

20 A. No.

21 Q. Now, many of the studies that you cite in your original
22 report and in your declaration are about intimate partner
23 homicide; is that right?

24 A. Yes.

25 Q. Actually, one of those studies defines "intimate partner

1 homicide" as those homicides in which the primary suspect was
2 the current or former romantic partner, including spouse or
3 nonmarried partner.

4 Do you agree with that definition?

5 A. Yes.

6 Q. That's actually -- the study is actually "Suicide and
7 additional homicides associated with intimate partner
8 homicide," which is -- we don't have to pull it up. It's
9 PEX 763.

10 That study focuses specifically on intimate partner
11 homicide and related suicides and additional homicide victims;
12 correct?

13 A. That's correct.

14 Q. And you've mentioned a few times the study led by
15 Campbell, of which you're the second author. I think we
16 looked at it in some great detail.

17 That study, "Risk factors for femicide and abusive
18 relationships," PEX 754. Yeah?

19 A. Yes.

20 Q. And actually, in your report, you describe that study as
21 an 11-city case control study of risk factors for intimate
22 partner femicide among those who were in intimate
23 relationships with history of physical violence; is that
24 correct?

25 A. Yes.

1 Q. This is looking at women who are killed by their intimate
2 partners; right?

3 A. Yes.

4 Q. There's another study that you cite. It's -- the lead
5 author is Jane Koziol-McLain, titled "Risk factors for
6 femicide-suicide and abuse relationships."

7 You're a coauthor on that study as well; right?

8 A. Yes.

9 Q. In your report, you describe that study as one where you,
10 "looked at factors associated with intimate partner
11 femicides." Correct?

12 A. Correct.

13 Q. Just one more study. Again, the lead author is April
14 Zeoli. The second author is McCourt, "Analysis of the
15 strength of legal firearms restrictions for perpetrators of
16 domestic violence and their associations with intimate partner
17 homicide."

18 And you're a coauthor on that study as well; right?

19 A. Yes, I am.

20 Q. And you cited that study in your report?

21 A. Yes.

22 Q. And you described that study as one "designed to
23 understand the impact of firearm restrictions on population
24 level rates of intimate partner homicide." Correct?

25 A. Correct.

1 Q. These are some of the studies on which you base your
2 conclusions in your report; correct?

3 A. Correct.

4 Q. None of these studies assessed mass shooters?

5 A. None of those studies you cite address mass shooters
6 directly.

7 Q. Devin Kelley did not commit intimate partner homicide;
8 right?

9 A. That's correct.

10 Q. Danielle Kelley is still alive?

11 A. She is, thankfully.

12 Q. Now, in your original report, you state -- and I think you
13 state it again in your direct testimony -- that many of the
14 risk factors for intimate partner homicide are common among
15 those who commit mass shooting; is that right?

16 A. Yes.

17 Q. And one of the studies you cite to support that statement
18 is that study by April Zeoli that we've already mentioned,
19 "Potential to prevent mass shootings through domestic firearm
20 restrictions," PEX 750.

21 Let's pull that back up.

22 A. Yes.

23 MS. KRIEGER: Now, looking at page 15 of that study,
24 I think it is the -- yeah, the first full paragraph. Can you
25 make that larger.

1 BY MS. KRIEGER:

2 Q. They state in that study, "We do not suggest that domestic
3 violence perpetration be viewed as a predictor of mass
4 shootings. Certainly, only a small fraction of individuals
5 who commit domestic violence will conceive of, plan, or commit
6 a mass shooting."

7 Did I read that correctly?

8 A. Yes.

9 Q. In fact, in your own research, you found no evidence that
10 laws designed to keep firearms from perpetrators of domestic
11 violence have affected mass shootings connected to domestic
12 violence; is that correct?

13 A. Yes.

14 MS. KRIEGER: Just pull up that article. It's
15 Government Exhibit 102.

16 BY MS. KRIEGER:

17 Q. You're the -- this article is titled "Evidence concerning
18 the regulation of firearms design sale, and carrying on fatal
19 mass shootings in the United States." Correct?

20 A. Correct.

21 Q. And you're the lead author of this article; correct?

22 A. Correct.

23 Q. You'd agree that your own study is a reliable authority;
24 correct?

25 A. Yes.

1 MS. KRIEGER: Let's look at page 17. I think it's in
2 the middle of a paragraph, so I may have to search a little
3 bit.

4 BY MS. KRIEGER:

5 Q. It starts "28 percent of the shootings." I believe
6 it's -- got it.

7 Yeah. So middle of that paragraph there, "28 percent of
8 the shootings in this study" -- sorry -- just to back up a
9 second.

10 Here, you were studying specifically mass shootings;
11 correct?

12 A. Yes.

13 Q. "28" --

14 A. Fatal -- just to be clear, "fatal mass shootings,"
15 principally defined, four or more victims killed.

16 Q. Thank you. Thank you for clarifying that.

17 It says, "28 percent of the shootings in this study had
18 some connection to domestic violence, yet we found no evidence
19 that laws designed to keep firearms from perpetrators of
20 domestic violence have affected mass shootings connected to
21 domestic violence."

22 Did I read that correctly?

23 A. Yes.

24 MS. KRIEGER: Okay. Take that down.

25

1 BY MS. KRIEGER:

2 Q. You cite to a few studies regarding -- you talked about a
3 few studies about whether denials of handgun purchases have a
4 deterrent effect; correct?

5 A. Yes.

6 Q. Specifically, you talked about a study led by Garen
7 Wintemute, "Subsequent criminal activity among violent
8 misdemeanants who seek to purchase handguns."

9 A. Yes.

10 MS. KRIEGER: That was PEX 757. Let's pull that one
11 up.

12 BY MS. KRIEGER:

13 Q. You talked quite a bit with Mr. Jacob, so I don't need to
14 belabor it.

15 This study compared people with violent misdemeanors who
16 attempted to buy guns before and after California outlawed
17 sales to those people; right?

18 A. Correct.

19 Q. And it looked at whether those individuals were arrested
20 during the three-year follow-up period?

21 A. Yes.

22 Q. So if those individuals committed violence either with or
23 without a gun but were not arrested, that data would not be
24 included in this study; correct?

25 A. That's correct.

1 Q. In fact, most violent behavior is not reported, and it's
2 difficult to measure; right?

3 A. Yes.

4 MS. KRIEGER: Let's look at page 7, bottom of the
5 second column.

6 BY MS. KRIEGER:

7 Q. It says, "The records" -- I think it's the last paragraph
8 in the second column. Here we go.

9 It says, "Because the criminal records data were not
10 sufficiently specific, we were unable to categorize crimes
11 systematically as involving guns, violence, both, or neither."
12 Correct?

13 A. Yes.

14 Q. And when they're talking in this study about guns or
15 violent crime, we can't actually be sure whether these
16 individuals committed a gun crime or a violent crime or both;
17 is that right?

18 A. Yeah. They were in these broad categories.

19 Q. Let's go back to --

20 A. Because --

21 Q. Sorry. Go ahead.

22 A. I'm just saying that they could only provide the broad
23 categories.

24 Q. Of course.

25 Let's look at Table 2, which is on page 4.

1 A. Okay.

2 Q. Looking at the line where it says "purchase status." And
3 it says "denied" and "approved" there.

4 Do you see that?

5 Can you highlight that all the way across the line.

6 A. Um-hum.

7 Q. Of the people who were denied, 20.1 percent were later
8 arrested for gun or violent crimes; is that correct?

9 Gun and/or violent crimes?

10 A. Yeah. I just want to make sure I'm reading this
11 correctly.

12 Yes.

13 Q. And among the people who purchased guns, 23.9 percent were
14 later arrested for gun or violent crimes; correct?

15 A. Correct.

16 Q. And I think you actually mentioned in your supplemental
17 declaration that, among the denied group, there were only
18 eight people charged with gun or violent crimes for every
19 100 years of person follow-up.

20 Do you see that there?

21 A. Yes.

22 Q. And among the approved group for the same statistics, it's
23 only 9.9 people charged with gun or violent crimes per
24 100 years of follow-up; correct?

25 A. Yes.

1 MS. KRIEGER: Let's look at Table 2 -- I'm sorry,
2 Table 3, which is on page 6.

3 BY MS. KRIEGER:

4 Q. You talked about this a little bit with Mr. Jacob.

5 Now, what we're looking at under "purchase status,"
6 "denied" or "approved," the column "gun and/or violent crime
7 adjusted relative hazard."

8 Now, you noted that based on this -- this is a multivaried
9 regression analysis; right?

10 A. Yes.

11 Q. So based on that regression analysis, violent offenders
12 who were allowed to purchase handguns subsequently had a rate
13 of offending for violent and/or gun crimes that was 29 percent
14 higher than those with similar histories who were denied
15 handgun purchases.

16 And I apologize for the math here, but a 29 percent higher
17 rate for those with similar histories is essentially the same
18 thing as a 22.5 percent reduction in future violence for those
19 who were denied; is that right?

20 A. I haven't done the math, but it's probably pretty close.

21 Q. Dividing 1.29 by 1?

22 A. Um-hum.

23 Q. Okay. So that means that three out of four people who
24 were denied are still going to commit -- or were still going
25 to commit a gun or violent crime even though they're denied;

1 correct?

2 A. Approximate, yep.

3 Q. You also talked -- you can pull this study down -- talked
4 about the study headed by Mona Wright, "Effectiveness of
5 denial of handgun purchase to persons believed to be at high
6 risk for firearm violence." That's PEX 753.

7 Now, again, this study looked at -- the follow-up was
8 looking at charges that were made for new offenses; is that
9 correct?

10 Do you want me to pull it out? I think it's the top
11 paragraph of the second column there. It says, "Arrest
12 charges for new offenses occurring in the three years
13 following handgun purchase were the outcomes of interest."

14 A. Yes.

15 Q. Okay. So, again, to the extent that any of these persons
16 were committing violent acts but were never arrested, that
17 wouldn't have been caught by this study; right?

18 A. That's correct. Of course, it's simply impossible to
19 follow people and all of their violent things they do. So
20 almost all studies that are going to be published are going to
21 be based upon -- you know, at least that are looking at gun
22 violence in these sort of studies are going to rely upon the
23 available records.

24 Q. Of course.

25 And let's go to the next page. I'm sorry. Let's pull out

1 the paragraph just above where it says "Discussion."

2 It says here, "We estimate that 12 percent of gun offense
3 and 14 percent of violence offense arrests among handgun
4 purchasers were attributable to the handgun purchase."

5 Did I read that correctly?

6 A. Yes.

7 Q. So, again, the math, not my strongest suit.

8 86 percent of violent offense arrests would not have been
9 attributable to the handgun purchase?

10 A. Um, that's correct.

11 Q. And 88 percent of gun offenses are also not attributable
12 to the handgun purchase?

13 A. Correct.

14 Q. And let's just look -- you looked at this already, but
15 very briefly, that last paragraph in the -- very last
16 paragraph on the page. I'm sorry.

17 Ms. Wright -- Dr. Wright and her coauthors state here, "We
18 do not know whether those denied legal handgun purchase
19 obtained a firearm by other means."

20 Did I read that correctly?

21 A. That's correct.

22 Q. A certain percentage of them did commit future gun crimes,
23 though; correct? A certain percentage of those denied legal
24 handgun purchases, nonetheless, committed future gun offenses?

25 A. That's correct.

1 Q. Now, based on those two studies, it's your view that those
2 studies are an indication that the denial of background checks
3 lowers the population rates of violent crime; is that correct?

4 A. It lowers the rate for those who are denied.

5 Q. Yes. And I apologize if I said that badly.

6 Looking at a population, the people being denied as a
7 result of background checks over the course of population will
8 lower their rates of violent crime, the overall rates?

9 A. That's what these studies indicate.

10 Q. You don't have data specifically as to how denials of
11 background checks impact mass shootings on a population level,
12 do you?

13 A. No.

14 Q. You talked a little bit in your direct examination about
15 the idea that persons might have a hesitancy to engage in
16 transaction with firearms without somebody that they know and
17 trust; correct?

18 A. That's correct.

19 Q. You mentioned some studies that you were involved in;
20 correct?

21 A. Yes.

22 Q. Both of those studies that you were involved in were
23 surveys done in Maryland?

24 A. Correct.

25 Q. One was a survey conducted in Baltimore; correct?

1 A. Yes.

2 Q. And that was -- you mentioned on direct that that was a
3 survey conducted of people on parole or probation; is that
4 right?

5 A. That's right, yes.

6 Q. And the other was?

7 A. These were anonymous, just for what that's worth. So we
8 wanted to make sure people were giving us honest information.

9 Q. The other survey was one conducted of youths in Maryland?

10 A. Yes, incarcerated youth.

11 Q. Incarcerated youths, that's right.

12 Now, Maryland has firearm regulations that go beyond
13 federal law; correct?

14 A. Yes.

15 Q. Maryland requires all handgun sales, including private
16 sales, to be contingent on the purchaser passing a background
17 check?

18 A. Yes.

19 Q. And, actually, one of the studies you mentioned was
20 actually looking at the effect of the 2013 Firearms Safety Act
21 in Maryland; is that right?

22 A. That's right.

23 Q. That law required a permit to purchase for anyone
24 purchasing a handgun, including in private sales. Yes?

25 A. Yes.

1 Q. That statute banned assault rifles?

2 A. It did.

3 Q. It also limited magazine sizes to ten rounds?

4 A. That's correct.

5 Q. And it expanded authority for state police to act against
6 gun dealers who were in violation of state gun laws; is that
7 right?

8 A. That's right.

9 Q. Also in your declaration, you mentioned some studies that
10 were done by Philip Cook; correct?

11 A. Yes.

12 Q. Those studies were done in Chicago?

13 A. Yes.

14 Q. Chicago has unusually restrictive firearm regulations;
15 doesn't it?

16 A. Yes.

17 Q. In fact, in Illinois, all gun owners are required to have
18 a Firearm Owner's ID Card; right?

19 A. That's correct.

20 Q. Private sales to persons without that card are illegal?

21 A. Yes.

22 Q. Chicago has actually essentially banned handguns; isn't
23 that right?

24 A. In 2010, the Supreme Court said that they could not do
25 that anymore. So, no, handguns are not banned in the city of

1 Chicago, no.

2 Q. At the time that these studies were done, were handguns
3 banned in Chicago?

4 A. Yes. The one in particular that I believe I cited.
5 There's been subsequent studies in Chicago, actually, led by
6 Philip Cook, a slightly different method.

7 Q. The Chicago Police Department has made gun enforcement a
8 priority since the 1950s; correct?

9 A. Yes.

10 Q. So the studies that support your statement -- your opinion
11 that prohibited persons prefer to use a trusted source, those
12 were done in areas with significant restrictive firearm
13 regulations and enforcement; is that right?

14 A. Well, you could certainly say that about Chicago.

15 With respect to the Baltimore examples, actually, I have
16 studied the frequency with which people are charged for
17 violating the private background check requirement. And what
18 we find is that it is extremely rare in the entire state of
19 Maryland, but particularly in Baltimore city, that anyone is
20 ever charged with that.

21 So there -- yes, there are requirements. But with respect
22 to enforcing the private background check requirement, I would
23 say that that is not something that is strictly enforced. So
24 I felt that that's relevant to this conversation.

25 Q. You'd agree that regulations on gun sales have an impact

1 on the illegal market; correct?

2 A. Yes, I do.

3 Q. Texas firearm regulations do not go beyond what is
4 required by federal law; correct?

5 A. For the most part. And I don't have the full spectrum of
6 their laws in front of me right now. But generally speaking,
7 their laws are reasonably close to the federal laws.

8 Q. In Texas, private sales without a background check are
9 legal?

10 A. Say that again, please.

11 Q. I'm sorry. In Texas, private sales done without a
12 background check between private -- to private individuals are
13 legal; is that correct?

14 A. You can legally do that, yes.

15 Q. You're aware that private sales occur at gun shows;
16 correct?

17 A. Yes.

18 Q. You're aware that private sales occur on the internet;
19 correct?

20 A. Yes.

21 Q. You're aware -- are you aware of the website Armslist?

22 A. Yes.

23 Q. That's a place where people can conduct private sales of
24 firearms; correct?

25 A. Yes.

1 Q. You don't know whether people who buy their firearms
2 through websites like Armslist have some kind of preexisting
3 trusted relationship with those sellers, do you?

4 A. I don't.

5 Q. And you actually -- you talked a little bit about Kelley
6 being concerned about the risky, unpredictable, quote,
7 underground gun market; is that right?

8 A. What I said is that it's quite likely that he did not want
9 to go into that unregulated marketplace --

10 Q. Because it --

11 A. -- for the reasons I -- for the reasons I stated; that
12 there's less control with respect to the quality of the
13 firearms, whether they have been used in a crime or not, and
14 personal safety reasons.

15 Q. Risky and unpredictable to use the private market;
16 correct?

17 A. Yes.

18 Q. You don't -- you didn't cite any research in either your
19 report or your declaration discussing the riskiness or
20 unpredictability of private sales in Texas, did you?

21 A. No.

22 Q. You talked about a study, on direct, "Patterns of multiple
23 family homicide." That was PEX 785.

24 A. Um-hum.

25 Q. You -- in discussing that study, you were talking about

1 extended family members being killed; is that right?

2 A. Yes.

3 MS. KRIEGER: Let's look at page 10 of that study,
4 the paragraph that starts -- second to the last paragraph, can
5 you bring that out. Here we go. Sorry.

6 BY MS. KRIEGER:

7 Q. Looking in the middle of the paragraph, it says, "In cases
8 in which the spouse and in-laws were killed, the spouse
9 constituted the primary target. Here, the perpetrator
10 perceived the in-laws as equally guilty of betrayal."

11 Did I read that correctly?

12 A. Yes.

13 Q. Again, these are cases in which both the spouse and the
14 in-laws are killed, is that right, what's describes in that
15 sentence?

16 A. Yes. Yes.

17 MS. KRIEGER: Let's look at page 12. And then
18 there's a paragraph that starts "diffuse conflict." Here we
19 go.

20 BY MS. KRIEGER:

21 Q. So this paragraph is talking about familicides involving
22 relatives who are much more distantly related; correct?

23 A. Yes.

24 MS. KRIEGER: Highlight the sentence starting "Based
25 on the available information." Keep going. There you go.

1 BY MS. KRIEGER:

2 Q. I'm going to read the sentence.

3 "Based on the available information, it could be
4 hypothesized that the more distant the family relation between
5 victim and perpetrator, such as involving cousins, nephews,
6 uncles and grandparents, the more likely the homicide
7 resembles nonfamily homicides."

8 Did I read that correctly?

9 A. Yes.

10 MS. KRIEGER: Take that down.

11 BY MS. KRIEGER:

12 Q. You testified that you believed that the shooting was
13 motivated by domestic violence; correct?

14 A. It was connected to domestic violence, yes.

15 Q. You actually were talking to Mr. Jacob about the -- when
16 you first heard about this case, prior to being retained.

17 Do you remember that conversation?

18 A. Yes.

19 Q. You actually testified that before you were retained, when
20 you first heard about this case, you had already determined
21 that the motivation was domestic violence; is that right?

22 A. Based on the information that was available.

23 Q. That was before you viewed any of the documents that were
24 provided to you specifically by plaintiffs' counsel in this
25 case; correct?

1 A. It was based on information that was coming up from news
2 reports about the connections between Danielle Kelley's
3 family, his history of domestic violence, and the importance
4 of that church community to Danielle and her family.

5 Q. Um-hum. And we've spent some time already talking about
6 whether Kelley was likely to purchase a gun from a non-FFL
7 source. And I think you already mentioned this.

8 You are aware that Kelley bought a handgun from a friend;
9 right?

10 A. Yes.

11 Q. And you're aware that he bartered for another shotgun --
12 for a shotgun?

13 A. Yes.

14 Q. And I don't know if you were observing the testimony of
15 Ranger Snyder.

16 Are you aware that Kelley sold a firearm to a pawn shop
17 for which there's no 4473 on record?

18 A. Yes. Yeah. I mean, going into a pawn shop is not a
19 particularly risky thing to do.

20 Q. Sure. He was actually selling that firearm; correct?

21 A. Right. That's correct.

22 Q. And the fact that there's no Form 4473 on record suggests
23 that was also acquired from a non-FFL source?

24 MR. JACOB: Objection, Your Honor. Counsel is
25 conflating the various firearms. The firearm -- the handgun

1 that he got rid of was the handgun he sold.

2 THE COURT: So let's let the witness testify to what
3 he knows.

4 THE WITNESS: I'm sorry. Could you please restate
5 the question.

6 BY MS. KRIEGER:

7 Q. Were you aware that the firearm that was sold to the pawn
8 shop, there's no 4473 form on record for that firearm?

9 A. No, I didn't know anything about that.

10 Q. I'm just going to ask you a couple questions about some of
11 the things that you testified here.

12 You stated at one point that Kelley -- you were basing
13 some of your opinions on the records of Kelley's involuntary
14 hospitalization.

15 Are you aware that Kelley was actually voluntarily
16 hospitalized?

17 A. Yeah. I misspoke. Sorry.

18 Q. And you also said that Kelley's father didn't trust Devin
19 with firearms; is that correct?

20 A. Yes.

21 Q. Kelley's father allowed him to have firearms in his home;
22 is that right?

23 A. Well, he didn't have -- allow him to access his own
24 firearms -- I mean, Mr. Kelley's firearms.

25 Q. Sure. But Mr. Kelley didn't have any problems with

1 Devin Kelley having -- possessing firearms within Mr. Kelley's
2 house, having Devin's own firearms?

3 A. I don't think he was crazy about that. But, again, I
4 don't necessarily want to speak to that. I mean --

5 Q. What are you basing the testimony -- what are you basing
6 that statement on, that he wasn't crazy about Devin having
7 firearms in the house?

8 A. Well, I just read testimony that he was concerned about
9 firearms and his son.

10 Q. Mr. Kelley had his own firearms; right?

11 A. Yeah.

12 Q. He testified, I think, he had four firearms at one point?

13 A. Um-hum. Yes.

14 Q. And he also -- and his wife, Mrs. Kelley, testified that
15 they had no idea that Kelley was prohibited from owning
16 firearms; correct?

17 A. Yes.

18 Q. They testified that on at least one occasion, Devin Kelley
19 cleaned one of his parents' guns.

20 Do you recall that testimony?

21 A. Yes.

22 Q. They also testified that Devin went shooting almost daily
23 on the family property; correct?

24 A. Yes.

25 Q. There was no testimony that they ever asked Devin not to

1 have firearms on the property; correct?

2 A. As far as I know, no.

3 Q. Let's go back to one of -- your own study. We looked at
4 this a few minutes ago, the article from March 2020 called
5 "Evidence concerning the regulation of firearms design, sale
6 and carrying on fatal mass shootings in the USA," GEX 102.

7 A. Um-hum.

8 MS. KRIEGER: Can you pull up that research summary,
9 just the whole gray box.

10 BY MS. KRIEGER:

11 Q. So in the summary, when it's providing a summary of the
12 conclusions, it says, "Handgun purchaser licensing laws and
13 bans of large-capacity magazines were associated with
14 significant reduction in the incidence of fatal mass
15 shootings." Correct?

16 A. Correct.

17 Q. And below that, it says, "Other laws commonly advocated as
18 solutions to mass shootings - comprehensive background checks,
19 assault weapons bans, and deregulation of civilian concealed
20 carry of firearms - were unrelated to fatal mass shootings."
21 Correct?

22 A. That's correct.

23 MS. KRIEGER: Let's turn to page 11. It says
24 "Results." I want to say the second paragraph, but I'm
25 actually not positive. Pull out that whole section.

1 Yes, second paragraph.

2 BY MS. KRIEGER:

3 Q. Are you able to read that? Should we make it a little
4 bigger?

5 A. No. I can read it.

6 Q. Okay. You concluded -- so I'm starting kind of partway --
7 the first sentence of that second paragraph, you concluded,
8 "The estimates from the full negative binomial models indicate
9 that handgun purchaser licensing laws requiring in-person
10 application with law enforcement or fingerprinting were
11 associated with incidence of fatal mass shootings 56 percent
12 lower than that of other states."

13 Did I read that correctly?

14 A. Yes.

15 Q. Texas does not have handgun purchaser license laws
16 requiring in-person application with law enforcement or
17 fingerprinting; is that correct?

18 A. That's correct.

19 Q. And then, same paragraph, you state, "For LCM bans" -- and
20 just to be clear, "LCM bans," that's large-capacity magazine
21 bans?

22 A. Correct.

23 Q. "For LCM bans, the IRR estimate indicates a 48 percent
24 lower risk of fatal mass shootings associated with the
25 policy."

1 Did I read that correctly?

2 A. Yes.

3 Q. Texas does not have a large-capacity magazine ban;
4 correct?

5 A. Correct.

6 Q. Colorado does have a large-capacity magazine ban; is that
7 right?

8 A. That is correct.

9 Q. And Colorado's large-capacity magazine ban was in effect
10 in 2016, was it not?

11 A. Yes.

12 Q. Next sentence, "We found no evidence that concealed carry
13 laws, assault weapons bans, prohibitions for domestic abusers
14 and violent misdemeanants or point of sale CBC laws were
15 associated with the incidence of fatal mass shootings."

16 Did I read that correctly?

17 A. You did.

18 Q. "CBC laws" are comprehensive background check laws?

19 A. Yes.

20 MS. KRIEGER: Let's look at page 12. You can pull up
21 the paragraph there. Just the whole thing.

22 BY MS. KRIEGER:

23 Q. There it says, "Models for the incidence of mass shootings
24 with domestic or intimate partner violence links revealed no
25 significant associations with laws prohibiting firearms for

1 domestic violence abusers or violent misdemeanants or
2 purchaser licensing laws."

3 Did I read that correctly?

4 A. Yes.

5 Q. The next sentence there, "LCM bans, however, were
6 associated with a 61 percent lower rate of domestic mass
7 shootings."

8 Is that correct? Did I read that correctly?

9 A. That is. You did.

10 MS. KRIEGER: Let's turn to page 17. It says, "The
11 findings of this study." Second -- yeah.

12 BY MS. KRIEGER:

13 Q. You state, "The findings of this study suggest that the
14 most common policy prescriptions offered by advocates on each
15 side of the debate over gun control - comprehensive background
16 checks, and assault weapons bans on one side and so-called
17 'right to carry' laws reducing restrictions on civilian
18 concealed carry of firearms on the other side - do not seem to
19 be associated with the incidence of fatal mass shootings."

20 Is that correct?

21 A. Yes.

22 Q. Continuing on, you state, "28 percent of the shootings in
23 this study had some connection to domestic violence, yet we
24 found no evidence that laws designed to keep firearms from
25 perpetrators of domestic violence have affected mass shootings

1 connected to domestic violence."

2 Did I read that correctly?

3 A. Yes.

4 Q. You would agree there are always some people who -- if
5 they have the resources, the determination, and the ability,
6 there are always some people who are going to get a firearm;
7 is that right?

8 A. Yes.

9 MS. KRIEGER: Pass the witness.

10 THE COURT: Any redirect?

11 MR. JACOB: Yes, Your Honor.

12 May I proceed Your Honor?

13 THE COURT: Yes.

14 REDIRECT EXAMINATION

15 BY MR. JACOB:

16 Q. Dr. Webster, I want to start with that study, and I'll
17 give an opportunity for the tech -- can you hear me okay?

18 A. Yeah.

19 Q. Okay. Let me start with GEX 102, and I'm going to display
20 GEX 102 for you.

21 And this is the study that you were just discussing with
22 Ms. Krieger; is that correct?

23 A. That's right.

24 Q. Dr. Webster, does GEX 102 answer any question that is at
25 issue in this case?

1 A. Well, what I think it does is it examines broad policies
2 and their impact across populations within the states. The
3 nature of the data that we had to examine -- pardon me.

4 We couldn't -- we could not, in essence, assess which
5 individuals were prohibited or not. These were broad --
6 again, broad correlational studies looking at the presence of
7 certain firearm laws and population rates.

8 Q. The government -- in this study, Government Exhibit 102
9 discusses comprehensive background checks.

10 Is a comprehensive background check different than the
11 status quo, the federal system that we're discussing here?

12 A. Yeah. It's different, principally, in the sense that
13 private transfers are required to proceed only if the
14 purchaser or transferee has passed a background check.

15 Now, I think it's important to understand what we were
16 examining here. We were examining whether that policy change
17 of extending the background check requirement to private
18 transfers, in addition to transfers from licensed dealers,
19 impacts fatal mass shootings. We found it did not.

20 Research that I have cited in -- I believe, in my second
21 declaration, points out that in studies that I've coauthored,
22 we find actually no significant increase in the number of
23 background checks after these requirements are put into place,
24 which brings it in what I was describing earlier about the
25 case in Maryland where these -- sadly, these are types of laws

1 that for private individuals, law enforcement seems very
2 reluctant to investigate and bring charges against as opposed
3 to federally licensed firearm dealers.

4 Q. Okay. And just so I understand the specific data that
5 you're comparing when you reach conclusions in Government
6 Exhibit 102, such as the effectiveness of comprehensive
7 background searches -- search laws, are you comparing
8 basically two groups or two sets of data, one set of data
9 being the effectiveness of comprehensive -- extending the
10 background check to private sales in contrast to just -- in
11 contrast to data that does not extend the background check to
12 private sales?

13 A. Yeah, exactly. We're contrasting changes that occur in
14 response to this extension to background checks for private
15 sellers and whether the trends change differentially in those
16 states versus states that don't extend their background check
17 requirement to private transfers.

18 Q. So is it --

19 A. So we find no clear correlation between extending -- the
20 law extending requirements to private sellers and the
21 incidence of fatal mass shootings.

22 Q. And let's take a look at some of the reasons why that may
23 be.

24 If we can look at Plaintiffs' Exhibit 765, the Wintemute
25 article that was covered by Ms. Krieger as well.

1 You recognize this article; right?

2 A. Yes.

3 Q. And I want to take you to page 4 of the Wintemute article,
4 Plaintiffs' Exhibit 765, and just zoom in on the first
5 paragraph that says, "Incomplete data due to failed
6 reporting."

7 A. Yes.

8 Q. Can you explain to us what this summary article is
9 describing about the literature in the field?

10 A. Yeah. What Dr. Wintemute was doing here is really
11 breaking down a far more detailed understanding of background
12 checks and research relevant to background checks -- so what
13 we can and cannot conclude -- and also identifying, in
14 essence, how one might get better outcomes from background
15 check requirements.

16 And one of the things Dr. Wintemute focuses on,
17 particularly, in this article, is completeness of the records.

18 Q. And how does incomplete records affect the studies and the
19 research done on background check systems?

20 A. Well, incompleteness of records would reduce the impact of
21 background check requirements by people applying to purchase
22 firearms who are prohibited but are given a green light to go
23 forward because those records aren't in there. And many of
24 the studies that actually I've coauthored with Dr. Wintemute
25 are studies that were done examining law changes in the 1990s,

1 principally, at a time when the records were far less complete
2 than they are now.

3 So that's one reason why we are continuing research to
4 look at more recent adoption of these laws because this is
5 getting better. The completeness of records are improving
6 over time.

7 Q. And from what you've learned in your research and in this
8 case, is the federal government responsible for some of the
9 incompleteness of the records that you're seeing in the
10 background check system?

11 A. Yes, they are, including the Department of Defense.

12 Q. And is AFOSI, in particular, responsible for at least
13 7,300 records not being reported to NICS?

14 A. That's correct.

15 Q. Let me show you Plaintiffs' -- or Exhibit 750.

16 And do you recognize PEX 750 as an article that you
17 discussed with Ms. Krieger?

18 A. That's right, yes.

19 Q. And I want to zoom in to the policy implication section
20 of -- well, first, tell us what PEX 750 is trying to do, the
21 article itself.

22 A. Yeah. It's trying to -- it's summarizing data relevant to
23 the degree to which domestic violence has -- is connected to
24 fatal mass shootings.

25 And as the title implies, might there be opportunities to

1 prevent these types of acts that are -- have this nexus
2 between domestic violence and fatal mass shootings.

3 Q. And I want to zoom in on policy implications, and have you
4 read the policy implications into the record for us.

5 A. Sure. "Implementation of domestic violence firearm
6 restrictions may prevent access to firearms for some
7 potential" -- "some potential mass shooters. For this to
8 happen, domestic violence cases need to become known to and
9 move through the justice system to conviction or granting a
10 domestic violence restraining order, and the firearms
11 restrictions need to be effectively implemented."

12 And this is really important in studies, that actually
13 I've done with Dr. Zeoli, that show that how comprehensive the
14 restraining orders are, and whether there's actual
15 requirements to surrender the firearms actually matter in
16 terms of their impact on domestic homicides.

17 Q. And when it says "firearms restrictions need to be
18 effectively implemented," does that include the need for
19 governmental agencies like AFOSI and security forces to submit
20 criminal history to the FBI?

21 A. Yes, that's certainly part of it.

22 Q. Okay. Let me show you the last page of this article. So
23 you should -- you should be looking at page 15 -- sorry,
24 page 15 of PEX 750. And if we can highlight just the first
25 section of under "Conclusion" so we can see it, including the

1 word "Conclusion" so you're able to read that.

2 A. Okay.

3 Q. Can you read into the record the first three sentences of
4 the conclusion?

5 A. Yes. "Domestic violence firearm restrictions are
6 considered promising tools to prevent mass shootings because
7 of the perception that mass shooters typically have histories
8 of committing domestic violence. Through this analysis, we
9 found that more than 30 percent of mass shooters had these
10 histories.

11 "It is clear that domestic violence firearm restrictions
12 will only prevent mass shootings if high-risk individuals
13 obtain restrictions through criminal convictions or domestic
14 violence restraining orders and have those restrictions
15 enforced."

16 Q. So I guess two points here.

17 First, is the figure that Zeoli -- in this article, PEX
18 750 -- that 30 percent of mass shooters have history of
19 domestic violence, is that an accurate figure based on your
20 survey of all the literature in the field?

21 A. That's certainly consistent with it. I mean, this
22 particular study that Dr. Zeoli led was, I think, the most
23 recent comprehensive study to pull this data together.

24 Q. And when it says "it is clear that domestic violence
25 firearm restrictions will only prevent mass shootings if

1 high-risk individuals obtain restrictions through criminal
2 convictions," does that include the conviction and submission
3 of that conviction information to the FBI's NICS system?

4 A. Yes.

5 Q. I want to go to one last article, PEX 785. And I'll go to
6 page 2 of PEX 785.

7 Do you remember discussing patterns of multifamily
8 homicide with Ms. Krieger?

9 A. Yes.

10 Q. And I believe y'all discussed page 10 of PEX 785, and if I
11 can show you the paragraph, in particular, that y'all
12 discussed on page 10 of 785.

13 We'll zoom in to that paragraph that starts with
14 "Cluster 4."

15 A. Okay.

16 Q. Okay. And I think the sentence that Ms. Krieger talked to
17 you about was "In cases in which the spouse and in-laws were
18 killed, the spouse constituted the primary target. Here the
19 perpetrator perceived in-laws as equally guilty of betrayal."

20 Did I read that correctly?

21 A. Yes.

22 Q. Could you read the last sentence of this paragraph,
23 starting with "typically."

24 A. Oh, yes. "Typically, the victims and perpetrator did not
25 share a household. The event was premeditated in about

1 two-thirds of the cases."

2 Q. And with this in mind, I want to ask you a couple of
3 questions.

4 If this were not -- if the Sutherland Springs shooting
5 were not in some way connected to domestic violence, do you
6 have any evidence or knowledge as to why Devin Kelley would
7 hogtie Danielle Shields before leaving to shoot up the church?

8 MS. KRIEGER: Objection. Calls for speculation.

9 THE COURT: Yeah, I don't see how he can answer that
10 this question. How is that within his realm of expertise?

11 MR. JACOB: Well, the point is that there would be no
12 other explanation, Your Honor.

13 MS. KRIEGER: Your Honor, I could think of plenty of
14 other explanations, but I'm not testifying.

15 THE COURT: That's sustained.

16 BY MR. JACOB:

17 Q. Now, this article talks about the spouse being a target.
18 I want to show you the part of the trial transcript from
19 Danielle Kelley's testimony, day one.

20 And if I can pull up page 107 of the transcript from the
21 first day of trial and show that to you. And I want to just
22 highlight line 17 through 22 of Danielle Smith's testimony for
23 you.

24 This is where Ms. Smith is discussing how Devin Kelley
25 hogtied her before leaving for the Sutherland Springs

1 shooting.

2 Do you see that?

3 A. I'm reading.

4 Okay. Yes.

5 Q. And based on Ms. Smith's testimony, is it your
6 understanding that Devin Kelley told their son that he would
7 be back after the Sutherland Springs shooting?

8 A. Yes.

9 Q. And do you know why he would be back?

10 MS. KRIEGER: Objection. Calls for speculation.

11 THE COURT: That's sustained.

12 MR. JACOB: I'll withdraw, Your Honor, and pass the
13 witness.

14 THE COURT: Anything further?

15 MS. KRIEGER: Just two things.

16 RECROSS-EXAMINATION

17 BY MS. KRIEGER:

18 Q. Sorry. Turning back to GEX 102, page 17 again.

19 Mr. Jacob asked you -- and I don't even need the page --
20 Mr. Jacob asked you whether this study answered any questions
21 that are relevant to this case.

22 Now, you found on -- page 17, you stated, "28 percent of
23 the shootings in this study had some connection to domestic
24 violence, yet we found no evidence that laws designed to keep
25 firearms from perpetrators of domestic violence have affected

1 mass shootings connected to domestic violence."

2 I read that correctly; right?

3 A. Yeah.

4 But the audio right now is not great, so I'm sorry.

5 Q. I apologize. That's my fault. I muted my microphone.

6 Do you want me to read that again, or did you -- you got
7 it?

8 A. No, that's fine. I think I got it, but I just wanted to
9 make sure I was hearing you.

10 MS. KRIEGER: Did the court reporter get that? I
11 think I was on the microphone.

12 THE REPORTER: Yes.

13 BY MS. KRIEGER:

14 Q. And then just very briefly, do you know what percentage of
15 people who commit domestic violence go on to commit mass
16 shootings?

17 A. No, I don't.

18 MS. KRIEGER: If we could pull up PEX 750, page 15
19 one more time, and that last paragraph above "Conclusions"
20 again.

21 BY MS. KRIEGER:

22 Q. Dr. Zeoli states there, "Certainly only a small fraction
23 of individuals who commit domestic violence will conceive of,
24 plan, or commit a mass shooting." Is that correct?

25 A. Yeah, that's correct. I mean, domestic violence is very

1 common; mass shootings aren't.

2 MS. KRIEGER: No further questions.

3 THE COURT: Anything else?

4 MR. JACOB: Yes, Your Honor briefly.

5 FURTHER REDIRECT EXAMINATION

6 BY MR. JACOB:

7 Q. Back to GEX 102.

8 When the -- when the article, GEX 102, says, "Laws
9 designed to keep firearms away from perpetrators," is that
10 referring to, for example, the comprehensive background check
11 system that we discussed in your redirect examination
12 previously?

13 A. It certainly includes it, yes.

14 Q. So, again, is this referring to the difference between the
15 comprehensive background search system versus the status quo
16 federal system, which we are here discussing today?

17 A. Yeah. That's what this article examines as it relates to
18 comprehensive background checks. We also look at other
19 firearm policies as well.

20 Q. So would another way of stating that sentence be "Laws
21 extending background checks to private sales have" -- let me
22 read the exact language.

23 "Laws extending background checks to private sales have
24 demonstrate" -- one second. Let me...

25 Okay. So another way -- would another way of stating that

1 be "Laws extending background checks to private sales have no
2 effect on mass shootings"?

3 A. Yes.

4 MR. JACOB: Pass the witness, Your Honor.

5 MS. KRIEGER: I'm sorry. I just have one or two
6 questions.

7 FURTHER RECROSS-EXAMINATION

8 BY MS. KRIEGER:

9 Q. Looking at GEX 102, looking at page 12, just pull out that
10 first paragraph.

11 It says, "Models for the incidence of mass shootings with
12 domestic or intimate partner violence links revealed no
13 significant associations with laws prohibiting firearms for
14 domestic violence abusers or violent misdemeanants or
15 purchaser licensing laws. Table 4."

16 Is that correct?

17 A. Yes.

18 MS. KRIEGER: Looking at table -- that's Table 2. I
19 apologize. Looking at Table 4, which is on page 15.

20 Never mind. No further questions.

21 But, Your Honor, the United States would request that
22 the documents cited by Dr. Webster in his testimony be moved
23 into evidence. He read from them, but none of them have
24 actually been moved in.

25 MR. JACOB: Your Honor, the learned treatise rule

1 expressly prohibits the entrance of learned treatises into
2 evidence. They can only be read into the record, not entered
3 into evidence.

4 MS. KRIEGER: Your Honor, this is a bench trial. We
5 believe that these documents would be helpful to you.

6 THE COURT: So give me specifics. What numbers are
7 we talking about?

8 MS. KRIEGER: Let's see. PEX 782, PEX 765,
9 PEX 750 -- I have kind after long list -- PEX 754, 759,
10 PEX 763, PEX 761, certainly Government Exhibit 102, PEX 757,
11 PEX -- did I say 753? No. 753. PEX 788, PEX 786, and
12 PEX 787, as well as, I think, PEX 785.

13 THE COURT: So...

14 MS. KRIEGER: If there are others that plaintiffs'
15 counsel -- those are the ones on my list. If there are others
16 that plaintiffs' counsel would like to move in, we would not
17 object to that.

18 THE COURT: So these were all initially offered by
19 the plaintiffs, and now you don't want them admitted?

20 MR. JACOB: Well, Your Honor, we were offering them
21 under the learned treatise rule, which expressly says that, if
22 admitted, the statement may be read into evidence but not
23 received as an exhibit.

24 If Your Honor is going to take this into evidence, I
25 ask that you allow us an opportunity to review specifically

1 what documents after we receive the transcript and then make
2 that offer tomorrow.

3 THE COURT: Yeah, I'll take that under consideration.
4 I want to review again the learned evidence rule and find out
5 what the exceptions may be.

6 But, Dr. Webster, I do have a question for you.

7 Can you go back to where the government was on
8 page 12 just a moment ago.

9 MS. KRIEGER: Of GEX 102?

10 THE COURT: Yes. So I think it was page 12 that you
11 were at earlier.

12 MS. KRIEGER: Yes.

13 THE COURT: If you can pull out that language there.
14 There we go.

15 So, Doctor, to sort of summarize your testimony, I
16 want to make sure I understand here.

17 So big picture, what I walked away from was that
18 you're opining that extending background checks to non-FFLs
19 doesn't have any kind of correlation between diminishing acts
20 of violence or mass violence; is that correct?

21 THE WITNESS: That's correct. In this case, we're
22 focused on fatal mass shootings.

23 THE COURT: Okay. However, on this page, with regard
24 to domestic violence, you seem to opine that these models for
25 incidence of mass shootings with domestic violence or intimate

1 partner violence links revealed no significant associations
2 with laws prohibiting firearms or purchaser licensing laws.

3 How do I reconcile that statement that's highlighted
4 right now with an earlier statement that you opined that
5 domestic violence firearm restrictions will only prevent mass
6 shootings if restrictions are enforced?

7 How are those two statements reconciled, or can they
8 be?

9 THE WITNESS: Well, in the case of the domestic
10 violence prohibitors, the information needs to get into the
11 NICS system for them to work, basically. And what we've found
12 and what Dr. Wintemute in his article goes into -- but other
13 studies examined this more specifically; in particular, as it
14 relates to domestic violence.

15 Because a lot of the records, for example, might have
16 a conviction for aggravated assault, but it is not specific
17 enough to say whether or not it was domestic violence.
18 Restraining order records, sadly, over the years have not
19 always been submitted to the systems.

20 So I think the way I reconciled this is that for
21 these very specific domestic violence prohibitors to be
22 impactful, that they require the full reporting of the
23 records.

24 THE COURT: So I just want to make sure what your
25 opinions are.

1 THE WITNESS: Um-hum.

2 THE COURT: Do I understand you correctly that you're
3 saying that if an act of domestic violence should put somebody
4 on the restriction list and the restriction list is reported,
5 there's a decrease in violence in the future, but just
6 domestic violence incidence, without any kind of triggering,
7 doesn't do anything?

8 Is that what I'm walking away with from your
9 testimony?

10 THE WITNESS: Well, I want to be specific about
11 what's in this study. And then, you know, there are separate
12 ways to think about this general question.

13 So in other studies, we've found -- that I've done
14 with April Zeoli, for example -- we found that domestic
15 violence restraining orders, and laws that restrict firearms
16 connected to those restraining orders, and firearm laws that
17 prohibit based upon violent misdemeanors result in significant
18 reductions in intimate partner homicide.

19 We did not see that in the case of mass shootings.
20 We're talking about a much smaller sample size to examine this
21 rather than for overall intimate partner homicides.

22 And so we also, in our prior work, didn't see as
23 strong a relationship to the domestic violence offenses as --
24 rather than the broader category of violent convictions for
25 violent crimes. And, again, I think that has to do with a

1 combination of the incidence not being categorized as domestic
2 violence, as well as the fact that convictions don't happen as
3 frequently because victims don't want to press those charges
4 and so on.

5 So it's sort of a complicated set of factors involved
6 as they relate very specific to offenses that are in the
7 records as domestic violence prohibitors.

8 THE COURT: Any questions based on my questions?

9 MR. JACOB: No, Your Honor.

10 MS. KRIEGER: Just one, Your Honor.

11 FURTHER RECROSS-EXAMINATION

12 BY MS. KRIEGER:

13 Q. Dr. Webster, this study, GEX 102, it doesn't state that
14 the reason that laws designed to keep firearms from
15 perpetrators of domestic violence has -- that no effect was
16 seen on mass shootings based on those laws, the study doesn't
17 state that the reason for that is because these incidents are
18 not reported; is that correct?

19 A. Well, what we're looking at here is just the results.
20 You're presenting the results.

21 Q. Right. The study doesn't actually --

22 A. So --

23 Q. -- give an explanation for that; is that right?

24 A. Well, we don't have the access to all the records to say
25 precisely what is going on in each of these cases.

1 Q. Um-hum.

2 A. But as we have discussed, it's well documented that there
3 are problems in the records upon which the background check
4 systems are based and the firearm prohibitors are based.

5 Q. Well, you actually -- can we just pull up page 17 again.

6 I think this is actually something that you just testified
7 to. You state -- sorry. Pull up that second-to-last
8 paragraph.

9 You state that -- the last sentence, it's actually
10 surprising that there's no evidence that this affects mass
11 shooters because there is evidence that laws prohibiting
12 persons under these types of -- these types of laws are
13 associated with reduced intimate partner homicides; correct?

14 A. That's correct.

15 MS. KRIEGER: That's all. Thank you.

16 THE COURT: Any further need for this witness?

17 MR. JACOB: No, Your Honor.

18 THE COURT: May he be excused?

19 MS. KRIEGER: Yes, Your Honor.

20 THE COURT: Thank you, Dr. Webster.

21 THE WITNESS: Thanks.

22 THE COURT: So let's go over the schedule for the
23 rest of the week here before we adjourn for the day.

24 So the only conflict that I have is on Friday. At
25 1:00, the judges of the Western District are meeting to

1 discuss a couple of those issues, and I would like to be
2 present. One of the discussions is going to be a potential
3 relocation of one of our posts to another division. So it's
4 going to be an interesting discussion, and I'd like to be
5 present for that.

6 So how do we keep us on track? We've got two
7 witnesses for tomorrow, Ryan and Barborini?

8 MR. ALSAFFAR: Yes, the defense witnesses, Your
9 Honor. That's my understanding.

10 THE COURT: Yeah. And then Wednesday, we only have
11 one. I mean, is there a possibility we can move everybody up
12 one, and that way we only have one witness for Friday morning?
13 Would that work?

14 MR. STERN: The problem, Your Honor, is that we
15 already issued the witness subpoena for Erin Higgins for
16 Thursday, and we would like our experts, Drs. Fox and
17 Dr. Bursztajn, to watch that testimony before they give their
18 own testimony.

19 THE COURT: Okay.

20 MR. ALSAFFAR: Your Honor, they can still do that,
21 actually. If they go Higgins on Wednesday, Bursztajn and Fox
22 would follow Higgins on Thursday.

23 MR. STERN: We don't think we're going to get to both
24 of them on Thursday.

25 THE COURT: Okay. So what we'll do -- that's fine.

1 I'm just trying to do my planning.

2 So I, over an abundance of precaution, am thinking
3 that we may not finish by the 16th. We can still do closing
4 arguments perhaps on Monday the 19th. And if necessary, I've
5 got the 20th still free, so if, for some reason, we have to
6 push over.

7 Let's plan on this, then. Let's plan that we're only
8 going to be working Friday morning, and we'll recess at about
9 12:55 for me to get to that meeting. So you can plan
10 accordingly for that.

11 With that, does the plaintiffs rest?

12 MR. ALSAFFAR: Your Honor, we have a rebuttal
13 witness, Dr. Metzner, who will be coming after their last
14 witness.

15 THE COURT: Okay.

16 MR. ALSAFFAR: And so I think what I'm hearing, Your
17 Honor, is that the government will not have a witness
18 Wednesday afternoon, so that we'll just do two on Thursday and
19 then their final witness on Friday morning, which would mean,
20 with your break, we would do Metzner, our rebuttal witness, on
21 Monday and then perhaps close Monday afternoon.

22 Does that sound --

23 MR. STERN: Originally, you talked about Metzner
24 going Friday morning, but we are kicking him to Monday now?

25 MR. ALSAFFAR: Because the judge cannot go past

1 12:55.

2 MR. STERN: Exactly. Fox, Friday morning; Metzner,
3 Monday morning?

4 MR. ALSAFFAR: That's right, yes.

5 MR. STERN: I think we're all right.

6 THE COURT: Let's plan accordingly, then.

7 MR. STERN: Your Honor, there's one other thing.

8 THE COURT: Shall we -- well, the rest of those
9 watching these proceedings, we are finished with testimony for
10 today. We are just merely doing housekeeping matters. You're
11 welcome to remain online, or you can drop if you wish.

12 MR. STERN: Your Honor, technically, it's not a
13 housekeeping matter, but that's up to you. Sorry.

14 THE COURT: Oh. Well, we won't be hearing any
15 testimony. You're welcome to remain on if you'd like.

16 So what we do have?

17 MR. STERN: As the plaintiffs have just closed their
18 case in chief the United States would seek judgment on partial
19 findings pursuant to Federal Rule of Civil Procedure 52(c).

20 Now, admittedly, several of these grounds are issues
21 that the Court has already adjudicated, and so the United
22 States is happy to file a formal motion. But, of course,
23 considering there's been about 400-plus entries in the docket
24 already, I don't want to clog the Court's dockets.

25 So I can either read the grounds into the record

1 right now or proceed however Your Honor wants.

2 THE COURT: Why don't you read them into the record
3 right now.

4 MR. STERN: Fair enough.

5 Your Honor, the United States seeks motion on partial
6 findings pursuant to Federal Rule of Civil Procedure 52(c) on
7 five grounds.

8 The first, the United States is immune from suit
9 under the Brady Act immunity provision, 18 USC 922(t)(6).

10 Second, the United States is immune from suit under
11 the FTCA misrepresentation exception, 28 USC 2680(h).

12 Three, the United States is immune from suit because
13 the Federal Tort Claims Act creates no causes of action for
14 violations of federal statutes or regulations pursuant to
15 *Johnson v. Sawyer*, 47 F.3d 716, from 1985 from the Fifth
16 Circuit.

17 Fourth, under Texas law, a private person would not
18 be held liable to these plaintiffs in similar circumstances,
19 and the United States, therefore, do not owe a duty of care in
20 this case.

21 And, five, plaintiffs have failed to prove the United
22 States was the proximate cause of their injuries.

23 THE COURT: Any response?

24 MR. ALSAFFAR: Well, Your Honor, I think we've
25 litigated every single one of those already extensively, so we

1 would refer to our filings. And we'd also refer to the 20
2 depositions that have been preadmitted as part of the trial.
3 It's easy to forget those. All of those establish the Brady
4 immunity doesn't apply and reinforces the Court's initial
5 decision.

6 And in terms of the FTCA state law, the motion and --
7 that -- again, Your Honor, that's a matter of law. I don't
8 think we need to discuss that right now. That doesn't relate
9 to the trial facts.

10 And then the last one, proximate cause, Your Honor,
11 we've obviously put on extensive evidence that the government
12 was both aware causally and factually that this particular
13 plaintiff -- I'm sorry, this particular shooter had a very
14 specific and particular preference for these kinds of weapons
15 that he specifically used in this shooting. They really
16 presented no evidence to the contrary on that, other than
17 speculation.

18 And then on the second part, foreseeability, which I
19 assume is part of the proximate cause analysis, without going
20 into the extensive detailed records we've admitted into
21 evidence, it's safe to say that the Air Force knew more than
22 anybody else in Devin Kelley's life that this was a deeply
23 depraved, mentally unstable man who had extensive violence
24 that the Air Force knew more about than any other person in
25 his life. And that included sexual violence, physical

1 violence, domestic violence. And now we know more than we
2 knew before, extensive threats of mass shooting violence.

3 And that clears the foreseeability bar quite clearly.

4 MR. STERN: Your Honor?

5 THE COURT: Go ahead.

6 MR. STERN: The plaintiffs got to make some argument.
7 Am I allowed to do the same briefly?

8 THE COURT: Sure.

9 MR. STERN: With regard to the Brady Act immunity
10 provision, I understand that this has been briefed
11 extensively. However, Your Honor has still yet to rule as —
12 how *Maroney* [phonetic] applies in this case. Because if you
13 recall, *Maroney* actually is a case whereby an employer, under
14 Texas law, was allowed to use the immunity provided by its
15 employee under federal statute.

16 And this is the same exact case we have here, that
17 under Texas law, an employer can get the benefit of a federal
18 immunity given to its employee.

19 Therefore, even if Your Honor reads 922(t) (6) as
20 allowing immunity to United States employees, then under
21 respondeat superior liability pursuant to the Federal Tort
22 Claims Act, the United States gets the benefit of immunities
23 given to its employees not only pursuant to state law under
24 *Alfonso* case, but those immunities provided by federal law
25 under the *Maroney* case.

1 And that has still not been adjudicated by the Court,
2 how it reconciles the *Maroney* decision. When it comes to --

3 MR. ALSAFFAR: Your Honor?

4 MR. STERN: Hold on.

5 MR. ALSAFFAR: I thought you were finished.

6 MR. STERN: I'm going to keep going, if you don't
7 mind.

8 Let's start with Number 2, the misrepresentation
9 exception. This has been briefed as well. However, to the
10 extent that the plaintiffs are arguing that the Air Force
11 failed to provide information to NICS, then that was a
12 misrepresentation by the Air Force. Or if they are arguing
13 that the NICS system provided a proceed to the FFL rather than
14 what should have been denial, that is a misrepresentation too.

15 So under either communication that's at issue in this
16 case, it is barred under the misrepresentation exception under
17 28 USC 2680 (h) .

18 Three, with regards to *Johnson v. Sawyer*, the United
19 States has to be clear and somewhat careful because I know
20 Your Honor has already ruled on this issue.

21 But the United States maintains that *Johnson v.*
22 *Sawyer* is very clear that, under FTCA law, the tort or the
23 duty cannot be based on federal statutory duties.

24 And, Your Honor, with due deference, the notion that
25 this case is not predicated on federal statutory duties but

1 the operation of a bureaucratic system pursuant to those
2 federal statutory duties is a distinction without a
3 difference.

4 Plaintiffs can always circumvent *Johnson v. Sawyer* by
5 saying "No, no, no, it's not the Brady Act, but it's the
6 operation of NICS. It's not the Crime Reporting Act, but it's
7 the operation of interstate identification index. It's not
8 the Patriot Act, but it's the implementation of a terrorist
9 watch list."

10 Under all of those circumstances, *Johnson v. Sawyer*
11 can always be circumvented by saying it's not federal law, but
12 it's the intergovernmental reporting obligations pursuant to
13 that federal law.

14 And that's why under even the restatement of torts
15 323 and 324A, you need a negligent undertaking that is a
16 service-rendered, quote/unquote, to another. And here, this
17 is not a duty rendered to these plaintiffs; it is provided to
18 the general public.

19 And I remember when we were arguing the motion to
20 dismiss, and it was our deputy assistant attorney general who
21 argued this was arguably a responsibility to the general
22 public for all Americans. And the next sentence should have
23 been "a duty to all is a duty to none." That is black letter
24 law both in Texas tort law and throughout this country that
25 without some type of tethering to these plaintiffs, then this

1 is just simply a bureaucratic enterprise for which the United
2 States cannot be held liable.

3 With regards to four, no private person analogue,
4 simply because Texas recognizes the doctrine of negligent
5 undertaking, it does not mean that the plaintiffs have found a
6 private person analogue.

7 Here, the most analogous case is *Perry versus S.N.*
8 And Your Honor already recognized that there was no common law
9 duty under that case. Frankly, Your Honor, that should have
10 ended this case two years ago. *Perry v. SN* is the most
11 analogous case to the case at bar.

12 And as a result, plaintiffs cannot show a common law
13 duty for which a private party would be held liable. And so
14 the United States, likewise, in similar circumstances, must be
15 dismissed from this case.

16 And, five, I want to be very clear because, yes, of
17 course, when we're talking about proximate cause, we're
18 talking about two factors; foreseeability and cause-in-fact.

19 Foreseeability, we only look at what which gave rise
20 to the alleged duty. And I want to be clear with the word
21 "alleged." Because when we're talking about proximate cause
22 we are talking about whether the breach of a duty proximately
23 caused the injuries.

24 So what was the alleged duty? Here, it is only
25 predicated on 18 USC (g) (1) and (g) (9), the two specifications

1 that gave rise to any reporting obligation by the Air Force.
2 As a result, that is the only conduct of Devin Kelley's that
3 can even be considered by the Court as to whether or not there
4 was a duty, a breach, and whether the breach of that duty
5 caused plaintiffs' injuries.

6 And as a result, if you're looking at foreseeability,
7 which means whether the mass shooting was of the same general
8 character as that which occurred when Devin Kelley was in the
9 Air Force, the answer is categorically no.

10 The assault that he did, while it was brutal on Tessa
11 Kelley and his stepson, is so different in kind in both
12 severity and in character to one of the most deadly mass
13 shootings in the United States that, on its face, it cannot go
14 forward, and the case must be dismissed because it was not
15 foreseeable to the Air Force that five years later or any time
16 period later that Devin Kelley would commit this heinous act.

17 And when it comes to cause-in-fact, Your Honor has
18 heard testimony regarding the numerous instances where Kelley
19 obtained firearms from non-FFLs, his determination, his
20 motivation, the fact that this person was not deterred by
21 laws, was not deterred by physical barriers as he jumped a
22 fence to elope from Peak to obtain firearms he had researched
23 online, the fact that he broke the laws time and time again,
24 that he was planning days in advance, that he had a black box
25 where he was concealing his true intent, including putting on

1 that "Punisher" mask and doing what he did.

2 Your Honor, it is very clear that no laws, certainly
3 no background checks that are limited by law that Congress has
4 limited only to FFLs when everyone knows, that you can easily
5 obtain firearms in Texas through non-FFLs. Ranger Snyder said
6 as much, that other individuals recognize Kelley researched
7 online extensively. You can obtain firearms through non-FFLs
8 online.

9 He went to gun shows regularly. That shows that he
10 knows how to obtain firearms knew non-FFLs. His father, when
11 he was being interviewed by the Texas Rangers on the day of
12 the shooting, said his son could access his firearms.

13 There was the access. There was determination.
14 There was the means. And there was Kelley's depravity, which
15 shows that the background check system would not have
16 prevented him from committing this act.

17 And even if the Air Force failed to submit his
18 information to NICS, it was not a substantial factor, because
19 we all know Devin Kelley would have committed this heinous act
20 regardless of whether his information was in NICS.

21 THE COURT: Finished?

22 MR. STERN: I am, Your Honor.

23 THE COURT: Your response.

24 MR. ALSAFFAR: Do I need to respond, Your Honor?

25 THE COURT: No. But feel free if you want.

1 MR. ALSAFFAR: I think I'm good.

2 THE COURT: So with regard to misrepresentations,
3 there was no misrepresentation. There was a complete failure
4 by the United States Air Force to transmit the necessary
5 information to NICS.

6 With regard to *Johnson v. Sawyer*, I've already ruled
7 on that. And so this is basically a motion for
8 reconsideration, which I deny.

9 With regard to the negligent undertaking to all
10 should be a duty to no one, that's an interesting theory from
11 the government.

12 You know, the Air Force foresaw that he was a danger.
13 The tech sergeant -- I think that was her rank -- was saying
14 that he was a danger to -- "he's going to shoot us all" I
15 believe was her statement. You know, so the Air Force
16 obviously knew that he could potentially be a mass shooter,
17 and so they foresaw this or could have foreseen this. I'm not
18 making any final rulings.

19 And so there's fact issues still remaining that cause
20 this motion to be denied on the foreseeability issue.

21 The Air Force was concerned enough to get a
22 restraining order placed against him that would bar him from
23 reentering the facility. So, apparently, the Air Force was
24 protecting themselves. It's disappointing from the government
25 that the argument is they had no duty to protect the rest of

1 us.

2 Anything else we need to take up today?

3 MR. ALSAFFAR: Not from plaintiffs, Your Honor.

4 THE COURT: We'll resume at 9:00.

5 (Proceedings continued in progress.)

6 -o0o-

7 I certify that the foregoing is a correct transcript from
8 the record of proceedings in the above-entitled matter. I
9 further certify that the transcript fees and format comply
10 with those prescribed by the Court and the Judicial Conference
11 of the United States.

12

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 13, 2021

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GIGI SIMCOX, RMR, CRR
CHRIS POAGE, RMR, CRR
OFFICIAL COURT REPORTERS
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 *(San Antonio, Texas; April 13, 2021, at 9:00 a.m., in open*
2 *court.)*

3 THE COURT: Good morning, ladies and gentlemen.
4 We'll resume with the trial today. All counsel, parties,
5 witnesses, participants, and members of the public are
6 reminded that this is a formal proceeding, and that they
7 should behave at all times as if they were present in the
8 courtroom.

9 The standing order of the San Antonio Division of the
10 Western District of Texas on remote access to court
11 proceedings remains in effect. Photography, recording, or
12 streaming of this proceeding by any means is strictly
13 prohibited. Though this proceeding is open to the public,
14 technological restraints require that members of the general
15 public request access from the courtroom deputy to participate
16 remotely. Those granted approval to participate remotely must
17 not forward the electronic link to nonparticipating colleagues
18 or persons and must not post a link on any public forum.

19 As with all proceedings, violations of these
20 instructions are subject to contempt proceedings.
21 Accordingly, please exercise proper decorum at all times, and,
22 with that, we'll begin with the government's case.

23 Your witness.

24 MR. STERN: Thank you, Your Honor. The United States
25 calls Mr. William Ryan.

WILLIAM RYAN - DIRECT

1 (WILLIAM RYAN, having been duly sworn, testified as
2 follows:)

3 THE COURT: Is it warm in here?

4 THE DEPUTY CLERK: Yes, I went ahead and let Michael
5 know.

6 THE COURT: Thank you.

7 DIRECT EXAMINATION

8 BY MR. STERN:

9 Q. Mr. Ryan, good morning.

10 A. Good morning.

11 Q. Would you please introduce yourself to the Court.

12 A. My name is William Ryan. I'm an assistant chief counsel
13 for the Bureau of Alcohol, Tobacco, Firearms, and Explosives.
14 I'm stationed in Martinsburg, West Virginia.

15 Q. When we talk about alcohol, tobacco, firearms and
16 explosives, can I use the acronym "ATF"?

17 A. Yes.

18 Q. How long have you worked for ATF?

19 A. I've worked for approximately since 2009. I've been in
20 five positions since that time. Prior to that time, I was a
21 Marine Corps officer and judge advocate in Camp Pendleton,
22 California.

23 THE COURT: Mr. Ryan, can you move that mic closer to
24 you?

25 (Reporter clarification.)

1 THE WITNESS: Camp Pendleton, California.

2 BY MR. STERN:

3 Q. And can you tell the Court some of the various roles that
4 you've held within the ATF?

5 A. Yes, sir. At ATF, I started as a staff attorney in 2009.
6 Through various reorganizations of the Office of Chief
7 Counsel, I was a senior attorney, and then finally assistant
8 chief counsel in the firearms and explosives law division.
9 I've been in that position for approximately three and a half
10 years.

11 Q. In those positions with the ATF, do you have any
12 familiarity with the Gun Control Act of 1968?

13 A. Yes, sir, I do. Gun Control Act of 1968 is one of the
14 four laws that the ATF is -- that the Attorney General has
15 allowed ATF to enforce through delegation orders.

16 Q. Is that the same with the Brady Act?

17 A. The Brady Act is part of the Gun Control Act, sir, yes.

18 Q. And then the NICS Improvement Amendments Act of 2007?

19 A. Also the Gun Control Act. Yes, sir.

20 Q. Thank you. And, again, can I use an acronym NIAA for NICS
21 Improvement Amendments Act?

22 A. Yes, sir. That is the accepted acronym.

23 Q. Thank you. And do you have familiarity with firearms and
24 modifications of firearms?

25 A. Yes. One of my roles at ATF in the Martinsburg facility

WILLIAM RYAN - DIRECT

1 is counsel to the Firearms and Ammunition Technology Division
2 or FATD. FATD houses the ATF's experts on firearm
3 classifications, technical modifications, things like that.
4 And so I have a regular -- regular role of advising them in
5 the legal aspects of their job.

6 Q. And you have already talked about your service with the
7 armed forces. Do you have experience with tactical weaponry
8 as a result of that experience?

9 A. I do. I did serve on one tour in Al-Fallujah, Iraq with
10 the infantry battalion. I was a legal adviser there.

11 Also, all Marine Corps officers are sent through what's
12 known as the basic school in Quantico, Virginia six-month
13 infantry training, so every Marine Corps officer is a rifle
14 platoon commander first. So I've experienced and had
15 experience with many weapon systems there.

16 And then as part of my training for ATF, I've also gone to
17 gunsmithing courses, including one for LWRCI, which is a
18 manufacturer in Maryland.

19 Q. Any other certifications or schooling relating to
20 firearms?

21 A. Just mostly on-the-job training and what's involved in my
22 daily work at ATF, sir.

23 Q. Okay. I'd like to talk to you a little bit about
24 Devin Kelley specifically and his being prohibited under the
25 Gun Control Act, if that's okay.

WILLIAM RYAN - DIRECT

1 A. Yes, sir.

2 Q. Did there come a time when the Department of Defense
3 Office of Inspector General's office contacted your office and
4 request an official determination and analysis from the ATF
5 regarding Devin Patrick Kelley?

6 A. There was. I was at a meeting with the Office of
7 Inspector General for DOD and met with an inspector there who
8 was also working on the Devin Kelley case. And we made
9 contact and I agreed that I would be -- and I was appointed to
10 be the ATF liaison to the DOD Office of Inspector General on
11 that case.

12 Q. And did you make determinations regarding whether Devin
13 Patrick Kelley was disqualified from legally owning or
14 possessing a firearm under the Gun Control Act?

15 A. Yes, sir. The Office of Inspector General provided us
16 documentation that they had accrued during their
17 investigation, and we determined that Mr. Kelley was a
18 prohibited person under 922(g) (1) and (g) (9) of the Gun
19 Control Act, the felon and the misdemeanor crime of domestic
20 violence prohibitors.

21 Q. I want to pull up Joint Exhibit 9, please.

22 Is this the memorandum your office sent to the Department
23 of Defense Office of Inspector General in response to their
24 request?

25 A. That is. Yes, sir.

1 Q. If we look at the bottom there, is that your signature?

2 A. That is my signature, yes.

3 Q. Now, it says "Barry Barlow," [phonetic], but that is your
4 signature?

5 A. That is. I have -- as assistant chief counsel, I had
6 signature authority, so I was allowed to sign it, but
7 Mr. Barlow was the associate chief counsel who was in charge
8 of the section.

9 Q. No forgery. We're okay on that?

10 A. We're good, sir. Yes.

11 Q. Then again, your conclusion, was Devin Kelley prohibited
12 from owning or possessing a firearm under 18 U.S.C. 922(g) (1)?

13 A. That's correct, yes.

14 Q. And (g) (9)?

15 A. That's right.

16 Q. What about (g) (4)? Was Devin Kelley prohibited from
17 owning or possessing a firearm under 18 U.S.C. 922(g) (4)?

18 A. No, sir. Based on the documentation that we received from
19 the Office of Inspector General, we determined that Mr. Kelley
20 was either adjudicated a mental defective or committed to a
21 mental institution.

22 Q. That he was not either of those?

23 A. Right.

24 Q. And then with regards to 922(g) (6), regarding dishonorable
25 discharges, was Devin Kelley prohibited from owning or

1 possessing a firearm under 18 U.S.C. 922(g) (6)?

2 A. No, sir, he was not. He had received a bad conduct
3 discharge as a characterization of service and the prohibitor
4 under the Gun Control Act, (g) (6), very specifically states
5 dishonorable discharge. A bad conduct discharge and a
6 dishonorable discharge are two very different
7 characterizations of service under the law.

8 Q. And I'll actually represent to you that the parties have
9 stipulated that your analysis, this is correct, insofar as
10 Devin Kelley was not prohibited under 922(g) (4) or (g) (6)?

11 A. Yes, sir.

12 Q. Now, is each prohibitor under the Gun Control Act
13 independent of one another?

14 A. Yes. Each of the prohibitors stands alone, and so when
15 ATF or FBI is determining whether someone is prohibited, each
16 of the individual prohibitors would be looked at in -- in --
17 by themselves to determine whether a person is prohibited.

18 Q. Can the submitting department or agency evaluate any other
19 conduct regarding an individual when deciding whether they are
20 prohibited under the Gun Control Act?

21 A. The submitting agency can submit information, whether --
22 whether that -- it results in a prohibition -- or that would
23 not result in a prohibition, I should say. Unless it meets
24 one of those specific statutory factors.

25 Q. So you said the agency may submit other information, but

1 can that other information, in and of itself, create an
2 obligation to report under the Gun Control Act?

3 A. No, sir.

4 Q. What can the submitting department or agency consider when
5 determining whether an individual is prohibited under the Gun
6 Control Act?

7 A. Any information that would -- that would lead to a
8 conclusion that one of those prohibitors is met: a conviction
9 for a felony; a conviction for a misdemeanor crime of domestic
10 violence; or in this case, you know, if a discharge from the
11 military was a dishonorable discharge. A bad conduct
12 discharge is indicative of something, but it is not indicative
13 that a person is prohibited under the Gun Control Act from
14 owning a firearm.

15 Q. So, again, a bad conduct discharge in and of itself does
16 not create an obligation to submit under the Gun Control Act;
17 is that fair?

18 A. It would not make it prohibited. That's right, sir.

19 Q. Let's take a look at Joint Exhibit 20.

20 Are you familiar with this document?

21 A. I am. Yes, sir.

22 Q. What is it?

23 A. This is the results of trial from the Air Force
24 court-martial of Devin Kelley.

25 Q. And did Devin Kelley plead guilty to two specifications

1 under Article 128(g) of the Uniform Code of Military Justice?

2 A. Yes. The document shows two guilty pleas, one for each
3 specification.

4 Q. Let's pull up Specification 1 and I'm going to have you
5 read the specifics of Specification 1.

6 A. Sure. "The nature of the offense is that Mr. Kelley did,
7 within the Continental United States, on diverse occasions
8 between on or about 24, June 2011, and on or about 27,
9 April 2012, unlawfully strike Tessa K. Kelley on her body with
10 his hands, unlawfully choked the said Tessa K. Kelley on the
11 neck with his hands, unlawfully pull the hair of said Tessa K.
12 Kelley with his hands, and unlawfully kick the said Tessa K.
13 Kelley on her body with his foot."

14 Q. Was this the specification that made Devin Kelley
15 prohibited under 18 U.S.C. 922(g)(9)?

16 A. Yes, sir.

17 Q. Why is it that this specification is under (g)(9) as
18 opposed to (g)(1)?

19 A. The -- the possible sentence, term of imprisonment that
20 Mr. Kelley could have received was limited to less than a
21 year, it would have been six months, and so it would not have
22 qualified as a (g)(1) confinement and greater than one year --
23 one year or greater.

24 Q. So is it fair to say that in order to be a (g)(1) felony,
25 the maximum allowable punishment would have to be over one

1 year?

2 A. That's right.

3 Q. And then for this specification, the maximum allowable
4 punishment was under one year?

5 A. That's right.

6 Q. Take a look at Specification 2, please.

7 Could you read aloud?

8 A. "That Mr. Kelley did within the Continental United States,
9 on diverse occasions between on or about 27, April 2011, and
10 on or about 16, June 2011, commit an assault upon JML, a child
11 under the age of 16 years by striking him on the head and body
12 with a force likely to produce death or grievous bodily harm,
13 to wit: his hands."

14 Q. Was this a specification that made Devin Kelley prohibited
15 under 18 U.S.C. 922 (g) (1)?

16 A. Yes, it was.

17 Q. And why was this a felony rather than a misdemeanor of
18 domestic violence?

19 A. The possible sentence or term of confinement that
20 Mr. Kelley could have received for this was over one year. I
21 believe it was up to five years because of the age of the
22 child and the grievous bodily harm that was charged.

23 Q. Did either of these specifications include the use of a
24 firearm?

25 A. They did not.

1 Q. In fact, if we look at the second page of the result of
2 trial, do we see several specifications where Devin Kelley is
3 alleged to have used a firearm, either loaded or unloaded?

4 A. Yes. Specifications include both using pointing a loaded
5 and unloaded firearm.

6 Q. What were the results of these specifications?

7 A. These specifications resulted in not guilty pleas and then
8 ultimately withdrawal and dismissal after the arraignment.

9 Q. Because these specifications were withdrawn, could they be
10 considered in determining whether Kelley was prohibited under
11 the Gun Control Act?

12 A. No. They would not have been relevant under the statutory
13 prohibitors.

14 Q. Could they have created an obligation by the Air Force to
15 submit information regarding those specifications?

16 A. Not as it pertains to the Gun Control Act, sir.

17 Q. Thank you.

18 Going back to the first page, are these two specifications
19 the only grounds upon which the Air Force had an obligation to
20 submit Kelley's disqualifying information?

21 A. Based on the information we've received there, sir, that's
22 correct, these were the two grounds.

23 Q. Did any conduct other than these two specifications create
24 an obligation by the Air Force to submit Devin Kelley's
25 information to NICS?

1 A. No, sir. Not under the Gun Control Act.

2 Q. If Devin Kelley was not adjudicated a mental defect or
3 involuntarily committed, could his mental health issues create
4 an obligation by the Air Force to submit information to NICS?

5 MR. ALSAFFAR: Objection, Your Honor. This goes well
6 beyond his expertise. Now he's trying to get him to testify
7 on specific elements of causes of action that he's clearly not
8 demonstrated as an expert in. They have not actually
9 designated him in that area as well, Your Honor.

10 THE COURT: I don't think he's been designated as an
11 expert at all. That's overruled.

12 BY MR. STERN:

13 Q. Again, based on your memo and your understanding of 18
14 U.S.C. 922(g) (4), if Devin Kelley was not adjudicated a mental
15 defect or was not involuntarily committed, could his mental
16 health issues create an obligation by the Air Force to submit
17 anything regarding Devin Kelley?

18 A. Not as it pertains to prohibitors under the Gun Control
19 Act, sir.

20 Q. Now, we've heard some testimony about general threats
21 Devin Kelley made to kill leadership and other people. Could
22 such threats create an obligation by the Air Force to submit
23 Kelley's information into NICS?

24 A. The statutory prohibitors are clear, sir, and -- and so
25 the answer is no, because the statutory prohibitors are clear

1 that only those categories of items are relevant. Those
2 categories of prohibitors are relevant in determining whether
3 somebody can lawfully possess a firearm.

4 Q. So could those threats even be considered when determining
5 whether someone was prohibited from owning or possessing a
6 firearm?

7 A. They would be irrelevant, sir.

8 Q. We've also heard about some really horrendous acts by
9 Devin Kelley that may have been known to the Air Force at the
10 time. Could those other bad acts be considered in determining
11 whether Kelley was prohibited under the Gun Control Act?

12 A. Yes, sir. The prohibitors are for things such as
13 convictions. None of those things were convictions. Those
14 bad acts would not have led to a prohibition on the possession
15 of firearms, the lawful possession of firearms.

16 Q. Those other bad acts wouldn't create a duty by the Air
17 Force, or an obligation by the Air Force to submit anything;
18 correct?

19 A. Not under the Gun Control Act, sir, no.

20 Q. And they couldn't be considered in terms of whether or not
21 Kelley was prohibited under the Gun Control Act?

22 A. That's right.

23 Q. Are you familiar with the facts of this case?

24 A. I am, sir, yes.

25 Q. Are you familiar with Kelley's interest in firearms?

1 A. I am, yes, sir.

2 Q. Based on your knowledge and experience, was Devin Kelley
3 the type of person who would seek firearms through any means
4 possible?

5 MR. ALSAFFAR: Objection, Your Honor. That goes well
6 beyond his designation.

7 THE COURT: That does. That's sustained.

8 BY MR. STERN:

9 Q. Okay. So let's talk about the firearm that Devin Kelley
10 purchased at Academy in April 2016. Are you familiar with
11 that transaction?

12 A. I am, yes, sir.

13 Q. Let's first talk about the firearm as it was found by the
14 Texas Rangers following the shooting.

15 A. Okay, sir.

16 Q. Following the shooting, did the ATF conduct an examination
17 of Kelley's firearm as it was recovered by the Texas Rangers?

18 A. They did. Yes, sir.

19 Q. Can we take a look at Joint Exhibit 423.

20 Are you familiar with this document?

21 A. I am. Yes, sir.

22 Q. What is it?

23 A. This is the report of investigation from the San Antonio
24 Field Office, the field office from -- for ATF, and this first
25 portion is a summary of events of the -- of the --

1 observations and the investigation of the scene.

2 Q. Turn to page 5. A little further down. Page 5 of this
3 memo. One up above that.

4 If you look at the portion of this memo that talks about
5 the Ruger 556, can you read the first three lines?

6 A. "The above rifle was manufactured by Ruger in Mayodan,
7 North Carolina as a semiautomatic firearm. Manual field
8 testing of the firearm indicated semiautomatic function. The
9 firearm was not test-fired by ATF personnel during the
10 inspection. Additionally, the rifle was found to incorporate
11 an aftermarket drop in trigger assembly."

12 Q. What is an aftermarket drop in trigger assembly?

13 A. Aftermarket drop in trigger assemblies are often highly
14 engineered quality triggers that differ from the factory
15 triggers in the smoothness of operation, things like that, and
16 so target shooters, hunters, people who often use aftermarket
17 drop in triggers to increase the quality, the smoothness of
18 functioning of the weapon when they're -- when they're firing
19 rounds.

20 Q. So is it fair to say this trigger did not come with the
21 rifle as it was purchased?

22 A. That's right. It does not appear to have come with the
23 rifle as a factory.

24 Q. If we look at the next page, it talks about several other
25 modifications; is that correct?

1 A. Yes. Those are -- those are the other features of that
2 firearm, yes.

3 Q. Let's go -- was it features of the firearm, or is it
4 modifications to the firearm?

5 A. I don't know. Like, for example, the electronic red dot
6 sight, likely aftermarket. Whether or not Ruger had these in
7 the factory, these are -- these are generally aftermarket.
8 They may have been put on in the factory, but they are
9 typically what we see in the aftermarket realm.

10 Q. Let's take these one at a time here.

11 First, the Bushnell electronic red dot sight with
12 high-rise mount. What is that?

13 A. The red dot sight is a sight that differs from a
14 traditional rifle sight, whereas a traditional rifle sight one
15 would close -- the shooter would close his eye, look through
16 the circle and align the post to fire. The red dot sight
17 allows both eyes to remain open, increases target acquisition
18 and --

19 MR. ALSAFFAR: Objection. May I interpose an
20 objection?

21 If I could, Your Honor, this is outside the scope of
22 his designation. I would like to show you his designation --
23 fact witness designation. That's what it was. It's the
24 defendant's latest disclosures on that.

25 His designation was simply to talk about the Gun

1 Control Act prohibitors, which he's done, so we can check that
2 off and the section under the U.S.C. -- 18 U.S.C. Code
3 relating to Academy sale.

4 That's it. He was not designated to talk about
5 firearms. He was not designated to talk about how they work
6 and how you modify them and how you put them on and how you
7 change them. This is well outside their designation.

8 And if we could show you --

9 Could you pop up --

10 THE COURT: Well, why isn't this relevant to whether
11 or not at the time they were purchased from Academy, they had
12 this stuff on there or not?

13 MR. ALSAFFAR: It's not relevant, Your Honor. The
14 only question on that is whether it should have been sold.

15 THE COURT: Your response?

16 MR. STERN: To Your Honor's point, it does go to the
17 extent to which these modifications were made after the sale,
18 so we will get to the actual sale itself. But to the extent
19 that Devin Kelley modified this firearm, it is directly
20 relevant to that purchase.

21 THE COURT: Well, so the problem with your question
22 is about who modified them or not. He doesn't know that. But
23 you can ask him questions about at the time of the sale at
24 Academy, does he believe these were part of the sale or
25 whether they were done after the fact.

1 MR. STERN: Okay.

2 BY MR. STERN:

3 Q. Then let's take the Court's lead and ask just those
4 questions with regard to each of these.

5 Do you have an understanding as to whether the Bushnell
6 electronic red dot sight with high-rise mount was part of the
7 sale of the AR-556 in April of 2016?

8 A. My understanding is that that was an aftermarket addition
9 to the firearm.

10 MR. STERN: Your Honor, may I ask him what these
11 items are?

12 THE COURT: Yeah, that's fine.

13 MR. STERN: Thank you.

14 BY MR. STERN:

15 Q. I think we've already talked about the high-rise mount
16 sight. Let's talk about the Magpul forend having vertical
17 foregrip installed. Do you believe that that was part of the
18 rifle as purchased in April 2016?

19 A. I do believe that is an aftermarket addition as well.

20 Q. And what is that?

21 A. The foregrip is a place for the forward hand to grip the
22 firearm. Rather than with palm upward, gripping the plastic
23 piece around the barrel, this allows the shooter to grip the
24 firearm in a more natural way, so the palm outward. Just a
25 more ergonomic way of handling the firearm, especially over

1 long time periods or through much shooting.

2 Q. Next, Magpul adjustable shoulder stock. Do you believe
3 that was part of the firearm as purchased in April 2016?

4 A. I don't -- I don't know if it was or not. The -- the
5 adjustable shoulder stocks are specifically sometimes
6 included. Whether the Magpul was, I just don't know if it
7 was.

8 Q. That's fair.

9 The Magpul battery assist device. Is it also known as
10 BAD?

11 A. That's the Magpul acronym for it, yes.

12 Q. What is a battery assist device?

13 A. A battery assist device is -- specifically as it's used by
14 Magpul, when one needs to release the bolt to load a round
15 after loading another magazine, one would normally have to
16 release the bolt by taking the finger off the trigger, or
17 otherwise moving the hands from the shooting position.

18 This allows a shooter to send a bolt home, load a new
19 round from the bolt, new magazine, without removing hands from
20 the trigger or other shooter positions -- shooting positions.

21 Q. And do you have an understanding as to whether or not this
22 was part of the rifle as purchased in April of 2016?

23 A. I do not believe that it was.

24 Q. Now, we've already talked about the aftermarket trigger
25 assembly, and you testified that you believed that that was

1 not part of the rifle as purchased in April 2016?

2 A. That's correct, based on the FATD report. That's right.

3 Q. The enlarged charging handle latch. What is that?

4 A. The enlarged charging handle latch is a mechanism for
5 pulling back and releasing the bolt to charge the weapon the
6 first time to load the first round. Oftentimes, with gloves
7 or simply because of manual dexterity issues, it's a very
8 small factory handle. Sometimes larger handles are added to
9 make it easier to charge the weapon the first time.

10 Q. Do you have an understanding as to whether or not that
11 would have been part of the rifle at the time of purchase in
12 April 2016?

13 A. That I don't know. I don't know if that was part of the
14 Ruger package or not.

15 Q. And, finally, two-point sling assembly.

16 A. The two-point sling assembly is two loops on either --
17 metal loops, plastic loops, on either end of the firearm the
18 sling attached to, makes it possible to carry the firearm
19 either over the shoulder or cross-body.

20 Q. Let's talk about the modifications as you've identified
21 them post -- post-purchase.

22 Do those modifications -- were they designed for a
23 military and law enforcement purpose?

24 A. These, the Magpuls, the red dot sight, those are typically
25 used in a tactical setting. And that's, I believe, what they

1 were designed for, based on my experience, rapid target
2 acquisition, rapid loading, things like that.

3 Q. Do they enhance the lethality of the firearm?

4 A. They arguably enhance the accuracy and the number of
5 rounds that we say can get down range in a matter of time, and
6 so certainly they increase fire rate and perhaps accuracy as
7 well.

8 Q. When we talk about accuracy and the number of bullets,
9 doesn't that equal lethality?

10 A. Arguably, yes.

11 Q. Does the fact that Devin Kelley made many modifications to
12 his firearms tell you anything about his level of gun
13 enthusiasm?

14 MR. ALSAFFAR: Objection, Your Honor. Speculation.

15 THE COURT: Sustained.

16 BY MR. STERN:

17 Q. Take a look at Joint Exhibit 502-128.

18 Is this a picture of Devin Kelley's firearm with the
19 various modifications?

20 A. I can't see the serial number but that does appear to be
21 the firearm, or one very similar to it. This one has the
22 addition of the Taclight, which is a tactical light, a
23 flashlight that was added on to the rail system on the front
24 of the firearm.

25 Q. Thank you. You can take that down.

1 Now, let's talk about the actual purchase by Devin Kelley
2 at Academy Sports and Outdoors in April 2016; is that okay?

3 A. Yes, sir.

4 Q. Are you familiar with that transaction?

5 A. I am, yes, sir.

6 Q. Did -- and I'm going to use shorthand "Academy" for
7 Academy Sports and Outdoors; is that okay?

8 A. Yes, sir.

9 Q. Did Academy violate federal law by selling the AR-556 to
10 Devin Patrick Kelley?

11 MR. ALSAFFAR: Objection, Your Honor. We do have an
12 objection to this because now the government is -- the
13 objection, Your Honor, is that it's irrelevant because this is
14 testimony that goes directly to the province of the Court. He
15 is now going to come in and testify as a lawyer for the same
16 Department of Justice that the attorneys work for to tell you
17 what the law is and in apportioning responsibility in this
18 case.

19 Just as Colonel Youngner had to stay within his
20 contours and not comment on the ultimate issues of law before
21 the Court, they have now brought one of their very own
22 Department of Justice lawyers, just as if I'd brought
23 Mr. Jacob and put him on the stand to tell you about
24 proportionate responsibility to tell you what the law is and
25 how to apply that law to these facts in the case.

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1 That is beyond the scope of any witness, much less
2 one of the very attorneys hired by the Department of Justice.

3 THE COURT: So I'll let it in. That's overruled.

4 I'm allowing in facts that this witness can tell me
5 to place with Academy's purchase, and that it is continuing
6 the relevant -- there is relevance here for the proportionate
7 liability claim that the government's asserted against
8 Academy. So with that, yeah, I don't want to hear --

9 I don't want you to tell me what the law is, just
10 tell me what the facts were.

11 BY MR. STERN:

12 Q. As a matter of fact, April 7, 2016, when Academy sold the
13 AR-556 to Devin Kelley, was it violating federal law?

14 THE COURT: Well, let's backtrack. Tell me how it
15 violated. What took place at Academy? Give me facts. Don't
16 give me a conclusion.

17 THE WITNESS: Yes, sir. Yes, sir.

18 The facts of this case were that the Ruger model that
19 was sold, the -- I believe it was the 8500 -- included with
20 it, and in the package, in the wrapped package, a 30-round
21 magazine. That 30-round magazine is lawful to possess in
22 Texas. It is unlawful to possess in Colorado.

23 BY MR. STERN:

24 Q. If we pull up Joint Exhibit 345, page 4.

25 We're trying to deal with just the facts of the case --

1 right? -- we will break it down piece by piece. If we look on
2 the first page, what address did Devin Kelley write down on
3 his ATF 4473 Form?

4 A. On the 4473, his current residence address is listed as
5 Colorado Springs, Colorado.

6 Q. If we look at the next page, what government-issued ID did
7 he use to make the purchase?

8 A. The Box 20A for identification says, "CODL," which
9 indicates a Colorado driver's license was used as government
10 identification.

11 Q. Is Academy required to rely on that address when
12 determining where Devin Kelley resided for purposes of
13 complying with federal law?

14 A. So under federal law, one of the requirements is that an
15 individual provide government identification with an address.
16 That's what was provided. That's the document that Mr. Kelley
17 provided, and that's the information he provided on his form.
18 And so the Colorado address, for Academy's purposes, would
19 have been the address they would have relied on.

20 Q. Now, when we take a look at page 6 of this transaction, we
21 see in the top portion that the manufacturer is Ruger;
22 correct?

23 A. That is correct.

24 Q. What is the model?

25 A. An AR-556.

1 Q. Do you see the serial number?

2 A. Serial number's included as well in Box 28.

3 Q. And the type?

4 A. Type, generally is a rifle listed in 29.

5 Q. And the caliber or gauge?

6 A. The caliber is in Box 30 as 5.56 NATO.

7 Q. If we look a little bit further down, we see a signature
8 by an employee of the FFL; is that correct?

9 A. Yes, that appears to be the sales associate.

10 Q. What is the purpose of having someone on behalf of the FFL
11 sign this form?

12 A. One of the requirements is that the FFL must certify that
13 it's not unlawful to sell, deliver, transport, or dispose of
14 the firearm to the person listed on the 4473. This is that
15 certification.

16 Q. So is this, then, essentially saying that they are
17 complying with federal law?

18 A. That's right.

19 Q. If you look at page 12 -- look at the bottom portion
20 there. Do you know what this document is?

21 A. Yes. I understand. This document is an internal
22 document, a document to Academy that ensures or is meant to
23 ensure compliance with federal law in firearms transactions.

24 Q. If we look at the last portion, do you see where it says,
25 "SKU number"?

1 A. Yes, sir.

2 Q. What is a SKU?

3 A. A SKU is a general term used for production or a general
4 concept used for inventory purposes. A SKU represents a
5 particular packaging or a particular item in an inventory, and
6 so the SKU in this case represented the AR-556 package that
7 was sold at the Academy sports store.

8 Q. We'll come back to this document, but for right now, I
9 want to go to Joint Exhibit 76. And let's remember that SKU.
10 I think if we highlight it one more time.

11 Can you read the SKU, please?

12 A. The SKU is 103530047.

13 Q. Thank you. We'll return to this document, but let's go to
14 Joint Exhibit 76. Are you familiar with this document?

15 A. I am. This is a printout of the Academy Sports and
16 Outdoor Web page advertisement for the Ruger AR-556.

17 Q. If we pull up the portion that reads "SKU."

18 I know it's pretty difficult to read, but can you see it?

19 A. I can. On that Web page, the advertisement includes the
20 SKU 103530047.

21 Q. Is that the same SKU that was on the transaction checklist
22 filled out by Academy when they sold the AR-556 to
23 Devin Kelley in April of 2016?

24 A. Yes, sir.

25 Q. So is it fair to surmise that this is the model and SKU of

1 the AR-556 as it was sold to Devin Kelley?

2 A. Yes, sir.

3 Q. Can we look at page 2 of this document.

4 Can you read the paragraph that says, "details and specs"?

5 A. I can.

6 Q. Thank you.

7 A. "The Ruger AR-556, 5.56 semiautomatic rifle, is a
8 semiautomatic rifle with a 30-round capacity that features a
9 cooled hammerforged medium contour, 1 1/2 by 28 threaded
10 barrel with a matte, corrosion resistant Type III hardcoat
11 anodized finish, a six-position telescoping M4 style buttstock
12 with a Milspec buffer tube, and an ergonomic pistol grip with
13 heat resistant glass-filled nylon handguards, includes a
14 30-round Magpul PMAG magazine."

15 Q. By reading the details of the specs, do you know whether
16 the 30-round capacity magazine was sold in the box with the
17 AR-556?

18 A. Yes, sir. It came included with the rifle.

19 Q. And if the 30-round capacity magazine is sold in the box
20 with the rest of the AR-556, is it a component part of the
21 rifle?

22 A. Yes, sir.

23 MR. ALSAFFAR: Objection, Your Honor. He's now
24 testifying on what the definition of component part in the law
25 is. The answer should be stricken.

1 THE COURT: That's overruled.

2 BY MR. STERN:

3 Q. Continue.

4 A. Yes, sir. It was included in the box. That was a
5 component that Ruger specifically sold as a component of that
6 firearm.

7 Q. Is the 30-round capacity magazine lawful to purchase in
8 Colorado at the time?

9 MR. ALSAFFAR: Objection, Your Honor. He's now
10 talking about the law and how it applies to the case.

11 THE COURT: Yeah. That's overruled.

12 THE WITNESS: The -- at the time that this firearm
13 purchase occurred, and currently, 30-round magazines are not
14 lawfully possessed in Colorado.

15 BY MR. STERN:

16 Q. When did Colorado ban large-capacity magazines?

17 A. Following the -- the theater shooting up in Colorado,
18 Aurora, the Colorado legislature passed a law banning
19 large-capacity magazines, I think after the date July 1st,
20 2013. So possession of large-capacity magazines, including
21 30-round magazines after that date was unlawful within that
22 state.

23 Q. And, again, Devin Kelley purchased the AR-556 with the
24 30-round magazine in the box; correct?

25 A. That's correct.

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1 Q. And as a result, would that have been a violation of
2 Colorado state law?

3 A. Yes, sir. That --

4 MR. ALSAFFAR: Objection, Your Honor.

5 Again -- and I apologize, but this is a clever way of
6 trying to sneak now this witness' opinion into what Texas law
7 is, and that's, I believe, the boundaries we've established
8 here.

9 THE COURT: He's already answered that. It wasn't a
10 violation of Texas law. It was a violation of Colorado law.
11 So your objection is noted, but overruled.

12 BY MR. STERN:

13 Q. Was it a violation of federal law? When Academy sold the
14 AR-556 with the 30-round magazine in the box, was it a
15 violation of 18 U.S.C. 922 (b) (3)?

16 A. Yes, sir, it was.

17 Q. Why?

18 A. The Gun Control Act is meant to assist states in the
19 regulation within their borders of their firearms laws. One
20 of the problems that Congress recognized in 1968 was that
21 someone could merely go over state lines, buy a firearm, and
22 bring it back to another state.

23 As part of that, what Congress did in the Gun Control Act
24 was made it unlawful for federal firearms licensees to assist
25 in that circumvention. And so 922 (b) (3) prohibits an FFL

1 within one state from violating another state's laws when they
2 know that buyer resides in that other state.

3 Q. In other words, Colorado banned large-capacity magazines
4 after a mass shooting; correct?

5 A. That is correct.

6 Q. And Congress was concerned about prohibited individuals or
7 any individuals circumventing that law by going to other
8 states and purchasing the firearms; correct?

9 A. That's correct.

10 Q. And so as a result, Texas has to comport with the state
11 laws of Colorado?

12 A. When selling to Colorado residents, yes, sir.

13 Q. Again, we've already established that Academy had to rely
14 on Devin Kelley's Colorado driver's license when making the
15 sale?

16 A. That's correct.

17 Q. Take a look at Joint Exhibit 82.

18 Are you familiar with this document?

19 A. I am, yes, sir.

20 Q. What is it?

21 A. This is the ATF guidebook for Importation & Verification
22 of Firearms, Ammunition, and Implements of the War. This is a
23 document that ATF puts out and is available online.

24 Q. If we look at page 8, this talks about a self-loading
25 action or a semiautomatic, correct?

1 A. That is correct. Yes, sir.

2 Q. And under this nomenclator guidebook, would the magazine
3 be a component part, just like any other component team here?

4 A. That is correct, sir. The magazine is a component, same
5 as a trigger or a bolt, and it lists a couple different -- or
6 three different types, generally, of magazines that may be
7 used in semiautomatic firearms.

8 Q. And if we take a look at Joint Exhibit 79. Flip that
9 over.

10 Does this comparison chart show the distinction between an
11 AR-556 and a state-compliant AR-556?

12 A. Yes, sir. That's what it looks to show.

13 Q. What would be the purpose of Ruger creating a
14 state-compliant AR-556?

15 A. The reason is because of those state laws we talked about
16 before, sir. Ruger is a national company. They sell in more
17 than one state, and so what they've done is, in order to
18 comply with federal law, they've created a firearm -- the
19 "state compliant" refers generally to a firearm that would be
20 compliant in those states that have lower magazine
21 capacities -- allowances, and so the state compliant would not
22 typically have a 30-round magazine, it would have, say, a
23 10-round magazine, in a state such as Colorado, New York,
24 California, Connecticut, states like that where this firearm
25 could be sold.

1 Q. In fact, when we take a look at the row that talks about
2 magazines, we see the distinction that you are referring to;
3 correct?

4 A. That's correct. Yes, sir.

5 Q. And how many rounds does the standard AR-556 have?

6 A. The 556 in the first column has a 30-round Magpul
7 magazine.

8 Q. And the state compliant?

9 A. The state compliant, sir, has a 10-round metal magazine.

10 Q. So in order to comply with Colorado law, does Ruger sell
11 this even in Colorado?

12 A. The SKU for the AR-556 with the 30-round magazine would
13 not be lawful to sell to non-law enforcement or government
14 entities in Colorado, sir.

15 Q. Do they sell the state-compliant version of the AR-556?

16 A. I do believe that they do. Yes, sir.

17 Q. Is that -- to the extent that you know, is that in order
18 to be compliant with Colorado law?

19 A. That's right, sir. It would be unlawful to sell the rifle
20 with the 30-round magazine to citizens, just regular citizens,
21 in Colorado.

22 Q. Thank you.

23 And let's take a look at Government Exhibit 223.

24 Are you familiar with this document?

25 A. I am, yes, sir.

1 Q. What is it?

2 A. This is an acknowledgment of federal firearms regulation.
3 This is a document that ATF utilizes in inspections and in
4 reviewing the laws with federal firearms licensees.

5 Q. So can you walk the Court through that process of how you
6 sort of explain to FFLs their compliance requirements?

7 A. Yes, sir.

8 One of the requirements, Your Honor, when an FFL
9 determines, or an individual company decides it's going to get
10 a federal firearms license, it has to go through numerous
11 inspections to make sure the facility is appropriate, there
12 is -- the zoning is correct, all sorts of things.

13 One of the requirements is that ATF sit down with whoever
14 that responsible party is and go through all of the laws that
15 apply to federal firearms licensees, specifically when they
16 make sales or when they are engaged in the business.

17 This document is meant to guide that discussion and ensure
18 that all of the aspects of legal compliance are covered in
19 both the initial inspection when the license is issued, as
20 well as the annual inspections as they occur.

21 BY MR. STERN:

22 Q. If we look down at the bottom of this document, page 2, we
23 see the signature. Is that a signature from the -- an
24 employee of the FFL?

25 A. That's what it would be. Yes, sir.

1 Q. And what -- what would the first name -- the first name,
2 would that be from the ATF inspector?

3 A. The investigator's name is Mark Sadler who conducted this
4 review with the FFL or the responsible party of the FFL. His
5 name is typed, and I believe his ATF investigator signature, I
6 believe that's also his signature on the second line.

7 Q. So both the FFL and the ATF inspector have signed this
8 document?

9 A. That's correct.

10 Q. This is the way -- is this -- what's the purpose of having
11 the FFL sign this document?

12 A. To ensure that that was the individual who was there, that
13 that individual is a responsible party who -- who would be
14 someone with authority in these areas, and just to make sure
15 that, you know, that this meeting actually occurred.

16 Q. And if we look at the date, November 24th, 2015?

17 A. That's correct.

18 Q. That would be approximately six months before the sale?

19 A. Sometime before the sale, yes, sir.

20 Q. Thank you.

21 Let's go back to --

22 THE COURT: Before we get off that, I'm just curious,
23 so is this for Academy nationwide, or is this -- or does each
24 Academy store and independent FFL that has to go through this
25 process?

1 THE WITNESS: Oh, yes, sir.

2 The actual business address. So if Academy has 100
3 sites, they would have to have 100 licenses at the different
4 addresses, and each of those would require a responsible
5 person. And so this would be at each of the addresses, not
6 corporate overall.

7 THE COURT: So no one has shown this to me, but I'm
8 assuming this is for the location which the gun was sold?

9 MR. STERN: That's correct.

10 BY MR. STERN:

11 Q. Did you have an understanding as to whether or not this
12 was from the address where the firearm was sold?

13 A. Yes, sir. Mr. Sadler is an inspector in the San Antonio
14 office.

15 Q. Thank you.

16 Let's go back to Joint Exhibit 67. Again, I believe you
17 informed the Court what this document is, but can you please
18 state again briefly, what is the purpose of this firearm
19 checklist?

20 A. This is a compliance document that the company made
21 through legal counsel or through their compliance people, I
22 would imagine, to make sure that the individual sales
23 associate goes through and hits all of these requirements to
24 make sure that every sale complies with the law.

25 Q. I believe that there's about six steps on this checklist?

1 A. That's correct.

2 Q. Can you walk the Court through these various steps?

3 A. Sure. In each of these steps, Step 1 starts with follow
4 all safety instructions for handling firearms. Obviously,
5 don't point the weapon at anyone. Make sure it's unloaded
6 before you hand it to customer, things like that. And then in
7 concluding there, you'll see in line one, that the customer
8 has been instructed to follow all of these safety
9 instructions.

10 Step 2, verify the customer meets age and residency
11 requirements for a firearms transfer. This includes the --
12 you know, the age of 18 for a long gun; 21 for other firearms,
13 and then that -- there is a government-issued photo
14 identification as is required by the statute.

15 Step 3, is that they provide that identification.

16 Step 4, is to complete the 4473, which is the ATF Firearms
17 Transaction Record. This is the document in which the
18 prohibited person questions are asked and the background check
19 information is completed or -- or noted.

20 And then, finally, Step 5, pass the NICS or point of
21 contact background check, so that the firearm can finally be
22 transferred.

23 Q. Is there a Step 6 in the last portion of this?

24 A. I'm sorry. Yes.

25 Step 6, and then review the paperwork and firearm, and

1 complete the firearm transfer, actually turning over that
2 firearm to the customer.

3 Q. So when should have Academy stopped this transaction?

4 A. Based on this form, one of the questions is, does the
5 customer meet the minimum age and residency requirements for a
6 handgun, pistol grip firearm, or receiver transfer.

7 That question, when I look at this form, is a bit odd that
8 it's not applicable, because the question is, "Does the
9 customer meet requirements and residency" -- I'm sorry -- "the
10 minimum age and residency requirements." It's applicable.
11 And, unfortunately, the answer is no, they didn't.

12 Now, the question may be, well, this wasn't that kind of
13 firearm.

14 Q. Um-hum.

15 A. But that -- that answer, "not applicable," at that point
16 is simply inaccurate. No, the customer would not have met the
17 requirements for those firearms.

18 Q. So you are saying this checklist is not complete or
19 comprehensive enough?

20 A. It's filled out -- it is filled out in a strange way such
21 that it asks a question that probably maybe isn't the question
22 they wanted to ask, but the way that question is termed,
23 "Does the customer meet the residency requirements for these
24 things," the answer is, no, he doesn't. It's not that it's
25 not applicable. It's that he doesn't meet those requirements.

1 Q. So let's step back from this document, then. In the
2 normal transaction, if a Colorado resident, or someone showing
3 a Colorado ID, goes to a Texas FFL, tries to purchase this
4 AR-556 with the 30-round magazine in the box, when should the
5 FFL stop that transaction?

6 A. The FFL, knowing that the individual is a Colorado
7 resident, has information at that point. That information
8 includes that this person is not from a state where this —
9 this box could be sold, this magazine with this firearm could
10 be sold. At that point, one would hope the red flags would go
11 up, and the Academy sales associate, or manager, or somebody
12 would have recognized that there may be an issue here.

13 Q. In that circumstance when the FFL recognizes that there is
14 an issue, would they even initiate a NICS background check?

15 A. If there's a concern about violating the law such that
16 this can't — this transaction can't go through because it
17 would violate the law, there is no need to perform a
18 background check at that point, because there's no point.
19 Even if the person is — comes back as not prohibited, the
20 firearm transaction can't go forward.

21 Q. So is it fair to say that this sale should have stopped
22 before Step 4 on this checklist?

23 A. Arguably that's when the — that is when the store, the
24 FFL was on notice that something was — that there may be a
25 problem with this. That Colorado documentation that

1 Mr. Kelley provided should have been that point. Even if the
2 4473 was completed or being done at the same time, that's at
3 the point that one would hope Academy, the sales associate
4 would have recognized an issue.

5 Q. Let me ask you this way: You don't need to run a NICS
6 background check in order to realize, or at least -- or at
7 least for an FFL that they should have realized that they were
8 not complying with federal law; correct?

9 A. That's right. That's why that information is on the top
10 of the 4473 before the background check information, to cut
11 out those issues before the background check is completed.

12 Q. So if Academy complied with federal law, would it have
13 conducted a NICS background check?

14 MR. ALSAFFAR: Objection. That calls for complete
15 speculation. They have not established a foundation at all
16 that he has any factual knowledge or understanding of the
17 process and the order in which anyone at this Academy store
18 went through. He's guessing at this point.

19 THE COURT: Say your question again.

20 MR. STERN: If Academy complied with federal law,
21 would it have conducted a NICS background check?

22 THE COURT: You can answer. That's overruled.

23 THE WITNESS: There would not have been a need to
24 conduct a background check, sir.

25

1 BY MR. STERN:

2 Q. They would have all the requisite information to make the
3 determination that the sale was not compliant with federal
4 law?

5 A. Regardless of whether that individual was specifically
6 prohibited, the transfer could not have gone forward.

7 Q. Are FFLs presumed to know and comply with federal law?

8 A. Yes, sir.

9 Q. The acknowledgment form that we already looked at verified
10 that FFLs are presumed to know and comply with federal law?

11 A. And then -- yes, sir. And then go over specifics that are
12 included.

13 Q. Why is it important for FFLs to comply with the laws of
14 both where the state -- where the sale occurs and where the
15 buyer resides?

16 A. Again, sir, the point of the Gun Control Act, and one of
17 Congress' concern, was helping states enforce their law and
18 allowing the unfettered interstate transfer or transport of
19 these items in violation of that would undermine that purpose.
20 And so the requirements that FFLs abide with other state's
21 laws is one of the bases of the Gun Control Act.

22 Q. Following the events of November 5th, 2017, did anyone
23 from ATF tell Academy that its sale to Devin Kelley in April
24 2016 was legal?

25 A. Not based on these facts. No, sir.

1 Q. Did anyone from ATF tell Academy that the sale was, quote,
2 unquote "a good sale"?

3 A. Not based on the facts that we have here, sir, no.

4 Q. Are you aware that there was testimony from Academy's
5 compliance officer, testifying that after the shooting,
6 Academy received confirmation from ATF Assistant Director Andy
7 Graham, and that he told Academy the sale was, quote,
8 "completely legal"?

9 A. I understand that testimony exists, yes, sir.

10 Q. Can you confirm whether anyone, including Assistant
11 Director Graham told Academy that the sale was completely
12 legal?

13 A. Based on these facts, sir, of what it was that was sold,
14 not just a quote, unquote "long gun" --

15 MR. ALSAFFAR: Objection, Your Honor.

16 Two objections. First, speculation. Second, this
17 goes well beyond his designation. He is now guessing over
18 what an assistant director may or may not have told at the
19 ATF -- or may not have -- told or communicated to the Academy
20 store. The question was: What do you think he would have
21 done in this situation?

22 THE COURT: That's not the question yet. So that's
23 overruled.

24 Let's take this one question at a time. Supposedly,
25 this gentleman said that this sale was legal. From your

1 personal knowledge, is the question is that correct or not?

2 MR. STERN: Well, I can ask him if he has spoken --
3 if he has spoken to ATF Assistant Andy Graham.

4 MR. ALSAFFAR: That's hearsay.

5 THE COURT: Well, that's hearsay, so ask him
6 something that's going to avoid a hearsay problem.

7 BY MR. STERN:

8 Q. Are you aware of any communications by ATF to Academy
9 telling Academy that that sale was legal?

10 A. Not based on the facts, and what was in the box, sir.

11 THE COURT: Well, but you know that now. But, I
12 mean, the question is: Do you know something that
13 contradicts -- other than your testimony today, are you aware
14 of something else that contradicts this gentleman's testimony?

15 THE WITNESS: Well, sir. Yes, sir.

16 The question that -- that concerned me is what was
17 said on the phone. And if the question was, we sold a long
18 gun to a resident of Colorado, that's a very different
19 question than, we sold a long gun that Ruger sells with a
20 30-round magazine to a resident of Colorado.

21 And so I guess my problem is no one at ATF has
22 advised that the sale of a Ruger 556 with a 30-round magazine
23 under that SKU is permissible or lawful. Whether someone said
24 sale of a long gun to a Colorado resident is lawful is an
25 entirely different question.

1 THE COURT: Well, just for my sake, is there
2 testimony from this gentleman that he said this?

3 MR. STERN: There is no testimony, Your Honor.

4 MR. ALSAFFAR: That's right.

5 THE COURT: Okay. Go ahead.

6 MR. STERN: Pass the witness.

7 THE COURT: Any questions?

8 MR. ALSAFFAR: Yes, Your Honor. Thank you.

9 CROSS-EXAMINATION

10 BY MR. ALSAFFAR:

11 Q. I had to check my watch to make sure it was still morning.

12 Good morning, sir.

13 A. Good morning, sir.

14 Q. You and I have never met before; right?

15 A. I don't believe so.

16 Q. My name is Mr. Alsaffar. I represent the Sutherland
17 Springs victims of this mass shooting. I have a few questions
18 for you, if that's okay?

19 A. Yes, sir.

20 Q. Can you hear me okay?

21 A. I can. Yes, sir. Thank you.

22 Q. Let me -- let me ask you just to start off with about what
23 you were asked about in regards to the prohibitors early on in
24 Mr. Stern's examination. The bottom line is that -- that
25 Devin Kelley should never have been able to be -- have a gun,

1 like the one he used in this shooting; right?

2 A. He was a prohibited person at the time he bought it. Yes,
3 sir.

4 Q. And that means that an FFL can't sell it to him if it's
5 reported to the FBI, those convictions were reported to the
6 FBI?

7 A. It means that the background check would catch it, so the
8 FFL would not be able to sell it. Yes, sir.

9 Q. The thing that Mr. Stern, I don't think, asked you about
10 very quickly is that you went over the conviction and the
11 report of result of trial; do you remember that?

12 A. Yes, sir.

13 Q. And those were -- those would have resulted in automatic
14 denials from the FBI background check; right?

15 MR. STERN: Objection. Calls for speculation.

16 THE COURT: That's overruled.

17 THE WITNESS: It would have resulted in an automatic
18 denial. The term "automatic denial" is throwing me, sir.

19 Could you clarify?

20 BY MR. ALSAFFAR:

21 Q. Are you familiar -- you've talked a lot about the
22 background check system, and whether or not -- and the timing
23 of it and how it goes along. Are you familiar with how it
24 interacts with these prohibitors that you testified about?

25 A. Yes, sir.

1 Q. What I'm saying is that when you beat a child --

2 THE COURT: Mr. Alsaffar, slow down.

3 MR. ALSAFFAR: Oh. Thank you.

4 I'm sorry, Gigi. I apologize.

5 BY MR. ALSAFFAR:

6 Q. When you are convicted of beating a child almost to
7 death -- which is what Devin Kelley was convicted of by the
8 Air Force; correct?

9 A. Yes, sir.

10 Q. And the way in which that was communicated on the report
11 of result of trial, it was clear that that was a prohibitor
12 that should result in an automatic denial if it's reported to
13 the FBI?

14 A. That's right, sir. It would be a felony conviction. And
15 that, the FBI would deny on. Yes, sir.

16 Q. And I'm sorry if I wasn't clear. What I meant by
17 automatic was just fast, quick to know.

18 MR. STERN: Objection. Calls for speculation.

19 MR. ALSAFFAR: I'm asking him, Your Honor.

20 THE COURT: That's overruled.

21 THE WITNESS: Based on the results of trial, that
22 would be a clear felony conviction, sir. Yes, sir, for the
23 child.

24 BY MR. ALSAFFAR:

25 Q. Thank you. I appreciate that.

1 You also -- I didn't know this until today, you said that
2 the actual DODIG Inspector General, I believe Mr. Fine, who
3 conducted the investigation into the Devin Kelley shooting,
4 that you were asked by that office to provide them with legal
5 opinions?

6 A. No, sir. It wasn't Mr. Fine. One of the investigators,
7 Laura Hummage [phonetic] was her name. She was working on
8 that case. I met with her and she asked if -- if ATF could
9 assist Mr. Siminton [phonetic], who was the recipient of that
10 letter, is the one who corresponded with us.

11 Q. And all I meant was -- and I apologize, because that's
12 exactly what I said. What I really meant was the Office of
13 the IG that did the ultimate report, that office asked you to
14 provide them with legal opinions; correct?

15 A. As the agency authorized to enforce the Gun Control Act,
16 and delegated, they wanted the Attorney General and the ATF to
17 opine, sir. Yes.

18 Q. You did that?

19 A. Yes, sir.

20 Q. And you've seen the report?

21 A. The report, sir?

22 Q. I apologize. You -- any time I ask you a question and you
23 don't know what I'm asking, please, please tell me.

24 A. Yes, sir.

25 Q. That's always my fault, not your fault.

1 A. Yes, sir.

2 Q. When I say "report," I mean the DOD Inspector General
3 final report on the Devin Kelley shooting.

4 A. I did review that, sir, some time ago, yes.

5 Q. I would imagine you would have -- you would have reviewed
6 it to ensure that whatever opinions you gave about this
7 transaction were actually accurately represented in the
8 report; is that fair?

9 A. I think so, sir. I think that I was more concerned with
10 the Air Force opinion and -- but, yes, sir, I get your point.
11 Yes, I wanted to make sure that they didn't disagree, or that
12 my opinions were not in error in some way, yes.

13 Q. Or that they misrepresented your opinions regarding this
14 transaction?

15 A. Fair enough.

16 Q. And nowhere in the inspector general report, do we find
17 any kind of conclusions, like the ones you just gave,
18 regarding Academy; is that fair to say?

19 MR. STERN: Objection. Relevance, whether the DODIG
20 report talked about Academy in its reporting.

21 THE COURT: That's overruled.

22 BY MR. ALSAFFAR:

23 Q. Let me re-ask the question.

24 A. Please.

25 Q. Nowhere in the DODIG report or the -- that you've seen,

1 does -- did the DODIG make any kind of conclusions or
2 commentary about Academy's role in this -- in this shooting;
3 correct?

4 A. I think that's right, sir. As I recall, they were
5 concerned with internal processes of reporting. I don't think
6 they were concerned with how he got the weapon afterwards.
7 That was what DOJ was more concerned with, not DOD.

8 Q. And I appreciate that. So what I said was correct?

9 A. I don't think they talked about Academy. That's right,
10 sir.

11 Q. Now, let me transition to something that you and Mr. Stern
12 talked about and I'd like to actually relate it to the --
13 relate it to the sale transactions at Academy, and I'd like to
14 show you some documents that the government decided not to
15 show you that relate to that transaction, if you don't mind.

16 A. Okay, sir.

17 Q. Is that okay?

18 A. Yes, sir.

19 THE COURT: Let's avoid those kind of snide remarks.

20 MR. ALSAFFAR: Thank you, Your Honor.

21 BY MR. ALSAFFAR:

22 Q. Devin Kelley was convicted of a felony in a crime of
23 domestic violence; right?

24 A. Yes, sir.

25 Q. Both of which required the Air Force to submit his

1 fingerprints and conviction to the NICS background system?

2 A. That's correct.

3 Q. Which means he would be, like we said, he would be
4 prohibited from purchasing weapons at Academy or any other FFL
5 for that matter?

6 A. That's right.

7 Q. Did you know that Devin Kelley obtained a Texas driver's
8 license before the shooting occurred?

9 A. I don't believe I knew that, sir, or if I knew it, I
10 didn't recall that.

11 Q. Did anybody from the government Department of Justice
12 office provide you with any evidence that Devin Kelley had
13 obtained a Texas driver's license well before this shooting
14 had occurred?

15 A. I don't recall a Texas driver's license, sir. I just
16 recall the 4473 with the Colorado. So to answer your
17 question, sir, I don't remember hearing about a Texas driver's
18 license.

19 Q. That's okay. Is it okay if I show it to you?

20 A. Yes, sir.

21 Q. Okay. I'd like to show Mr. Ryan Joint Exhibit 380, if we
22 could.

23 Mr. Ryan, just so you are oriented a little bit, it should
24 pop up on your screen.

25 Do you have something that's showing up on your screen

1 that says JEX 380?

2 A. I do, sir, yes.

3 Q. Okay. And what I'd like to do is just highlight for you
4 the part that talks about Devin Kelley's driver's license
5 number, if we could highlight that paragraph, "driver's
6 license" and "commercial," and it will -- it will magnify for
7 you. Do you see that?

8 A. Yes, sir.

9 Q. So this shows that Devin Kelley, prior to the shooting,
10 you see that May 2017, had obtained a Texas driver's license,
11 license number 25628192; correct?

12 A. Yes, sir.

13 Q. All right. Did the government attorneys also let you know
14 that not only did Devin Kelley obtain a Texas driver's
15 license, but that he also used that Texas driver's license at
16 an Academy in Texas to purchase a firearm?

17 A. Yes, sir. I was aware that -- that there was some debate
18 at the Academy store about whether Mr. Kelley was actually
19 Colorado or Texas, but that he put Colorado on the 4473, sir.
20 So I was aware that there was a question about that at the
21 location.

22 Q. You are in the ATF; correct?

23 A. That's right. Yes, sir.

24 Q. Where is the ATF building in Washington, D.C.?

25 A. It is at 99 New York Avenue, north of the Capitol

1 building.

2 Q. That's right across the street from Mr. Stern's office;
3 isn't it?

4 A. That could be. I don't know.

5 Q. The ATF actually does what's called "trace summary
6 sheets;" correct?

7 A. That's right.

8 Q. And what that means is that whenever a gun is purchased at
9 an FFL, like you've been talking about, the ATF does a trace
10 summary, tells you where it was purchased, tells you what time
11 it was purchased, tells you the license that was used to
12 purchase that firearm; correct?

13 A. I think it's when a firearm is traced, yes, sir, it
14 creates that summary.

15 Q. Fair enough.

16 And this firearm from Devin Kelley was traced, all of his
17 firearms were traced by the ATF?

18 A. Yes, sir.

19 Q. And can I show you -- I want to show you that trace
20 summary. It's --

21 Your Honor, it's Joint Exhibit 554.

22 And before I --

23 Does this look familiar, the standard ATF Trace Summary
24 Report?

25 A. It does, sir. That's the general format, yes.

1 Q. And what I'm going to do is just highlight a couple of
2 parts for you so you can see them clearly. If we could go
3 there, Sean, thank you very much. That middle part. I'm just
4 going to make it easier for you to see.

5 Can you see that?

6 A. I can. Yes, sir.

7 Q. Okay. Now, this trace summary report shows that
8 Devin Kelley used his Texas driver's license. Do you see that
9 driver's license number at the bottom there that's
10 highlighted?

11 A. I do. Yes, sir.

12 Q. And if you will recall, that's the same driver's license
13 that matches up with the abstract that I showed you from the
14 Texas DPS; correct?

15 A. I believe it is, sir, yes.

16 Q. And if you look just a little bit up there, it's not
17 highlighted, right above Devin Kelley -- I'm sorry --
18 Devin Kelley's name, it says, "purchase date, 10/18/2017"; do
19 you see that?

20 A. Yes, sir.

21 Q. That is less than a month before this shooting; isn't it?

22 A. Yes, sir.

23 Q. All right. And then you see the address where this weapon
24 was sold to Devin Kelley using a Texas driver's license at an
25 Academy store in Selma; is that right?

1 A. That is correct.

2 Q. So if Devin Kelley was denied the first time at the
3 Academy due to a Colorado license, let's just say that
4 happened, okay, he could have come back with his Texas license
5 and purchased a gun?

6 MR. STERN: Objection. Calls for speculation.

7 THE COURT: That's overruled.

8 BY MR. ALSAFFAR:

9 Q. If Devin Kelley, as you said, should have been denied
10 purchasing an AR-15 with his Colorado license, he could have
11 just come back with his Texas license and bought it; correct?

12 A. If he had a Texas license, sir, he could have used that
13 showing he was a resident of Texas and that problem would not
14 have occurred for him.

15 Q. That's right. In fact, that's exactly what happened in
16 this case. He bought a gun before the shooting at an Academy
17 with a Texas driver's license; correct?

18 A. The Ruger SR22, yes, sir.

19 Q. He didn't have the AR-15 on October 18, 2017. He could
20 have showed his license with the Texas driver's license,
21 bought the AR-15, and there would have been no problems with
22 that sale, you would have no criticisms of Academy then; would
23 you?

24 A. That's right, sir. And the reason is because the Texas
25 driver's license would show him to be a Texas resident, not a

1 Colorado resident, so (b) (3) wouldn't be the issue.

2 Q. Okay. So what I said was correct?

3 A. Just further explaining, yes, sir.

4 Q. That's okay. I don't mind.

5 Now, regardless of whether he had a Texas driver's
6 license, if the Air Force had done its job, all those sales at
7 the FFLs following his conviction would have been denied;
8 correct?

9 A. Regardless of the license, sir, if he was a prohibited
10 person and the NICS check was conducted, that would have
11 stopped the sale.

12 Q. And he was a prohibited person; correct?

13 A. That's right.

14 Q. And you've seen it, that Academy ran the NICS background
15 check on those purchases?

16 A. They do have a NICS number on the 4473, yes.

17 Q. What did they say on them?

18 A. They proceeded, sir.

19 Q. Including the AR-15; correct?

20 A. That's right.

21 Q. If the federal government would have done its job and
22 reported his convictions, all those guns would not have been
23 sold to Devin Kelley at Academy; correct?

24 A. If the Air Force had reported the record of trial, the FBI
25 would have denied the transaction, yes, sir.

1 Q. And it doesn't matter what language a salesperson used.
2 It doesn't matter what order a salesperson at Academy decided
3 to do their application process. Had that happened, the
4 Air Force had done its job, those guns wouldn't have been sold
5 to him?

6 THE COURT: One second.

7 MR. STERN: Objection. Speculation.

8 THE COURT: That's overruled.

9 THE WITNESS: The background check would have denied
10 the transactions.

11 BY MR. ALSAFFAR:

12 Q. And the Air Force, Mr. Ryan, you would agree with me, is
13 the only party 100 percent responsible for reporting
14 Devin Kelley's fingerprints and conviction information to the
15 FBI; is that fair?

16 A. Because it was an Air Force court-martial, sir, I would
17 agree with you.

18 Q. Are you saying that the Academy sale caused the shooting
19 in this case?

20 MR. STERN: Objection. Argumentative. Calls for a
21 legal conclusion.

22 THE COURT: This is strange. I'm not sure which part
23 of the government is speaking here. This is the ATF. That's
24 the Department of Air Force's position. I'm not sure whether
25 that's the ATF's position.

1 MR. ALSAFFAR: I'm not sure either, Your Honor.

2 THE COURT: So make it clear which part of the
3 government you think you are asking this question to.

4 MR. ALSAFFAR: I'll try to clear it up, Your Honor.

5 MR. STERN: Your Honor, it still calls for a legal
6 conclusion.

7 THE COURT: That's overruled.

8 BY MR. ALSAFFAR:

9 Q. All I'm asking you is: Do you -- is it your stance, on
10 behalf of the ATF, that had Academy not sold this AR-15 to
11 Devin Kelley, this shooting wouldn't have happened?

12 A. I don't think that anybody at ATF or the government can
13 say that that single factor, that an FFL selling a firearm or
14 not selling a firearm caused or did not cause the shooting to
15 happen, sir. I just cannot say that.

16 Q. That's okay. So you have no opinion on that, then?

17 A. No opinion on it is different than "I can't agree with
18 your conclusion." So I think that as much as a single factor
19 can cause anything, I understand your point, but the fact that
20 Academy didn't sell the firearm, doesn't mean he couldn't have
21 gotten it elsewhere, doesn't mean he couldn't have bought it
22 from a private sale. Whatever the situation is, I just can't
23 speculate on the fact, whether that one transaction was the
24 cause. I just can't do that.

25 Q. That's fair. Then we won't ask you any more about that.

1 All right. Let me ask you something that Mr. Stern
2 brought up that I'd like to talk to you about, and that was --
3 do you remember the discussion he had with you about -- about
4 whether -- whether ATF had communicated to Academy at all that
5 this sale was -- I think the term used was good sale or legal
6 sale. Do you remember that conversation?

7 A. Yes, sir.

8 Q. And I think what you were talking about is, "Hey" -- you
9 were being asked is, "Well, did the ATF tell Academy, no, this
10 is a good sale?" Is that what you were referring to?

11 A. After the fact, was it a good sale. That's right, sir.

12 Q. And I think you said, no, they didn't -- they didn't ever
13 bless this as a good sale or a legal sale; correct?

14 Is that right?

15 A. I think my testimony, and still is, that they never
16 blessed it as a good sale based on the facts here.

17 Q. Okay.

18 A. So given all the facts, no one at ATF said, "Yes, that
19 sale was a good sale," as that term is used.

20 Q. I have a similar but different question for you.

21 A. Okay.

22 Q. Because it's been over three years since this horrific
23 shooting. My question to you is: As senior legal counsel for
24 the ATF, has anyone from the ATF communicated to Academy that
25 this sale was illegal that you are aware of?

1 A. I just don't know. I have not.

2 Q. Okay. It's a pretty big deal what you are saying Academy
3 did; right? It's a pretty big deal what they did?

4 MR. STERN: Objection. Argumentative.

5 THE COURT: That's sustained.

6 BY MR. ALSAFFAR:

7 Q. Let me rephrase it for you. The laws that you are talking
8 about that you say Academy broke are important laws; right?

9 A. Yes, sir.

10 Q. Those laws about selling guns are designed to keep every
11 single one of us safe; correct?

12 A. Yes, sir.

13 Q. Safe -- they are designed to keep all of us safe from gun
14 violence; aren't they?

15 A. Yes. Yes, sir.

16 Q. And when a gun seller breaks the law, do you think they
17 ought to be held accountable for breaking the law?

18 A. Yes, sir.

19 Q. What have you done, then, to hold Academy accountable for
20 allegedly breaking the law?

21 MR. STERN: Objection. This is beyond the scope of
22 direct examination.

23 MR. ALSAFFAR: It goes to credibility, Your Honor.

24 THE COURT: Well, I'm questioning relevance. What is
25 the relevance of this question?

1 MR. ALSAFFAR: Your Honor, the United States has
2 brought in a DOJ lawyer to say that the -- this Academy sale
3 was wrong, and that the ATF specifically never told Academy
4 that it was a good legal sale. And I think if this is -- if
5 that's what their position is, then we ought to know, for
6 credibility reasons, if they have done one thing to tell
7 Academy or enforce the law against Academy for this alleged
8 breaking of the law.

9 THE COURT: So my job, though, is to determine what
10 liability, if any, and what proportionate liability ought to
11 be assigned to either the United States Air Force or to
12 Academy. And so whatever deficiencies the ATF might have done
13 in not chastising or reprimanding or disciplining the FFL is
14 not relevant to what I have to do. That's sustained.

15 Well, my objection is sustained.

16 MR. ALSAFFAR: Well, I understood what your objection
17 was. Thank you, Your Honor.

18 BY MR. ALSAFFAR:

19 Q. All right. Well, let me ask you something about the
20 document that Mr. Stern showed you in your direct examination.
21 I believe it was JEX 423, and we'll look at the first page,
22 page 1. This document, JEX 423, I think is an ATF document;
23 correct?

24 A. That is correct, yes, sir.

25 Q. Summary of what happened at the scene of the shooting;

1 right?

2 A. That's right.

3 Q. And this was actually done by ATF agents on the scene; is
4 that right?

5 A. That is correct, yes, sir.

6 Q. All right. And what -- if we can look at paragraph --
7 sorry -- paragraph 5. What that's telling us and telling the
8 Court is that every single gun that was found at the scene of
9 this crime was an FFL-purchased gun; correct?

10 A. It looks that way, sir. Academy, Academy and Specialty
11 Sports and Supply, I would assume, is an FFL.

12 Q. Right. If it was any kind of an illegal purchase,
13 certainly the ATF would have noted that on the report of
14 investigation; correct?

15 A. If it was an illegal purchase, I would assume so, yes,
16 sir.

17 Q. Okay. And if we go to paragraph numbers 9 and 10, I'll
18 ask you about that, and one of the things that ATF special
19 agents do when they arrive at a scene like this, is they
20 gather every single piece of firearm evidence that they can at
21 the scene; correct?

22 A. That's right, sir. If it's -- if it's FBI, if it's ATF,
23 whoever is in charge, they will collect all of them, yes, sir.

24 Q. And at this particular scene, if we look at the paragraph
25 number 10, "no additional," that sentence.

1 Is it on your screen, sir? I'm sorry?

2 A. I'm sorry. My little -- the picture of myself is covering
3 half the words on the -- on the screen, so I can't.

4 SEAN: Can I do it?

5 MR. ALSAFFAR: Yeah, please do, because that might be
6 a problem later.

7 Is that okay, Your Honor?

8 THE COURT: Yes.

9 THE WITNESS: Thank you, sir.

10 BY MR. ALSAFFAR:

11 Q. Are you ready?

12 A. I am. Yes, sir. Thank you.

13 Q. No, you're welcome. You're welcome.

14 So looking at paragraphs 9 and 10, what we know also in
15 addition to all the guns at the scene were FFL purchased guns,
16 we also know that all the casings, the ammunition that were
17 recovered at the scene, the magazines were all from the AR-15
18 that was purchased at the FFL by Devin Kelley after clearing a
19 background check; correct?

20 A. I believe that's correct, sir, what they collected was
21 from the -- were 5.56 caliber. Yes, sir.

22 Q. Okay. Thank you.

23 If you don't mind, I'd like to transition a little bit
24 into some of the -- some of the roles you were discussing on
25 direct examination, in terms of sort of the ATF roles in these

1 gun sales, these gun purchases, and how they happen?

2 A. Yes, sir.

3 Q. Now, the NICS system, the FBI NICS system, you are
4 familiar with it; right?

5 A. I am. Yes, sir.

6 Q. It does a really good job of keeping firearms out of the
7 hands of felons; doesn't it?

8 A. They do an amazing job, yes, sir.

9 Q. And just to show you the amazing job that they do, if we
10 can show Plaintiffs' Exhibit 798. This has been admitted into
11 evidence, Your Honor, even though it's PEX 798.

12 This is the most recent FBI data, if we can highlight
13 paragraph -- let's highlight paragraph 1 and 3. This is the
14 most recent NICS FBI data on how many -- how many felons they
15 have prevented from having access to firearms through the
16 background check system; correct?

17 MR. STERN: Your Honor, I'm going to argue that this
18 is cumulative testimony. Deputy Assistant Director Kim Del
19 Greco already testified to this line of questioning.

20 THE COURT: So this is cumulative. What is the
21 purpose of asking him?

22 MR. ALSAFFAR: Well, Your Honor, if they are going to
23 designate an ATF person to talk about background checks, I
24 think it's important that we have as many federal government
25 representatives saying that these things work, because part of

1 their position, Your Honor, is that they don't work.

2 THE COURT: Yeah. So --

3 MR. STERN: He didn't testify about background
4 checks. He only testified about prohibitors and the sale by
5 Academy.

6 THE COURT: No, I think what Mr. Alsaffar's comment
7 is, yesterday the government seemed to suggest that we
8 shouldn't bother with background checks because they don't
9 work. And so we heard contradictory testimony from the
10 director of NICS and the other groups, so I'll hear from ATF
11 on that.

12 MR. STERN: Your Honor, can I just clarify one point,
13 because the United States' position has never been that we
14 shouldn't bother with background checks. That needs to be
15 clear as a representative of the Department of Justice,
16 because we have never taken the position in this case or
17 anyone else that NICS is ineffective or that we shouldn't
18 bother.

19 We recognize that NICS can be efficient and
20 effective; however, it is limited in scope by the law as
21 written by Congress. And as a result, in Texas, the access to
22 firearms through non-FFLs renders the United States not a
23 proximate cause in this case, because it was not --
24 Devin Kelley's ability to purchase a firearm through an FFL
25 was not a substantial factor.

1 That needs to be clear. The United States' position
2 has never been that NICS is not efficient, effective, or that
3 we shouldn't bother conducting background checks. I can't --

4 THE COURT: No, I appreciate that stipulation, and I
5 thank you for that because it was sort of coming across
6 yesterday that you were attempting to argue that it wasn't
7 efficient. And so I was questioning, well, then why do we
8 have a NICS chief and the NICS staff and so --

9 MR. STERN: Then, Your Honor --

10 THE COURT: -- thank you for the stipulation and the
11 concession because, you know, it did appear to me that you
12 were arguing otherwise.

13 MR. STERN: If my passion got the best of me, then I
14 do apologize. I am making a tort argument, not a policy
15 argument, and so I just need to be crystal clear that the
16 DOJ's position has never been to impugn the efficiency of
17 NICS. I can't make that position.

18 My position is simply is as a matter of Texas tort
19 law because of the alternative avenues for Devin Kelley to
20 purchase, obtain, or purchase firearms through non-FFLs, that
21 his ability to get guns at FFLs was not a substantial factor
22 in causing this mass shooting.

23 THE COURT: Thank you. So that helps me better
24 understand the government's position here, and so thank you
25 for that.

1 With that said, you can still ask him questions.

2 MR. ALSAFFAR: Thank you, Your Honor. I'll be brief
3 on this.

4 BY MR. ALSAFFAR:

5 Q. When we look at these two categories, the reason I
6 highlighted these two for you, Mr. Ryan -- and you probably
7 know this better than I do, but those are the two categories
8 that Devin Kelley was convicted on. Is that a fair statement
9 by me?

10 A. Yes, sir. The (g) (1) and the (g) (9), the felony and the
11 MCDV. Yes, sir.

12 Q. So if we look at just those two categories that
13 Devin Kelley was convicted of, that's, doing simple math,
14 that's over 1.1 million denials for people like Devin Kelley
15 that the FBI NICS system has provided for us in this country;
16 right?

17 A. That's correct. Yes, sir.

18 Q. And if you look -- if we pan out just a little bit so we
19 can see the total number. If you don't mind showing the total
20 number of denials.

21 Fair to say that the categories of convictions that
22 Devin Kelley was convicted of consists of a majority of the
23 FBI NICS denials in this country. Is that fair to say?

24 A. Yes, sir. A large percentage, yes, sir.

25 Q. Thank you. You can put it down whenever you are ready.

1 Now, the reason Devin Kelley was not denied by NICS was
2 because the Air Force didn't do its job; right?

3 A. The records are not in NICS, yes, sir.

4 Q. And but the NICS system is not just about what I was
5 showing you there, it's not just about denying felons access
6 to dangerous weapons; right? It plays many roles, including
7 roles that you at the ATF work with as well. Is that fair to
8 say, sir?

9 A. Yes.

10 Q. The more information that the FBI has on dangerous felons,
11 would you agree that they are the better decisions they can
12 make in preventing individuals who shouldn't have firearms
13 from getting those firearms?

14 A. The better of -- I would agree with that with the caveat,
15 sir, the better information on convictions that they have.

16 Q. Fair enough.

17 When the government agencies don't share data on dangerous
18 and violent felons, they unnecessarily expose the public to a
19 risk of gun violence; is that fair to say?

20 A. Yes, sir. I mean, I wouldn't -- again, the phrasing is
21 not quite the way I would put it. When the information is not
22 put into NICS, NICS can't rely on that to deny. And so if
23 someone is prohibited and the information is not in the
24 system, NICS can't deny that person based on that information.

25 Q. Fair enough.

1 Would you agree that the more -- that the dangerous
2 felons -- let me take that back.

3 Do you agree Devin Kelley was a dangerous felon?

4 A. Yes, sir.

5 Q. Do you agree that dangerous felons become more dangerous
6 to the public the more weapons they are allowed to accumulate
7 illegally?

8 A. I think as a general statement, I would agree with that,
9 yes, sir, there is a greater public safety risk.

10 Q. So, remember, we're talking about how the NICS system also
11 does other things to keep us safe, not just denying guns to
12 felons, but also working with federal agencies like the ATF;
13 is that correct?

14 A. That's right. Yes, sir.

15 Q. You are familiar with "lie and buy"?

16 A. Yes, sir.

17 Q. And if a criminal -- as an example, and if it's not a good
18 one, tell me, but, for example, if criminal history data is
19 accurately reported to NICS, the ATF actually can help catch
20 people who lie on their Form 4473s; correct?

21 A. That's right, sir. So the information would come in and
22 then a determination could be made whether that person -- a
23 further investigation could occur, yes, sir.

24 Q. And I believe that's no small penalty; is it? It's up to
25 10 years and \$250,000 fine, right?

1 A. Potentially, sir.

2 MR. STERN: Your Honor, this is now going beyond the
3 scope of direct examination.

4 THE COURT: Sustained.

5 MR. ALSAFFAR: Your Honor, if I may, just for the
6 record -- just before -- just so I can get it on the record,
7 actually, Mr. Stern showed this witness several Form 4473s.
8 This is information that appeared on those forms. He just
9 didn't ask him about it.

10 THE COURT: That's a bit of a stretch. Let's move
11 on. I don't need to know the penalties.

12 MR. ALSAFFAR: Okay. Yes, Your Honor.

13 BY MR. ALSAFFAR:

14 Q. Do you know how much time the -- oh, let me -- before I
15 ask you that question. What I wanted to ask you about this,
16 sort of this part of the interaction with the ATF and the NICS
17 system is that, when a felon lies on those forms, they can be
18 subject to prosecution; right?

19 A. That's correct.

20 Q. Do you know how many times Devin Kelley lied on these
21 forms that would have made him subject to prosecution and a
22 referral to the ATF?

23 A. On these forms, I think there have been -- what? -- three
24 different transactions. For example, the firearms that we
25 talked about here, where he said he was not a felon or not

1 convicted of an MCDV, a misdemeanor crime of domestic
2 violence. And so I think three in this case is what the
3 answer would be.

4 Q. Well, let me show you Plaintiffs' Exhibit B very quickly.
5 It's just a -- shows a timeline of those purchases. And
6 you'll see the number and then we can get that clear for you
7 on the record.

8 A. Okay.

9 Q. This is Demonstrative Exhibit B.

10 MR. STERN: Objection, Your Honor. I thought my
11 objection was sustained.

12 THE COURT: It was.

13 What's your question now that you are asking him?

14 MR. ALSAFFAR: Your Honor, I'm asking him how many
15 legal purchases he was allowed to make, and that the ATF could
16 have followed up on.

17 THE COURT: Yeah. This is repetitive. I know. I
18 know the answers to this.

19 MR. ALSAFFAR: Okay. You can take that down. Thank
20 you.

21 BY MR. ALSAFFAR:

22 Q. All right. Now, second thing, different than -- that what
23 we were talking about, lying on the form, is, felons -- it's a
24 felony for felons to be in possession; correct?

25 A. That's correct, yes, sir.

1 Q. And the ATF actually works with United States attorneys in
2 prosecuting felons who are in possession; correct?

3 A. That's correct, sir.

4 Q. And Devin Kelley was a felon, illegally in possession;
5 right?

6 MR. STERN: Again, Your Honor, this is beyond the
7 scope of direct examination.

8 THE COURT: Yeah. This is also not relevant.

9 MR. ALSAFFAR: Okay.

10 BY MR. ALSAFFAR:

11 Q. Well, let me ask you about firearm retrievals.

12 Are you familiar with firearm retrievals?

13 A. Yes, sir.

14 Q. So what we are talking about here is that the ATF, when
15 they learned that a prohibitor, a prohibited individual like
16 Devin Kelly, is in possession of an illegal firearm, they can
17 actually go and get those illegally possessed guns; correct?

18 MR. STERN: Same objection.

19 THE COURT: Yeah. That's not relevant.

20 MR. ALSAFFAR: Okay.

21 BY MR. ALSAFFAR:

22 Q. Do you remember during direct examination you were asked
23 about all the records you reviewed to the Department of
24 Defense Inspector General relating to your conclusions that
25 you were providing -- both here and at the time -- to the

1 Department of Defense Inspector General?

2 A. Yes, sir.

3 Q. And he showed you the memo that you did. And I can show
4 it to you again. It's Joint Exhibit 9.

5 A. Yes, sir. I remember the memo, yes.

6 Q. I want to show that to you, if you don't mind, and just
7 ask you a couple of quick questions that you weren't asked
8 about on direct on this memo, on this memo.

9 This was the memo you were talking about on direct
10 examination; correct?

11 A. Yes, sir.

12 Q. And, again, that's your signature, even though it's -- you
13 were writing signed for your boss there?

14 A. That's correct. That is my signature.

15 Q. Don't worry. That's okay. I can give you that legal
16 opinion. Nothing wrong with that?

17 A. I appreciate that, sir. Thank you.

18 Q. I want to show you on page 3 of your memo. You had access
19 to Devin Kelley's -- I believe you said to a lot of records in
20 this case file -- that included his mental health history; is
21 that right?

22 A. That's right. Yes, sir.

23 Q. And you put in this, you included in this memo a timeline
24 of that mental health history; is that right?

25 A. That's right. That was based on the documents I was

1 given. Yes, sir.

2 Q. That was actually based on the Air Force mental health
3 medical records that were provided to you in order for you to
4 make that opinion; right?

5 A. In whatever it was. Peak -- I believe it was Peak -- Peak
6 Behavioral Service as well. I don't know if that was
7 Air Force or civilian, but this is what I received from DOD.
8 Yes, sir.

9 Q. If we look at that section, if we can highlight that
10 paragraph with the dates on it. First, the first one,
11 June 2010 through June 2012. You were stating here that based
12 on your review of the Air Force mental health records, that
13 Devin Kelley essentially was receiving out-patient mental
14 health care almost the entire time he was in the Air Force;
15 correct?

16 MR. STERN: I'm sorry, Your Honor. I'm going to
17 object to relevance. Mr. Ryan has already testified that
18 Kelley wasn't prohibited under (g) (4) and the parties have
19 already stipulated that Mr. Kelley was not prohibited under
20 922 (g) (4) .

21 MR. ALSAFFAR: May I respond, Your Honor?

22 You made a point in your order, your most recent
23 order, that even though he was not a prohibitor, that this
24 type of evidence actually was directly relevant, and it goes
25 to the foreseeability and causation analysis. And if they are

1 allowed to talk about his mental health on direct, we
2 certainly can go into what he discovered about the Air Force's
3 knowledge, too.

4 THE COURT: That's overruled.

5 BY MR. ALSAFFAR:

6 Q. If we could -- I'm sorry. I couldn't remember the answer.
7 Did you say that's correct, that almost his -- Devin Kelley's,
8 entire time at the Air Force was marked by mental health
9 treatment of some kind?

10 A. I'm sorry. Sir, I don't know off the top of my head what
11 his entire career with the Air Force was, but from June 2010
12 to June 2012, that is correct, he was receiving out-patient
13 treatment.

14 Q. Fair. Fair.

15 He was admitted two different times, voluntarily admitted
16 two different times to mental health facilities while in the
17 Air Force; correct?

18 A. That appears to be the case, yes, sir.

19 Q. And then you note here that on May 14th to 15th, that
20 Holloman Air Force Base put together a high risk for violence
21 responsible team; correct?

22 A. That's right.

23 Q. And you note here that Kelley's -- sorry. Go back to
24 that. We're almost done.

25 You note here in the May 14th and 15th entry that Kelley's

1 squadron leadership and his mental health providers feel that
2 he's a major threat to commit an act of violence; correct?

3 A. That's right, yes, sir.

4 Q. And that was your ATF conclusion after reviewing all the
5 mental health records; correct?

6 A. That's correct, yes, sir.

7 Q. And you also looked -- this is the Peak medical records
8 you were looking at, if I can show you Joint Exhibit 365. I'm
9 going to show you one page, page 52. This is Joint Exhibit
10 365, page 52.

11 A. Yes, sir.

12 Q. All right. And you see this is from the mental health
13 family advocacy at the Air Force?

14 A. I do, yes, sir.

15 Q. And you see here that it's the May -- it states May -- the
16 date on this is May --

17 If we could show the date, please, Sean.

18 The date on this is May 2, 2012 from the Department of the
19 Air Force; correct?

20 A. That's correct.

21 Q. And if you look at the paragraph now. I'll show that to
22 you.

23 Thank you.

24 It states in the middle there -- do you see "Airman
25 Kelley's condition"? Do you see that?

1 A. I do, yes, sir. Thank you.

2 Q. In May 2012, the Air Force was stating in his mental
3 health records that Airman Kelley's condition took a rapid
4 decline in February, whereupon he was hospitalized
5 February 23rd, 2012, for depression and possible suicidal
6 ideations. Do you see that?

7 A. Yes, sir.

8 Q. All right. And you remember how in your ATF note, JX 9,
9 you stated that this high risk for violence response team was
10 formed by Kelley's leadership?

11 A. Yes, in the family advocacy program. Yes, sir.

12 Q. Still sticking with these records you reviewed, I want to
13 show you same Joint Exhibit 365. This is page 156. So this
14 relates -- sorry. Page 1. Yeah, you got it.

15 Page 156 of Joint Exhibit 365. This is one of -- this is
16 in May. I believe that's 14th, 2012; correct?

17 A. That's right. Yes, sir. That's the date.

18 Q. And you if you look at the last sentence, "It was agreed
19 that the service member is to be considered high risk for SI
20 and HI, should be he released from the hospital." Do you see
21 that?

22 A. Yes, sir.

23 Q. And that's, SI and HI stands for suicidal and homicidal
24 ideation; is that your understanding?

25 A. That's my understanding. Yes, sir.

1 Q. Show you one last page from the record you reviewed in
2 forming your memo, 365 -- still Joint Exhibit 365. And this
3 is page 150, and I believe this is dated May 30th, a few weeks
4 later, 2012.

5 A. That's correct.

6 Q. All right. You see that the meeting here, "The high risk
7 for violence response team included Devin Kelley's commander,
8 First Sergeant Security Forces OSI."

9 Do you know what OSI and Security Forces are?

10 A. Yes, sir. The law enforcement arms of the Air Force.

11 Q. And the next sentence states, "In May 30th, 2012, that it
12 was determined by Security Forces and OSI that ADM," that's
13 Devin Kelley, "is a danger to the community." Correct?

14 A. That's right. Yes, sir.

15 Q. All right, and you reviewed his records at the time. You
16 would agree with that, right?

17 A. I agree that's what the records state, yes, sir.

18 Q. And you didn't offer any opinions in your memos or to
19 DODIG that any of this was inaccurate?

20 A. No, sir. I had no reason to believe it was inaccurate.

21 MR. ALSAFFAR: Pass the witness, Your Honor.

22 THE COURT: Anything further, or do you want to
23 break?

24 MR. STERN: Very briefly, but I just have a few
25 questions. So we'll go ahead and then break after, I guess.

WILLIAM RYAN - REDIRECT

1 THE COURT: That's fine.

2 MR. STERN: Thank you, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. STERN:

5 Q. Just briefly, you spoke about a few of the medical records
6 you reviewed when rendering your -- or offering your opinion
7 to DOD Office of the Inspector General; correct?

8 A. Yes, sir.

9 Q. And despite all of those medical records, did you conclude
10 that Devin Kelley was not prohibited under 18 U.S.C.
11 922(g)(4)?

12 A. In spite all of those medical records and the things in
13 them, we concluded that he was not prohibited under (g)(4).

14 Q. As a result, did any of those medical records create an
15 obligation by the Air Force to do anything with regards to
16 preventing Devin Kelley from owning or possessing a firearm?

17 A. Not under the GCA -- or not in regard to the GCA, sir.

18 Q. And we previously talked about how each prohibition is
19 sort of assessed unto itself. Is that fair?

20 A. That's right, sir.

21 Q. There's never a heightened obligation or a lesser
22 obligation to that; correct?

23 A. That's right, sir. If there was a general public safety
24 threat prohibitor, perhaps. That doesn't exist in the
25 statute.

1 Q. And so as a result -- is it fair to say that as a result
2 of Devin Kelley's mental health -- Devin Kelley's mental
3 health records had no bearing on any obligations by the
4 Air Force?

5 A. That's right, sir, under the GCA. That is correct.

6 Q. Thank you.

7 Very briefly, the ATF issued a report of investigation
8 regarding the firearm that was actually used in the mass
9 shooting; correct?

10 A. Yes, sir.

11 Q. And was that firearm that was used the Ruger AR-556, that
12 we previously discussed?

13 A. Yes, it was, sir.

14 Q. And according to your previous testimony, was Academy
15 prohibited from selling that firearm to Devin Kelley?

16 A. It was, sir, yes.

17 Q. So under any -- under that scenario, would Devin Kelley
18 had to have obtained a different firearm, whether through an
19 FFL or a non-FFL, in order to commit that mass shooting?

20 A. I'm sorry, sir. I don't understand the question.

21 Q. In order to obtain an AR-556 to commit this mass shooting,
22 would Devin Kelley had to have obtained the firearm in a
23 transaction other than what actually occurred in April 2016?

24 That was a terrible question.

25 A. I'm sorry, sir.

1 Q. Yeah. Okay.

2 Did Devin Kelley use the firearm that he purchased from
3 Academy to commit the mass shooting?

4 A. Yes, sir.

5 Q. And was that sale a legal sale under federal law?

6 A. It was not.

7 Q. So if Devin Kelley was going to obtain an AR in order to
8 commit this heinous act, would he have had to obtain a gun
9 elsewhere?

10 A. If he had been denied at Academy, he could have obtained
11 -- or would have had to obtain a gun elsewhere, sir.

12 Q. Whether that be through an FFL or a non-FFL?

13 A. It could have been an FFL, a non-FFL, or however. It
14 would have had to have been another means.

15 Q. A different sale?

16 A. Yes, sir.

17 MR. ALSAFFAR: Thank you. No further questions.

18 MR. STERN: Nothing further, Your Honor.

19 THE COURT: Any further need for this witness?

20 MR. ALSAFFAR: No, Your Honor.

21 MR. STERN: No, Your Honor.

22 THE COURT: Thank you, sir. You are excused.

23 Let's go ahead and take a 15-minute break.

24 (Recess.)

25 THE COURT: Your next witness.

STEPHEN BARBORINI - DIRECT

1 MS. CHRISTILLES: The United States calls Stephen
2 Barborini.

3 THE COURT: Swear him in.

4 (STEPHEN BARBORINI, having been duly sworn, testified as
5 follows:)

6 DIRECT EXAMINATION

7 BY MS. CHRISTILLES:

8 Q. Good morning, Mr. Barborini. I'm Jacquelyn Christilles.
9 We've talked on the phone a couple of times.

10 Can you please introduce yourself to Judge Rodriguez?

11 A. Stephen Barborini, B-A-R-B-O-R-I-N-I.

12 Q. Mr. Barborini, are you having some audio issues?

13 A. I don't believe so. I hear myself on sort of an echo.

14 Can you hear me?

15 Q. I can hear you. I'm just making sure that you can -- I
16 heard a pause when you were introducing yourself, so I was
17 making sure that your audio was working okay.

18 A. I'm good.

19 Q. All right. Mr. Barborini, what is your present
20 employment, including your position and title?

21 A. I'm currently a detective on a part-time basis, 28 hours a
22 week for the Palm Beach County Sheriff's Office located in
23 West Palm Beach, Florida. I'm assigned to the violent crime
24 division to a subunit called the firearms investigative unit.

25 Q. So you indicated that on a part-time basis you work for

1 the Palm Beach County Sheriff's Office in a specialized unit.

2 What do you do in that specialized unit?

3 A. Our unit, which basically consists of myself, a NIBIN
4 tech, an analyst from -- a crime analyst -- that deals with
5 firearms investigations, and now we actually have a detective
6 assigned -- another detective, part-time assigned, a gang unit
7 detective.

8 My job is multifaceted. In the morning, the guns that
9 come in, myself and the NIBIN tech look at the guns that come
10 in. We compare what's on the box to what is really in the box
11 because there's many mistakes. We take that information and
12 correct any mistakes. We then use that information to trace
13 the guns, myself and the analyst, trace these firearms through
14 the ATF Tracing Center.

15 We also -- we have a crimes lab that shoots more of the
16 high-priority guns. I and the NIBIN tech, shoot the lower
17 priority guns. We did get over 1500 guns last year, so it's a
18 bunch of guns.

19 Besides that, I also create training for PDSO and firearms
20 identification and investigations, as well as I also am a,
21 sort of a person here that goes to review social media,
22 cellphone downloads, and computers, photographs of firearms to
23 attempt to make criminal cases where felons are displaying
24 firearms so we can get either a search warrant or to assist in
25 a sentencing or actually to get arrest warrants.

STEPHEN BARBORINI - DIRECT

1 Q. How long have you been a part-time detective for the Palm
2 Beach County Sheriff's Office?

3 A. Since March of 2012.

4 Q. Do you currently have any other employment besides your
5 part-time employment with the Palm Beach County Sheriff's
6 Office?

7 A. Yes. I'm contracted with the Bureau of Alcohol, Tobacco
8 and Firearms, the ATF, to instruct both at the National
9 Academy in Glynco, Georgia, as well as on the road. And the
10 subject matter is basically firearms identification, firearms
11 technology, and firearms trafficking.

12 Q. Were you employed prior to the Palm Beach County Sheriff's
13 Office and your part-time instructing with ATF?

14 A. Yes. For 25 years, I was a special agent with the Bureau
15 of Alcohol, Tobacco, and Firearms. The last four and a half
16 years, I was the resident agent in charge of the local area
17 that the West Palm Beach field office served.

18 Q. So how long were you employed by ATF in total?

19 A. Just about 25 years.

20 Q. What is the mission of ATF?

21 A. Investigate violations of the firearms and explosives and
22 arson laws.

23 Q. As a special agent, what were your duties?

24 A. I investigated mostly firearms violations. That was about
25 85 to 95 percent of our work. Felons in possession, firearms

STEPHEN BARBORINI - DIRECT

1 trafficking, people -- dirty gun dealers, importers, as well
2 as street crimes. Occasional, I worked pipe bomb cases and as
3 well as commercial arson cases.

4 Q. Did you have any other law enforcement employment prior to
5 your time at ATF?

6 A. Before that, I was just over a year with the U.S. Marshal
7 Service. And before that, I was approximately seven years as
8 a police officer. I worked patrol. I worked as a crime
9 scene. I worked as a detective. And then last was a road
10 patrol sergeant.

11 Q. Have I covered all the employment history relevant to your
12 testimony today?

13 A. Yes.

14 Q. I want to talk to you a little bit about your education.
15 Do you hold any degrees?

16 A. A bachelor's degree in criminal justice.

17 Q. Besides your bachelor's degree, do you have any
18 specialized training specifically as it relates to firearms?

19 A. Yes. The training -- actually, the training started -- a
20 lot of personal training, because I did collect firearms at a
21 young age as well as personal interest as well as research.

22 Professional training was at various police academies to
23 include the ATF Academy, which is now in Glynco, Georgia at
24 F-L-E-T-C, and that training is -- we have, obviously, this
25 four or five days with nothing but firearms identification and

1 trafficking training as well as firearms law training.

2 After that, I went to a couple of advanced schools at
3 FLETC. I also went to armored schools, both Glock, Remington,
4 and six-hour armored schools.

5 Because of my knowledge in firearms, I was asked to --
6 to -- it's called the firearms nexus training, where there's
7 really no schools we can go, so to learn more about firearm's
8 function and identification, we actually tour factories. So
9 part of our training is to actually go to firearms factories
10 in the United States first, you know, normal factories, Colt,
11 Remington, and whatever.

12 And from there, we also go to museums, which continued
13 throughout my career. For a very short time, ATF did have
14 some funds. We -- they wanted 24 people that over a
15 three-year period was chosen to go to Europe, and we actually
16 toured factories, proof houses, and museums throughout Europe,
17 and continued to go to through these factories tours until
18 COVID hit.

19 ATF hired me, sort of, to set up factory tours in Florida,
20 places like Taurus, Rossi, Diamondback Firearms, Caltech, and
21 Knights Armament Corporation, and that stopped when COVID hit,
22 as well as sell -- going to, on my own, going to -- I go to
23 the shot show year every year, except for this year because of
24 COVID, which is the largest place where you can look at
25 firearms in the United States as well as personal tours of

1 firearms and museums.

2 Q. Now, I'm going to show you JEX 621, which has been
3 previously admitted. Do you see that up on your screen there?

4 A. Yes, it's my CV.

5 Q. I think you broke up there a little bit, but I think that
6 you indicated that this is your CV; is that correct?

7 A. That is correct.

8 Q. So you recognize this document as your CV?

9 A. Yes, I do.

10 Q. Does your CV accurately reflect your employment, your
11 education, and your training?

12 A. Yes.

13 Q. Now, you talked a little bit about the training that you
14 received, some of the proof houses, and gun manufacturer
15 facilities that you have toured.

16 Have you also instructed courses on firearms?

17 A. Yes. Starting in approximately 1998, '99, I teach the
18 firearms technology Glock. Now it's known as the GCA NFA
19 class, which basically starts with -- if you know nothing
20 about firearms, or something, we start at the beginning, with
21 anti-condition systems, all the way through modern firearms,
22 how they function, as well as the laws that apply to those
23 firearms. And also, of course, things change. We also talk
24 about various conversions to machine guns, common conversions
25 for Glocks, and AR-15s, for instance. Of course, now ghost

1 guns and silencers. So it's basically -- that's the basic
2 firearms class ATF agents get.

3 I also teach -- up until last year, I was teaching
4 firearms trafficking, so we teach how to investigate people
5 that traffic firearms, whether it's interstate, intrastate, or
6 internationally.

7 Q. So I think that you have indicated that through your
8 professional employment and training, you've gained expertise
9 in firearms generally; is that fair to say?

10 A. Yes.

11 Q. You indicated that you've taught on conversions for
12 firearms. Would it be fair to say that your professional
13 employment and training has helped you gain expertise on
14 firearms, accessories, and conversions?

15 A. Yes.

16 Q. When we are talking about conversions and accessories,
17 does that include aftermarket modifications for firearms?

18 A. Yes.

19 Q. You've talked a little bit about firearms trafficking.
20 Does that mean you have expertise in firearm sales?

21 A. Yes.

22 Q. Does that expertise include firearm sales by federally
23 licensed firearm dealers?

24 A. Yes.

25 Q. How about sales outside of federally licensed firearm

1 dealers, and if you wouldn't mind if I use the term "FFL," can
2 we agree that I'm talking about federally licensed firearm
3 dealers?

4 A. Sure.

5 Q. Okay. So have you gained any experience, or do you have
6 expertise on sales of firearms by non-FFLs?

7 A. Yes.

8 Q. You also gained experience on illegal firearm sales?

9 A. Yes.

10 Q. Have you been accepted in both state and federal courts as
11 a qualified expert to testify on firearms, firearm
12 modifications, and sales of firearms?

13 A. Yes. Well, I taught the firearms trafficking, firearms
14 identifications, the -- also the information needed for sale
15 of a firearm from an FFL.

16 Q. Is your testimonial history reflected on your curriculum
17 vitae?

18 A. Yes.

19 Q. I want to turn to your review in this case.

20 What, generally, just generally, were you requested to do
21 in this case?

22 A. Oh, the screen just changed -- okay.

23 Basically, alternative ways to purchase firearms other
24 than a federal licensed firearms dealer.

25 Q. With regard to Devin Kelley and the shooting that he

1 committed on November 5th, 2017 at the First Baptist Church of
2 Sutherland Springs, can we agree that when I refer to "the
3 shooting," that that's what I'm referring to?

4 A. Yes.

5 Q. Did you prepare a report concerning the alternative means
6 of obtaining a gun as it would have related to Devin Kelley?

7 A. Yes.

8 Q. Did you ever supplement that report?

9 A. Yes.

10 Q. What material did you review in creating your original
11 report?

12 A. I reviewed the Texas Ranger report, ATF report,
13 photographs that was also in the Texas Ranger report,
14 Department of Defense report, and Danielle Kelley and I think
15 the father's deposition.

16 Q. Now, you've indicated that you supplemented your report.
17 Why did you supplement your report?

18 A. I was given a deposition from the father about -- mostly
19 about gun storage, so after I read that, I supplemented.

20 Q. Do your reports include conclusions regarding the firearms
21 issues in this case?

22 A. Yes.

23 Q. Did you use your knowledge, skill, experience, training,
24 and education to analyze the firearms issues in this case?

25 A. Yes, I did.

1 Q. Do you believe your testimony will be helpful in assisting
2 the judge to understand the facts of this case?

3 A. Yes.

4 MS. CHRISTILLES: Your Honor, at this time, we tender
5 Mr. Barborini as an expert in firearms, firearms accessories,
6 and aftermarket modification, and alternative sales of
7 firearms.

8 THE COURT: Any objection?

9 MR. LeGRAND: Your Honor, we have no objection on
10 those specific areas.

11 THE COURT: He's recognized as such.

12 BY MS. CHRISTILLES:

13 Q. Mr. Barborini, in general terms, what did you -- what did
14 you find with respect to whether or not Devin Kelley would
15 have obtained a firearm, even if his information had not been
16 entered into NICS?

17 MR. LeGRAND: Your Honor, we object.

18 That's completely outside the areas that they just
19 designated him in. He is not qualified in any way whatsoever
20 to testify as to what Devin Kelley would have done.

21 MS. CHRISTILLES: Your Honor, I asked in general
22 terms. He looked at the firearms issues in this case with
23 regard to Devin Kelley, that's what he indicated, and he
24 indicated that he looked into the issues of purchases outside
25 of an FFL.

1 THE COURT: Yeah. So he's been recognized as an
2 expert in alternative sales, and so this broadly fits into
3 that category.

4 Restate your question for me.

5 MS. CHRISTILLES: Yes, Your Honor.

6 In general terms, what did you find with respect to
7 whether or not Devin Kelley would have obtained a firearm,
8 even if his information had been entered into NICS?

9 MR. LeGRAND: Your Honor, we object to the word
10 "would." He is designated as an expert in "do these markets
11 exist," and "could he have attained a firearm from some other
12 source," but whether he would or not requires lots of
13 expertise concerning human behavioral psychology, various
14 other subjects.

15 THE COURT: That's sustained.

16 So you can get there. You're just using the wrong
17 verbiage.

18 MS. CHRISTILLES: Yes, Your Honor.

19 BY MS. CHRISTILLES:

20 Q. Mr. Barborini, in general terms, what did you find with
21 respect to whether or not Devin Kelley could have obtained a
22 firearm, even if his information had been entered into NICS?

23 A. Yes. Very easily he could have purchased firearms from
24 alternate methods, alternate places.

25 Q. Are your opinions reflected in your report and your

1 supplemental report?

2 A. Yes.

3 MS. CHRISTILLES: Your Honor, at this time, the
4 government offers GEX 30 and GEX 154 into evidence.

5 MR. LeGRAND: Your Honor, we object. Those are his
6 reports. They are repetitious. They are hearsay. And he's
7 here to testify. And if they want to ask him a question about
8 his reports, they are free to do so.

9 And we further object to the reports because in some
10 areas there are certain sentences that suggest what
11 Devin Kelley would have done under certain circumstances. And
12 we object to that because he's not qualified. There is no
13 foundation for those opinions, and it's speculation on his
14 part.

15 THE COURT: Yeah. Generally, expert reports don't
16 come in. Is there some exception?

17 MR. LeGRAND: No, Your Honor.

18 THE COURT: I'm talking to her.

19 MR. LeGRAND: I'm sorry. I apologize.

20 THE COURT: I knew what your answer was.

21 MR. LeGRAND: Yes, sir. I accept that.

22 MS. CHRISTILLES: Your Honor, as you have indicated
23 many times during this case, this is a bench trial. There is
24 no jury. Mr. Barborini is here testifying in court, is
25 subject to cross-examination by plaintiffs' counsels. The

1 parties have already given this Court almost a thousand pages
2 of documents to review. We believe that it will be helpful to
3 the Court to also have the expert reports available while you
4 are making your decision, and Your Honor has already reviewed
5 in totality two of plaintiffs' experts reports in motion
6 practice for this case.

7 THE COURT: Yeah. So here, though, if I let the
8 expert reports in, extraneous matter might come in that I'm
9 not supposed to be taking into account. So 30 and 31 are not
10 admitted.

11 MS. CHRISTILLES: And it would be 30 and 154, Your
12 Honor, just for the record, I believe.

13 THE COURT: Oh, I'm sorry. So it's GEX 30? I
14 thought you said 31. What's the other one?

15 MS. CHRISTILLES: GEX 30 is the --

16 THE COURT: That's the Barborini report.

17 MS. CHRISTILLES: Yes. And then 154 should be the
18 supplemental report, if I have my numbers here correctly, Your
19 Honor. Yes. 154 would be his supplemental report.

20 THE COURT: Yeah, that's not admitted.

21 Oh, and, by the way, while I'm doing clean up, so
22 I've taken a look at your -- the objections to the learned
23 treatise doctrine.

24 The government's request to have all those exhibits
25 admitted into evidence is denied. There's no exemption

1 applicable. I'll clean up later. Someone remind me about
2 which exhibit numbers are not admitted.

3 Go ahead.

4 MS. CHRISTILLES: Yes, Your Honor.

5 BY MS. CHRISTILLES:

6 Q. And I know I've already asked this question, but just
7 because we got off track there a little bit I want to make
8 sure that we're refocusing here.

9 I think you stated that you did come to an opinion on
10 whether or not Devin Kelley could have obtained a firearm even
11 if his information had been entered into NICS. And in general
12 terms, what was that opinion?

13 A. Yes, very easily from various methods.

14 Q. Now, I use the word "NICS," are you familiar with what
15 NICS is?

16 A. Yes, the National Instant Background Check, basically.

17 Q. What is NICS used for?

18 A. When you --

19 MR. LeGRAND: Your Honor, we object. This witness
20 has not been designated as an expert on NICS.

21 THE COURT: So that's -- that's overruled.

22 BY MS. CHRISTILLES:

23 Q. In your experience, what is NICS used for?

24 A. When you purchase a firearm from an FFL, after you've
25 filled out the ATF Form 4473 and give your biographical

1 information, then the gun dealer, federal or state, either by
2 phone or by computer, then runs your -- runs your information
3 through CJIS, which is basically a criminal record background
4 check.

5 Q. Is there any way to obtain a weapon besides purchasing one
6 from an FFL?

7 A. Yes.

8 Q. Would you refer to that as a secondary market?

9 A. Yes.

10 Q. What are the types of secondary markets that you are
11 familiar with?

12 A. Gun shows, the internet, newspapers, friends, ghost guns,
13 and straw purchases, and a straw purchase from an FFL.

14 Q. Are these secondary --

15 A. It is a secondary market. It would be a secondary person.

16 Q. So just to make sure, we've got gun shows, flea markets,
17 online, newspaper, friends, ghost guns, and then a straw
18 purchase would kind of be lumped in there; would you agree?

19 A. Yes.

20 Q. Are these secondary markets considered underground
21 markets?

22 A. No. It's considered basically -- for instance, a gun show
23 or even internet, it could be a private sale. So, I mean, I
24 buy -- I've bought guns at gun shows without background
25 checks, so it's not underground at all. It's in the open.

1 Q. And you indicate that you buy guns at gun shows. I'm
2 assuming you are not a prohibited purchaser.

3 A. Assuming I'm not, yes. I'm sure I'm not.

4 Q. So is it fair to say that people who are legally allowed
5 to buy weapons utilize these secondary markets?

6 A. Correct.

7 Q. They utilize these markets without concern that something
8 nefarious might happen during the sale?

9 A. Yes. Yes. It's legal, unless they are prohibited, and
10 then that would be a problem if we know about it, but we don't
11 know when people do private sales.

12 Q. And I want to go into that a little more. You indicated
13 that there's no laws prohibiting those sales, so is it fair to
14 say that there are no laws prohibiting sales between private
15 parties?

16 A. I believe there's not a law about private sales. And
17 Texas, like Florida, is an open state, where there is no
18 registration or permit requirement.

19 Q. You used the term "open state," and you indicated that
20 Florida and Texas are open states; is that accurate?

21 A. Yes.

22 Q. Are there states that are not, quote, unquote "open
23 states"?

24 A. Yes. States -- mostly, they are northeast, such as like
25 New York. You have to have a permit to buy a -- buy a

1 firearm, so it would not be a state where I can just walk in
2 and buy a gun and take it that day or do any private sale
3 since guns have to be registered.

4 Q. So do sales between private individuals require a
5 background check in Texas?

6 A. No.

7 Q. So is it fair to say that Texas is different from other
8 states with regard to non-FFL sales?

9 A. It's an open state, so it's -- actually, most states are
10 open states in my experience. There's no requirement for
11 background checks on private sales.

12 Q. I want to shift gears and talk about these secondary
13 markets that you've indicated. Let's start with gun shows.
14 What exactly is a gun show?

15 A. A gun show is a place where both FFLs and private
16 individuals or hobbyists can display their firearms for sale
17 where you can -- where a private individual actually can have
18 a table at the gun show and they can sell guns to enhance
19 their collection, buy guns without background checks.

20 And FFLs are also at gun shows. Of course, when they sell
21 at gun shows, they are allowed to sell, other than a licensed
22 premise, and they have to complete the ATF forms and the
23 background checks.

24 Q. So at gun shows, there can be FFLs and non-FFLs selling
25 firearms; correct?

1 A. Correct.

2 Q. What types of firearms are sold at gun shows?

3 A. Everything from antiques to collectible guns to brand new
4 guns.

5 Q. You indicated that brand new guns are for sale at gun
6 shows; is that accurate?

7 A. Yes.

8 Q. So are new guns only available for sale from FFLs at gun
9 shows?

10 A. Oh, not at all. Many private individuals have brand new
11 guns or appear to be brand new guns. You can't really tell if
12 they are brand new. They're in the box with the original
13 paperwork and they are for sale from private individuals as
14 well as licensed dealers, FFLs.

15 Q. So at a gun show, a private seller could be selling a
16 brand new in the box gun; is that accurate?

17 A. Yes.

18 Q. So you wouldn't say that only defective guns are for sale
19 at gun shows; correct?

20 A. No, not at all.

21 Q. Now, you said sometimes it's hard to tell whether or not
22 it's a brand new gun, but it's in the box. Are brand new guns
23 never fired?

24 A. No. Manufacturers, when they make a firearm, they shoot
25 them. So if you look at a brand new gun, it's actually --

1 you'll see some residue in the barrel because they shoot them.
2 It's called proof test. They usually shoot them with an
3 overload, and if they survive the overload, obviously, for
4 liability reasons they do it. So if somebody shoots a gun and
5 said it blew up when they shot factory ammunition, they show
6 that we shot this with a proof load, so it must be something
7 you did.

8 Q. In your experience, have you actually seen new guns for
9 sale at gun shows from non-FFLs?

10 A. Oh, yes, many times. Actually, both in criminal
11 investigations where the private seller oversteps private
12 sales, and we see these people all over the State of Florida
13 selling guns that are new where they will buy brand new guns,
14 a multiple purchase, and then take them right to the gun show
15 and sell them to people without background checks.

16 Q. Now, you said they overstep. What's the difference
17 between a private seller that's allowed to sell a brand new
18 gun at a gun show and somebody who oversteps?

19 A. The law basically says anybody that devotes time and
20 attendance to the repetitive sale of firearms for profit needs
21 to get a federal firearms license, which is a very gray area,
22 so we've -- if you see somebody with brand new guns, or even a
23 lot of used guns, let's say in Ft. Lauderdale, Florida, the
24 next day -- next weekend he's in West Palm Beach.

25 We get complaints from licensed gun dealers who say, "Hey,

1 this guy is all over the State of Florida. I've actually seen
2 him in Texas and Oklahoma. Why do I have a license, when this
3 guy is buying guns and flipping them without any paperwork"?

4 Q. Have you actually attended gun shows as part of your
5 professional employment?

6 A. Yes. I actually ran the gun show task force throughout
7 the State of Florida in 1996 and '97. And then here, I had a
8 gun show task force from 2008. So December 2012. I
9 occasionally still assist with it at the Palm Beach County
10 area.

11 Q. I think you mentioned it earlier. Have you also attended
12 gun shows in your personal capacity?

13 A. Oh, yeah.

14 Q. How many gun shows would you say that you have attended in
15 your lifetime?

16 A. Just in 1996, I attended 50 in one year, so it's going to
17 be in the hundreds.

18 Q. What percentage of those gun shows that you have attended
19 had new or like new firearms for sale from non-FFLs?

20 MR. LeGRAND: Your Honor, we object. That calls for
21 speculation.

22 THE COURT: That's overruled.

23 THE WITNESS: Other than the gun show that's local,
24 that's for antique guns, basically all of them.

25

1 BY MS. CHRISTILLES:

2 Q. So is it fair to say that new guns are available without a
3 background check from non-FFLs at a gun show?

4 A. Yes. Guns that are brand new or appear brand new, because
5 you really can't tell.

6 Q. Are you aware of the firearms that were recovered from the
7 scene of the shooting?

8 A. Yes.

9 Q. Did the investigation determine if all of the firearms
10 were used by Kelley to perpetrate the shooting?

11 A. Except for the Ruger 22 pistol, it was not used.

12 Q. Okay. So the Ruger 22 pistol was not used; is that
13 accurate?

14 A. Yes.

15 Q. So what weapons were used in the shooting?

16 A. The AR-15 and the Glock 19.

17 Q. Now, you've called it an AR-15. I've also called it an
18 AR-556. Help me clear up the difference there.

19 A. Well, AR-15 is basically the most popular rifle in the
20 United States. There are well over a hundred brands of
21 AR-15s. They started back in the '50s, developed by Eugene
22 Stoner in the military, and that's now morphed into hundreds
23 and hundreds of brands of semiautomatic versions of the
24 military M16 rifle.

25 SR556, AR-556, they are both AR-15 type rifles. They are

1 just -- there are names for them.

2 You remember AR-15 rifles, they have to be the same, as
3 far as the receivers, because the aftermarket parts have to
4 fit. So the lower receiver and the upper receivers are all
5 the same, they just, as far as a Milspec, to accept the
6 trigger or whatever.

7 So it was just Smith & Wesson has an MD15. I'm going to
8 say the Army has a PA-15, so... And then Ruger has an AR-556
9 and an SR556, and there's hundreds and hundreds of companies,
10 but it's the same basic rifle.

11 Q. So where in the spectrum is the AR-556? Is it the
12 absolutely best AR-15 sold on the market? Is it the worst?
13 Where does it fall on that spectrum?

14 A. It's considered an average, so it's a middle-of-the-road
15 AR-15.

16 Q. So I think what you are saying is there are brands of
17 cars, like Ford, Chevy, just like there are brands of AR-15,
18 and the AR-556 is the mid-range AR-15?

19 A. Yes. Yes.

20 Q. Would the AR-556 be generally available at a gun show?

21 A. It could be. I mean, the gun shows that are -- especially
22 the last 15 years, probably the most popular rifle are the
23 AR-15s. You could find an AR-556, but I'm not saying every
24 show you have an AR-556. There will be plenty of AR-15s.

25 Q. So not every show might have the Ruger AR-556, but how

1 many would have a different brand of AR-15?

2 A. Oh, all except the antique shows will have AR-15s.

3 Q. And you talk about the AR-556 kind of being in the middle
4 spectrum. Are there other AR-15s that are kind of in that
5 middle spectrum with the AR-556?

6 A. Yeah. Such as, like the Smith & Wesson, the Bushmasters,
7 the Remingtons, the Armories, they are all -- I just went to a
8 gun show a couple weeks ago, and it was plenty of those type
9 of guns. Of course, the price is a lot higher now.

10 Q. So I think you mentioned this. The gun show you went to
11 last weekend, plenty of AR-15s available. Did I hear that
12 correctly?

13 A. Yes.

14 Q. Would an AR-15 be available in a new condition from a
15 non-FFL at a gun show?

16 A. Yes.

17 Q. Have you personally seen a new AR-15 available from a
18 non-FFL at a gun show?

19 A. Yes.

20 Q. How about the Glock 9mm? Have you seen a new Glock 9mm
21 available from a non-FFL at a gun show?

22 A. Yes. Or appears new, original box and papers.

23 Q. How often do you see Glock 9mms at gun shows?

24 A. Glock is the number one selling handgun, in Florida
25 anyway. Very popular. And I see them. Just at the last show

1 there were plenty of Glocks from both FFLs and non-FFLs.

2 Q. You indicated that the Glock is the number one selling
3 handgun. Did I get that correct?

4 A. From my research here, I'm looking both at what I see at
5 the gun shows, and also what I see in evidence. We took in
6 1500 guns, and it's -- I don't know how many thousand brands
7 of firearms. Last year, 18 percent of the guns were Glocks.
8 Not because they were used in crimes, but many are stolen from
9 legitimate citizens.

10 Q. You said many are stolen from legitimate citizens?

11 A. Yes.

12 Q. What makes the Glock so popular?

13 A. Well, it's the first mass produced polymer striker fire
14 pistol that passed all the torture tests in the '80s, so the
15 police department started accepting them and using them. They
16 are cheaper than the metal guns back then, including PBSO.
17 You have 3,000 here.

18 So and, of course, once police and military use them, then
19 you know, citizens also use them. They are very reliable.
20 They are very easy to shoot. You pull the trigger. It goes
21 off. There's no real manual safety to turn on and off. And
22 so actually (audio transmission gap).

23 Q. You indicated that it's a polymer weapon. What is
24 polymer?

25 A. Well, it's like a plastic. The frame and receiver, the

1 bottom part is polymer.

2 Q. And we've talked about the AR-15 and the Glock being
3 available at a gun show from a non-FFL. Is a background check
4 required to purchase a weapon from a non-FFL at a gun show in
5 Texas?

6 A. No.

7 Q. Do you have any experience with individuals buying
8 firearms at gun shows where those individuals would otherwise
9 be prohibited from buying a firearm from an FFL?

10 A. Yes.

11 Q. You also talked about online sales, so I want to shift to
12 online sales. How would an individual purchase a firearm
13 online?

14 A. Just people used to advertise in newspapers, which is sort
15 of rare. When they sell guns now it's basically done online.
16 For instance, Armslist, Guntraders, and, plus, every website
17 actually that deals in collecting guns usually has a buy-sell
18 page, when it's something like Armslist.

19 We have Florida Gun Traders, because of Texas Gun Trader,
20 which I joined, I think back in June -- and within 15 minutes,
21 I found people. If I could meet them in Texas, I could have
22 bought an AR-15 rifle and a Glock, and they were non-FFLs.

23 Q. So you indicated that you actually joined some of the
24 online forums for buying guns in Texas; is that accurate?

25 A. Yes.

1 Q. And you indicated that within 15 minutes, you could have
2 purchased an AR-15 and a Glock; is that accurate?

3 A. Correct.

4 Q. Would a background check have been required for you to
5 purchase that AR-15 or the Glock that you found on Texas Gun
6 Traders?

7 A. Well, the people that were advertising were not dealers,
8 so I would have to meet them in Texas, obviously, meet them in
9 a parking lot to consummate the deal, but I wouldn't -- not
10 have to have a background check.

11 Q. Are new guns available through these online forums?

12 A. Oh, yes.

13 Q. Now, I think you talked about the Texas Gun Traders, and
14 you actually going to that site. In your professional
15 experience, besides that do you have other experience with
16 purchasing firearms online without a background check?

17 A. Oh, yes. As an agent with ATF I purchased everything from
18 normal guns to machine guns from people without background
19 checks.

20 Q. Have you also done some work outside of the ATF concerning
21 online purchases of firearms without a background check?

22 A. Yes. In 2012 I was approached by the Today show about the
23 ease of buying guns, online sales with a background check, so
24 I agreed to do it. And we went and met in Arizona, another
25 open state, and we went to an internet buy-sell site called

1 Backpage, which is now no longer, this is 2012, where
2 basically I just looked for ads for guns and I would use my
3 iPad and I set up buying the guns and setting up the meeting
4 places where instead of me being the person that met these
5 people for the final sale, I set up the deal and then they
6 would show up.

7 It was a male and female actor and they would buy the gun
8 without any background checks. And also after they bought the
9 gun from these people, which they actually told the people,
10 "Thank you for selling me the gun. I probably couldn't pass a
11 background check anyway," nobody asked for the gun back.

12 All those guns that we bought, a Glock and AR-15, after
13 our investigation was over it was on the Today show, and those
14 guns were turned over to Phoenix PD.

15 Q. You indicated in that Today show work you purchased an
16 AR-15 and a Glock online. Is that accurate?

17 A. Correct.

18 Q. Now, in addition to gun shows and online sales, you also
19 mentioned something called a straw purchase. What is a straw
20 purchase?

21 A. A straw purchase is where somebody, usually a prohibited
22 person, or maybe it's somebody that doesn't want their name on
23 the ATF Form 4473 because they want to commit a crime or ship
24 the guns either out-of-state or to a gang or internationally,
25 they will send a straw purchaser in, which means the straw

1 purchaser goes to the FFL, fills out the form, but the true
2 buyer is the person that doesn't want their name on the form
3 so they will provide the money and buy the gun.

4 So if the gun is ever traced, it comes back to the straw
5 purchaser, not total actual possessor or the actual purchaser.
6 It goes back to the straw purchaser which has no interest in
7 the gun. We see many of those and work them both from FFLs at
8 gun shows.

9 Q. So how would an FFL know if the weapon is being purchased
10 for someone else in a straw purchase type of scenario?

11 A. If the FFL is -- they are actually training the other guy
12 to FFLs, or if they suspect the straw purchase they should
13 stop the sale. But in our experience, my experience actually,
14 we actually -- actually during gun shows because gun shows are
15 so crowded we see people -- we have people outside the gun
16 show, usually local police that could identify that the gang
17 members, the felons, people that shouldn't be there, and if
18 they are at a gun show they are going to buy a gun or ammo.

19 We follow these people around. Or a gun dealer will call
20 us. And they may approach a table many times with a
21 girlfriend or a wife. We will see that person that we know is
22 prohibited, pick up a gun, look at a gun. And they will walk
23 away. And then the female that is with them -- usually it's a
24 female, will fill out the paperwork, get the gun. And later
25 on we do a traffic stop and find out who the true purchaser

1 is.

2 Q. You talked a little bit about -- I know we've talked about
3 gun shows, but you just brought something up. You talked
4 about having your agents at a gun show and it's very crowded
5 and you used the word "gang members and felons." When you are
6 working a gun show, are you just randomly targeting people to
7 determine if there is some type of sale where a background
8 check might be required?

9 A. No. Information usually comes from either a gun dealer
10 that suspects it, or from one of the local either ATF. Local
11 cops usually that know these people that say so--and--so is in
12 the show, he shouldn't be here, he's a felon. And that's how
13 we spot them. Either somebody buys from a collector or a
14 private sale, or they will buy it using a straw purchaser from
15 an FFL.

16 Q. Now, what if a parent buys a firearm for a child. Is that
17 considered a straw purchase?

18 A. No. That's a gift exception. You can buy your -- you
19 know, obviously a child, a gun, if your child is a convicted
20 felon -- if your child is a convicted felon and you know it,
21 then that would be a straw purchase. But, no, you can buy
22 your child a gift.

23 Q. How about a wife buying a firearm for her husband. Is
24 that considered a straw purchase?

25 A. No. Only if she knows he's a prohibited person and can't

1 buy the gun, then it would be. Otherwise, it would just be a
2 gift.

3 Q. Now, you also used the term "ghost gun." What is a ghost
4 gun?

5 A. A ghost gun, I guess, is a term used by the news for a gun
6 that's untraceable. It's been a problem lately. The last
7 five or six years it's gotten a lot worse because of the
8 polymer kits. Polymer kits are so easy.

9 For instance, a Polymer80 is probably one of the
10 highest-selling kits in the United States. Some states are
11 making it illegal right now.

12 So the Polymer80 kit, they basically sell mostly Glock
13 kits and AR-15 kits. So you get this piece of plastic that
14 looks like the lower receiver or a frame of a Glock. But it
15 comes in a jig. It comes with little pieces you have to put
16 in it, as well as drill bits.

17 So when you get the gun, it's also there is an 80 percent
18 gun. ATF advises in that form, it's not yet a firearm. So
19 once you go to YouTube -- usually that's the best way to learn
20 how to do it, and use hand tools, and they provide everything.
21 You need maybe a pair of snips and a little file and a drill.

22 It's all there. The kit tells you where to drill. You
23 put in a couple parts. And at that point, you've made a
24 firearm, because that's the control item. And it's legal,
25 because federally it's legal to make your own firearm.

1 So everything else -- that's the only controlled item. So
2 a convicted felon cannot have that piece.

3 Now, everything else, let's say an AR-15, Glock, the
4 barrel, the triggers, some of these are all -- they are not
5 regulated, so everything else you can either buy at a gun show
6 or online or buy at the gun store.

7 Q. So that was a lot of information so I'm going to break
8 that down a little bit. So a ghost a gun is an untraceable
9 gun. That's really what that term means; is that correct?

10 A. Correct.

11 Q. Okay. And then you talked about Polymer80 kits. Are
12 those often referred to as 80 percent kits?

13 A. It's one of the brands of 80 percent kits, yes.

14 Q. So there is 80 percent kits. There's different brands.
15 Polymer80 is the most popular?

16 A. Correct.

17 Q. Okay. And with one of these 80 percent kits, you can
18 assemble a firearm; is that correct?

19 A. Correct.

20 Q. Okay. Are there 80 percent kits available for an AR-15?

21 A. Yes.

22 Q. Are there 80 percent kits available for a Glock .9mm?

23 A. Yes.

24 Q. Can a felon purchase an 80 percent kit?

25 A. Yes.

1 Q. Is a background check required to purchase an 80 percent
2 kit?

3 A. No, not at all. He can buy them in the mail.

4 Q. Okay. So tell me where you can buy a 80 percent kit from.

5 A. You go to the website and have it mailed to your home.

6 You can go to a gun show and buy it from anyone. And actually
7 some gun stores sell it. But when you buy it from an FFL, you
8 don't need a background check. You just buy it like you would
9 buy a (audio transmission gap). It's not regulated at all.

10 Q. Are you telling me you can buy an 80 percent kit from an
11 FFL?

12 A. Yes.

13 Q. Without a background check?

14 A. Yes.

15 Q. Once you get that 80 percent kit, let's say in the mail,
16 you get your 80 percent kit, you get it home. How do you make
17 a gun out of it?

18 A. Well, it has instructions. And the best thing is to go to
19 YouTube. There is hundreds of YouTube sites that show you how
20 to do it step by step, because it actually comes in a jig,
21 which is like something -- it's plastic, looks like a gun
22 frame. It's not yet a gun yet. And it comes in this jig.
23 And it tells you exactly where to drill, to put in your pins.
24 And actually it supplies a drill bit.

25 So watch YouTube, drill the holes. You might have to snip

1 out a little bit of plastic, grind a little of the file. And
2 at that point ATF is going to say, okay, you just made a gun.

3 So when you start, it's not a gun. When you finish, let's
4 say if it's a Polymer80 Glock, once you make that bottom, the
5 frame, you have made a firearm. And then any Glock parts kits
6 or aftermarket Glock kits will fit right in and function as a
7 Glock pistol would.

8 Q. What kind of tools do you need to put the 80 percent kit
9 together?

10 A. Probably snips, the file, and an electric drill.

11 Q. Do you need a metal lathe?

12 A. No.

13 Q. So to put one of these -- to make a gun out of an
14 80 percent kit, you need a hand drill, a pair of snips, and
15 maybe a file; is that correct?

16 A. Yes. Especially for the polymer plastic, which is the
17 Polymer80S.

18 Q. And I think we talked earlier, the Glock .9mm that you
19 would purchase from a store, it's made out of polymer; is that
20 right?

21 A. Correct.

22 Q. So once somebody has assembled this 80 percent kit with
23 their hand drill, their pair of snips and their file, will it
24 operate as a firearm? Will it shoot bullets?

25 A. Yes. Shoots them automatically, just as it was -- the

1 same as a Glock pistol would.

2 Q. Okay. And just to be clear, are there any laws
3 prohibiting the sale of one of these kits to a felon?

4 A. Not federally and not in Texas or Florida.

5 Q. Are you aware of any shootings that have involved a
6 shooter using a ghost gun to carry out the shooting?

7 A. I think there was a Saugus High School shooting in 2019
8 and five kids were shot with an 80 percent kit. One dead.
9 One wounded. A couple wounded. I remember that because I saw
10 a picture.

11 Q. We've talked about gun shows. We've talked about online
12 purchases, straw purchases, and ghost guns. You also
13 mentioned family and friends. Would you consider that another
14 way to obtain a firearm without a background check?

15 A. Yes.

16 Q. In your review of this case did it appear that
17 Devin Kelley could have had access to firearms through a
18 friend or family member?

19 MR. LeGRAND: Your Honor, we object. That's outside
20 the evidence in the case.

21 THE COURT: That's overruled.

22 BY MS. CHRISTILLES:

23 Q. Mr. Barborini, I'll ask you again. In your review of this
24 case, did it appear that Devin Kelley could have accessed
25 firearms through a friend or family member?

1 A. Yes.

2 Q. And what was that access?

3 A. His father had guns that he shot. Also a friend. He got
4 a Maverick shotgun, which he bartered off later from someone.
5 It's not clear how he got that one, so it was from somebody.

6 Q. And you indicated that his father had firearms; is that
7 accurate?

8 A. Yes.

9 Q. How did you determine that Devin Kelley could have
10 accessed those firearms?

11 A. There was a -- the father, in a deposition, said he kept
12 his guns in a wardrobe cabinet that was made out of wood,
13 which where Devin Kelley stayed, so obviously, a wardrobe
14 cabinet, you can get in with a screwdriver. So even without
15 permission from his dad, most people would be able to get in
16 that wooden wardrobe cabinet. It's not gun safe.

17 Q. You mentioned that it's not a gun safe. Is there a
18 difference between a wardrobe cabinet and a gun safe?

19 A. Yes.

20 Q. What is that difference?

21 A. A gun safe, you'll have a metal gun cabinet. If you can't
22 afford a real gun safe, it's going to be steel. It's going to
23 have some locks that you bolt to the wall. You need a crowbar
24 (audio transmission gap) grow up to bigger gun safes, which
25 are pretty hard to get in. They have thicker metal.

1 A wooden cabinet for wardrobe is made with clothes. I
2 know I have one at home, so you could take a screwdriver and
3 get in in a second, or one shot with a hammer.

4 Q. Now, we've talked about the possible avenues that
5 Devin Kelley could have accessed weapons from a non-FFL. I
6 want to turn and talk to you about the firearms that
7 Devin Kelley actually used in the shooting; okay?

8 A. Yes. Okay.

9 Q. And we've talked a little bit about them, but let's go
10 back to the Glock .9mm semiautomatic pistol. Is there
11 anything about this particular firearm that would have made it
12 easier or more difficult for Devin Kelley to obtain it through
13 the methods that we've discussed?

14 A. No. It could get that gun private sale, gun show, online,
15 whatever, without a background.

16 Q. And is there any characteristics or anything about this
17 weapon that would make it available through these non-FFL
18 sources that we've discussed?

19 A. It's just a Glock 19. It's available anywhere, FFLs or
20 non-FFLs.

21 Q. How about the Ruger AR-556, or an AR-15, would it have
22 been easy for Devin Kelley to obtain this weapon from a
23 non-FFL?

24 A. AR-15, not a problem at all. If he wanted that exact
25 brand, he might have had to search for a while. It just

1 depends on how many are out there, but AR-15s are the most
2 popular guns out there.

3 Q. And I think you mentioned it a little earlier. We talked
4 about a Ruger model SR22. What is that gun generally used
5 for?

6 A. Used for plinking, because it shoots -- it's a long rifle,
7 so if you shoot, especially nowadays, even then the ammunition
8 cost of shooting a 9-millimeter Glock compared to a little 22.
9 So it's a semiautomatic, works similar to a Glock.
10 Semiautomatic. You pull the trigger. It will shoot. Except
11 the cost of shooting is probably about 89 percent less. So I
12 have the same thing. I have a 22. I shoot it more often
13 because it's cheaper to shoot so you get more trigger time for
14 training.

15 Q. And I think you used the word "plinking?" Did I hear that
16 correctly?

17 A. Plinking. So if you don't have a Glock, people use like
18 22S to shoot at cans, target shooting. It's a cheap way to
19 shoot.

20 Q. So SR22S are generally used for target practice and
21 training because the ammunition is cheaper. Is that fair to
22 say?

23 A. Yes.

24 Q. Was there any evidence that Devin Kelley used this firearm
25 during the shooting --

1 A. Not that I recall.

2 Q. -- in your review?

3 A. No.

4 Q. Now let's talk a little bit about Devin Kelley's actual
5 purchases of firearms. And I think you alluded to it a little
6 bit. Did you have an opportunity to review information about
7 Devin Kelley's firearm purchasing history?

8 A. Yes.

9 Q. In your expert opinion did Devin Kelley demonstrate any
10 knowledge of the types of non-FFL purchases that we have
11 discussed today?

12 A. Yes. He mentioned particular gun shows, and he was
13 searching the internet for accessories. So he would
14 definitely have knowledge.

15 Q. In your review of the information, did you find any
16 evidence that Devin Kelley ever utilized any type of non-FFL
17 purchase avenues that we have discussed today?

18 A. I believe the shotgun he got from a friend. And there's
19 another firearm that he didn't like and got rid of. And I
20 think it was the SCCY, S-C-C-Y. I don't know how he got that
21 one. I think that was also from a friend, but I couldn't be
22 sure.

23 Q. You talked about buying firearm accessories online. I
24 want to talk about some of Devin Kelley's non-firearm
25 purchases. Are you familiar with accessories that can be

1 purchased for firearms?

2 A. Yes.

3 Q. In your review of the case, was there any evidence that
4 Devin Kelley added any accessories to the firearms used in the
5 shooting?

6 A. Yes.

7 Q. In your experience, are these accessories generally sold
8 stock on the weapon, if it's purchased at a sporting goods
9 store?

10 A. No. It would have been added.

11 Q. How difficult is it to add these accessories to a firearm?

12 A. Oh, very easy.

13 Q. Now, we talked about assembling an 80 percent kit earlier.
14 If someone has the ability to add the types of accessories
15 that Devin Kelley added to his weapon --

16 MR. LeGRAND: Your Honor, we object. That calls for
17 speculation. There's no evidence that Devin Kelley had the
18 ability. That evidence has come in before the Court that
19 there's no evidence that he had the ability to manufacture
20 guns. And it's also irrelevant to the facts of this case,
21 Your Honor.

22 MS. CHRISTILLES: Your Honor, we are not asking
23 Mr. Barborini to speculate on whether Devin Kelley could have
24 assembled an 80 percent kit, or did assemble an 80 percent
25 kit, all we are asking is in his expert opinion if he could

1 put accessories on the gun --

2 THE COURT: But that's where the assumption is.
3 There is no evidence that he actually put the accessories on.
4 I mean, some third party could have put the accessories on.
5 I'm not aware of any evidence, one way or the other. Am I
6 missing something? Did I miss part of the evidence?

7 MS. CHRISTILLES: Your Honor, I will get there then
8 and I will save this question.

9 THE COURT: So, if you will bear with me, another
10 civil case has flared up. Let me attend to that. It will
11 take all of five minutes. Why don't y'all stick around. You
12 can hear the fight, and let me just put this case to bed.

13 (Off the record discussion.)

14 (Other proceedings were held.)

15 (Off the record discussion.)

16 THE COURT: Mr. Barborini, can you hear me now?

17 THE WITNESS: Yes, I can, Your Honor.

18 THE COURT: And the feedback solution has been taken
19 care of. Okay. I apologize for that.

20 Where were we? There we are.

21 MS. CHRISTILLES: Yes, Your Honor.

22 BY MS. CHRISTILLES:

23 Q. Mr. Barborini, when we took a little break there, we were
24 talking about the accessories for firearms. Do you remember
25 that conversation?

1 A. Yes.

2 Q. And during your review of the case were you able to look
3 at the accessories that had been added to the firearms used in
4 the shooting?

5 A. Yes.

6 Q. And I want to talk specifically about those accessories,
7 but I also want, before we get there, to talk a little bit
8 kind of about accessories in general. Are you familiar with
9 silencers?

10 A. Yes.

11 Q. Are they also called suppressors?

12 A. Yes.

13 Q. Are those regulated?

14 A. Yes. They have to be registered with ATF before you can
15 even buy one.

16 Q. So before you can even buy one, you have to go through a
17 process with ATF. Tell me about that process.

18 A. For instance, if you have a Class 3 dealer that deals in
19 national firearms act firearms, which is an FFL that has,
20 actually has special occupational taxpayer license, so if he
21 gets a silencer from, let's say, SilencerCo, which is a
22 manufacturer, it may be in the store but he can't just sell
23 you the silencers like he would a normal firearm.

24 You would fill out an ATF Form 4, which basically your
25 biographical data, photograph, fingerprints, and then \$200 as

1 a tax for that silencer. Then it all goes up to ATF. And it
2 takes approximately six months for approval.

3 Once that's approved and the check clears, then you can go
4 back and pay for your silencer.

5 Q. Is it fair to say that the process for getting a silencer
6 or a suppressor is more difficult than getting a firearm?

7 A. Yes. And it's also registered to you. You can't just
8 sell it after that either. It's got to go through the same
9 process again, if you wanted to sell it.

10 Q. I want to show you JEX 608 which has been previously
11 admitted. So you're going to have a document pop up on the
12 screen there for you.

13 In the middle of that document.

14 This is from the Texas Rangers report. You indicated that
15 you reviewed the Texas Rangers file; correct?

16 A. Right.

17 Q. Right in the middle of the page there, it says "oil can
18 type suppressor." Do you have any clue what that is?

19 MR. LeGRAND: Your Honor, we object. There's no
20 showing that this witness reviewed this document in
21 preparation of either of his reports. In fact, the first
22 paragraph of Government 30, which is his first report, the
23 whole first paragraph is what he did review. And this
24 document is not on there.

25 MS. CHRISTILLES: Your Honor, he indicated that he

1 reviewed the entire Texas Rangers file. This is clearly part
2 of the Texas Rangers file.

3 THE COURT: That's what I heard. That's overruled.

4 MR. LeGRAND: Your Honor, this paragraph says that he
5 reviewed certain, and he lists them from the Texas Rangers
6 file. And it's about 12 to 15 pages.

7 THE COURT: I'll let it in. That's overruled.

8 BY MS. CHRISTILLES:

9 Q. Mr. Barborini, do you know what an oil can type suppressor
10 is?

11 A. It's a vernacular of the, I guess, the back of the gun and
12 ways to get around licensed silencers. Oil can type
13 suppressor. So basically, also -- they are also called
14 solvent traps. So basically say you have a -- it could be a
15 couple different things.

16 The most common one is an oil filter like for your car,
17 like a canister spinner oil filter. That actually makes a
18 pretty good silencer for a couple shots. So what they do,
19 they sell an adapter for a thread. So you can thread this --
20 your oil filter to your firearm. Right?

21 So when you put on your firearm, these people that sell
22 the adaptors say this is for a solid trap, so when you clean
23 your gun you don't get solid on your carpet. So ATF has
24 basically said, well, it can catch solvent, which, of course,
25 is, you know, BS, because nobody screws an oil can filter on a

1 gun.

2 But anyway, so but once you shoot it, it acts as a
3 suppresser. So once you start shooting it, then your intent
4 is you actually made a silencer, which would be illegal to
5 possess.

6 Q. That was going to be my question. Is it legal to possess
7 an oil can type suppressor? Is it legal to possess one?

8 A. The only way you can possess that legally, it's called a
9 Form 1. You would have to take that oil can and the adapter,
10 or the adapter, and you would have to apply to make your own
11 silencer.

12 So you would have to put down you as a manufacturer, the
13 same state of manufacture, the serial number. You send all
14 the information, all your biographical information, to ATF,
15 fingerprints, photographs, all of that, with a \$200 check.

16 After six months goes buy, they will say, okay, you made
17 that oil can suppressor. Now you can have it. Before you
18 make it. Otherwise, no, you can't just screw it on your gun
19 and shoot it.

20 Q. Okay. Now, I want to talk about -- I do want to turn to
21 the accessories that were added to the firearms recovered from
22 the scene of the shooting. Do you know what accessories were
23 added to the Glock .9mm?

24 A. Yes. Basically a Glock 19 has a 15-shot magazine. So
25 this one had a 31-shot -- well, a high-capacity magazine that

1 could hold 31 rounds. But he also bought the floor plate.
2 It's called a plus-two extender. So now that magazine
3 actually holds 33 rounds.

4 And I also saw he added some grip decals. Commonly known
5 as grip tape. So it's a decal sold by the manufacturers that
6 you could stick on your Glock grip to make it, you know,
7 stickier or rougher so it doesn't slip in your hand.

8 Q. Were there accessories or aftermarket modifications to the
9 AR-556?

10 A. Yes.

11 Q. And I want to show you JEX 502-128. Oh, actually, before
12 I do that. Can I show you JEX 686?

13 A. Okay. Got it.

14 Q. All right. You talked about this extended magazine for
15 the Glock .9mm. Does this appear to be what you were
16 discussing with that extended magazine?

17 A. Yes.

18 Q. And which gun are we talking about, when we are talking
19 about the Glock .9mm, just to be clear?

20 A. The pistol pointing right at the camera.

21 Q. Okay. And what would be the part of that firearm that is
22 the extended magazine? How can you tell this has the extended
23 magazine?

24 A. Normally the stock log mags would stop at the grip, so it
25 would just be just below his pinkie finger. We can see it's

1 an extended magazine. And plus it has a little thicker floor
2 plate. That's a plus-two extender, so it makes it, you know,
3 a 33-round magazine.

4 Q. So it's fair to say that gun pointing forward in the
5 picture in JEX 686, the metal piece extending below
6 Devin Kelley's pinkie finger is the extended magazine that you
7 are referring to?

8 A. It's actually plastic, but yes.

9 Q. Okay. I apologize.

10 All right. Now I do want to turn to the accessories added
11 to the AR-556 and I want to pull up JEX 502 at page 128.

12 A. Yes.

13 Q. And we're going to bring up that picture.

14 A. Okay.

15 Q. You indicated that you reviewed the accessories that were
16 added to the AR-556 as part of your expert opinion in this
17 case?

18 A. Yes.

19 Q. I want to walk through some of those accessories. Does
20 this picture accurately reflect some of the accessories that
21 were added to the AR-556 used in the shooting?

22 A. Yes. Yes.

23 Q. Let's start in the front. It says Taclight. What is a
24 Taclight?

25 A. It's short for tactical lights. So he's got a

1 rail-mounted light, so he's got a little adapter to fit on
2 that rail system so he has a light so therefore he can shoot
3 when it's dark without holding a flashlight.

4 Q. Okay. How about the XTS quad rail. What is that?

5 A. That's the hand guard. That's a Picatinny rail.

6 Picatinny is -- you can see the little squares, so a Picatinny
7 rail is where you attach various accessories to include the
8 Taclight as a hook with a piece of metal, so you can hook to
9 the Picatinny rail.

10 Q. While we are looking at that rail, I'm going to do a
11 little shifting of pictures, and I'm apologize, but I want to
12 pull up -- we'll come back to this one, but I want to pull up
13 502-0039.

14 Highlight that picture.

15 A. Yes.

16 Q. We were talking about that rail. Does the rail appear to
17 be different in this picture?

18 A. Yes.

19 Q. And when we are talking about the rail, are we talking
20 about that front-most part of the firearm?

21 A. Not what's circled there, that's the vertical grip. So it
22 would be above that, so...

23 Q. Okay.

24 A. Yes. That's the hand guard, is the general term.

25 Q. And you indicated -- so this is different from the

1 previous picture; is that correct?

2 A. Yes. The other one is a quad rail, Picatinny rail. This
3 is a polymer Magpul rail.

4 Q. What's the difference in the two?

5 A. This is polymer and it's much lighter. And instead of
6 using a Picatinny saw tooth to attach -- it's called an M-LOK
7 system. So you can attach things. It's called an M-LOK
8 system. So it's smaller and lighter than the other rail.

9 Q. I want to zoom out of that and I want to look at the date
10 on this picture.

11 Mr. Barborini, what was the date that this picture was
12 posted?

13 A. So it says October 29, 2017.

14 Q. And just to be clear, the rail in this picture was a
15 different rail than the picture that we looked at previously;
16 correct?

17 A. Definitely.

18 Q. And this rail is lighter?

19 A. Yes.

20 Q. Okay. I want to go back to JEX 502-128. All right.
21 Let's highlight that picture again.

22 All right. We've talked about the Taclight. We've talked
23 about the quad rail. What is this TRS25 red dot?

24 A. It's a Bushnell, that's the brand, red dot. So instead of
25 having -- like a normal firearm, you have a rear site and a

1 front site, so you have to line up two things like this.

2 Well, I'm an AR-15 instructor and we were also issued this
3 ATF (audio transmission gap) a red dot type site. So instead
4 of lining up two things for faster target acquisition, you use
5 the red dot site. So once you site it in, wherever you shoot
6 at, you just point the dots. So wherever the dot it, it will
7 hit. I don't have to waste time lining up the rear and front
8 site.

9 Q. And you said this is a Bushnell brand red dot; is that
10 right?

11 A. Yes. You can sort of see the blurry brand on top of it.

12 Q. So it's not a Ruger red dot brand site?

13 A. No.

14 Q. And I think you mentioned this, but what is the purpose
15 for adding a red dot?

16 A. To make target acquisition much faster, especially it's --
17 so you see a target, whether it's moving or not, I put that
18 dot, I pull the trigger, I can go to the next target. So we
19 actually, through tactical training, we can address multiple
20 targets much faster.

21 Q. You then have the extended charging handle latch; what is
22 that?

23 A. AR-15s have charging handles and some people like to put
24 larger ones. Because if an AR-15 jams, you have to use the
25 charging handle to withdraw the (audio transmission gap) back

1 to clear the jam. Well, sometimes you have problems because
2 it's so small you slip. So people put on large charging
3 handles so you can clear jams easier.

4 Q. So the purpose of this modification is to clear jams
5 easier?

6 A. Yes. Get the gun up and running faster.

7 Q. Okay. What is an MOE stock?

8 A. It's another Magpul. A Magpul original equipment. So
9 that's just a polymer stock made by Magpul. It's an
10 adjustable AR-15 stock. It fits AR-15 variance rifles.

11 Q. And I think you indicated, is this stock on a weapon that
12 you would buy at a sporting goods store, this accessory?

13 A. That sometimes comes as factory on that brand, on some
14 AR-15s, or you can buy them after. You can buy them
15 afterwards. They just slip on and off. It doesn't take
16 really any tools.

17 Q. Why would you change the stock on your AR-15?

18 A. A personal preference.

19 Q. And then you've got a sling. What's a -- why would
20 somebody add a sling to their AR-15?

21 A. Well, it's a more of a tactical sling. You can see it's
22 attached at one side, the buttstock. The other side it has
23 attached to it the Picatinny rail.

24 And as a firearms instructor, an AR-15 firearms
25 instructor, we are trained if you are engaged in any kind of a

1 firefight and your AR-15 goes down, that's a bungee sling, so
2 it sort of springs. You basically brush your AR-15 to the
3 side. So you sling it. You don't want to get rid of it. You
4 switch to your handgun and continue to firefight while you
5 look for cover and get your rifle up and running.

6 Q. And then you've got the CMC3.5 trigger. What's that?

7 A. Usually a stock trigger on a Ruger 556 is going to be
8 stiff. Most AR-15s are base models, so you put a drop-in
9 trigger so it has a lighter trigger pull. It basically helps
10 you shoot faster and more accurately.

11 Q. Is it easy to put in one of those new trigger pulls?

12 A. Yeah. It's not -- you have to -- basically you have to
13 knock out some pins, take out the original trigger, drop this
14 trigger in it and replace the pins.

15 Q. How about this pro mag vert grip? What is that?

16 A. Instead of grabbing, when you fire right from the
17 shoulder, instead of holding around the hand guard some
18 people's personal preference, they like to hold a vertical
19 grip. It's a personal preference for tactical shooting. Some
20 people like it. Some people don't.

21 Q. I want to zoom out and look at the date on this picture.

22 A. It says June 3rd, 2017.

23 Q. Okay. And what is the title of this post?

24 A. Rifle mods pew pew.

25 Q. So this is June 3rd, 2017. I want to go to JEX 502-0127

1 next.

2 All right. And I want to look at this post. This says,
3 "I just put a magwell funnel on the rifle." What's a magwell
4 funnel?

5 A. A funnel is like you have, let's say, a funnel to a (audio
6 transmission gap) your car, or if you're cooking, so you don't
7 want to spill -- try to spill something into a small hole, so
8 you put a magwell funnel. So if you have to do a fast mag
9 change, sometimes you load the mag in fast and you hit the
10 side of the magwell. So this funnels your magazine in for
11 faster mag reloads.

12 Q. Okay. And just help me understand. What goes into the
13 magazine?

14 A. Well, what goes into the magazine well is the magazine.
15 The magazine holds the ammunition. In this case he had a
16 30-round, I believe a 30-round Magpul mags. So your magwell
17 is the lower receiver of AR-15, and this magwell, as it says
18 in this thing, it talks about it, it helps with the speed of
19 reloading.

20 So once you shoot a mag, you drop the mag. You want to
21 load again, you may screw up by hitting the side of the
22 magwell, but now you have a funnel. It's a bigger area. You
23 can jam that in without looking at it.

24 Q. So would it be accurate that somebody would put a magwell
25 funnel in to dramatically increase the consistency and speed

1 of reloads?

2 A. Yes, definitely.

3 Q. I want to look at -- let's look one more time at 502-0039.

4 Let's look at that picture again.

5 A. Okay.

6 Q. Besides that lighter rail, is there anything else
7 different about the accessories in this picture as opposed to
8 the ones we were looking at from the June 2017 picture?

9 A. In this one there is no magwell on -- what do you call it?
10 There is no mag funnel. And now I can clearly see a BAD
11 lever, a B-A-D lever, on it, which is right in front of the
12 trigger inside the trigger guard.

13 Q. What is a BAD lever?

14 A. BAD lever is made by MagPole, a battery assist device
15 basically. Our AR-15 type rifles, let's say you shoot your
16 AR-15s and a mag runs out. Well, the bullet stays open, so
17 then you would dump your magazine by pressing the magazine
18 release on the right side of the gun. The bolt is open, so
19 you put in your new mag, and now the bolt closes on the left
20 side.

21 So what the mag, the BAD lever does, you attach it just
22 with a screw, and now if you looked up at a trigger, instead
23 of taking my hand off the rifle and smacking the bolt closed,
24 I can just use my trigger finger and lift it up and it will do
25 the same thing. So it increases. You don't have to change

1 hands. Or you can hit it on the left or you can use the
2 right.

3 Q. So what's the purpose of having a BAD lever?

4 A. A couple of reasons. Number one, you don't have to move
5 your hands so you have more speed. You don't have to move
6 your hand to close that bolt. You keep it on -- you keep it
7 in the trigger guard, which you want to start shooting again.

8 And now it's ambidextrous. I can shoot -- I can close
9 with either hand basically. But now it allows my finger
10 trigger to also shut the bolt, get it up and running in faster
11 speed, and then I can start shooting again.

12 Q. And you said you didn't see the magwell funnel in this
13 picture?

14 A. No.

15 Q. Would having the BAD lever help with increased speed of
16 reloads?

17 A. Yes. Yes, because you don't have to take your hand off
18 the gun. You just use the -- especially if you practice. You
19 become much faster because if you just push your finger up and
20 it shuts the bolt.

21 Q. Mr. Barborini, I'm going to pose a hypothetical for you.
22 Based on your experience, if someone were to add accessories
23 to a weapon, like the accessories that we have seen here. If
24 they had the ability to add those accessories, would they have
25 the ability to assemble an 80 percent kit?

1 MR. LeGRAND: Your Honor, we object. That's an
2 attempt to circumvent this Court's ruling, first of all. And
3 it's assumption not in evidence.

4 MS. CHRISTILLES: Your Honor, I'm posing a
5 hypothetical to the expert witness, and Your Honor was
6 concerned that we didn't have any evidence that Devin Kelley
7 actually added these accessories, yet we just presented a
8 joint exhibit that at least circumstantially it could be
9 inferred that he added them when he talks about adding the
10 magwell funnel.

11 THE COURT: That's overruled. You can continue.

12 BY MS. CHRISTILLES:

13 Q. Mr. Barborini, just to make sure you heard my question:
14 If somebody hypothetically had the requisite ability to add
15 the accessories that we've seen on this weapon to the AR-15,
16 would they have the ability to assemble an 80 percent kit?

17 A. Yes. And especially the Polymer80 type kits, which is the
18 most common polymer.

19 Q. I want to show you JEX 583-0011.

20 MS. CHRISTILLES: If I may have a moment, Your Honor.

21 No 11. Not 111.

22 There we go. If you could blow that up for me.

23 BY MS. CHRISTILLES:

24 Q. Mr. Barborini, we've kind of talked about those
25 accessories. You see some weights here. Are those weights

1 that seem consistent with the accessories that we've looked
2 at?

3 A. Yes, except the grip. I mean, I don't know if that's the
4 brand grip, but you have the quick detach sling. You have the
5 light. You have the vertical foregrip. And then you have the
6 MOE hand guard, which is the Magpul. That's the, I guess the
7 final one he had, the polymer handgun we discussed, which
8 means Magpul original equipment hand guard. So that's a light
9 handgun. He even has 6.8 ounces, which is lighter than the
10 original one, which is made out of an aluminum and has all its
11 teeth on it.

12 Q. So that MOE hand guard would have been for the Glock .9mm?

13 A. No, that's for the AR-15.

14 Q. I apologize. So this would have all been the AR-15
15 accessories that were added to the firearm?

16 A. Yes.

17 Q. What would, in your professional experience, what would be
18 the purpose of weighing the parts on your gun?

19 A. Well, if you're going to move and shoot, you want the gun
20 to be lighter. I mean, we actually make fun. Some people
21 that don't know, they put so many heavy things on their AR-15
22 they can't even lift them. So the lighter I can make it, the
23 faster I can get it up, get it on my shoulder, and, you know,
24 move and shoot.

25 Q. Mr. Barborini, in your expert opinion what is the

1 significance of these accessories that were added to the
2 AR-556 used in this shooting?

3 A. Tactically, you have everything from the start of the red
4 dot which makes much quicker target acquisition than having
5 sites. And you see actually there is also back-up sites on
6 there, so that one actually has a pop-up back-up site. It's
7 called the back-up iron sites.

8 And then you have the BAD lever. So that helps get it up
9 and running, if you have a jam, or just to change mags. You
10 have that for more speed.

11 You have the charging handles, the extended charging
12 handle. Again, if you have a jab, or if you want to instead
13 of using your bolt close, you could actually sling shot that
14 charging handle and that could grip it.

15 You have the magwell, which makes it faster again. When
16 I'm doing speed, I don't want to jam the side of my gun. Now
17 I can funnel that magazine right away get this thing up and
18 running with a fresh mag.

19 And then you've got the magwell MOE hand guard. So the
20 Picatinny hand guard is much lighter. And then you have the
21 BAD lever, so now I can -- never have to take my finger out of
22 the trigger guard when I need to close that bolt. I just can
23 put my trigger finger up. So I mean, basically faster
24 shooting, multiple targets, easier, lighter, and faster target
25 access.

STEPHEN BARBORINI - DIRECT

1 MS. CHRISTILLES: Pass the witness, Your Honor.

2 THE COURT: Will there be cross?

3 MR. LeGRAND: Yes, Your Honor.

4 THE COURT: Do you want to take a lunch break now or
5 come back, or --

6 MR. LeGRAND: Your call.

7 THE COURT: How much time do you think you need?

8 MR. LeGRAND: Oh, roughly an hour. I'm usually not
9 very long.

10 THE COURT: Let's go ahead and take a break now then.

11 Mr. Barborini, we're going to take our lunch break
12 now. If you will be back on no later than 1:20, central. I'm
13 assuming you are in Florida.

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Yeah. So 1:20 central. 2:20 your time.

16 THE WITNESS: Thank you.

17 (Recess.)

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1 Q. How long -- if we add all the years up that you've been in
2 law enforcement, how would it -- how many would it be?

3 A. 19 -- I was sworn in -- I got hired '77, sworn in in '78,
4 to 2021.

5 Q. And --

6 A. You can do the math.

7 Q. In your career, have you testified more than once?

8 A. Yes.

9 Q. Okay. How many times have you testified?

10 A. I really don't know.

11 Q. Can you offer us a guess?

12 A. I'd say, in federal court, it's well over 100 times I've
13 testified as far as firearms-related matters.

14 Q. And that's just in federal court?

15 A. Well, federal and state court.

16 Q. Has that always been for a governmental entity?

17 A. You were broken up. Say that again.

18 Q. That's always been -- has all of your testimony that
19 you've ever given been for the government?

20 A. Other than civil cases.

21 Q. How many civil cases?

22 A. I worked on two civil cases.

23 Q. Okay. And when were they?

24 A. One was probably five years ago or six years ago, and one
25 was about three years ago.

1 Q. When you worked on civil cases, did you ever testify
2 against the government?

3 A. No.

4 Q. Would you?

5 A. Would I? Yeah. I testify to the truth.

6 Q. Would you testify against the government?

7 A. If the government was wrong, yes.

8 Q. Okay. You know the facts of this case; correct?

9 A. Basic facts, yes.

10 Q. Okay. Was the Air Force wrong?

11 A. The Air Force was --

12 MS. CHRISTILLES: Objection, Your Honor. Outside the
13 scope of direct examination. Speculation.

14 MR. LEGRAND: Your Honor, may I respond?

15 THE COURT: Yeah.

16 MR. LEGRAND: This witness has been directly
17 designated as an expert witness concerning these alternative
18 markets. Well, his opinion and his report -- both of his
19 reports, both his primary report and his supplemental report,
20 deal with a two-prong test.

21 First is that Mr. Kelley gets rejected in a firearms sale.
22 And then after that happens, we go to this other alternative
23 market part of his opinion.

24 So this part of my questioning is about the first prong,
25 and that is the Air Force.

1 THE COURT: That's overruled.

2 You can continue.

3 MR. LEGRAND: Thank you, Your Honor.

4 BY MR. LEGRAND:

5 Q. So did you understand my question, Mr. Barborini?

6 A. Yes.

7 Q. What's your answer?

8 A. Somebody in an arm of the military failed to send in an
9 R-84, which would be transmitted to the criminal justice
10 records. So that would -- that would be a mistake.

11 Q. Okay. Are you here to defend that conduct?

12 A. No. I'm here to testify about what I -- what I just
13 testified to; firearms and firearms-related matters.

14 Q. So in the past some 30-odd years that you've worked in law
15 enforcement, have you worked on gun-related cases where you
16 were trying to -- for example, how many years did you spend
17 where you were trying to arrest people for violating gun laws?

18 A. Well, I investigated gun laws for 25 years, and now I
19 assist in those investigations.

20 Q. And your reports talk about a lot -- many pages of arrests
21 that you've made for felons; correct? Committing felonies
22 related to guns; correct?

23 A. I don't think it has a number of arrests. But, yes, I
24 investigated felons who had firearms, correct.

25 Q. Have you been responsible in your career for felons

1 populating or being put into the NICS database?

2 A. Oh, when I make the arrest -- yes, I make the arrest, and
3 the fingerprints are sent in by my agency, whatever agency I
4 work for, yes.

5 Q. Okay. Are you aware of any instance where you were
6 involved in the prosecution of a felony where the fingerprints
7 of that -- well, where the person was convicted? Let's start
8 there.

9 A. Person was convicted, yes.

10 Q. Okay. Are you aware of any -- how many of those cases
11 have you worked on in 30 years where a felon was convicted?

12 A. Probably hundreds of those cases.

13 Q. Hundreds?

14 MS. CHRISTILLES: Objection, Your Honor. I think
15 that question's a little vague, "felons." How many cases have
16 you worked on where felons were convicted?

17 BY MR. LEGRAND:

18 Q. Okay. How many cases have you worked on where felons were
19 convicted in gun crimes?

20 A. Probably hundreds of cases, state and federal.

21 Q. Okay. And are you aware of any single case you've ever
22 worked for -- either in the police departments you worked for
23 or your 25 years at the ATF, or any of your Palm Beach County
24 work that you've done recently, are you aware of any felony
25 prosecution resulting in a conviction that was not put into

1 the NICS database?

2 A. I'm not aware of any of those.

3 Q. Okay. So they were all put into the NICS database;
4 correct?

5 A. I would assume so.

6 MS. CHRISTILLES: Objection.

7 MR. LEGRAND: Would you be --

8 MS. CHRISTILLES: Speculation.

9 THE COURT: He's already answered.

10 BY MR. LEGRAND:

11 Q. Would you be critical if any of your felony prosecutions
12 that you were involved in that resulted in a conviction were
13 not populated into the NICS database?

14 MS. CHRISTILLES: Objection, Your Honor. Relevance.

15 THE COURT: That's overruled.

16 THE WITNESS: Yes.

17 BY MR. LEGRAND:

18 Q. And why would you be critical of that?

19 A. Because he's convicted by a court of law, and it is
20 supposed to go to his -- to CJIS.

21 Q. Mr. Kelley was convicted of cracking his son's skull;
22 correct?

23 A. I'm not sure. He was convicted of -- in the military.
24 I'm not sure about cracking his son's skull. But yes.

25 Q. Was he convicted of a domestic violence felony --

1 A. Yes.

2 Q. -- that resulted in the fact that he should have been
3 denied any purchase of a firearm after that; correct?

4 A. Yes.

5 Q. And the Air Force should have submitted that to the FBI;
6 correct?

7 A. That is correct.

8 Q. And you're critical of them not doing that; correct?

9 A. Yes.

10 Q. And if they had submitted Mr. Kelley's criminal background
11 history to the FBI, do you agree Mr. Kelley would not have
12 been allowed to buy the AR-556 that he committed all of the
13 horrendous acts that he committed at the Sutherland Springs
14 Baptist Church?

15 A. Well --

16 MS. CHRISTILLES: Objection, Your Honor. That calls
17 for speculation.

18 THE COURT: That's overruled.

19 BY MR. LEGRAND:

20 Q. You can answer --

21 A. Yes, sir.

22 Q. -- Mr. Barborini.

23 A. That gun from that gun dealer, correct.

24 Q. Thank you.

25 So you agree he would not -- I'll go on to another

1 question.

2 You agree that your job for 30-some-odd years has been to
3 get criminals off the streets; correct?

4 A. Correct.

5 Q. And your job has been to make sure they get into the NICS
6 database; correct?

7 A. Yes.

8 Q. And do you agree that your job as a law enforcement
9 officer depends, in many respects, on felony convictions
10 getting into the FBI databases; correct?

11 A. Correct.

12 Q. Do you agree that you depend every day in your job on
13 the -- on the FBI databases having been properly populated
14 with felony convictions?

15 A. Most -- well, not every case. But yes.

16 Q. Do you agree that if someone is not put into the FBI
17 database when they've committed a domestic violence felony,
18 that it hinders your job as a law enforcement officer?

19 A. Yes.

20 Q. Now, Mr. Barborini, I'm going to go just for a moment --
21 if you'll bear with me, I need to go back through a few things
22 that the government went through with you, and then I'm going
23 to go back to some different subjects. Okay?

24 A. Okay.

25 Q. But, first of all, you reviewed -- or counsel put up on

1 the screen a Texas Ranger document.

2 Do you recall that?

3 A. Yes.

4 Q. Did you review that document before today?

5 A. Yes.

6 Q. When?

7 A. I don't know. But I've seen it before about the (audio
8 transmission gap).

9 Q. Okay. I've got your report -- your first report.

10 In fact, your second report only makes reference to you
11 reviewing some deposition testimony; correct?

12 A. Correct.

13 Q. Okay. And your first report talks about what documents
14 you've reviewed; correct?

15 A. Correct.

16 Q. And you recall -- and I think I've counted them -- it
17 mentions some 13 Texas Ranger documents?

18 A. I guess, what the report says, correct.

19 Q. Are you aware that the Texas Rangers file consists of some
20 70,000 documents?

21 A. No.

22 Q. So you -- did you review what the government sent you to
23 review?

24 A. I reviewed those documents, and I recall seeing that
25 document before. But there is a lot of documents.

1 Q. Did the government send you the 70,000 documents from the
2 Texas Ranger file or just these specific 13?

3 A. I --

4 Q. I guess we can say 14 today.

5 A. I am not sure exactly. I reviewed those documents. I do
6 not know if there were 70,000, sir.

7 Q. Okay. Well, I guess what I'm asking you is, in your
8 report, you only list 13.

9 A. Okay.

10 Q. So did you know there were 70,000?

11 That's really what I'm trying to get to.

12 A. I can't answer a question I don't know, sir. That's all I
13 can tell you.

14 Q. Wouldn't you remember if you reviewed 70,000 documents?

15 A. No, I would not.

16 MS. CHRISTILLES: Your Honor, this is asked and
17 answered.

18 BY MR. LEGRAND:

19 Q. You wouldn't?

20 A. No.

21 THE COURT: One second. So now it's been asked and
22 answered. I am surprised that he wouldn't recall reviewing
23 70,000 pages of stuff, but he's given an answer.

24 MR. LEGRAND: Thank you, sir.
25

1 BY MR. LEGRAND:

2 Q. In your review of the various documents the government
3 gave you to review in this case, one of the documents you do
4 list on your report is ATF Firearm Report 12797, which is
5 JEX 423.

6 Do you recall reviewing that, the ATF report in this case?

7 A. Yes.

8 Q. Okay. Did you find anywhere in the ATF report that they
9 discussed the existence of alternative markets that might have
10 been available to Devin Kelley for firearms?

11 A. No.

12 Q. Okay. In reviewing the Texas Rangers file, the some
13 70,000 documents that you don't recall, or in reviewing the
14 FBI file -- did you review the FBI file?

15 A. Yes.

16 Q. Okay. Did you see anything in the FBI file or the Texas
17 Ranger file that said anything about the availability of
18 alternative gun markets to Devin Kelley?

19 A. Do not recall seeing that.

20 Q. You didn't see it, did you?

21 A. No.

22 Q. As far as you know, it's not there, is it?

23 A. I do not remember seeing that document referring to that
24 subject.

25 Q. Okay. You went through with counsel the secondary

1 markets. Let me see if I wrote this down correctly. We'll
2 start with gun shows.

3 A. Yes.

4 Q. Are you aware of any evidence in this case that Devin
5 Kelley ever purchased a firearm at a gun show?

6 A. No.

7 Q. Okay. Are you aware of any evidence in this case that
8 Devin Kelley purchased a firearm from the internet?

9 A. No.

10 Q. Do you know whether or not -- in fact, do you believe that
11 the Texas Rangers turned over every stone trying to find
12 anything in this case about Devin Kelley?

13 MS. CHRISTILLES: Objection. Speculation.

14 THE COURT: That's sustained.

15 BY MR. LEGRAND:

16 Q. Do you know how extensive the Texas Ranger investigation
17 was?

18 A. I assume they're pretty good. I just don't -- I'm not
19 familiar with them.

20 Q. Did you find anything whatsoever to suggest that Devin
21 Kelley had a log-in for Armslist or Texas Gun Trader?

22 A. No.

23 Q. Did you find any evidence whatsoever that Devin Kelley
24 ever went to any of those websites?

25 A. No.

1 Q. So all of your conversation with counsel about that was
2 zero evidence, just conversation? You have no evidence of it?

3 A. No. The conversation was -- referenced how else to get a
4 gun -- that's what my testimony was about -- besides a dealer.

5 Q. Well, let's talk about whether Devin Kelley ever went to
6 those places.

7 Do you have any evidence of that?

8 A. No.

9 Q. Okay. That's what I meant by it being conversation.

10 In other words, the markets exist, is what you're saying?

11 A. Yes.

12 Q. Straw purchase? Do you have any evidence that Mr. Kelley
13 ever was involved in a straw purchase?

14 A. No.

15 Q. Do you have any evidence that Mr. Kelley ever used any of
16 his father's firearms?

17 A. He did shoot his father's firearms.

18 Q. You have evidence that he shot his father's firearms?

19 A. Depositions -- shooting at his father's place.

20 MR. LEGRAND: Okay. Could we pull up Michael
21 Kelley's deposition, Volume I, page 42.

22 *(Playing video)*

23 BY MR. LEGRAND:

24 Q. Okay. Does that refresh your recollection of that
25 testimony?

1 A. There's something about a .380 Walther, I sort of
2 remember, that Devin had access to.

3 Q. And you mentioned Mr. Kelley's guns and where they were
4 kept in a cabinet; correct?

5 A. Correct.

6 Q. You didn't mention the fact that Mr. Kelley used trigger
7 locks.

8 What are trigger locks?

9 A. A trigger lock is either a -- could be a -- looks like a
10 hasp lock with a cable on it, or a trigger lock that fills in
11 the trigger guard to prevent someone from pulling the trigger
12 or -- it depends on where you put the lock -- or accessing the
13 chamber to load it.

14 Q. Are they reliable?

15 A. Well, if it's the cable -- the trigger locks/cable locks
16 can be defeated with snips or a hacksaw.

17 Q. Do you own any trigger locks?

18 A. Yes.

19 Q. So you make use of them yourself?

20 A. No. I keep my guns in a safe.

21 Q. Have you ever used trigger locks?

22 A. No.

23 Q. Do you know whether or not Michael Kelley used trigger
24 locks?

25 A. I do not know.

1 Q. Okay. You didn't mention it in your reports; correct?

2 A. Correct.

3 Q. You did read his deposition, though.

4 Are you aware that he said in his deposition that he used
5 trigger locks?

6 A. He may have.

7 Q. Okay. Now, next, you talked about this 80 percent gun?

8 A. Yes.

9 Q. In this case, have you seen any evidence whatsoever that
10 Devin Kelley ever purchased or possessed an 80 percent gun?

11 A. No.

12 Q. Have you seen any evidence whatsoever that he ever built a
13 gun out of an 80 percent gun?

14 A. No.

15 Q. The newspaper? Have you seen any evidence that Mr. Kelley
16 ever -- Devin Kelley ever purchased a firearm from a
17 newspaper?

18 A. No.

19 Q. How about from friends?

20 A. Oh, Danielle, in her deposition, said that he got a gun
21 from a friend and he hated it. So he got rid of it and got
22 the Glock.

23 Q. And ghost guns? Any evidence that Mr. Kelley ever had a
24 ghost gun?

25 A. No.

1 Q. Do you know whether or not Devin Kelley ever attended any
2 gun shows?

3 A. No.

4 Q. Did the government give you any evidence in that regard
5 concerning Devin Kelley going to gun shows?

6 A. No. I don't believe so.

7 Q. Okay. Now, you mentioned -- in your conversations with
8 counsel, you also mentioned that sometimes FFLs call you to
9 complain.

10 Do you recall that?

11 A. Correct.

12 Q. Okay. Do you know if any FFLs in this case ever contacted
13 or were in touch with a law enforcement concerning Devin
14 Kelley?

15 A. No.

16 Q. Have you been provided any evidence that discusses whether
17 or not an FFL ever contacted law enforcement with reference to
18 Devin Kelley?

19 A. No.

20 MR. LEGRAND: Can we look at JEX 22-585.

21 Can you blow up paragraph 4 for me.

22 BY MR. LEGRAND:

23 Q. Have you ever reviewed -- this is the top half of
24 paragraph 4.

25 Have you seen this document before?

1 A. No, I --

2 Q. You have?

3 A. I don't know.

4 Q. You understand it talks about Mr. Kelley and "If the cops
5 show up at my door, I'll shoot them," and "My work is so lucky
6 I do not have a shotgun because I would go in there and shoot
7 everyone"?

8 MS. CHRISTILLES: Objection, Your Honor.

9 THE COURT: One second.

10 Go ahead.

11 MS. CHRISTILLES: Objection. Relevance.

12 I think the question was if an FFL ever called the cops on
13 Mr. Kelley, and then we transitioned into this document. And
14 I'm not sure how this document is at all relevant to
15 Mr. Barborini's expert testimony on firearms.

16 MR. LEGRAND: Your Honor, I'm going to show that here
17 in the next question.

18 THE COURT: Yeah. Tie it in.

19 MR. LEGRAND: Can we go to the next paragraph,
20 straight down, that begins with "on June" -- "on 7 June."

21 Can you highlight that paragraph for me, the first three
22 lines. Thank you.

23 BY MR. LEGRAND:

24 Q. Have you reviewed this paragraph of JEX 22 before,
25 Mr. Barborini?

1 A. I recall the DB9, yes.

2 Q. Okay. Are you aware that the Holloman Air Force Base base
3 exchange is also a firearm FFL?

4 A. Yes.

5 Q. And are you aware that at least two of the firearms that
6 Mr. Kelley owned or purchased were purchased at the Holloman
7 Air Force Base exchange?

8 A. Yes.

9 Q. Now, reading the first line of this paragraph, do you see
10 where it says "on 7 June --"

11 A. "The BX," yes.

12 Q. -- "of 2012"?

13 A. Yes.

14 Q. Do you know what was going on that day in Devin Kelley's
15 life?

16 MS. CHRISTILLES: Objection, Your Honor. Outside the
17 scope of direct. Relevance.

18 THE COURT: That's overruled.

19 BY MR. LEGRAND:

20 Q. Okay.

21 A. I don't recall --

22 Q. If you look down -- if you look down further in the
23 paragraph, Mr. Barborini, do you see that that is the same day
24 he escaped from the Peak mental health facility?

25 A. Yes. I'm reading that now. Yes, sir.

1 Q. Okay. And are you aware that on the very same day, the
2 Holloman Air Force Base, New Mexico, base exchange notified
3 the Air Force Office of Special Investigations, the Det 225
4 that "The subject" -- that would be referring to Devin Kelley;
5 correct?

6 A. Yes.

7 Q. "The subject called and placed an order around
8 1400 hours" -- that would be 2:00 in the afternoon; correct?

9 A. Yes.

10 Q. -- "on 7 June of 2012 for a Diamondback DB9, semiautomatic
11 9-millimeter handgun."

12 What is that, Mr. Barborini?

13 A. A DB9 is a semiautomatic pistol made in Daytona Beach,
14 Florida -- actually in Daytona, Florida -- Cocoa, Florida.
15 Excuse me. DB9 is a polymer semiautomatic handgun.

16 Q. Are you aware, Mr. Barborini, that on February 12th of
17 2012, Mr. Kelley bought an EAA W .38-caliber revolver at the
18 Holloman BX?

19 A. Yes.

20 Q. Okay.

21 THE COURT: What was that date again?

22 MR. LEGRAND: February 12th of 2012.

23 THE COURT: Thank you.

24 BY MR. LEGRAND:

25 Q. And are you aware, Mr. Barborini, that on April the 12th

1 of 2012, Mr. Kelley bought a SIG Sauer P250 at the Holloman
2 Air Force Base base exchange?

3 A. Yes.

4 Q. Did anyone in this case tell you that the 49th Security
5 Forces at Holloman Air Force Base had caused -- somewhere in
6 this time period had caused Mr. Kelley to give up his
7 EAA W .38 revolver?

8 A. No.

9 Q. Did the government ever tell you that that gun was in the
10 armory because the 49th Security Forces had ordered Mr. Kelley
11 to turn it over?

12 A. No.

13 Q. And does it appear here, then, that then he returned -- in
14 other words, after he was told to turn over his gun and put it
15 in the armory, where did he go next to buy a firearm? Another
16 FFL?

17 MS. CHRISTILLES: Your Honor, I'm going to object to
18 relevance and outside the scope of direct.

19 THE COURT: That's overruled.

20 BY MR. LEGRAND:

21 Q. Did he return to Holloman Air Force Base to purchase the
22 SIG Sauer P250?

23 A. The SIG Sauer, he already bought.

24 And then he went to the DB9; is that what you're saying?

25 Q. No. I'm saying they told him to turn in the

1 .38 revolver --

2 A. Okay.

3 Q. -- and then, after that, he bought the SIG Sauer P250 at
4 Holloman Air Force Base base exchange?

5 A. Yes. Yes.

6 Q. Okay. And so when confronted with giving his weapon up to
7 the -- to the Security Forces at the 49th, his -- what he
8 resorted to doing was returning to an FFL; correct?

9 A. Correct.

10 Q. In fact, the same one he had gone to before, on the BX?

11 A. Yes.

12 Q. Okay. And then as you and I talked a few minutes ago, on
13 the document that's JEX 22, apparently, on June the 9th -- on
14 June the 7th, Holloman Air Force Base base exchange called the
15 Office of Special Investigations and told them that Mr. Kelley
16 had ordered a firearm?

17 A. Yes.

18 Q. Why would an FFL call the law enforcement officers and
19 tell them that this man has ordered a firearm?

20 MS. CHRISTILLES: Objection. Speculation.

21 THE COURT: That's sustained.

22 BY MR. LEGRAND:

23 Q. Well, is it a fact they did apparently call the Office of
24 Special Investigations and tell them that Mr. Kelley had
25 ordered a firearm?

1 A. Yes.

2 Q. Okay. So does it appear from this document that, for some
3 reason, the BX called the Office of Special Investigations
4 about Mr. Kelley?

5 A. Yes.

6 Q. Do you know how the BX learned or came into the
7 understanding that they should call the Office of Special
8 Investigations if Mr. Kelley orders a firearm?

9 MS. CHRISTILLES: Objection. Personal knowledge.

10 THE COURT: Yeah, he needs to -- that's what the
11 question's asking him, does he know?

12 That's overruled so far. Let's wait for the response.

13 BY MR. LEGRAND:

14 Q. Well, do you know how they came into that knowledge?

15 A. No.

16 Q. We do know, do we not, sir, that no other FFLs in the
17 country came into any knowledge about Devin Kelley; correct?

18 A. That I know of, correct.

19 Q. Okay. So, apparently, the BX at Holloman somehow came
20 into some information about Mr. Kelley; correct?

21 A. Yes.

22 Q. But would it appear -- well, you know -- you know for a
23 fact that the security forces at Holloman Air Force Base
24 didn't share that information with the FBI, did they, that
25 there was a problem with Devin Kelley?

1 A. No.

2 Q. Okay. They should have, shouldn't they?

3 You and I have already discussed that.

4 A. The FBI -- when you say "FBI," you're talking about the
5 records?

6 Q. The FBI should have known about Devin Kelley's conviction?

7 A. If you're talking about CJIS records, correct.

8 Q. Okay. Now, next on my list, in December of 2014, am I
9 correct that's when Mr. Kelley bought the Glock 19 from
10 Specialty Sports?

11 A. Okay.

12 Q. Is that correct?

13 A. Yes.

14 Q. Okay. And is Specialty Sports an FFL?

15 A. Yes.

16 Q. Okay. And then June 26th of 2015, did Mr. Kelley buy a
17 .357 pistol or handgun from Specialty Sports --

18 A. Yes.

19 Q. -- in Colorado?

20 A. Yes.

21 Q. Are they an FFL?

22 A. Yes.

23 Q. On April the 7th of 2016, did Mr. Kelley buy that
24 Ruger AR-556 that he sprayed the church at Sutherland Springs
25 with?

1 A. Yes.

2 Q. Did he buy it from an FFL?

3 A. Yes.

4 Q. Did the government make you aware that a few months before
5 that, he had gone to Dick's Sporting Goods in New Braunfels
6 and tried to buy a weapon like that?

7 A. I don't believe so.

8 Q. Okay. Has the government made you aware that Dick's
9 Sporting Goods rejected Mr. Kelley?

10 A. There's one dealer that rejected him due to a magazine
11 being with the gun, but that was the same one he got it from.
12 I don't recall the other one.

13 Q. My question -- I'll repeat it for you.

14 My question is, did the government ever make you aware
15 that there's evidence that Dick's Sporting Goods rejected
16 Mr. Kelley in an attempt to purchase a firearm?

17 A. I don't -- I don't believe so.

18 Q. Okay. Assuming that they did, would it appear that
19 Mr. Kelley then again returned to another FFL?

20 A. Yes.

21 Q. Okay. He didn't go to any of these alternative markets
22 that you've talked about; correct?

23 A. For that gun, you are correct.

24 Q. In other words, when they took his gun away from him at
25 Holloman, he went back to an FFL, correct, to get another one?

1 A. Correct.

2 Q. Okay. When he escaped from Peak mental hospital, he tried
3 to get a gun from where? Another FFL; correct?

4 A. Yes.

5 Q. Okay. And, in fact, that FFL called security forces;
6 correct?

7 A. Yes.

8 Q. And then when he tried to buy a firearm at Dick's Sporting
9 Goods and was rejected, he returned to an FFL; correct?

10 A. Yes.

11 Q. He never went to any of these alternative markets that
12 you've testified about today; correct?

13 A. That I know of, correct.

14 Q. Now, am I correct that because of the Air Force and their
15 failure to report Mr. Kelley to the FBI, that the entire gun
16 market was available to Mr. Kelley?

17 A. From an FFL, correct.

18 Q. Okay. He could go anywhere he wanted to buy a firearm;
19 correct?

20 A. Yes. In certain -- in those states, correct. In -- state
21 and Colorado for long guns, correct.

22 Q. And do you have any evidence that other than this handgun
23 you mentioned and the shotgun that he didn't like, that he
24 ever went anywhere but an FFL?

25 A. No.

1 Q. That's the choice he made; correct?

2 A. Correct.

3 Q. Do you know why he made that choice?

4 A. I have no idea.

5 Q. Okay. You've talked about the fact that new weapons are
6 available at gun shows; correct?

7 A. You were broken up, sir. Try one more time.

8 Q. You testified today that new guns are available at gun
9 shows; correct?

10 A. Yes. Yes.

11 Q. Okay. Any evidence that Mr. Kelley ever took advantage of
12 that?

13 A. No.

14 Q. Any evidence that Mr. Kelley ever went anywhere to get
15 this Ruger AR-556 except a FFL?

16 A. No.

17 Q. He could have gone to his father? His father had an --
18 had an AR; correct?

19 A. Correct.

20 Q. In fact, he went with his father to Cabela's to buy that
21 firearm.

22 Did you understand that?

23 A. I don't recall that. Could have happened, but I don't
24 recall.

25 Q. So if one of these straw purchases you've talked about

1 were going to take place, that would have been an opportunity,
2 wouldn't it, when he and his father went to Cabela's and his
3 father bought an AR rifle?

4 A. Yes, could have.

5 Q. Okay. Do you have any evidence that Mr. Kelley bought
6 that gun for Devin?

7 A. No.

8 Q. Okay. So Devin didn't seize on that opportunity to go
9 through a straw sale, did he?

10 A. Correct.

11 Q. And the other choice he could have made, that you've
12 talked about, is Armslist or Texas Gun Traders.

13 We've gone through that, haven't we?

14 A. Yes, we have.

15 Q. Now, I want to go -- counsel talked about silencers and an
16 oil can silencer.

17 Do you know why she brought that up?

18 A. No.

19 Q. Okay. Any evidence that Mr. Kelley ever used a silencer
20 at Sutherland Springs?

21 A. No.

22 Q. These oil can silencers, could you fire 500 shots through
23 one of them?

24 A. Yes.

25 Q. Could?

1 Do you have any evidence that he used one to shoot all
2 these folks?

3 A. No.

4 Q. Okay. So you have no idea why she brought that up?

5 A. It was -- it was in an email.

6 Q. No, no. I'm talking about counsel for the government.

7 Do you know why she brought up the oil can silencer?

8 A. No.

9 Q. Do you know why she brought up all these alternative
10 markets?

11 A. Well, the oil can silencer, it's a way to get around the
12 law of -- a silencer law. And he stated it in an email, so
13 that's probably why she brought it up.

14 Q. The oil can silencer would have been illegal, correct, for
15 Devin Kelley?

16 A. Well, again, once he shoots it, yes. Once he intends to
17 use it as a silencer, correct.

18 Q. But that -- even if he had an oil can silencer or even if
19 he intended to use one, that oil can silencer wasn't any more
20 illegal than the three firearms he had with him at Sutherland
21 Springs, were they? They were just as illegal, weren't they?

22 A. The oil can silencer, when you buy it, it's a solvent
23 trap. So it's not illegal for anyone to have until you shoot
24 it. And then, okay, it's a silencer.

25 Q. So until he put it on a gun and used it as a silencer,

1 there's nothing wrong with having that?

2 A. That's correct.

3 Q. But the three firearms that he had with him at Sutherland
4 Springs, they were definitely -- definitely illegal; correct?

5 A. For him to possess, correct.

6 Q. Now, you and I have talked about -- and I don't want to
7 spend any length of time on this, really.

8 But you and I have talked about the fact you're critical
9 of the Air Force for not reporting Devin Kelley; correct?

10 A. Well, someone that -- yes.

11 Q. Do you agree that the Air Force failure to report was a
12 substantial factor in Devin Kelley being able to purchase the
13 AR-556 that he used at Sutherland Springs?

14 MS. CHRISTILLES: Objection.

15 THE COURT: One second.

16 MS. CHRISTILLES: That calls for a legal conclusion.

17 THE COURT: That's overruled.

18 BY MR. LEGRAND:

19 Q. Go ahead. You can answer, sir.

20 A. Say that question one more time.

21 Q. I'll say it a lot slower.

22 Do you agree, Mr. Barborini, that the Air Force's failure
23 to put Devin Kelley's felony conviction into the NICS database
24 was a substantial factor in Devin Kelley being able to acquire
25 the Ruger AR-556 that he used to shoot everybody at Sutherland

1 Springs?

2 A. That rifle, correct.

3 Q. Okay. And your testimony -- sir, your testimony's a
4 two-prong test, correct --

5 A. Tell me --

6 Q. -- as I understand it?

7 In reading your report -- in reading your report, what I
8 find, sir, is that your report depends on two factors.

9 One, your report talks about all these alternative markets
10 that are out there; correct?

11 A. Correct.

12 Q. Okay. But am I not correct that your report -- before
13 these alternative markets even come into play, Mr. Kelley had
14 to be rejected somewhere from buying a firearm; correct?
15 Doesn't your report assume that?

16 A. Well, it's an alternative market. If he was rejected, he
17 may have gone to that market, or maybe he just would have went
18 to that market anyway. But I don't know what was in his mind,
19 why he would go to an FFL.

20 Q. You don't know that, and I don't want to get into that.
21 My question is very simple.

22 Do you agree Mr. Kelley never had to go to an alternative
23 market? He could go where he wanted; correct?

24 A. He can go to a dealer, yes.

25 Q. And you have no evidence whatsoever that he ever went to

1 an alternative market; correct?

2 A. Correct.

3 Q. And all I'm driving at is that in your report, don't you
4 make it clear that all of these alternative markets aren't
5 really in Devin Kelley's universe unless he gets rejected
6 somewhere trying to buy a gun?

7 A. My report basically just outlines how to get the gun.
8 Yes, he was rejected, he could go there. But he could have
9 gone there anyway. And I don't know what was in Devin
10 Kelley's mind.

11 Q. But if he wasn't rejected, he continued -- he did continue
12 to go to FFLs; correct?

13 A. That is correct.

14 MR. LEGRAND: I'll pass the witness. Thank you.

15 THE COURT: Anything else?

16 MS. CHRISTILLES: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY MS. CHRISTILLES:

19 Q. Mr. Barborini, I'm going to go back through and just talk
20 about, first, Devin Kelley's access to other weapons. And
21 let's start with Michael Kelley and Rebecca Kelley.

22 Did you review certain depositions in this case from
23 Michael Kelley?

24 A. Yes.

25 Q. Okay. Did -- I think you started to say it on

1 cross-examination. You were talking about a weapon of Michael
2 Kelley's that you thought Devin Kelley had access to.

3 Why don't you go ahead and finish that statement now.

4 MR. LEGRAND: Your Honor, we would object. That's
5 not proper redirect.

6 THE COURT: That's overruled.

7 THE WITNESS: I remember he had access -- shoot a
8 Walther .380, a PPK.

9 BY MS. CHRISTILLES:

10 Q. And do you recall Michael Kelley talking about Devin
11 Kelley cleaning his weapons?

12 A. Yes.

13 Q. Do you ever recall looking at any testimony that talked
14 about Devin teaching his mother how to shoot?

15 A. You broke -- I'm sorry. You're broken up.

16 Q. Oh, because I can't remember to turn my microphone up.

17 A. Okay. That's better.

18 Q. That's all right.

19 Do you recall anything about Devin Kelley teaching his
20 mother to shoot better?

21 A. Yes.

22 Q. Now, let's talk about Danielle Kelley's testimony.

23 You reviewed her testimony; correct?

24 A. Yes.

25 Q. Okay. Does she talk about Devin Kelley ever going to any

1 gun shows?

2 A. I'm not sure. I think she makes mention of it, but I just
3 can't recall for -- but I just can't recall. I think she
4 mentioned going to a gun show, but I just don't recall.

5 Q. But I think you did talk about her mentioning a handgun
6 that --

7 A. Oh, she definitely got a handgun from -- Devin Kelley got
8 a handgun from a friend. He didn't like it, so he sold it.

9 And then I noticed further in a report that he said it was
10 a cheap gun and he didn't like it. And then later I noticed
11 the SCCY semiautomatic 9-millimeter pistol that he sold to a
12 pawn shop.

13 So I surmise that may be the gun, because it is a cheap
14 gun compared with the Glock.

15 Q. Do you recall any other weapons that Kelley might have
16 bartered for besides that handgun?

17 A. The shotgun, the 12-gauge shotgun. I believe it was a
18 Maverick shotgun.

19 Q. Do you recall whether or not he got that from an FFL or a
20 non-FFL?

21 A. I believe he got it from a source, a friend.

22 Q. Now, you reviewed some of Michael Kelley's information.

23 Do you recall if Michael Kelley ever mentioned trigger
24 locks when he was interviewed by the Texas Rangers?

25 A. I don't recall that.

1 Q. Now, I want to -- I want to shift to this information
2 about guns purchased while Devin Kelley was in the Air Force.
3 Okay?

4 A. Yes.

5 Q. Counsel talked about some gun purchases at the BX.
6 Do you know what a BX is?

7 A. Yes.

8 Q. What is a BX?

9 A. It's a place you go to get anything from food to clothing.
10 My father-in-law, who was in the military -- went to the BX
11 with him.

12 Q. Okay. So it's a store.

13 And plaintiffs' counsel talked to you about some gun
14 purchases in February of 2012.

15 Do you remember that?

16 A. Yes.

17 Q. Okay. And I think in April of 2012.

18 Do you remember that?

19 A. Yes.

20 Q. Do you know when Devin Kelley would have been prohibited
21 from buying an -- from buying a firearm from an FFL?

22 A. I don't recall -- the date that he was convicted, which I
23 don't recall the exact date.

24 Q. Okay. So you don't know whether or not -- when he
25 purchased those weapons from the BX, whether or not he was

1 prohibited from buying them?

2 A. I can't -- don't know -- don't remember the exact day he
3 was convicted. I think it was '15, maybe.

4 Q. But there would have had to have been a conviction;
5 correct?

6 A. Correct.

7 Q. And you don't have any personal knowledge about why there
8 would have been a call from the BX to OSI, do you?

9 A. No.

10 Q. Now, you were asked about whether or not Devin Kelley
11 could have purchased that AR-556, correct, from the FFL?

12 A. Yes.

13 Q. You're not here to testify about whether Academy legally
14 sold the AR-556 on April 7th, 2016, are you?

15 A. No.

16 MS. CHRISTILLES: One moment, Your Honor.

17 *(Discussion off the record)*

18 MS. CHRISTILLES: Pass the witness, Your Honor.

19 THE COURT: Anything further?

20 MR. LEGRAND: Nothing further.

21 THE COURT: Any further need for this witness?

22 MR. LEGRAND: No, Your Honor.

23 THE COURT: Can he be excused?

24 MS. CHRISTILLES: Yes, Your Honor.

25 MR. LEGRAND: Yes, Your Honor.

1 THE COURT: Thank you, sir. You're excused.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: Have we gone through all the witnesses
4 for today now or not?

5 MR. STERN: Yes, Your Honor.

6 THE COURT: So what's the schedule for tomorrow? Is
7 it still just John Donohue?

8 MR. STERN: Just John Donohue.

9 THE COURT: Okay.

10 MR. STERN: And, Your Honor, he's actually on
11 California time. I don't know if that means we could take a
12 little bit -- start a little bit later in the morning.

13 THE COURT: Yeah. Well, considering we're only doing
14 one witness.

15 And we can get through him tomorrow; right?

16 MR. STERN: Oh, I believe so. Absolutely.

17 MR. ALSAFFAR: Definitely. Definitely.

18 MR. STERN: I would think he's actually relatively
19 short.

20 THE COURT: Well, I don't want to give you -- I don't
21 want to give you too late a -- too late of a start time and
22 then all of the sudden we don't do -- finish him up.

23 Start at 10:00, 10:30? Central or --

24 MR. STERN: That works for us.

25 MR. ALSAFFAR: It's your witness, so that's fine with

1 me, but I don't want to --

2 MR. STERN: If we start at 10:30, we'll certainly
3 finish by --

4 MR. ALSAFFAR: I think that's true.

5 MR. STERN: -- I think around lunchtime, frankly.
6 But I don't know.

7 THE COURT: Okay. Then, we'll start 10:30 central
8 for the witness. That will be 8:30 his time. And just
9 Mr. Donohue tomorrow.

10 Then, just planning the rest of the week out, what are we
11 doing for Thursday?

12 MR. STERN: Thursday, we have, in the morning, Erin
13 Higgins, followed by Dr. Bursztajn.

14 Friday morning, we have only Dr. Fox.

15 Monday morning, we have plaintiffs' rebuttal, Dr. Metzner,
16 followed by -- I take it that we will do closing perhaps in
17 the afternoon. We haven't gotten much direction from Your
18 Honor in terms of the length of closing arguments.

19 THE COURT: So why don't I give you -- if we finish
20 up -- under the assumption we finish up Metzner Monday --

21 MR. ALSAFFAR: Yes.

22 THE COURT: -- let's just plan on just Metzner on
23 Monday. You all have time to prepare your closing remarks,
24 and we'll hear those on Tuesday.

25 How much time do you want for closing, Plaintiffs?

1 MR. ALSAFFAR: Your Honor, I don't think we need more
2 than an hour each.

3 THE COURT: What do you think?

4 MR. STERN: Your Honor, can -- I think you heard a
5 lot of mine yesterday, so I think an hour will be sufficient.

6 THE COURT: Okay. So an hour each for closing, and
7 that'll be on Tuesday morning, assuming we remain on this
8 schedule.

9 Very well, then. 10:30 tomorrow morning.

10 *(At the bench off the record)*

11 MR. STERN: Your Honor?

12 THE COURT: Yes.

13 MR. STERN: If I can propose?

14 THE COURT: Yes.

15 MR. STERN: I take it that your ruling with regards
16 to Mr. Barborini's report and supplemental report will hold as
17 it pertains to all the rest of the expert reports as well?

18 THE COURT: Yes.

19 MR. STERN: And the learned treatises as well.

20 THE COURT: Yes.

21 MR. STERN: So what I propose is just to have
22 plaintiffs' counsel and I go through the rest of the
23 outstanding exhibits tonight. And I think we could probably,
24 you know, cut down the vast majority of what's left.

25 THE COURT: That would be appreciated.

1 MR. STERN: Of course.

2 MR. ALSAFFAR: Yeah, I agree.

3 THE COURT: Anything else we need to take up, then,
4 before I leave today?

5 MR. ALSAFFAR: No, Your Honor, not from plaintiffs.

6 MR. STERN: Not from the government.

7 THE COURT: Thank you. We'll see you all 10:30
8 tomorrow morning.

9 * * *

10 *(Overnight recess)*

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I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
 .
 PLAINTIFFS, .
 vs. . DOCKET NO. 5:18-CV-555-XR
 .
 UNITED STATES OF AMERICA, .
 .
 DEFENDANT. .
 .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 14, 2021

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17 UNITED STATES DISTRICT COURT
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1 *(San Antonio, Texas; April 14, 2021, at 10:28 a.m.)*

2 THE COURT: Thank you. Please be seated.

3 Good morning. We'll resume with trial today.

4 All counsel, parties, witnesses, participants, and members
5 of the public are reminded that this is a formal proceeding,
6 and that they should behave at all times as if they were
7 present in the courtroom. The standing order of the
8 San Antonio Division of the Western District of Texas on
9 remote access to court proceedings remains in effect.

10 Photography, recording, or streaming of these proceedings
11 by any means is strictly prohibited. Though this proceeding
12 is open to the public, technological restraints require that
13 members of the general public request access from the
14 courtroom deputy to participate remotely. Those granted
15 approval to participate remotely must not forward the
16 electronic link to nonparticipating colleagues or persons and
17 must not post the link on any public forum.

18 As with all courtroom proceedings, violations of these
19 instructions are subject to contempt proceedings.
20 Accordingly, please exercise proper courtroom decorum at all
21 times.

22 With that, do we need to take up anything before the
23 witness?

24 MR. STERN: Just a minor housekeeping matter, Your
25 Honor. With regards to outstanding documents on the

1 government's exhibit list, the government seeks to move in
2 Government's Exhibit 123.

3 THE COURT: One second. Thank you.

4 123?

5 MR. STERN: 115 and 116.

6 THE COURT: Anything else?

7 MR. STERN: 143A through R. Those are not objected
8 to?

9 MR. JACOB: No objections, Your Honor.

10 THE COURT: 123's admitted, 115's admitted, 116 is
11 admitted, 143A through R admitted.

12 MR. STERN: We also seek to admit 157 through 162.

13 THE COURT: Any objection?

14 MR. JACOB: 157 through 162 are settlement documents
15 in a -- one of the plaintiff's cases. While we can address
16 that in the damages stage, they have no relevance to this
17 stage of the proceeding.

18 THE COURT: 157 through 162 are not admitted at this
19 time.

20 Any other government exhibits that are agreed to?

21 MR. STERN: Agreed to? No. Your Honor, there is the
22 Government's Exhibit 240 which is the government's key
23 documents. As I understand plaintiffs' position, obviously
24 I'll let them speak for themselves, the issue would be whether
25 there's any documents contained within the key documents that

1 have been either not admitted at this time or wouldn't be
2 agreed to at a future date. The government recognizes that,
3 and so with regards to one or two documents that may be
4 contained within the larger universe, those can be excluded
5 and then we would seek to admit the full Government's Exhibit
6 240.

7 MR. JACOB: And, Your Honor, we were just told about
8 this, so we haven't had an opportunity to cross-reference the
9 specific documents that are in that batch with what has been
10 admitted up to this point.

11 THE COURT: Right.

12 MR. STERN: And that's fair. So we can take up 240
13 at another time, and that's the only document that's still
14 outstanding with regards to the government's exhibit list.

15 THE COURT: Anything else from the government?

16 MR. STERN: No, Your Honor.

17 THE COURT: Thank you.

18 Is your witness here? Yes. Your witness?

19 MS. KRIEGER: Your Honor, the United States calls
20 John Donohue. May I proceed?

21 THE CLERK: Mr. Donohue, if you will raise your right
22 hand.

23 *(The oath was administered)*

24 THE COURT: You may.

25 MS. KRIEGER: Thank you.

1 JOHN DONOHUE, III, DEFENDANT'S WITNESS, SWORN

2 DIRECT EXAMINATION

3 BY MS. KRIEGER:

4 Q. Professor Donohue, can you see us okay?

5 A. I can.

6 Q. And you can hear us okay?

7 A. Yeah.

8 Q. And I see -- I just -- I can see you're in your office and
9 that you have assorted papers around you. I just want to ask
10 that you not look at any papers or documents unless we put
11 something on the screen. If there's something that you cannot
12 read on the screen and you happen to have a paper version of
13 it, please let us know and you'll be able to look at that
14 paper copy. Is that okay?

15 A. That's fine.

16 Q. Okay. Great.

17 Professor Donohue, can you please introduce yourself to
18 the Court.

19 A. Yes. My name is John J. Donohue.

20 Q. And what is your profession?

21 A. I am a lawyer and an economist, and I teach at Stanford
22 Law School.

23 Q. What is your title?

24 A. Well, it's a long and involved one. I'm the C. Wendell
25 and Edith M. Carlsmith Professor of Law.

1 Q. What does it mean to be the C. Wendell and Edith M.
2 Carlsmith Professor of Law at Stanford Law School?

3 A. That is just a designation that I'm -- I'm what's called a
4 chaired professor, so a professor with tenure, and a little --

5 THE COURT: I was going to say, can you bring the mic
6 closer? Professor Donohue, can you get either closer to the
7 mic or bring the mic closer to you?

8 THE WITNESS: Yes. Is that better?

9 THE COURT: That's better. Thank you.

10 THE WITNESS: Okay. I'll try to speak up.

11 MS. KRIEGER: Does the court reporter need him to
12 repeat that answer?

13 COURT REPORTER: Yes.

14 BY MS. KRIEGER:

15 Q. So I'm just going to ask the question again.

16 What does it mean to be the C. Wendell and Edith M.
17 Carlsmith Professor of Law at Stanford Law School?

18 A. Well, tenured professors are sometimes recognized with
19 what's called the chaired professorship, and this is what the
20 C. Wendell and Edith M. Carlsmith professorship is. So it's
21 an honorific for those who survive long enough to get it, I
22 guess.

23 Q. Professor Donohue, we're going to put JEX 619 up on the
24 screen. Do you recognize this document?

25 A. Yes, I do. This is my CV.

1 Q. Is this -- is this a current version of your CV, as far as
2 it's -- it's a long document. But as far as you can tell, is
3 this the most current version?

4 A. Yes.

5 Q. Let's talk for a minute about your educational background.
6 Can you tell the Court what degrees you hold?

7 A. Yes. I went to Hamilton College and got a BA majoring in
8 math and economics. Then I went to Harvard Law School, where
9 I got my law degree. Then, after clerking and working for a
10 while, I went back to Yale and got a Ph.D. in economics. And
11 then I've been teaching ever since I left Yale.

12 Q. Your degrees in mathematics and economics helped you in
13 your research?

14 A. Yes. I think of myself with -- a lot of my work as --
15 involved in empirical evaluation of law and policy, and it's
16 very heavily econometric and statistically focused. So math
17 and economics has been critical to that.

18 Q. Have you been awarded any fellowships?

19 A. Yes. I mean, I was a fellow at the Center for Advanced
20 Studies and Behavioral Sciences and have had other research
21 awards for funding of research.

22 Q. You mentioned some research awards. Can you give any
23 examples of awards that you have been, you know --

24 A. You know, the National Science Foundation has funded my
25 research at various times.

1 Q. Can you provide the Court with a summary of your teaching
2 background?

3 A. Yes. I mean, I -- I taught economics at Yale initially.
4 But since I've been teaching in law schools, I've taught quite
5 an array of different classes. But in recent years, I've
6 focused mainly on torts and criminal law. I teach a course in
7 advanced criminal law, a seminar on the death penalty, a
8 course on statistical inference in law, but I've also
9 taught -- corporations and corporate finance.

10 Q. Do you teach a course on empirical law and economics?

11 A. Yes. Empirical law and economics and empirical evaluation
12 of law have been constant courses that I've taught over the
13 years in the U.S. and around the country and even in other
14 countries.

15 Q. In addition to your position at Stanford, where else have
16 you been a chaired professor?

17 A. You know, first at Northwestern Law School before I came
18 to Stanford. And then after I was at Stanford for nine years,
19 I went back to teach at Yale Law School, where I was also a
20 chaired professor. And then now, eleven years ago, I returned
21 to Stanford after six years as a chaired professor at Yale.

22 Q. The weather in California's better than in Connecticut?

23 A. It is, indeed.

24 Q. Have you had any temporary appointments as a professor?

25 A. Yeah. I've been a visiting professor at an array of

1 schools.

2 Q. Can you give some examples?

3 A. You know, I was a visiting professor at Harvard,
4 University of Virginia, University of Chicago, Cornell. I was
5 a visiting professor at some foreign universities, St.
6 Gallen's in Switzerland, Oxford in England. I just taught a
7 course this summer through a university in Bogota, Colombia.
8 I was also a visiting professor in Japan, at a university
9 called Toin University. So I've done a fair amount of
10 visiting professors positions, also at Bocconi in Milan,
11 Italy.

12 Q. You mentioned, before, the subjects that you teach. But
13 have you developed any specializations in your research?

14 A. I do think of myself as broadly involved in the empirical
15 evaluation of law and policy. Within that broad category,
16 I -- I have spent quite a bit of time over the last 20 years
17 focusing on issues relating to crime and criminal justice.
18 And within that category, I've had quite a lot of work on
19 issues relating to guns and gun policy.

20 Q. Have you published on the topics of guns and gun policies?

21 A. Yes. I've published extensively on all aspects of crime
22 and criminal justice, including guns and gun policy.

23 Q. All right. Have you published on empirical research into
24 the impact of gun regulations and gun policies?

25 A. Yes, I have.

1 Q. Can you give some examples of your publications on that
2 topic?

3 A. Sure. So, for example, I published a major paper on
4 impact of right-to-carry laws on violent crime in the Journal
5 of Empirical Legal Studies. I had another publication on a
6 similar topic earlier in the American Law and Economics
7 Review. I published in Science on the issue of guns and gun
8 regulation. Also, in the American Journal of Public Health on
9 the same broad issue of guns and gun policy. Published in the
10 American Economic Review as well. So an array of publications
11 in peer-reviewed journals.

12 Q. I was just going to ask, are those journals peer reviewed?

13 A. Every one that I've just mentioned was peer reviewed.
14 I've also published quite a lot in non-peer-reviewed journals
15 as well.

16 Q. In addition to having your work peer reviewed, you were
17 also the -- were you also the coeditor of the American Law and
18 Economics Review?

19 A. Yes. The American Law and Economics Review had two
20 editors for the journal, Steve Shavell at Harvard was the
21 editor focusing on theoretical articles, and I was the editor
22 focusing on empirical articles.

23 Q. Are you a member of any boards or associations related to
24 gun regulations and gun policy?

25 A. You know, I wouldn't frame it exactly in that way. I was,

1 for eight years, a member of the committee on law and justice,
2 which I was probably invited to be a member of because of my
3 work in crime and gun policy, in particular. And that's a
4 particularly august group of scholars and some practitioners
5 who work in the area of crime and criminal justice,
6 and provide information and synthesis of the research to
7 federal agencies and also private groups. And it's part of
8 the National Science Foundation.

9 Q. Have you previously served as an expert witness on the
10 topic of gun regulations and gun laws?

11 A. Yes. I've done quite a bit of that in the last few years.

12 Q. Have you previously provided expert declarations as a
13 witness on those topics?

14 A. Yes. In -- in almost all of the cases where I served as
15 an expert witness, I provided a declaration or testified at
16 trial. There were a couple of times when --

17 Q. About how -- oh, I'm sorry.

18 About how many times have you provided expert declarations
19 or reports on the topic of gun regulation and gun laws?

20 A. You know, I probably should have kept it up on my CV. But
21 I would guess in the neighborhood of about 10 or 12 times.

22 Q. And then have you testified on subjects related to gun
23 regulations and gun policies?

24 A. I have.

25 Q. Have you testified in criminal or civil trials?

1 A. I think all of the cases I was testifying in were civil
2 cases.

3 Q. And were you testifying on behalf of plaintiffs or
4 defendants?

5 A. Typically, I was testifying on behalf of a governmental
6 entity who was a defendant, and so most of the time, and
7 perhaps all of the time, for defendants.

8 Q. And you say that you were testifying on behalf of
9 governmental entities.

10 What were those governmental entities defending?

11 A. Well, much of it involved cases where certain gun lobbies
12 were trying to overturn gun regulations and a governmental
13 agency, either a city, state, or in one case a university,
14 contacted me and asked me if I would provide testimony to
15 support their regulation against the attack from the gun
16 lobby.

17 Q. So is it -- is it fair to say that most of your testimony
18 has been in defense of gun regulations?

19 A. Yes.

20 Q. To your knowledge, have you ever been excluded as an
21 expert?

22 A. No. And I would know if I had been.

23 Q. Have you been accepted in federal and state court as a
24 qualified expert witness?

25 A. I have.

1 Q. And you were retained in this case; correct?

2 A. Yes, I was.

3 Q. What, generally, were you requested to do?

4 A. Well, I was originally contacted by your -- your team to
5 give some background information on the nature of the ways in
6 which people have access to guns in Texas. And then after
7 some back and forth in those discussions, I was asked to write
8 an expert report sort of outlining my thoughts relevant to
9 this case on issues like causation and effectiveness of gun
10 regulation in this context.

11 Q. What -- generally speaking, what information was given to
12 you?

13 A. So I was given, you know, basic information about the
14 nature of the events. Of course, I knew quite a bit about it
15 because I'd spent a number of years studying mass shootings.
16 But, you know, the government gave me an array of information
17 that I had not seen before.

18 Q. Did you review the Department of Defense inspector general
19 report on the Devin Kelley incident?

20 A. I did.

21 Q. Did you review federal laws and regulations on gun
22 policies?

23 A. I did.

24 Q. Did you review the reports of other experts?

25 A. Yes, I did.

1 Q. Did you review Kelley's ATF Forms 4473?

2 A. Yes. Those were given to me, and I examined them.

3 Q. Did you review the Air Force OSI file on Kelley?

4 A. No, I did not.

5 Q. Did you review any documents from the Texas Rangers
6 investigation?

7 A. Not specifically, no.

8 Q. The documents that were provided you -- to you, were they
9 of the type of information that you would ordinarily use to
10 conduct your research?

11 A. Yes. And, of course, I was delighted to have the
12 information that went beyond what I already knew.

13 Q. Did you feel you had sufficient information to come to
14 opinions in this case?

15 A. Yes. Sufficient information to come to the opinions that
16 I set forth in my report.

17 Q. I was just going to ask, did you prepare a report
18 concerning -- first, did you prepare a report concerning the
19 relevant gun regulations and laws at issue in this case?

20 A. I did.

21 Q. And did your report also contain the opinions that you
22 arrived at in this case?

23 A. Yes, it did.

24 Q. Did you use your -- your knowledge, training, and
25 expertise in coming to those opinions?

1 A. Yes, I did.

2 Q. Did you come to those -- did you develop those opinions to
3 a reasonable degree of certainty?

4 A. Yes, I did.

5 Q. After your report was issued, did you review the
6 depositions of Michael Kelley, Rebecca Kelley, Danielle Smith,
7 and Michelle Shields?

8 A. Yes, I did.

9 Q. Did those depositions change your opinions?

10 A. They didn't change the opinions that I articulated in my
11 expert report.

12 Q. And you've -- have you listened to the testimony that has
13 been given at trial so far?

14 A. I've listened to as much of it as I could. I was teaching
15 at some point, so I couldn't listen, but I tried to listen to
16 everything.

17 Q. And that which you couldn't listen, did you review in the
18 form of transcripts?

19 A. Yes.

20 Q. Has any of that testimony changed your opinions?

21 A. No. It hasn't changed any of the opinions I set forth in
22 my report.

23 MS. KRIEGER: Your Honor, at this time, we offer
24 Professor Donohue as an expert in the topics of federal and
25 state regulation of firearms in the United States, firearm

1 policies, and empirical research on firearm regulations and
2 policies.

3 MR. ALSAFFAR: No objections.

4 THE COURT: He's recognized as such.

5 MS. KRIEGER: Okay.

6 BY MS. KRIEGER:

7 Q. Dr. Donohue, before we get into your opinions --

8 THE COURT: Before we get going, Sylvia, is there a
9 way we can increase the volume on our end?

10 *(At the bench off the record)*

11 BY MS. KRIEGER:

12 Q. Professor, do you mind trying to speak loudly, perhaps as
13 if you are talking to a large classroom.

14 A. Yeah. My apologies. Most of the time the Zoom seems to
15 work well. But, today, it seems like I need to speak louder.
16 So is this better, if I speak at this level?

17 Q. Yes. Thank you.

18 A. Okay.

19 Q. Now, Professor, before we get into your opinions, just as
20 a background, can you discuss the regulatory framework set
21 forth in the Gun Control Act of 1968?

22 A. Yeah. The federal Gun Control Act of 1968 was the first
23 real effort to identify who should be prohibited by federal
24 law from having access to firearms. And the law was passed in
25 1968 and set forth ten categories of individuals who were

1 prohibited purchasers.

2 Q. I'm not going to ask you to recite all ten, but is one of
3 those categories a person "who has been convicted in any court
4 of a crime punishable by imprisonment for a term exceeding one
5 year"?

6 A. Yes. And that's often referred to as the prohibition on
7 felons in possession.

8 Q. And then another category is a person who has been
9 convicted of a misdemeanor crime of domestic violence?

10 A. That's correct.

11 Q. Now, before the Brady Act was passed, these ten classes of
12 individuals, with one exception, were already prohibited from
13 possessing firearms; is that right?

14 A. Yes. That's correct.

15 Q. Was there a mechanism to -- prior to the Brady Act, was
16 there a mechanism to enforce the prohibitions within the Gun
17 Control Act?

18 A. No. There was no effective mechanism. I mean, if a
19 police officer happened to recognize that someone was
20 possessing a weapon and happened to know that they were a
21 prohibited purchaser, they could arrest them for that. And,
22 of course, if they were caught in possession for another
23 crime, it would add on a penalty, but that was a very weak
24 form of enforcement.

25 Q. So prior to the Brady Act, what would happen if a

1 prohibited individual went to a gun store to purchase a
2 firearm?

3 A. Well, since there would be no screening of that
4 individual, the transaction would go through without any
5 inhibiting supervision.

6 Q. So, in other words, if the government did not operate the
7 NICS system, would Kelley have been able to walk into a gun
8 store and purchase a firearm even though he was a prohibited
9 individual?

10 A. Yes. Absolutely.

11 MR. ALSAFFAR: Objection, Your Honor. This is
12 irrelevant. I think they're about to get -- we might save
13 some time here. They're about to get into issues on negligent
14 undertaking, which obviously the Court's already ruled on.

15 THE COURT: Yeah. So at this point, this is history.
16 And so I'll let it in. I'll take this one step at a time.

17 MS. KRIEGER: Thank you.

18 BY MS. KRIEGER:

19 Q. Professor Donohue, would the risk to these plaintiffs have
20 been lower if the government had not operated a background
21 check system at all?

22 MR. ALSAFFAR: I think I should have waited one
23 question. That was the question, Your Honor.

24 Objection. Irrelevant.

25 MS. KRIEGER: Your Honor, we're -- we understand that

1 you have already ruled on this issue, but we're trying to
2 build a record if the -- for if this case goes up on appeal.

3 THE COURT: Yeah. Well, one side or the other's
4 going to take this up. So it's going on appeal.

5 But what's the relevance to this question, because I
6 thought you were in 1968 still.

7 MS. KRIEGER: I'm sorry, Your Honor. On the question
8 of increased risk of harm, we are just trying to demonstrate
9 that if the United States had not undertaken to have a
10 background check system at all, there would not have been --
11 the situation that the plaintiffs, then, would have been no
12 different, so that there was no increased risk of harm.

13 THE COURT: So you're at 1968, though. But at some
14 point, historically, NICS came into existence, and at some
15 point the Air Force was required to report to NICS. So what's
16 the relevance of this question at this point in time in this
17 narrative?

18 MS. KRIEGER: The question -- Your Honor has stated
19 that the voluntary undertaking in this case is the operation
20 of the background check system. We're just trying to
21 establish that, had that never been done, the risk of harm to
22 the plaintiffs would not have changed.

23 THE COURT: Yeah. Well, I'm still stuck in a very
24 chronological time frame. You haven't walked him to that
25 point yet. The objection's noted. Sustained.

1 MS. KRIEGER: Fair enough. I will walk him through
2 the time frame first, then.

3 BY MS. KRIEGER:

4 Q. Professor, do you know when the Brady Act was passed?

5 A. Yes. 1993.

6 Q. Okay. And did the Brady Act establish the National
7 Instant Criminal Background Check System?

8 A. It called for the creation of the National Background
9 Check System.

10 Q. Just for everyone's ease of speaking, is it okay if I call
11 the National Instant Criminal Background Check System the NICS
12 system?

13 A. Yeah. That's the typical reference.

14 Q. What is the NICS system?

15 A. Well, the NICS system, that was called for adoption in the
16 1993 Brady bill, said that the government had 60 months to
17 come up with a system that would allow Federal Firearms
18 Licensees, so gun dealers, to be able to contact the NICS
19 system and get an immediate decision as to whether the
20 purchase that was being contemplated was consistent with
21 federal law.

22 Q. And when did the NICS system become operational?

23 A. It was almost 60 months later, in 1998.

24 Q. And I think you answered this question, but: Was there a
25 federal statute that mandated this creation?

1 A. Yes. The Brady Act of 1993 instructed the Attorney
2 General to come up with the NICS system within 60 months.

3 Q. And do federal agencies submit records to the NICS system?

4 A. They do, and they are required by law to do so.

5 Q. Is that a statutory obligation?

6 A. Yes, it is, federal statutory obligation.

7 Q. So to be clear, was the Air Force required by federal law
8 to report Kelley's information to NICS?

9 A. It was required to provide information about convictions
10 for offenses that were within the prohibited categories set
11 out by the federal Gun Control Act of 1968.

12 Q. And in your opinion should the Air Force have reported
13 Kelley's information to NICS?

14 A. Yes. They should have, yes.

15 Q. I think that we've now gotten to the right point in time.
16 So I'm just going to ask, had the NICS system not been
17 implemented, would the risk to these plaintiffs have been
18 lower than it was, in fact?

19 MR. ALSAFFAR: Your Honor, we now object to this on
20 several grounds. Relevance. And this is outside his -- I
21 believe it's outside his level of expertise. The government
22 is now asking him to comment on tort law.

23 THE COURT: Your response?

24 MS. KRIEGER: We're not asking him to comment on tort
25 law. We're asking him to comment on empirical -- you know,

1 empirically, whether it would have made a difference in his
2 opinion, as an expert in gun regulations and gun policies.

3 THE COURT: I still don't understand, though, the
4 relevance. What would it have mattered if the system had not
5 been created? The fact of the matter is, the system was
6 created and he was required to report.

7 MS. KRIEGER: Your Honor, may Mr. Stern be heard on
8 this?

9 MR. STERN: May I be heard?

10 THE COURT: Yes.

11 MR. STERN: Thank you, Your Honor.

12 One of the elements for negligent undertaking under a --
13 Second Restatement of Torts 323 or 324(a) is an increased risk
14 of harm. Now, the plaintiffs and the United States have a
15 difference of opinion, legally speaking, as to what are the
16 comparison points for that increased risk of harm.

17 Plaintiff suggests that because the government operates
18 NICS, it must do so in a non-negligent way, and that failing
19 to do so increased the risk of harm.

20 Now, the government's position is that basically renders
21 the increased risk of harm element a nullity, because it folds
22 it into the causation analysis. The government's position,
23 instead, is that if the government never operated NICS, would
24 there have been an increased risk of harm? And our position
25 is no.

1 Because while he might have been prohibited under the Gun
2 Control Act of 1968, there would not have been any mechanism
3 for which to prohibit him when he went to an FFL. So if Your
4 Honor is finding the undertaking to be the operation of NICS,
5 there was no increased risk of harm, because had that
6 operation not occurred, then there would have been nothing to
7 prevent Devin Kelley from purchasing a firearm through an FFL.
8 That's why our comparison point has to be pre-NICS, i.e.
9 pre-November 1998 to post-operation in 1998. That's the point
10 I think the professor's trying to make.

11 MR. ALSAFFAR: May I respond, Your Honor?

12 THE COURT: Yeah.

13 MR. ALSAFFAR: I think the government has just
14 conceded that they're asking him to comment on tort law, and
15 that's outside his expertise. And -- but to the second point,
16 they can easily ask him about factual data pre-'68, post-'68.
17 That's a different inquiry. That's factual. That's research
18 based. He can certainly go into that, and we don't object.

19 What they're trying to do is bootstrap that in and then
20 have him make a tort opinion. If I can ask -- if I can take
21 him on voir dire for a couple of questions, I think I can
22 demonstrate that.

23 MR. STERN: Your Honor, not at all. We're going to
24 make that argument in closing, as I just did. But the point
25 is only that there's no mechanism pre-1998 for which a

1 prohibited individual goes into an FFL and gets a denial. He
2 would have been allowed to obtain that firearm even if he was
3 prohibited pre the operation of NICS.

4 So as a result, the United States, under Good Samaritan
5 Law, trying to create this mechanism, by doing so didn't
6 increase the risk of harm, because in the absence of that
7 operation, the net result would have been Kelley being allowed
8 to go and purchase the firearm at an FFL. And that's just the
9 factual underpinnings that we're trying to ascertain from
10 the -- from the professor.

11 THE COURT: So I'm not sure how Good Samaritan fits
12 into this. Good Samaritan's a voluntary act done by a person.
13 This is a statutory obligation imposed by Congress on the
14 federal agencies to report.

15 Your voir dire. Go ahead.

16 MR. ALSAFFAR: Thank you.

17 VOIR DIRE EXAMINATION

18 BY MR. ALSAFFAR:

19 Q. Mr. Donohue, hello. Can you hear me okay?

20 A. Yes, I can.

21 Q. Hi. We've never met before. Your deposition was not
22 taken in this case; correct?

23 A. It was not taken.

24 Q. And my name is Jamal Alsaffar. I represent the victims of
25 this shooting. It's nice to meet you, sir. I have a couple

1 of questions very quickly.

2 I've looked over your -- your CV. And please correct me
3 if I'm wrong. Have you ever been a professor or tenured
4 professor in any -- in torts?

5 A. Yeah. I taught torts for six years at Yale Law School and
6 also at Stanford Law School.

7 Q. And when did -- when was that?

8 A. So I was at Yale for 2004 to 2010, and then I came back to
9 Stanford, where I had been for nine years prior to Yale, in
10 2010. And I've been here ever since.

11 Q. Okay. And have you ever taught any courses on Texas tort
12 law?

13 A. No, I have not.

14 Q. Have you ever taught any courses on the Federal Tort
15 Claims Act and its intersection and application of state law
16 through the vehicle of the Federal Tort Claims Act?

17 A. No, I have not.

18 Q. Okay.

19 MR. ALSAFFAR: Your Honor, we raise our objection
20 again. We do not object to any factual data he's testifying
21 about pre and post, but any -- any conclusions he makes as to
22 duty and tort law should be excluded.

23 THE COURT: Yeah. So I'm personally going to exclude
24 it because this is an attempt to circumvent my prior ruling.
25 But I'm going to allow the questions just so everything's teed

1 up at the Court of Appeals, if it's necessary at that stage.

2 MR. ALSAFFAR: Thank you, Your Honor.

3 MS. KRIEGER: So may the witness answer that
4 question, then?

5 THE COURT: Yeah. If he remembers what the question
6 was.

7 MS. KRIEGER: Let me ask it one more time.

8 DIRECT EXAMINATION (CONTINUED)

9 BY MS. KRIEGER:

10 Q. Professor Donohue, would the risk to these plaintiffs have
11 been lower with regard to Devin Kelley if the government
12 didn't operate the NICS system at all?

13 A. No, it would not.

14 Q. Just to go back to the reporting -- the reporting
15 obligation, statutory reporting obligation of the Air Force,
16 would any information not directly tied to a prohibitor impact
17 the requirement for submission to NICS?

18 A. No, it would not impact that requirement.

19 Q. So if someone is convicted of a felony, but that person
20 has also been accused of other bad acts, such as sexual
21 assault or making threats, would that impact -- would that
22 information impact, in any way, the requirement for the
23 Air Force to submit his information to the NICS system under
24 federal law?

25 A. No. The federal requirements existed and is not

1 influenced by any other information.

2 Q. Let's turn to the sales side of the NICS system.

3 Are all gun sales in the United States subject to a NICS
4 background check?

5 A. No, they are not.

6 Q. Which gun sales are subject to the background check?

7 A. Well, sales that proceed through the Federal Firearm
8 Licensee, or gun dealer, must go through the federal
9 background check system. But other than that, there's no
10 federal obligation to have other gun transactions go through
11 the NICS background check system.

12 Q. Do you know what the definition is for a "Federal Firearms
13 Licensee"?

14 A. It's a little bit opaque, but it essentially refers to the
15 fact that someone's a federal firearm -- or must be a Federal
16 Firearm Licensee if they are engaged in the business of
17 selling firearms.

18 Q. So to be clear, if an individual is not regularly buying
19 and selling firearms for profit, is that person required to be
20 a Federal Firearms Licensee?

21 A. No, he's not.

22 Q. And under federal law, does the NICS system apply to sales
23 between private individuals who are residents of the same
24 state?

25 A. The NICS system does not apply to such private

1 individuals.

2 Q. Under federal law or non-FFLs, and using that as a
3 shorthand for "Federal Firearms Licensee," are non-FFLs
4 permitted to sell firearms without conducting background
5 checks?

6 A. Yes, they are.

7 Q. Now, without conducting a background check, do private
8 sellers have any way of knowing whether they are selling to a
9 prohibited purchaser?

10 A. In general, they would have no knowledge unless they
11 happened to know the individual or had some independent
12 information about them.

13 Q. Is that -- is that referred to as the "private sale
14 loophole"?

15 A. Yes. Sometimes it is referred to as the "private sale
16 loophole."

17 Q. Do prohibited individuals take advantage of the private
18 sale loophole?

19 A. Yes, they do.

20 Q. What are some of the ways these kinds of private sales
21 occur?

22 A. Well, it can occur in many different ways. You know, if
23 you think about the Columbine mass shooting, there were two
24 individuals who were not able to procure weapons on their own
25 because of their age and they got some weapons through a straw

1 purchase, and then they got other weapons through an employee
2 at a pizza shop that they happened to know.

3 So private sales and straw purchases are two mechanisms by
4 which individuals circumvent the NICS background check
5 requirement.

6 Q. Do private sales also occur at gun shows?

7 A. Yes, they do.

8 Q. Do private sales also occur online?

9 A. Yes. That's very common.

10 Q. I was going to mention -- so you kind of -- we kind of
11 said straw purchasers, private sales between individuals,
12 sales at gun shows, and sales online. Let's kind of talk
13 through those.

14 How is it that individuals are able to buy firearms at gun
15 shows without being subject to a background check?

16 A. Gun shows typically have two types of sellers. There'll
17 be federally licensed sellers. So FFLs show up at gun shows,
18 and they must go through the background check. But private
19 sellers also are abundant at gun shows, and they will
20 typically put up a card highlighting the fact that they are
21 private sellers, which is a way of signaling to prohibited
22 purchasers that they can buy guns from them without going
23 through a background check.

24 Q. Have any studies assessed whether private sellers at gun
25 shows are willing to sell even if they have reason to believe

1 the purchasers are prohibited?

2 A. Yeah. There have been investigations that have looked
3 into exactly that question by sending in investigators to see
4 whether the gun sellers at gun shows will go through with the
5 transaction.

6 Q. Okay. Can we put up GEX 104; what has been previously
7 marked as GEX 104.

8 Do you know what this document is?

9 A. Yeah. This is the study that I was referencing, and it
10 involved these undercover examinations to test whether illegal
11 sales were being conducted through private sellers at gun
12 shows.

13 Q. And the author of this study is the City of New York; is
14 that correct?

15 A. Yes. Mayor Bloomberg was very concerned about gun
16 violence, and, of course, New York has some strict laws, but
17 people were able to circumvent the laws by virtue of this
18 illegal conduct at -- at gun shows.

19 Q. Do you consider this study to be a reliable authority on
20 this topic?

21 A. Yes. It was -- it was an important examination, and I
22 thought it was well-done.

23 Q. Okay. Let's turn to page 6. And can we pull out that
24 last paragraph, the bullet point there. Yes. Under
25 "Results."

1 *(Discussion off the record)*

2 BY MS. KRIEGER:

3 Q. Professor, can you read that paragraph out loud?

4 A. Yes. It says, "63 percent of private sellers approached
5 by investigators failed the integrity test by selling to a
6 purchaser who said he probably could not pass a background
7 check. Some private sellers failed this test multiple times
8 at multiple shows."

9 Q. So these sellers had no independent way of knowing whether
10 someone is a prohibited individual; correct?

11 A. They wouldn't have known. In this particular case, the
12 investigator signaled to them -- the undercover investigator
13 signaled to them that they were, you know, a prohibited
14 purchaser, to see whether they would go ahead with the sale
15 once they were given that information.

16 Q. Right.

17 So even once they were told that this person was
18 prohibited, did they still, in many cases, sell the gun to the
19 individual?

20 A. Yeah. It was an alarmingly high percentage who were
21 willing to go ahead.

22 Q. Are gun shows common in Texas?

23 A. Yeah. Gun shows are more common in Texas than any other
24 state.

25 Q. Do you know if San Antonio has gun shows?

1 A. San Antonio does indeed have gun shows.

2 Q. Do you know if San Antonio had gun shows in the months
3 leading up to the shooting in November 2017?

4 A. Yes. There was a gun show in the summer of 2017, a few
5 months prior to the shooting in this case.

6 Q. I'm sorry. I'm just going to remind you to try and speak
7 up.

8 Are new guns available to purchase at gun shows?

9 A. Yes, they are.

10 Q. Are they available to purchase from private sellers at gun
11 shows?

12 A. Yes, they are.

13 Q. Let's talk about private sales that occur online. How is
14 it that individuals can buy firearms online without being
15 subject to a background check?

16 A. Well, again, if the online transaction is being conducted
17 through a private seller, private seller would have no
18 obligation to go through a NICS background check. If it is a
19 Federal Firearms Licensee selling guns on an online forum,
20 then they must go through the background check system. And so
21 you can go online and see both of them. You can find on
22 Armslist, for example, you know, lots of private sellers who
23 are selling guns. But if you, you know, go to Cabela's web
24 page, which is a major Federal Firearms Licensee, you can see
25 what guns are available through that licensed dealer.

1 Q. Are there -- are there websites that facilitate private
2 sales online?

3 A. Yeah. So Armslist would probably be one of the most, you
4 know, recognized ones, but there are many others. And if you
5 simply type in, you know, "private gun sales," it will bring
6 up a number of different online fora, you know, Pew-Pew or Gun
7 Buyers or other online mechanisms to seek out private sales.

8 Q. Let's pull up what has been marked as GEX 93.

9 And do you recognize this document?

10 A. Yes, I do.

11 Q. It's titled, "Felon Seeks Firearm, No Strings Attached."
12 This might be kind of hard to see, but I think the author is
13 "Mayors Against Illegal Guns." There it is.

14 A. Yes. And this is a group that Mayor Bloomberg initiated.

15 Q. Do you consider Mayors Against Illegal Guns to be a
16 reliable source?

17 A. Certainly for this study, I do. Yes.

18 Q. Do you consider this study to be a reliable authority in
19 this topic?

20 A. Yes, indeed.

21 Q. Let's turn to page 8. Starting with "the investigation."
22 I think it's the -- there we go.

23 Can you read this paragraph out loud?

24 A. Yes. "The investigation found that prohibited gun buyers
25 are clearly turning to the online marketplace. Individuals

1 looking for guns on Armslist are nearly four times more likely
2 to have prohibiting criminal records than buyers at licensed
3 dealers. Where fewer than 1 in 100 prospective buyers at a
4 dealer fails a federal background check due to a criminal
5 history, 1 in 30 prospective buyers on Armslist is prohibited
6 for that reason, and no background check prevents them from
7 completing the sale."

8 Q. Let's now turn to page 11. And highlight the paragraph
9 that starts with "the city's investigators," if we can pull
10 that out. It's at the top of the -- yeah, there it is.

11 Professor, can you read that paragraph out loud?

12 A. "The city's investigators called 125 private sellers in 14
13 states advertising guns on ten websites, including Armslist.
14 During each conversation, the investigators told the sellers
15 that they probably could not pass a background check. Fully,
16 62 percent of these sellers agreed to sell the gun anyway,
17 though, it is a felony to sell a firearm to a person the
18 seller has reason to believe is a prohibited purchaser. 54
19 percent of the private sellers who posted ads on Armslist were
20 willing to sell guns to people who admitted they were
21 prohibited purchasers."

22 Q. So was this investigation pretty similar to the -- the
23 previous one that we looked at for gun shows?

24 A. Yeah. What -- what the investigation was trying to do was
25 mimic the approach that had been used in gun shows, to show

1 that the same capacious mechanism for evading the federal
2 background check system was available for online purchases.

3 Q. And we looked at the results of both those studies.

4 How do the percentages of sellers willing to sell to
5 prohibited persons online compare to the percentages of
6 sellers willing to sell to a prohibited person at a gun show?

7 A. They are quite similar, and, indeed, these are often the
8 same people. So in that sense, it's not surprising that it
9 would be a similar percentage.

10 Q. Are new guns available to purchase in private sales
11 online?

12 A. Yes, they are.

13 Q. You mentioned the term "straw purchase."

14 What -- what is a straw purchase?

15 A. So in cases where an individual wants to procure a weapon
16 through a licensed dealer, if they are a prohibited purchaser,
17 they can ask a friend or acquaintance or relative to go in and
18 purchase a gun for them if that individual who is conducting
19 the sale can pass the background check system.

20 Q. Are straw purchases always friends or family members or
21 relatives?

22 A. No. You can actually pay someone to do it for you if you
23 don't have a friend or relative who's willing to do it.

24 Q. You mentioned the Columbine shooting, that the shooters
25 acquired their weapons through a straw purchase. Are you

1 aware of any other mass shootings where the individual used a
2 straw purchaser to obtain their weapons?

3 A. Yeah. The San Bernadino mass shooting, in which I believe
4 14 people were killed, was effectuated through a straw
5 purchase.

6 Q. Now, we talked about a number of alternative avenues to
7 get guns, to get -- guns.

8 Can you explain to the Court what a ghost gun is?

9 A. Yeah. A ghost gun is essentially a mechanism for evading
10 federal background checks by buying a kit usually that is --
11 involves a lower receiver that is not fully functional yet.
12 And because of the definition of a firearm under the federal
13 Gun Control Act, the incomplete lower receiver is not deemed
14 to be a firearm, and, therefore, it can be purchased in this
15 incomplete state, sometimes referred to as an "80 percent
16 receiver."

17 And the individual who purchases the kit then assembles it
18 into an effective and working, operable firearm but, in doing
19 so, they have evaded the NICS background check system, even if
20 they were a prohibited purchaser.

21 Q. You know how easy it is to build a ghost gun?

22 A. Yes. It's a relatively easy endeavor, and there are
23 instructions on YouTube to do it. And sometimes individuals
24 have parties to get together and assemble guns, you know, in a
25 group.

1 Q. Do you know what kind of equipment you need to build a
2 ghost gun?

3 A. It would be ordinary hand tools. And some of the kits
4 provide all of the material that you would need to complete
5 the assembly of the gun.

6 Q. Are these kits widely available?

7 A. Oh, yes.

8 Q. Do you recall in your report you discussed a 60 Minutes
9 episode on ghost guns.

10 Do you know what that episode stated about ghost guns?

11 MR. ALSAFFAR: Objection. Hearsay. Talking about 60
12 Minutes now?

13 MS. KRIEGER: Your Honor, I can reestablish that as a
14 learned treatise or a reliable authority.

15 MR. ALSAFFAR: Ooh. Boy.

16 THE COURT: 60 Minutes is a reliable treatise?

17 MS. KRIEGER: This goes to his -- the basis for his
18 opinion.

19 MR. ALSAFFAR: That doesn't make it admissible.

20 THE COURT: I'm sure the professor's able to answer
21 that question someday else. That's sustained.

22 BY MS. KRIEGER:

23 Q. Professor, are you aware of any mass shootings in which
24 the perpetrator used a ghost gun?

25 A. Yes. For example, a guy named John Zawahri committed a

1 mass shooting in Southern California, where he had been a
2 denied purchaser in 2011 by virtue of a mental health issue.
3 And in 2013, he went to Santa Monica College and ended up
4 killing five people with an AR-15 ghost gun that he had
5 assembled himself.

6 Q. Are ghost guns prominent in Texas?

7 A. You know, interestingly, while there have been mass
8 shootings in Texas involving ghost guns, it's usually so easy
9 to get guns in Texas that you don't need to take that extra
10 step of putting it together yourself. So ghost guns would be
11 more prevalent in California than they are in Texas because
12 California is much more concerned about keeping guns away from
13 dangerous individuals.

14 Q. You talked about straw purchasers, online purchasers, gun
15 shows, and ghost guns. Do any of these methods for acquiring
16 guns without a background check require any kind of
17 specialized knowledge?

18 A. No. So, for example, in the Odessa killing in Texas, that
19 was by a prohibited purchaser who procured his weapon through
20 a private sale where the seller had manufactured or put
21 together the ghost gun himself. So you don't -- you can
22 either do it yourself or you can buy in a private sale,
23 someone who has put it together for you.

24 Q. And all of these methods, ghost guns, gun shows, online
25 sales, straw purchasers, do you need some kind of special

1 connection or relationship with anyone in order to acquire
2 guns in those ways?

3 A. No, you don't.

4 Q. We talked about the federal regulations on gun sales.
5 Have some -- have some states enacted regulations that go
6 beyond federal law?

7 A. Yes. There's quite a range, with Texas being on the low
8 end of efforts to restrict mass shootings and other criminal
9 acts, and states like California typically thought to be at
10 the high end of gun safety regulation.

11 Q. What are -- what are some of the additional state
12 regulations that have been passed?

13 A. Well, you know, probably the one that comes immediately to
14 mind is the fact that a number of states have adopted
15 universal background checks in an effort to address what we
16 previously alluded to as the "private sale loophole."

17 So while federal law only requires Federal Firearms
18 Licensees to conduct a background check when they initiate a
19 gun sale, in a state like California and New York, all
20 transactions, whether private or through a gun dealer, are
21 required by law to be processed pursuant to a background
22 check.

23 Q. I'm sorry, sir. I think you just explained what a
24 universal background check system is, is that correct, that
25 all sales have to go through the background check?

1 A. That's right. That's the universal background check
2 system.

3 Q. What's a comprehensive background check system?

4 A. Well, these are -- are terms of art. Some people, when
5 they refer to comprehensive background check systems, are
6 referring to the universal background checks. I distinguish
7 them in the following way: A universal background check
8 system, as I use the term, refers to requirements that all gun
9 transactions must go through some form of background check.
10 And when I refer to comprehensive background check systems,
11 although not everyone follows this definition, I'm talking
12 about more comprehensive searches of databases beyond what's
13 available through the federal NICS system.

14 Q. And I think you were saying there's some confusion between
15 the two terms. Did you listen to or review Dr. Webster's
16 testimony?

17 A. Yes, I did.

18 Q. When he -- he discussed comprehensive background checks.
19 Do you recall that?

20 A. Yes. And he has written, you know, articles in which he
21 refers to comprehensive background check systems.

22 Q. And is it your understanding that when he talked about
23 comprehensive background checks, he was referring to what you
24 called universal background checks?

25 A. That's correct. That's correct.

1 Q. Have universal background checks been proven effective at
2 reducing gun violence?

3 A. Universal background checks, there is certainly empirical
4 evidence to indicate that you do get benefits from having
5 universal background check systems in place.

6 Q. Even in states with universal background checks, do a
7 large percentage of private party firearm transfers still
8 occur without a background check?

9 A. Yes. Even in states such as California and New York, that
10 have mandated requirements that private sales must go through
11 a background check system, a fairly substantial percentage of
12 firearm transactions still go through without conducting the
13 mandated background check.

14 Q. Professor, what are red flag laws?

15 A. So red flag laws are another effort to identify
16 individuals who are at risk for engaging in violent behavior,
17 that poses a threat to either themselves or to others, and it
18 allows family members, law enforcement, and others to petition
19 for an order to remove guns from those individuals as an
20 effort to stop them from engaging in dangerous conduct to
21 themselves or to others.

22 Q. Do some states limit the lethality of weapons sold in the
23 state?

24 A. Yes. We have a number of states in the country that have
25 persisted in the effort to do what the Federal Assault Weapon

1 Ban did, which was to restrict certain weapons because they
2 were considered to be more lethal and also would facilitate
3 more killing in these mass shooting events. So states will
4 pass laws banning certain assault weapons as well as
5 restricting the size of the magazines that are used in these
6 weapons.

7 Q. Has Texas adopted any of the state regulations that we've
8 just talked about?

9 A. No. Texas, in a sense, goes naked. They rely on the
10 federal system, but have not tried to augment any of the gun
11 safety measures that other states have adopted.

12 Q. So does Texas have universal background check laws?

13 A. No. And, in fact, has been highly -- at least the
14 politicians have been highly opposed to such efforts.

15 Q. What are Second Amendment sanctuaries?

16 A. So Second Amendment sanctuaries are proclamations, usually
17 by a city or county, in which the particular jurisdiction is
18 trying to make a pronouncement in which they show their
19 hostility to gun safety regulations.

20 Q. How do they show their hostility?

21 A. Well, they will pass statements saying that -- you know,
22 there are different pronouncements. They will typically say,
23 you know, this county or jurisdiction is a Second Amendment
24 sanctuary. Edwards County in Texas, for example, states that
25 universal background check systems are a violation of the

1 Second Amendment, which is an odd and unusual claim. But
2 those are the types of proclamations that they make.

3 Some -- some will say, we will not enforce any federal gun
4 safety measures. So it's an overall hostility. And, of
5 course, even the Brady bill, when it passed in 1993, was
6 overwhelmingly opposed by the Texas congressional delegation.
7 So there's been a long history of opposition by the
8 politicians in Texas to any measure of either federal or state
9 gun control.

10 Q. You mentioned one Texas county. Do you know how many
11 counties in Texas have adopted Second Amendment sanctuary
12 resolutions?

13 A. Yes. Well, there are 254 counties in Texas, and 78 of
14 them have specifically endorsed one of these so-called Second
15 Amendment sanctuary proclamations.

16 Q. In general, how easy is it to obtain a firearm in Texas
17 without undergoing a background check?

18 A. I mean, it's quite easy. It's sort of like about as easy
19 as buying a used car, and a lot cheaper.

20 Q. Now, what is a -- what is the GVPedia report?

21 A. GVPedia, which is sort of a shorthand for -- or an amalgam
22 of gun violence encyclopedia, is an online forum that tries to
23 collect, you know, the best data and research on gun violence
24 prevention.

25 Q. Does GVPedia provide grades as for -- on this -- on its

1 reports?

2 A. Well, they rely on the grading of the different states in
3 terms of the, you know, level of gun safety regulation that a
4 state will have, and they've conducted research and published
5 research using these gradings to see whether they are
6 effective in stopping mass shootings.

7 Q. You know what grade Texas received from the GVPedia
8 report?

9 A. Yes. The GVPedia used the Giffords rating of states, in
10 terms of gun safety regulation, and Texas always received an F
11 grade on that rating of gun safety regulation.

12 Q. Does the GVPedia report identify a correlation between the
13 number of mass shootings and states' ratings on gun laws?

14 A. Yes. The GVPedia report concluded, based on their
15 examination of mass shootings around the country, that those
16 states that had the lowest grades on gun safety regulation had
17 both higher numbers of mass shootings and also considerably
18 higher death counts when those mass shootings occurred.

19 Q. What are the consequences of Texas' limited firearms
20 regulations, in terms of mass shootings?

21 A. Well, Texas has become, you know, a leader in the
22 United States, and, indeed, the world in both the frequency
23 and deadliness of mass shootings. And the GVP -- Pedia report
24 highlighted that there were 20 mass shootings over the period
25 that they looked at, or the 20 mass shootings that had the

1 highest death tolls. And, essentially, 30 percent of those,
2 or six cases, occurred in Texas. So a number vastly higher
3 than the proportion of the population in the United States.

4 Q. Are you aware of mass shootings or would-be mass shootings
5 in Texas where the perpetrator was denied a firearm through a
6 NICS background check but, nonetheless, obtained the firearm?

7 A. Yes. I alluded to the Odessa mass shooting case a while
8 ago, and that was a case where the individual had been denied
9 access through a background check and then sought an AR-15
10 through a private sale.

11 Q. Do you know how many people were killed or injured in the
12 Odessa mass shooting?

13 A. If I'm not mistaken, I think seven were killed and 15 were
14 injured.

15 Q. Are you familiar with the White Settlement shooting?

16 A. Yes, I am.

17 Q. Do you know if the shooter in the White Settlement
18 shooting had previously been denied a firearm through a NICS
19 background check?

20 A. Yeah. That particular killer had been denied repeatedly
21 and was still able to acquire a weapon in Texas, and go into a
22 church and started killing people at random.

23 Q. You already mentioned John Zawahri who was also a mass
24 shooter who was denied a firearm, but obtained -- through
25 NICS -- but obtained one anyway?

1 A. Yes.

2 Q. Are you aware of any other mass shootings in general
3 perpetrated by people who obtained their firearms through
4 means other than at FFLs?

5 A. Yeah. There are quite a large number. I mean, everyone
6 from, you know, the Columbine shooters to Adam Lanza, who went
7 into Newtown. And, you know, in Texas, you have the Santa Fe
8 High School shooting, where an individual, you know, took his
9 father's gun and went into a high school and killed quite a
10 number of students. So, you know, the vehicle -- the pathways
11 to procure guns are fairly abundant, and mass shooters have
12 taken an advantage of all of the different opportunities.

13 Q. Let's talk about some of your opinions.

14 What is your opinion on whether the shooting at the First
15 Baptist Church of Sutherland Springs would have occurred if
16 Kelley's information -- if Kelley's information had been
17 submitted to NICS?

18 A. Yes. So obviously, the federal government had an
19 obligation to submit the background check information. And,
20 you know, thinking in terms of what would have happened had
21 they submitted it, I was focused on, is it more likely than
22 not that this mass shooting could have been avoided had they
23 submitted the information? And I concluded it was not more
24 likely than not that this mass shooting would have been
25 avoided had the Air Force complied with its obligation to

1 supply the information to the NICS background check system.

2 Q. Is that opinion made to a reasonable degree of certainty?

3 A. Yes, it was.

4 Q. What's the basis for that opinion?

5 A. Well, it's based both on my examination of mass shootings
6 over a number of years of research as well as the empirical
7 literature that tries to identify how effective background
8 check systems are in reducing crime in general and mass
9 shootings in particular.

10 Q. And we'll get more into that research in a minute.

11 Did all the alternative means to obtain firearms that we
12 just discussed have any effect on your opinion regarding
13 whether the shooting would have occurred had Kelley's
14 information been in NICS?

15 A. Yes. That was critical to the discussion -- both for
16 Kelley himself as well as the existing regulatory environment
17 in Texas, where, you know, both the lack of gun safety
18 regulation, hostility towards gun safety regulation, and gun
19 safety enforcement by the relevant authorities in Texas, you
20 know, very strongly informs my opinion in this case.

21 Q. Does research show that prohibited persons regularly
22 obtain firearms through means other than FFLs?

23 A. Yes, it does.

24 Q. I'm going to pull up a document we've already seen, GEX
25 93. And let's turn to page 10. And can you pull up the

1 second paragraph.

2 Can you please read just that first sentence of the -- of
3 the second paragraph.

4 A. "This system is efficient and effective."

5 Q. Is this referring to the NICS system?

6 A. Yes, it is.

7 Q. And then can we scroll down to the next paragraph. Can
8 you read that top paragraph here, "Since its creation in
9 1998."

10 A. "Since its creation in 1998, NICS has blocked more than
11 two million gun sales to criminals and other prohibited
12 purchasers."

13 Q. Can you read the next paragraph there as well?

14 A. "But not all gun sellers are required to conduct
15 background checks. Under federal law, licensed firearm
16 dealers must do so, but unlicensed sellers who are not 'in the
17 business' of selling firearms, are exempt."

18 Q. And let's go down to the last paragraph in this column.
19 Can you just read the first two sentences of this paragraph?

20 A. Yes. "This two-tiered system has created a vast secondary
21 market, leaving a large share of firearms sales completely
22 unregulated. National telephone surveys and law enforcement
23 data suggest that some 40 percent of gun transfers do not
24 involve a licensed dealer, meaning an estimated 6.6 million
25 guns were transferred without background checks in 2012."

1 Q. Thank you. You can take that down. Let's turn to your
2 second opinion.

3 What is your opinion on the effectiveness of background
4 checks to deter individuals from acquiring weapons?

5 A. So I think the empirical evidence shows that background
6 check systems are effective in reducing both suicides and
7 violence. And -- but with obviously much less than 100
8 percent effectiveness. The effectiveness obviously depends on
9 how comprehensive or universal the background check system is,
10 and also depends on the nature of the individual, with some
11 individuals being much more likely to be dissuaded by virtue
12 of a background check system, and others much less likely to
13 be dissuaded.

14 Q. So is it your opinion that background checks are not
15 universally effective and are less effective in stopping
16 individuals who are more extreme cases of dysfunction and
17 criminality, such as determined mass shooters?

18 A. Yes. That would be my opinion.

19 Q. Is this opinion made to a reasonable degree of certainty?

20 A. Yes, it is.

21 Q. Is there -- we've already talked about this a little bit,
22 but there is evidence that background checks and similar
23 measures have some deterrent effect; is that -- is that right?

24 A. Yes, there is.

25 Q. Are there categories of people for whom background checks

1 and other measures are more likely to be an effective
2 deterrent?

3 A. Yes. And you can see this in many different ways. One
4 thing that I often point out is, you know, for suicides, for
5 example, you know, sort of modest measures have been proven to
6 reduce some suicides because some people are on the margins of
7 suicide, and impediments for them are effective. Obviously,
8 if you're on the other side of intense suicidal urge, you're
9 going to be much less likely to be dissuaded.

10 And the same thing applies for gun violence. There are
11 some people who are on the margins of gun violence, and,
12 therefore, are more likely to be dissuaded. And, conversely,
13 others who are more, sort of, intensely focused on committing
14 gun violence and perhaps have greater interest and access to
15 guns are going to be less effectively dissuaded by background
16 check systems.

17 Q. Let's look at Plaintiffs' Exhibit 757. Now, we've --
18 Dr. Webster testified extensively on this study. So we don't
19 need to belabor the point.

20 But what did this study evaluate?

21 A. So this was a very interesting study done, looking at
22 effectiveness of two aspects of California state law that were
23 adopted in 1991. One was the universal background check
24 system, and two was the fact that California had made any form
25 of misdemeanor violence a prohibiting category. So it went

1 beyond what the federal Gun Control Act stated, in terms of
2 who is prohibited by virtue of a misdemeanor conviction.

3 Q. And how did the study make -- conduct its evaluation?

4 A. Yeah. So the author, Garen Wintemute, who is quite an
5 impressive researcher, got very detailed information on
6 individuals who had been convicted of misdemeanor violence
7 prior to the 1991 prohibition, and compared that with
8 individuals who were prohibited from purchasing after 1991 by
9 virtue of a conviction. And he sought to examine whether
10 the -- these two categories of individuals, who were the same
11 in terms of the underlying misconduct, had different rates of
12 gun violence in the future.

13 And what he concluded was that the California universal
14 background check system reduced the prevalence of gun violence
15 by these miscreants you can refer to them as.

16 Q. Let's turn to Table 3. It's at page 6. And can we just
17 highlight under where "purchase status approved," that middle
18 column there. We've already heard testimony on this, so I'll
19 just say: Does this show that purchasers who were approved
20 had a 29 percent higher rate of later arrests for gun or
21 violent crime?

22 A. Yes. 29 percent higher rate for gun or violent crime, and
23 no higher rate for non-gun or nonviolent crime.

24 Q. Can we just kind of flip that. What does that mean as far
25 as reducing violent crime for people who were denied?

1 A. Yeah. So the -- the 29 percent increase relative to those
2 who denied essentially tells us that the prohibition and
3 universal background check system in place in California
4 reduced violence within this group by roughly 22 percent.

5 Q. Do you believe that this study is relevant to this case?

6 A. I do think it is relevant to this case, yes.

7 Q. And how -- why is it relevant?

8 A. Well, I think it shows two things. That universal -- a
9 universal background check system does reduce gun or violent
10 crime in a category that's at least close in some respects to
11 Devin Kelley, but that it's, you know, far less than 100
12 percent or even 50 percent effective in reducing gun or
13 violent crime.

14 Q. Now, the rate that it reduced violent crime -- gun or
15 violent crime, this study was focused on misdemeanants; right?

16 A. Yes, misdemeanants who had been convicted of a violent
17 misdemeanor.

18 Q. In your opinion, would that reduction be higher or lower
19 for prohibited felons?

20 A. Yeah. So one would ordinarily think that the more violent
21 one's nature, the less effective the particular universal
22 background check system, in this case, would be in reducing
23 future criminality. And, therefore, while this study was
24 focused on those who had only committed and been convicted of
25 violent misdemeanors, you would think it would be less

1 effective if you were referring to felons.

2 Q. And now, this study was also done in California.

3 Do you think that effect would be higher or lower in a
4 state like Texas?

5 A. One would assume that the effect would be lower in a state
6 like Texas.

7 MR. ALSAFFAR: Objection, Your Honor. This is
8 speculation. This study has to do with California. Now she's
9 asking him to speculate on how it would apply in Texas.

10 THE COURT: Yeah. Professor, have you done any
11 studies to be able to make that jump to Texas?

12 THE WITNESS: Well, essentially, the way I make the
13 leap is by recognizing that Texas has a -- that California has
14 a universal background check system and Texas has a more
15 limited background check system, only relying on the NICS
16 system. So it's almost a matter of logic that the impact will
17 be lower because the avenues for circumvention are greater in
18 Texas.

19 MR. ALSAFFAR: Well, that's -- that's why it's apples
20 and oranges, Your Honor.

21 THE COURT: Yeah. It goes to the weight of his
22 testimony, not to striking.

23 Go ahead.

24 BY MS. KRIEGER:

25 Q. I think you basically just said it. But in your opinion,

1 based on your expertise, would that rate be higher or lower in
2 a state like Texas?

3 A. You would expect it to be lower because Texas doesn't have
4 the universal background check systems that were in operation
5 at the time of this study in 1991 in California.

6 Q. Do you know what the saturation of guns is in Texas?

7 A. I mean, I don't have a precise number, but it's widely
8 recognized that it is a far more gun-saturated environment
9 than certainly California was in 1991.

10 Q. Based on your experience, training, research, expertise,
11 would the saturation level of guns in Texas have an impact on
12 the deterrent effect of a denial?

13 A. Yes. And this goes to the point that we've made
14 previously, about Texas being a leader in mass shootings. The
15 greater the access to weaponry, the more it facilitates these
16 types of mass shooting events.

17 Q. Would that deterrent effect be higher or lower for
18 somebody who loves guns?

19 A. Yeah. If one looks across the universe of mass shooters,
20 one of the things that stands out is some mass shooters seem
21 to be more deterrable than others. The ones who have a
22 fascination with mass shootings and with guns tend to be those
23 who are more committed to their deadly enterprise and,
24 therefore, harder to deter simply with a background check
25 system.

1 Q. Based on this study, can plaintiffs say that it was more
2 likely than not that Kelley would have been deterred by a
3 background check?

4 MR. ALSAFFAR: Your Honor, that now is speculation.
5 I think we can demonstrate that he has actually looked at no
6 records relating to Devin Kelley, so he has no personal
7 knowledge about Devin Kelley specifically.

8 THE COURT: Professor, this is sounding like
9 psychology. I mean, can you answer this question?

10 THE WITNESS: Yeah. Well, let me give you an
11 example. You know, Dylann Roof committed a horrific mass
12 shooting in a church.

13 MR. ALSAFFAR: Your Honor, I don't mean interrupt.
14 He's now pulling on another person we have nothing about. It
15 doesn't apply.

16 THE COURT: Yeah, s.o let me hear his answer before I
17 strike it.

18 THE WITNESS: Okay. So I was going to say that
19 Dylann Roof committed a horrendous mass shooting at a church
20 in South Carolina in Charleston. And he actually waited to
21 purchase his firearm lawfully when he became 21. So he was
22 someone who seemed to be restrained by the prohibitions that
23 NICS were -- and failed because he didn't buy the gun until he
24 reached his 21st birthday.

25 So he is someone who, you know, might have been deterred

1 by a more effective background check system.

2 Kelley, on the other hand, represents a very different
3 category of someone both with demonstrated mental illness, a
4 commitment to --

5 THE COURT: But, Professor, how do you know that if
6 you didn't review any of those records? That's what I'm
7 struck by.

8 THE WITNESS: Yeah. Well, this is actually sort of
9 well known in the literature on these individuals. I mean,
10 I've studied mass shootings. And so I was commenting on the
11 Charleston mass shooting by Dylann Roof, and then I've
12 reviewed, you know, all of the publicly available information
13 on this case, which was abundant, as well as all of the
14 information that's been presented in this trial and the
15 depositions that we alluded to earlier. So I think I do have
16 a rich understanding of how this mass shooting fits into the
17 overall picture of cases, you know, based on my research over
18 the years examining mass shooting episodes.

19 THE COURT: Yeah. I'll note that he hasn't reviewed
20 many of the records in this case, but this goes to the weight,
21 not to exclusion.

22 You can continue.

23 MR. STERN: Your Honor, we would have the last answer
24 stricken from the record as well, the entirety of the answer.

25 MR. ALSAFFAR: Your Honor, can I tell you why they're

1 asking you to do that? They're now asking you to strike their
2 witness' answer because he gave an inaccurate one, and they
3 know that the answer he just gave is going to hurt them in the
4 Dylann Roof litigation.

5 Right now -- I was going to cross-examine him on -- now.
6 Right now, the federal government is on -- is about to go to
7 trial for their failure to operate the system properly in the
8 South Carolina shooting case. It was not because he was able
9 to access guns because there weren't good laws. It was
10 because the federal government was negligent in allowing him
11 to have guns he shouldn't have had. It's very similar to this
12 case. This is the Sanders case, Your Honor, the Fourth
13 Circuit case. So that's why now they want this witness'
14 answer stricken.

15 THE COURT: So --

16 MR. ALSAFFAR: I would like to keep that one on the
17 record because I want to cross-examine on it now.

18 THE COURT: Yeah. His answer will not be stricken.

19 You know, I guess I'm going back to the comment I made
20 yesterday or day before. I'm not sure I understand the
21 government's position. You seem to be telling me that, no,
22 you-all -- the government's position is y'all still believe in
23 gun regulation. But then you keep on bringing witnesses to
24 the -- to the witness stand who all keep saying that these
25 things are ineffective. I'm just -- I'm not -- I don't

1 understand what's going on here.

2 MR. STERN: The government's position is that the
3 NICS system is effective, but it is limited by law. It is
4 only pertaining to purchases at FFLs. And as Your Honor
5 stated in Docket Entry 318, the order in response to partial
6 motions for summary judgment, Devin Kelley's ability to access
7 firearms through non-FFLs is at the heart of this litigation.

8 We are trying to demonstrate that, given the limitations
9 of the NICS system, that Devin Kelley could easily have
10 accessed firearms through non-FFLs, thereby circumventing the
11 NICS background check. And his individualized determination
12 as well as his obsession with firearms ensures that it is more
13 likely than not he would have obtained a firearm through a
14 non-FFL in order to commit this mass shooting.

15 Therefore, as a matter of tort law -- not as a matter of
16 policy, but as a matter of tort law, cause and effect cannot
17 be proven by plaintiffs because this shooting would have
18 occurred regardless of whether Devin Kelley's information had
19 been submitted by the Air Force. And as a result, his ability
20 to obtain a firearm through an FFL was not a substantial
21 factor in bringing about this shooting. And that is what's at
22 issue here, whether his ability to get a gun through a non-FFL
23 was a substantial factor, without which plaintiffs' injuries
24 would not have occurred.

25 And our argument has always been, his access, his

1 determination, and his obsession all ensure that he would have
2 obtained a firearm, particularly in Texas, through non-FFL
3 means and, thereby, still committed this heinous act.

4 THE COURT: So I'm still hearing that you-all say,
5 though, despite all of that distinction, that -- and what I
6 thought I heard Professor Donohue say is, some background
7 checks have some minimal ability to deter -- it may have some
8 deterrent effect, but it's less than 50 percent efficiency
9 based upon that Table 3 that you-all relied upon.

10 So then, I mean, Congress required federal agencies to
11 report. And so the effect of your position is, there should
12 be no consequences if federal agencies do not report. That's
13 the natural leap; right?

14 MR. STERN: The natural leap is that this case runs
15 headlong into *Johnson v. Sawyer*, Your Honor. Your Honor just
16 said it a few minutes ago: What does Good Samaritan Law have
17 to do with this case?

18 This is a statutorily-imposed obligation by Congress.
19 Your Honor, the government couldn't agree more. That is
20 exactly why this case is barred by *Johnson v. Sawyer*.

21 THE COURT: Well, but answer my question. So the
22 natural -- the natural effect of the government's position
23 here is, no federal agency will ever have any liability for
24 any failure to report.

25 MR. STERN: When it comes to these type of

1 intra-governmental reporting obligations, there is no duty
2 under Texas state substantive law.

3 THE COURT: So your answer to my question is, yes,
4 there will never -- there will never, ever be liability on a
5 federal agency?

6 MR. STERN: Your Honor, I hesitate to say "never,
7 ever." I mean, to the extent that you can make an argument
8 that perhaps if Tessa Kelley was killed -- I wouldn't even go
9 there. But, perhaps, there'd be some argument with regards to
10 using these common law tort principles that Your Honor used
11 under -- I think it was *Greater Houston Transportation v.*
12 *Phillips*, to try to find a tort under Texas state law.

13 The problem with that, though, Your Honor, is when it
14 comes to issues like foreseeability, the foreseeability
15 analysis here is limited by statute. That's why we're
16 still --

17 THE COURT: -- foreseeability. I'm sorry, Professor
18 Donohue, we're sort of going sidetrack here.

19 But for foreseeability, the government is arguing that
20 Academy ought to be brought in. I mean, Academy here
21 doesn't -- they sell a 30-round magazine that they shouldn't
22 have sold. But just because of that failure, you're arguing,
23 by bringing them in, that they should have foresaw that this
24 would have caused a mass shooting; right?

25 MR. STERN: Well, Your Honor, there's several

1 arguments with regards to Academy. But we're bringing them in
2 because plaintiffs have argued previously that all of these
3 types of counterfactuals are beside the point. Devin Kelley
4 purchased this firearm to commit this shooting. That was one
5 of their arguments. And, of course, we disagree. And I
6 believe Your Honor disagrees because, otherwise, we wouldn't
7 be having a trial here. That has never really been in
8 dispute; right? That statement is correct; right?

9 The Air Force has always -- I'm sorry. The government's
10 position has always been -- in fact, we stipulated to it two
11 years ago -- the Air Force did fail to submit Devin Kelley's
12 disqualifying information in to NICS. He purchased the AR-556
13 from Academy in April 2016. Our position is, even if we're
14 looking only at that specific purchase on that day, then that
15 purchase should have been denied by Academy.

16 And then the question becomes, "Well, maybe he would have
17 changed his Texas driver's license." Maybe, maybe not. But
18 now we're back in this counterfactual world. If Devin Kelley
19 was denied at all FFLs, would he simply have just stopped
20 trying to obtain firearms to commit this heinous act? And the
21 government is saying, of course not.

22 He certainly had numerous means, because Texas -- and this
23 is the point we're trying to make here -- Texas has not
24 imposed these additional limitations to gun access. They
25 haven't imposed or enacted a universal background check, a

1 permit to purchase or any of these other types of gun policies
2 that can limit access. And by more limited -- by limiting the
3 access, you actually impact the cause-and-fact analysis that
4 we're trying to make here. So I don't know that we can make
5 this argument in all states, but here --

6 THE COURT: So let me circle back to, I think, the
7 question that was pending before Professor Donohue.

8 So he made the statement that some mass shootings -- or
9 shooters are more deterrable than others. And then we, I
10 think, got off on, well, how does he know that? And --
11 because he didn't review a lot of the underlying records
12 regarding Mr. Kelley.

13 MR. STERN: And our point was, I think we agree, Your
14 Honor. We have future experts that will handle those issues.
15 So to the extent that he is here to talk about gun policies
16 and sort of the argument that I am making here, that is the
17 scope of his testimony, which is why we're asking to strike
18 his previous answers.

19 MR. ALSAFFAR: I forgot my original objection. But I
20 think I'm going to try to go back to sum it up very quickly.
21 I think what the government is saying, Your Honor -- we
22 shouldn't strike his answers, Your Honor. It's too late for
23 that. But secondarily -- because it's cross-examination
24 fodder.

25 The second thing, Your Honor, just very quickly. I

1 believe I just heard, and I think it would make this a little
2 bit easier, the government is stipulating that this witness,
3 just this witness, will not be offering any opinions on the
4 foreseeability prong of proximate cause. Is that correct?

5 MR. STERN: He could talk about mass shooters in
6 general and the laws applicable to gun access through FFL and
7 non-FFL means. I would agree that with regards to the
8 particulars of Devin Kelley, we will have future experts, most
9 notably a criminologist and a forensic psychiatrist, who will
10 sort of do the deeper dive into Kelley.

11 That is why, with regards to the professor's comparison to
12 Dylann Roof versus Kelley or anyone else, we are not asking
13 him to opine on that limited portion.

14 THE COURT: So that's where I thought he was headed
15 when he started talking about some mass shooters were more
16 deterrable than others. I thought we were heading towards
17 causation and foreseeability. But since you're saying he's
18 not being used for that purpose, let's pose a new question to
19 the professor.

20 BY MS. KRIEGER:

21 Q. Let's pull up GEX 102.

22 Professor, are you familiar with this study?

23 A. Yes, I am.

24 Q. This is a study by Dr. Webster. We've looked at this
25 before as well. Do you consider this study to be a reliable

1 authority?

2 A. You know, it's -- it's by a very imminent group of
3 researchers and a significant publication. And -- I may have
4 some disagreement with its conclusions, I do think it's a
5 reliable study to look at.

6 Q. Let's look at page 4. Can we bring out the first
7 paragraph under "Data."

8 Can you read the second sentence starting with, "We
9 limited our data"?

10 A. Yes. "We limited our dataset to incidents of homicide
11 that occurred between 1984 and 2017, involved four or more
12 victims (excluding any offender death), and involved a firearm
13 of any type."

14 Q. So this study was only looking -- was this study only
15 looking at the effect of state laws on mass shootings?

16 A. Yes. And the particular definition of mass shootings that
17 they articulate here.

18 Q. Do you -- do you recall -- we had testimony on this.

19 Do you recall what the study said about the effectiveness
20 of universal -- or I think they might call it comprehensive --
21 background check systems on mass shootings?

22 A. Yeah. This study concluded that comprehensive background
23 check systems were not effective.

24 Q. For reducing mass shootings; is that fair?

25 A. Yeah. For the mass shootings that they were looking at in

1 this case.

2 Q. Is the finding of this study different from the research
3 on the effectiveness of universal background checks on gun
4 violence at-large?

5 A. Yes. It was different from what we were looking at
6 earlier with the study by Wintemute and his coauthors.

7 Q. We've just talked about -- you can take that down.

8 We've talked about some of the research on whether
9 background checks are an effective deterrent. Based on this
10 research and other research that you've seen, in your opinion
11 at a population level, does NICS reduce the number of
12 prohibited individuals who acquire firearms?

13 A. Yes, it does.

14 Q. And in your opinion do universal background check systems
15 at a population level reduce the number of prohibited
16 individuals who obtain firearms?

17 A. Yes, they do.

18 Q. Now, in your opinion does being denied from purchasing a
19 firearm, either via NICS or a universal background check
20 system, make it more likely than not that any given individual
21 would be prevented from obtaining a firearm in the future?

22 A. It is a different inquiry for any specific individual than
23 at the population level.

24 Q. Why is that?

25 A. Well, as I said earlier, there is a range of durability

1 based on the characteristics of the individual jurisdiction as
2 well as the elements of the particular individual, both in
3 terms of their focus on weaponry and also their, you know,
4 mental health or predisposition to commit violent crime.

5 MS. KRIEGER: Pass the witness.

6 THE COURT: How much time do you think you're going
7 to need?

8 MR. ALSAFFAR: No more than 30 to 40 minutes, Your
9 Honor.

10 THE COURT: You want to plow through?

11 MR. ALSAFFAR: I'm more than happy to.

12 THE COURT: Go ahead.

13 MR. ALSAFFAR: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. ALSAFFAR:

16 Q. Good afternoon, Doctor.

17 A. Good afternoon.

18 Q. Can you hear me okay?

19 A. Yes, I can hear you.

20 Q. All right. Can you see me okay?

21 A. I can. You look good.

22 Q. It's coming. My camera just moved off me right when I
23 asked that question.

24 Can you see me now?

25 A. I can.

1 Q. Okay. Doctor, to be fair, everything you just said about
2 the alternate gun market has nothing to do with the facts of
3 this case; correct?

4 A. Are you being fair?

5 Q. I'm asking you if that's a fair statement, sir.

6 A. Oh, no. I don't think that's fair.

7 Q. Okay. Well, then let's talk about it a little bit. First
8 of all, do you agree that an opinion -- any opinion, including
9 one in a court of law -- is only as good as the information
10 that it's based upon?

11 A. Yeah. Presumably, that is true.

12 Q. Okay. Do you agree that the more relevant information
13 that you can review related to a case you're providing
14 opinions on, the more reliable your opinion will be?

15 A. Certainly, more information as a general matter is better
16 than less information.

17 Q. "More relevant information" was my question. That's
18 important. The more relevant information that you can review
19 regarding your opinion, the more reliable your opinion will
20 be. Is that a fair statement?

21 A. Yeah. As a general matter, that is true.

22 Q. And my understanding, Mr. -- is it Mister or Doctor
23 Donahue? I did not ask you how you prefer to be referenced,
24 and I apologize.

25 A. It is -- I am a doctor, but my mother would never allow me

1 to refer to myself in this way.

2 Q. Okay. Okay. I just -- I wanted -- I didn't want to be
3 disrespectful. Mr. Donohue is okay, then?

4 A. Yeah. That's fine.

5 Q. Okay. Mother approved?

6 A. That would be mother approved.

7 Q. All right. In this case -- in this case, you are -- my
8 understanding is you are offering opinions about other gun
9 markets and other gun options that Devin Kelley specifically
10 could have accessed; is that right?

11 A. That's correct.

12 Q. And in order to reach those opinions, would it be helpful
13 for you to look at the facts and the circumstances available
14 to you that relate to Devin Kelley's actual life?

15 A. Yes. And I think I did.

16 Q. Okay. Well, let's talk about that. Specifically, when
17 I'm asking you about facts and circumstances related to Devin
18 Kelley's life specifically, those would aid you in reliably
19 forming your conclusions about what other options he actually
20 did have and what his feelings and -- were about those
21 options; right?

22 A. Yes.

23 Q. Now, did the government tell you, before you formed your
24 opinions in this case, when you provided your report, that
25 there were over 30,000 documents that were produced relating

1 to Devin Kelley's time in the Air Force specifically?

2 MS. KRIEGER: Objection. He's asking for
3 communications between government --

4 THE COURT: He's asking a sheer number, nothing
5 detailed. That's overruled.

6 THE WITNESS: They did not mention any specific
7 number, no.

8 BY MR. ALSAFFAR:

9 Q. Let me ask a more specific question. And did they provide
10 you with the over 30,000 documents related specifically to
11 Devin Kelley's time in the Air Force?

12 A. Not the 30,000 documents, no.

13 Q. Okay. Did the government provide you with the over 70,000
14 documents that were produced by the Texas Rangers, the ATF,
15 the FBI, local Texas law enforcement that specifically related
16 to Devin Kelley's life and this shooting in particular?

17 A. Not 70,000 documents, no.

18 Q. I think I heard you on the direct examination, that you
19 didn't look at one Texas Ranger document file. Is that fair
20 to say?

21 A. I mean, I think there were Texas Ranger documents that
22 were presented in court, and I did examine those documents.

23 Q. Okay. And that's not my -- thank you for clarifying that,
24 but that's not what I asked you. So let's be specific about
25 this.

1 In forming your conclusions that you just gave in this
2 case, and the ones that you placed in your report, you did not
3 review one document from the Texas Rangers file that related
4 to Devin Kelley's life and this shooting specifically; is that
5 fair?

6 A. Well, in forming the opinions that I just testified to, I
7 did consult the documents that were presented here in court
8 today.

9 Q. Only those that were presented during the trial this week;
10 correct?

11 A. And last week, yes.

12 Q. And when you provided your report in this case, you didn't
13 look at any Texas Ranger documents; correct?

14 A. You know, I don't believe I looked at a Texas Ranger
15 document at that time.

16 Q. Okay. Well, let's actually look at what you reviewed
17 before forming your opinions, in your report at least, in this
18 case. If we could show GEX 29.

19 And this has been admitted into evidence, Your Honor, I
20 believe.

21 MR. STERN: What document?

22 MR. ALSAFFAR: List of documents he reviewed.

23 Oh, it hasn't? Okay. I apologize.

24 So we're just going to show you this for cross-examination
25 purposes. This is GEX 29.

1 BY MR. ALSAFFAR:

2 Q. Is this a true and correct copy of the list of documents
3 you reviewed prior to forming your opinions in this case?

4 A. Oh, it's a list of documents that were specifically
5 provided in this case. But, of course, I've spent years
6 looking at both this mass shooting and many others that inform
7 my thinking on these matters.

8 Q. So this is a list of the entire universe of documents you
9 reviewed prior to forming your specific opinions in the Devin
10 Kelley case; correct? Your report.

11 A. With the qualification that I just gave, these were the
12 documents that were provided to me anew, beyond what I already
13 had from my prior research.

14 Q. You didn't look at -- you didn't review any depositions in
15 this case, other than the FBI director's, prior to forming
16 your written report opinions in this case; correct?

17 A. I think that's correct.

18 Q. You didn't review -- you still haven't reviewed any of the
19 20-plus depositions of the Air Force employees, the Air Force
20 commanders, the Air Force supervisors and colonels and
21 commanders that were taken in this case prior to today. Is
22 that fair to say?

23 MS. KRIEGER: Objection, Your Honor. This witness is
24 not being offered for the question of foreseeability by the
25 Air Force.

1 MR. ALSAFFAR: Your Honor, may I respond? This
2 actually gets into that part of his testimony in direct where
3 he was talking about increased risk of harm, and that does
4 dovetail with how much information. And it's a credibility
5 assessment, too.

6 THE COURT: It's overruled.

7 BY MR. ALSAFFAR:

8 Q. Mr. Donohue, I'm sorry. If you answered, I didn't hear
9 you, so I'm going to reask the question for the record, if
10 that's okay?

11 A. Sure.

12 Q. Prior to today's testimony, you did not review any of the
13 depositions of the Air Force members, commanders, employees,
14 or experts that provided testimony in this case; correct?

15 A. Not beyond what was made available during the trial.

16 Q. Okay. And I think you mentioned that the only thing you
17 finally did review prior to your trial testimony was the
18 Michael Kelley, Rebecca Kelley, Danielle Smith, and
19 Ms. Shields depositions. Did I get that correct?

20 A. Yeah. I did review all of those depositions.

21 Q. Okay. And four of those documents listed on your list
22 here that's still in front of you relate to a shooter that has
23 nothing to do with this case; right?

24 A. Yeah. Some of them are documents not related to this.

25 Q. And more specifically related to the causation opinion

1 that you provided earlier, are you aware of how many mental
2 health records related to Devin Kelley's mental health history
3 were in the file that the Air Force had while he was in the
4 Air Force?

5 MS. KRIEGER: Objection. Speculation.

6 THE COURT: That's overruled.

7 MR. ALSAFFAR: I'm asking --

8 BY MR. ALSAFFAR:

9 Q. Let me reask the question.

10 A. Sure.

11 Q. Are you aware of how many mental health records the
12 Air Force was aware of and had in their possession related to
13 the Devin Kelley mental health treatment that he received
14 while he was in the Air Force?

15 A. I assume, by virtue of two episodes in a psychiatric ward,
16 there were lots of records.

17 Q. Would it surprise you to learn that there are over 2500
18 mental health records related to his mental health treatment
19 while in the Air Force?

20 A. 2500 documents?

21 Q. Pages.

22 A. Pages. I might be surprised at the number.

23 Q. That's a lot; isn't it?

24 A. It is a lot.

25 Q. Okay. Did you -- my understanding, too, and I want to be

1 clear for the record, but I think this is correct, but you
2 tell me if I'm wrong, is that you also did not review any of
3 the approximately 1400 pages of investigations, of reviews, of
4 barment requests records that all related to Devin Kelley's
5 conduct while he was in the Air Force, prior to forming your
6 conclusions in this case?

7 A. Yeah. I didn't go look at those, beyond what was
8 available in this trial.

9 Q. Okay. So is my statement correct?

10 A. To the extent it doesn't disagree with my statement.

11 Q. Okay. I think what you're saying is that for the first
12 time in your history of this -- sort of your life -- your
13 history -- when I say "history," your time involved as an
14 expert in this case. The first time you ever laid eyes on a
15 few of these records from the investigative file was when you
16 were sitting down and watching other witnesses provide
17 testimony in trial. Is that fair to say?

18 A. Well, I mean, I did testify that I reviewed depositions,
19 and, obviously, much of this information was available. The
20 amount of surprising information that came to me today in the
21 course of the trial is a very limited set of things. One of
22 them was your statement that there were 2500 pages. I might
23 have thought it was a smaller number than that. But almost
24 everything else that I've heard is sort of consistent with the
25 evidence that I had prior, and generally reaffirmed the views

1 that I had.

2 Q. Okay. So it's not -- we understand, you're not changing
3 your opinions despite not looking at any of those records
4 about Devin Kelley; is that right? You're keeping to your --
5 sticking to your guns on that so to speak?

6 MS. KRIEGER: Objection. Argumentative.

7 THE COURT: That's overruled.

8 BY MR. ALSAFFAR:

9 Q. Is that correct?

10 A. I have not changed my opinion as articulated in the
11 testimony today.

12 Q. Thank you, Doctor.

13 Now, I want to turn now to something that -- I believe it
14 was -- Ms. Krieger was asking you on direct examinations. And
15 it kind of related now to sort of the general research or
16 general opinions you've provided sort of in the body of work
17 on -- on gun violence.

18 And you've written -- sir, you've written a lot of op-eds
19 and newspaper articles about this area of gun violence; is
20 that right?

21 A. I have.

22 Q. And I'd like to talk to you just about a few of those, if
23 you don't mind, for a minute. If you can please put up the
24 article, "It's Going to Take More." And if we can go to
25 page 2. This is one of your publications, or one of your

1 op-eds; correct?

2 A. It is.

3 Q. Okay. And if we look at the second paragraph, beginning
4 with "in this realm." And tell me if you can see that okay,
5 Mr. Donohue.

6 A. "In this realm."

7 Q. Oh, no. No. I'm just -- I'll ask you what -- yeah. No,
8 absolutely, you can read as much to yourself as possible. But
9 I won't ask -- I won't ask you to be reading stuff into the
10 record like you did on direct, if that's all right. But I
11 certainly want you to read it to yourself, absolutely.

12 A. Okay. Sure.

13 Q. So my question is about this statement that you said,
14 "Although the vast majority," that part, "of mass shooters
15 have left a record that would clearly reflect unsuitability
16 for gun possession." You see that line? We can highlight
17 that all the way down to "databases."

18 A. Yes. Yes.

19 Q. Okay. Now, is it fair to say that what you're talking
20 about here is that one of the problems, when we're talking
21 about the effectiveness of these background -- universal or
22 NICS, background check systems is one of the problems that's
23 been plaguing the country in the -- in making these more
24 effective is the failure to submit the proper criminal records
25 into the databases?

1 MS. KRIEGER: Objection. Misstates the evidence.

2 THE COURT: Well, he can answer his own --

3 MR. ALSAFFAR: Yeah.

4 THE COURT: -- statement.

5 BY MR. ALSAFFAR:

6 Q. Do you agree to that?

7 A. Well, this statement was referring to my basic notion
8 that, you know, if we went to, you know, systems that are
9 prevalent in other major affluent democracies, you would have
10 a more effective system in place, beyond NICS or even the
11 universal background check system. And, you know, as it
12 states, in almost every mass shooting -- I won't say in every
13 one -- but in almost every one that I've looked at, the
14 evidence was so abundant that this person should not have a
15 gun in my view and the view of most, you know, western
16 democracies. I would like to see a system that would allow
17 that to be, you know, effectuated much better than we have in
18 the United States.

19 Q. In fact -- and so let's go back to my statement, actually.

20 Is it -- is it correct or incorrect that one of the -- one
21 of the issues plaguing the background check system efficiency
22 is a failure of law enforcement agencies to submit those
23 criminal records into the system? Is that one of the
24 problems?

25 A. You know, there are multiple problems, and one problem is

1 when the records don't get into the system.

2 Q. And if we just talk about the facts of this case and not
3 others, we know that that particular problem is why Devin
4 Kelley was able to get the gun he used to kill everybody in
5 this case and to injure everybody in this case; right?

6 A. If you're talking about the specific gun, certainly, that
7 made it a lot more likely that he would get that particular
8 gun.

9 Q. A lot more likely to get that gun?

10 A. Yes.

11 Q. Okay. Was your answer, "yes"? I'm sorry.

12 A. Yes. A lot more likely that he would get that specific
13 gun.

14 Q. Okay. And then you make the point here that -- at the
15 bottom there, that without the proper reporting of these
16 criminal records by these law enforcement agencies, these
17 folks buying really deadly weapons just appear to be
18 law-abiding citizens until they kill somebody; right?

19 A. Yes.

20 Q. Okay. I want to talk about another -- another piece --
21 actually, let's stick on this one, if we can, really quickly.
22 On the next page, 4, in this article, Mr. Donohue, do you
23 still agree -- the second paragraph "while the best."

24 Do you still agree with this opinion that you've put in
25 this 2018 article, that "the best way to stop shooters is to

1 prevent them from having a gun from the first place"?

2 A. Yeah. I mean, I think that it is much better if you can
3 stop them from having a gun the first place.

4 Q. All right. And let's take that down.

5 If we could put up for Mr. Donohue the piece he
6 contributed to in -- that's titled "How to Stop Shootings in
7 America." And if we could show him the first page first. I
8 want to make sure he looks at the first page or two.

9 You contributed to this piece in the Business Insider; is
10 that correct?

11 A. (Inaudible.)

12 Q. That's okay.

13 A. Is my name somewhere on this?

14 Q. Yeah. Yeah. Oh, here. Actually, why don't we go to page
15 3. I'll just show you some exemplars. Just, if we could
16 highlight his name that appears quoted in here a few times. I
17 think there are three or four times on this page.

18 Do you -- do you -- first of all, do you remember
19 participating in this piece?

20 A. Yeah. It looks like I was interviewed for this
21 publication.

22 Q. And if we could go to page 6 of this piece.

23 A. Yes.

24 Q. And I actually believe this is an opinion you just
25 testified on direct examination, that I'm going to like to ask

1 you just little bit about. And that is this. They're asking
2 the question, "Do gun violence restraining orders or red
3 flags" -- sorry -- "red flag laws work?" And you believe they
4 do. You are a big advocate of red flag laws; correct?

5 A. Yeah. I think red flag laws would be helpful, certainly.

6 Q. And you've -- you've done work with the Every Town for Gun
7 Safety, the Bloomberg group; correct? You've worked with them
8 before?

9 A. You know, I've probably spoken at some of their events. I
10 haven't specifically worked with them.

11 Q. And I didn't mean to -- like you're an employee or
12 anything. What I meant is that you review their publications.
13 They're reliable publications regarding mass shootings;
14 correct?

15 A. Yes.

16 Q. Okay. And if you look down on the paragraph here, this
17 article you appeared in, under "according to" -- can we
18 highlight that for Mr. Donohue so he can see it.

19 And do you agree with this analysis, that according to
20 analysis from Every Town for Gun Safety, "Of the 156 mass
21 shootings that occur between 2009 and 2016, 54 percent were
22 related to domestic or family violence. This strong
23 connection suggests that domestic violence is a likely
24 predictor of violent behavior."

25 Do you agree with that?

1 MS. KRIEGER: Objection, Your Honor. I think this is
2 improper impeachment. This is not Professor Donohue's
3 statement.

4 MR. ALSAFFAR: I just asked if he agreed with it.
5 It's a publication he appeared in.

6 THE COURT: That's overruled.

7 BY MR. ALSAFFAR:

8 Q. Do you agree with that statement, Doctor -- Mr. Donohue?
9 Sorry.

10 A. Well, the Gun Control Act specifically does single out
11 those who are convicted of a misdemeanor -- you know, violent
12 misdemeanor involving domestic violence. And so that is a
13 presumption of federal law.

14 Q. But it's not only a presumption of federal law. The
15 statistics of "54 percent of mass shootings were related to
16 domestic or family violence," that's true; right?

17 A. You know, I don't know the exact percentage. And there
18 are, you know, differences in definitions of mass shootings.
19 But there certainly is quite a bit of evidence that the
20 shooters have some sort of history of family violence or
21 commit such violence.

22 You know, for example, in the Newtown shooting, the first
23 person that was killed was the -- was the mother of the mass
24 shooter. So there was --

25 Q. Yeah.

1 A. -- a domestic violence element there. And we mentioned
2 the Santa Monica shooting with John Zawahri. And he first
3 killed his father and his brother and then went off to kill
4 others. So in that sense, I don't know exactly what the
5 percentage is, but it does seem that there is often this
6 connection to violence within the family that then spills over
7 into the public arena, in these mass shooting cases.

8 Q. And those two mass shootings you just mentioned, they --
9 they had -- both things were true at the same time? They were
10 domestic-violence-related shootings, but also other innocent
11 nonfamily members were killed and injured seriously; correct?

12 A. That's correct.

13 Q. And that's a lot like this case; right?

14 A. Well, those are differing in the sense that the person
15 seemed to have broke in and then started the killing. Here,
16 there was earlier violence in the domestic realm, and there --
17 there wasn't the, you know, sort of immediate family killing
18 before launching the wider attack.

19 Q. And in this case, I think you said you listened to -- I
20 know you didn't review this prior to the trial, but you did
21 listen to the trial testimony of family members; right?

22 A. Yes.

23 Q. The morning of the shooting, Devin Kelley committed an act
24 of domestic violence against his wife; right? He put a gun to
25 her head and tied her up, hogtied her?

1 A. Yes.

2 Q. And then said he'd be back; right? You heard that?

3 A. Yes.

4 Q. And then he went to the church where his -- to the church,
5 his wife's family church; right?

6 A. Yes, he did.

7 Q. He went to his wife's family church where his
8 mother-in-law, his grandmother, his step -- his wife's
9 stepfather, and his wife's brother went to church regularly;
10 correct?

11 A. That's my understanding, yes.

12 Q. And he killed his wife's grandmother; correct?

13 A. He did.

14 Q. He killed his grandmother who he had several conflicts
15 with in that year of the shooting; correct? You heard that
16 testimony?

17 A. Yeah. His wife's grandmother, yes.

18 Q. Uh-huh. And he targeted that church within months after,
19 specifically threatening to wipe out Danielle's entire family,
20 his mother-in-law, his grandmother, his brother, and his --
21 Danielle's stepfather; correct?

22 MS. KRIEGER: Objection. Misstates prior testimony.

23 THE COURT: That's overruled.

24 BY MR. ALSAFFAR:

25 Q. You can answer.

1 A. I think you're asking about the nature of the threats.
2 And, certainly, I was aware of many threatening comments, but
3 the full extent of the threatening comments, I'm less certain
4 about.

5 Q. Well, I'm just asking about what you -- I know you didn't
6 review everything in this case. I'm asking about the trial
7 testimony. Were you -- I don't know. Were you teaching, or
8 did you read the Michelle Shields trial testimony?

9 A. No. I did listen.

10 Q. Okay. So you saw both the documentary evidence from the
11 Ranger file, that Devin Kelley had sent a specific threat to
12 wipe out Michelle Shields' entire family, which is Danielle
13 Shields' family, in the few months before the shooting;
14 correct?

15 A. Yes.

16 Q. And then you read the testimony that Michelle Shields felt
17 she was target of the shooting; correct?

18 A. Yes.

19 Q. And, in fact, her family, Danielle's family, was targeted
20 in the shooting; correct?

21 MS. KRIEGER: Objection. Calls for speculation.

22 MR. ALSAFFAR: I'm asking about facts, Your Honor.

23 THE COURT: That's overruled.

24 BY MR. ALSAFFAR:

25 Q. Danielle Kelley's family was targeted, and, in fact, one

1 of them was murdered in the shooting; correct?

2 A. Yeah. Certainly, the evidence suggests that he went to
3 that church because the family connection was there.

4 Q. Okay. And just like in the Sandy Hook church shooting and
5 the other one you mentioned, you had one or two families
6 either shot or injured or targeted. And yet, other family
7 members, who are either strangers or not strangers but not
8 family, were also killed and shot; correct? In this one?

9 A. Yes.

10 Q. Okay. Thank you, Doctor.

11 All right. Now, I want to talk now about these -- these
12 other -- these other factors that you said were other gun
13 avenues that you said were available in Texas, I believe; is
14 that right?

15 A. Yes.

16 Q. Okay. And first, let me ask this question. It's about
17 the FBI, the Department of Justice. You know -- and I bet --
18 you obviously probably know a lot more than I do. But you
19 know that the FBI has actually looked in -- extensively, has
20 looked into the very thing you're talking about today, the
21 availability or reality of other markets and comparing what
22 actually happens in theory with these other markets versus
23 facts. You know the FBI has studied that; right?

24 A. Yes. The FBI is attentive to these issues.

25 Q. And, Mr. Donohue, I would imagine that in your field of

1 gun violence research, that you would look at what the FBI
2 does, pretty extensively, when it comes to their research on
3 gun violence and mass shootings specifically; is that -- or am
4 I making an assumption I shouldn't?

5 A. You know, I try to look at everything that I think is
6 relevant to my work.

7 Q. Okay. And would the FBI criminal statistics data on mass
8 shootings and what tools and methods mass shooters use, would
9 that be relevant to your area of gun violence research?

10 A. Yes.

11 Q. Okay. I want to show you the U.S. Department of Justice
12 FBI study of pre-attack behaviors of active shooters in the
13 United States between 2000 and 2013.

14 Can you see that on your screen?

15 A. Yes.

16 Q. And let's actually skip to their study summaries on page
17 7, if we could. And if we could look at -- let's highlight
18 conclusion 3 with you -- for you. I'm sorry.

19 TECHNOLOGY SPECIALIST: 3?

20 MR. ALSAFFAR: Yes, please.

21 BY MR. ALSAFFAR:

22 Q. The FBI concluded that, "A majority of active shooters
23 obtained their firearms legally, with only very small
24 percentages obtaining a firearm illegally"; correct?

25 A. That's what they say, yes.

1 Q. Any reason to disagree with the FBI and Department of
2 Justice on that?

3 A. Well, there are some sort of caveats to that statement,
4 but --

5 Q. Well, let me ask you this -- let me ask you this: You
6 brought up on --

7 *(Audio echoing)*

8 MR. ALSAFFAR: Okay. I heard myself twice. I want
9 to make sure -- I think we got an audio problem here.

10 THE COURT: It's probably your laptop. Check your
11 volume.

12 MR. ALSAFFAR: Mine's on mute. But I'm going to
13 close it. Now I think it got resolved.

14 Is that -- is it okay on your end, Your Honor?

15 THE COURT: Yeah.

16 BY MR. ALSAFFAR:

17 Q. Okay. Mr. Donohue, am I okay on your end?

18 A. Yes, very good.

19 Q. I hate the sound of my voice. And to hear it twice must
20 be horrible. So are you okay?

21 A. Yeah. Great.

22 Q. Okay. Thank you.

23 On direct examination you brought up a couple of other
24 examples where illegal purchases were made; right?

25 A. Yes.

1 Q. And the FBI is not disagreeing with you. They're just
2 saying, "Well, only a very small percentage of mass shootings
3 are a result of being an illegal firearm"; fair?

4 A. Yeah. Although, here is where I think I disagree with
5 this statement, at least as relevant to this case, because
6 they're considering like the Adam Lanza mass shooting as being
7 a legally-obtained firearm. And, of course, you know, those
8 types of things, the gun purchase was legal, but then somebody
9 used the gun of somebody else to go off and do the killing.

10 Q. Yeah.

11 A. And that pattern is actually fairly common. And that's --
12 you know, somebody grabs the dad's gun and then goes off and
13 commits the mass shooting. So even though it's a
14 legally-obtained firearm, it has relevance to this case where,
15 you know, other avenues of acquisition might apply.

16 Q. Okay. Well, let's break that down a little bit. And
17 Mr. Lanza, actually, he stole his mother's guns; right?

18 A. Yeah. But the gun itself was a legally-obtained firearm
19 and --

20 Q. By his mother? By his mother?

21 A. But that's what they're referring to here --

22 Q. Okay.

23 A. -- in this.

24 Q. Sure. No. It's okay. You don't have to agree with the
25 FBI. No. It's okay. That's why I asked.

1 Let me ask you about another conclusion they came to and
2 ask you if you agree or disagree with the FBI again on this
3 one.

4 A. Sure.

5 Q. Let's go to Conclusion No. 6.

6 A. Yeah.

7 Q. The FBI concluded that, "The most frequently occurring
8 concerning behaviors were related to the active shooter's
9 mental health, problematic interpersonal interactions, and
10 leakage of violent intent." You see that?

11 A. I do.

12 Q. Do you agree with that statement, conclusion from the FBI?

13 A. Yeah. I think that there were certainly -- it's a lot to
14 that. I'm just trying to canvass in my own mind my
15 examination of the array of mass shooters. And as I said, you
16 know, many of them manifest these particular problems I think
17 well in advance of the actual mass shooting.

18 Q. Like Devin Kelley did; right?

19 A. Yes.

20 Q. In fact, he evidenced every single one of these factors
21 that are the most concerning factors related to active shooter
22 threats; correct?

23 MS. KRIEGER: Objection. Plaintiffs have established
24 very well that Professor Donohue is unaware of Mr. Kelley's
25 personal behavior.

1 MR. ALSAFFAR: I'll rephrase. I'll rephrase.

2 BY MR. ALSAFFAR:

3 Q. Just based on -- just based alone on the trial testimony
4 that you viewed this last week and a half, Devin Kelley
5 exhibited every single one of these factors identified by the
6 FBI as the most concerning behaviors that were related to
7 active shooters; correct?

8 A. Well, certainly, the mental health problem, problematic
9 interpersonal interactions.

10 "Leakage of violent intent," I'm not exactly sure what
11 they're referring to. But I would -- I would have said
12 something like manifestations of violent intent.

13 Q. Right.

14 Well, let's use your phrase. Devin Kelley had a whole
15 assortment of manifestation of violent intent that the
16 Air Force was aware of before they released him to the public;
17 correct?

18 MS. KRIEGER: Objection. He's already testified that
19 he has not reviewed the Air Force records.

20 MR. ALSAFFAR: Just limiting it to what he's reviewed
21 in the trial, Your Honor.

22 THE COURT: Go ahead.

23 BY MR. ALSAFFAR:

24 Q. Based on what you reviewed in this trial, you know that
25 the Air Force had a whole array of manifestations of violent

1 intent exhibited by Devin Kelley before they released him to
2 the public. Is that a fair statement?

3 A. That's correct.

4 Q. Okay. And one of those hosts and array of manifestations
5 of violent intent that the Air Force knew about prior to
6 releasing him to the public was specific and numerous threats
7 of mass shooting violence, correct, based on your review of
8 the trial testimony?

9 A. I'm just not sure what -- what your time frame is in
10 referring to this.

11 Q. Fair. Fair. Let me reask the question.

12 Based on your review of the trial testimony, the
13 Air Force, while Devin Kelley was in the Air Force, was aware
14 of numerous instances of specific threats Devin Kelley made to
15 commit mass shooting violence?

16 MS. KRIEGER: Objection. Once again, this witness is
17 not testifying as to the question of foreseeability by the
18 Air Force. So I don't know what the relevance is of this
19 question.

20 MR. ALSAFFAR: Your Honor, this relates direct --
21 sorry. This relates directly to that causation prong again.
22 He testified on risk of harm.

23 THE COURT: That's overruled.

24 BY MR. ALSAFFAR:

25 Q. Let me ask the question again, Mr. Donohue.

1 A. Sure.

2 Q. While Devin Kelley was in the Air Force, the Air Force had
3 numerous examples of the manifestation of Devin Kelley's
4 violent intent, specifically to threats by him to commit mass
5 shooting violence; is that fair?

6 A. There were certainly testimony and evidence that people in
7 the Air Force were concerned about the possibility that he
8 would come and shoot us all up and things of that nature.

9 Q. "Blow everybody's head off" is one of the statements he
10 made; correct?

11 A. Yeah. I don't remember that specific one, but I do
12 remember expressions of concern that he's the sort of person
13 that could, you know, come and try to shoot us all up.

14 Q. Okay. Remember a few minutes ago when we were talking
15 about the FDI -- FBI data -- specifically about background
16 check systems and how reporting that criminal data is really
17 important to help increase the efficiency of background check
18 systems. Do you remember that discussion?

19 A. Yes.

20 Q. And in addition to not reporting Devin Kelley's, you know
21 that -- prior to the shooting, that the Air Force -- just the
22 Air Force had failed to submit over 7,300 instances of
23 qualified prohibited cases of folks who were supposed to be
24 reported to the background check system; true?

25 A. Yeah. I can't remember the precise number, but it was in

1 that neighborhood. So yes.

2 Q. And you know, based on your gun research and your
3 examination of the validity of these background check systems,
4 that when a government agency fails to submit thousands of
5 data on violent criminals, that that -- by that information
6 not being in the system, the background check NICS system,
7 that increases the risk of harm to the public because those
8 folks can get guns when they shouldn't be able to; is that
9 fair?

10 MS. KRIEGER: Objection. Calls for a legal
11 conclusion.

12 MR. ALSAFFAR: Your Honor, they asked him three times
13 to specifically comment on increase risk of harm.

14 MS. KRIEGER: And Mr. Alsaffar objected.

15 MR. ALSAFFAR: And I got overruled, Your Honor, so I
16 have to cross on it.

17 THE COURT: And this objection's overruled.
18 Go ahead.

19 THE WITNESS: So the, you know, failure to submit,
20 you know, thousands of background check systems would, you
21 know, be likely to lead to more adverse outcomes, whether it's
22 violence or suicide -- so yes. I mean, that's what the
23 background check system is for.

24 BY MR. ALSAFFAR:

25 Q. Okay. Let's turn to the alternate markets you talked

1 about as they specifically apply to Devin Kelley's case.

2 Is that okay? Can we talk about that?

3 A. Sure.

4 Q. Okay. Now, I think you stated this, but I want to make
5 sure this is clear as day for the record; that the facts of
6 this case -- this case, no one else's, no one else in Texas,
7 no one else in California, no one else in Connecticut, this
8 case. All the guns that Devin Kelley had with him the day of
9 this massacre, and that were used to kill 26 people and injure
10 and maim 22 others at the Sutherland Springs Baptist Church,
11 were all legally purchased from FFLs; correct?

12 A. That's correct.

13 Q. And the only reason, the hundred percent reason he was
14 able to legally purchase them was because he passed an FBI
15 background check at the FFLs; correct?

16 A. Yeah. I mean -- for him to purchase them himself, he
17 needed to either pass the background check system or have an
18 FFL who ignored the background check system.

19 Q. Okay. And that's what happened; right?

20 A. Yeah. He did -- he did purchase them himself.

21 Q. And the only reason he was able to pass the FBI -- the
22 hundred percent reason that he was able to pass the FBI
23 background check was because the Air Force did not report the
24 mandatory criminal data they were required to report to the
25 FBI; true?

1 A. Yes. That's correct.

2 Q. Okay. Now, let's turn to your alternate theories. First,
3 we only get to your theories, is it fair, Mr. Donohue -- and
4 I'm not being disrespectful here. But we only get to your
5 theories if we assume away the facts that happened in this
6 case; correct?

7 A. Well, that's the nature of tort litigation. You have to
8 consider the counterfactual.

9 Q. And the definition, the William -- the Webster's
10 Dictionary definition of "counterfactual" is contrary to the
11 facts; fair?

12 A. Yeah. And every private tort litigation requires you to
13 consider what would have happened had the person complied with
14 the legal obligation.

15 Q. So my definition of "counterfactual" is correct; right?

16 A. Yeah. And my statement, that every tort litigation
17 involves it, is also correct.

18 Q. "Every tort litigation," that's your opinion, is contrary
19 to the facts?

20 A. No. I said every tort litigation in which causation is a
21 relevant factor requires you to answer the question, "What
22 would have happened had the person complied with the legal
23 obligation?"

24 Q. And let me talk about, though -- that's not the only fact
25 we have to assume away to reach your conclusion. We also have

1 to assume away that the Air Force negligently failed to report
2 his criminal conviction; correct?

3 A. Yeah. So the counterfactual is, what would have happened
4 had the Air Force complied with the requirement to turn over
5 the evidence to the NICS background check system.

6 Q. Right.

7 There's a third set of facts that we have to assume away
8 to reach your conclusion as well. And let me ask you, the
9 third set of the facts we have to assume away is that Devin
10 Kelley would have both preferred and followed through on any
11 one of these alternative reality methods that you've opined
12 about today; true?

13 A. Yeah. I mean, I think what I'm trying to say is if the
14 Air Force had complied with their obligation, Devin Kelley
15 would have been able to directly purchase from an FFL, and
16 what seems most likely would have been the outcome, based on
17 research and sort of understanding of his particular case.

18 Q. Right.

19 So my question is correct. You -- looking at Devin -- you
20 have to look at Devin Kelley specifically and assume that he
21 would have both preferred and followed through on all these
22 alternative methods that you've talked about today; correct?

23 A. Yeah. Make some judgment about what is more likely than
24 not.

25 Q. Okay. Well, let's talk about just those real quickly

1 individually.

2 A. Yeah.

3 Q. The first one I think you mentioned was --

4 MR. STERN: Could we take five?

5 MR. ALSAFFAR: No. I'm almost done. If I can
6 finish, and we'll be done. Okay.

7 Mr. Donohue, I'm sorry. We're close to being done. Are
8 you okay? Do you need a break? Are you okay?

9 THE WITNESS: I'm having a good time.

10 BY MR. ALSAFFAR:

11 Q. Okay. All right. So let's talk about the first one,
12 "stealing guns." You remember -- and I asked you earlier
13 about the 70,000-page Texas Rangers investigation that was
14 done on Devin Kelley specifically. You remember that?

15 A. Uh-huh.

16 Q. And I'm sorry. I didn't hear your answer.

17 A. Yes. I remember that.

18 Q. And you -- I'm assuming you reviewed and looked at the
19 testimony of Terry Snyder, the Texas Ranger that conducted
20 that investigation; correct?

21 A. (Inaudible).

22 Q. Correct?

23 A. Yes, I did.

24 Q. Sorry. It just -- let me say something. I do not mean to
25 be rude when I say that. I'm just not sure -- if I'm not sure

1 about your answer for the court reporter, Chris here, I listen
2 to him, and I need to make sure he gets that record. So I'll
3 just follow up every once in a while. Is that okay?

4 A. Oh, sure.

5 Q. Okay. So let's talk. I want to show you Travis
6 Snyder's -- I'm sorry. Terry Snyder's -- I was going to say
7 deposition. His trial testimony. He was --

8 Do you see it on your screen?

9 A. Yes.

10 Q. So you now know, as of today, that there were no stolen
11 weapons found anywhere on Devin Kelley or his property;
12 correct?

13 MS. KRIEGER: Objection. Goes beyond the scope of
14 direct. Professor Donohue didn't testify about stolen
15 weapons.

16 THE COURT: Yeah. I didn't hear any testimony about
17 stolen weapons.

18 MR. ALSAFFAR: Oh, Your Honor, if I may, the reason I
19 brought this up is he spoke about the Sandy Hook and the
20 California gun -- ghost gun case. Those are both where
21 someone took -- stole the guns of somebody else.

22 THE COURT: Let's go quickly through that.

23 MR. ALSAFFAR: That's the last question.

24 BY MR. ALSAFFAR:

25 Q. Mr. Donohue, you now know -- you now know that there were

1 no stolen weapons found anywhere on his person or anywhere on
2 his property; correct?

3 A. That's correct.

4 Q. All right. Let's talk about straw purchases. You
5 remember discussing straw purchases; right?

6 A. Yes, I do.

7 Q. And I want to show you the testimony of Terry Snyder at
8 trial. This is page 395, line 22 through 396, line 3.

9 Can you see that?

10 A. Yes.

11 Q. So Ranger Snyder testified there was no evidence
12 whatsoever that Mr. Kelley ever straw purchased a firearm;
13 correct?

14 A. That's correct.

15 Q. All right. And you also -- unless you need me to, but --
16 and I'll be happy to. But you also read the testimony or saw
17 the testimony of Rebecca Kelley, his mother, Michael Kelley,
18 his father, and Danielle Smith, his wife, all of whom said
19 that neither did they conduct a straw purchase or were even
20 asked to buy a gun on behalf of Devin Kelley; is that correct?

21 A. That's correct.

22 Q. All right. So those are the facts of this case on straw
23 purchasing; correct?

24 A. That's what happened in this case, yes.

25 Q. All right. Let's look at gun shows. You talked a lot

1 about gun shows. And there are a lot of -- I'll agree with
2 you, Mr. Donohue. There are a lot of guns in Texas and a lot
3 of gun shows in Texas; right?

4 A. That's correct.

5 Q. Okay. And Devin Kelley went to a few gun shows. You
6 learned that; didn't you?

7 A. Yes.

8 Q. Okay. I want to show you -- do you remember Danielle, his
9 wife's testimony, that she went to gun shows with him, and
10 that he never -- despite going to them, he never purchased any
11 guns at gun shows; correct?

12 A. When she was there.

13 Q. All right. Well, there's no evidence in this case --
14 unless you can point me to it. I'd love to hear it -- is
15 there is no evidence in this case that any of his guns were
16 purchased at gun shows; correct?

17 A. I think that's right. There are some guns where -- not
18 totally sure where they came from, but no specific evidence
19 that they came from gun shows.

20 Q. Right.

21 Those guns you're talking about, they'd gotten rid of
22 years before this shooting; correct?

23 A. Some time before the shooting, yes.

24 Q. Years before. Not "some time." Years before the
25 shooting; correct?

1 A. "Some time" includes years.

2 Q. Okay. And, of course, every single gun that was found on
3 his property, every single gun that was found at the scene,
4 every single gun that was used in the massacre, none from gun
5 shows; correct?

6 A. That's correct.

7 Q. Those are the facts of this case; aren't they?

8 A. Correct.

9 Q. You also spoke about ghost guns. And I'll show you page
10 398 from the trial transcript. Page 24 to 399. This is --
11 the lead Texas Ranger investigator also looked into this
12 alternative reality; didn't he? The gun ghost theory;
13 correct?

14 A. Yes.

15 Q. And you know, don't you, that the Texas Rangers, the FBI,
16 the ATF, they turned over every stone in Devin Kelley's life,
17 including every piece, every inch of his property?

18 You know that now; don't you?

19 A. They certainly examined extensively.

20 Q. Yeah. And after doing, as you put it, an extensive
21 examination of his life, the Texas Ranger testified that there
22 was no evidence whatsoever that Mr. Kelley constructed or was
23 even in the process of constructing a gun, a ghost gun;
24 correct?

25 A. Yeah. That's what they testified.

1 Q. Okay. And Terry Snyder, the head investigator of the
2 Texas Rangers investigation, also said there's no evidence
3 that Devin Kelley even had the capability of constructing a
4 firearm; correct? They looked into that, and there's no
5 evidence that he even had the capability of constructing one;
6 correct?

7 A. That's what it says here. Although, I would -- I would be
8 in some disagreement that statement.

9 Q. All right. Do you have any evidence, specifically -- and
10 it's okay if you disagree with the lead investigator. It's
11 fine. So do you have any evidence specifically, that you can
12 show the Court, that Mr. Kelley -- not some other person --
13 Mr. Kelley had the capability specifically to construct a
14 firearm?

15 A. Well, my own sense of the gun kits that are readily
16 available are that almost anyone is capable of constructing a
17 firearm out of them. And then we do have the evidence about
18 the modifications that Kelley was doing on his gun. So I
19 would say he certainly had the capability to, you know, put
20 together a ghost gun. Now, he might not have the capability
21 to manufacture a 3D gun or make a gun from scratch. So I'm
22 just not clear what the investigator was alluding to when he
23 made this statement.

24 Q. And if I -- to be fair, if I understand your conclusion,
25 really kind of what you're saying is, "Well, anyone can do it,

1 so Devin Kelley could have done it"?

2 A. Yeah. And also, people who are obsessed with guns and
3 tinker with their guns and add accouterments that make them
4 more lethal, you know, are showing an interest and a capacity
5 to work with firearms that not everyone else would have.

6 Q. And every single one of those trinkets that Mr. Kelley put
7 on his gun that you referenced, all of those are off the
8 shelf. You can buy them and just hook them onto your gun.
9 You don't need a drill. You don't need a press. You don't
10 need a lathe. You don't need anything like that. You can
11 just snap them on. Yeah? Is that correct?

12 A. Right. But you don't need a lathe to put together a ghost
13 gun either.

14 Q. That's not my question. Everything that he put on that
15 gun is something you could buy off the shelf at Walmart and
16 stick on your gun; correct?

17 A. I don't know if Walmart sells them, but you can buy them
18 and add them to your weapon.

19 Q. All right. And more to the point, Devin Kelley didn't
20 have any ghost gun kits or ghost guns anywhere; right?

21 A. That's right.

22 MR. ALSAFFAR: Pass the witness, Your Honor.

23 THE COURT: Anything further?

24 MS. KRIEGER: I do have a little bit further, but
25 could we just take a five-minute break?

1 THE COURT: Yes.

2 *(Recess)*

3 *(Open court)*

4 THE COURT: Thank you. Please be seated.

5 MS. KRIEGER: May I proceed?

6 THE COURT: Yes.

7 REDIRECT EXAMINATION

8 BY MS. KRIEGER:

9 Q. Oh, I was going to ask you to unmute, but I see that you
10 have done so.

11 Professor, plaintiffs put up a document from the FBI.
12 There was a statement along the lines of that the majority of
13 active shooters obtained firearms legally. And you said there
14 were some caveats to that statement. What are those caveats?

15 A. Yes. So in that particular active shooter, the
16 investigators looked at the source of the weapon that was used
17 in the mass shooting. And so if the weapon itself was legally
18 acquired, they considered that to be a, quote, "legally
19 acquired weapon." But many of those mass shootings
20 represented circumvention of, you know, criminal background
21 check scenarios.

22 So, for example, you know, if you think about the Santa Fe
23 shooting in Texas in 2018, that 17-year-old shooter took a
24 legally-acquired weapon of his father and then committed the
25 mass shooting. And that was the case with Adam Lanza as well,

1 where he took a legally-acquired weapon of his mother to
2 commit the mass shooting.

3 So you just want to be focused about how you're
4 aggregating the data. And in that case, I was just making
5 that caveat.

6 Q. Are private sales legal?

7 A. Yeah. Private sales are legal.

8 Q. Are ghost guns legal?

9 A. Yeah. Ghost guns are legal.

10 Q. Do you need a lathe or a press to put together a ghost
11 gun?

12 A. No. You would not need a lathe or a press to put together
13 a ghost gun.

14 Q. Plaintiffs asked you some questions about Devin Kelley's
15 history in the Air Force. In your opinion, someone with that
16 history, such as the threats, his mental health history, would
17 that history make somebody more or less likely to be deterred
18 by a denial at a gun shop -- to be deterred from obtaining a
19 weapon in the future, in your opinion?

20 A. Yeah. In my opinion, those aspects of Devin Kelley's, you
21 know, specific traits made it more likely that he was sort of
22 dedicated to pursue his -- designs, and, therefore, would be
23 less deterrable than someone with less of the mental health
24 and other violent tendencies.

25 Q. And plaintiffs' counsel also discussed increased risk of

1 harm. And I think they were talking about the increased risk
2 of harm for the Air Force failing to submit some 7,000 records
3 to the FBI. Do you recall that conversation?

4 A. Yes.

5 Q. Now, that's an increased risk on a population level; is
6 that correct?

7 A. That's correct.

8 Q. Can you say if the failure to submit any one person's
9 information would increase the risk of harm to the public?

10 A. You know, you -- what we've already seen is that the
11 likelihood that any given individual will be deterred is, you
12 know, quite a bit less than even 25 percent.

13 MS. KRIEGER: No further questions.

14 THE COURT: Anything else?

15 MR. ALSAFFAR: No, Your Honor.

16 THE COURT: Any further need for this witness?

17 MS. KRIEGER: No, Your Honor.

18 THE COURT: Mr. Alsaffar?

19 MR. ALSAFFAR: No, Your Honor.

20 THE COURT: Thank you, Professor. You're excused.

21 THE WITNESS: Thank you.

22 THE COURT: So I believe this concludes the witnesses
23 we had scheduled for today. Do we still have Ms. Higgins
24 and -- sorry, I'm going to pronounce -- mispronounce the
25 doctor's name -- Dr. Bursztajn?

1 MR. STERN: I think --

2 MR. ALSAFFAR: I think that's right.

3 MS. KRIEGER: I believe -- is it Bursztajn?

4 MR. STERN: We're still trying to figure that out.

5 MR. ALSAFFAR: I wrote this down a year ago. And I
6 put S-T-A-I-N to that last part. And I think that's -- you
7 told me that was right. So I think the judge -- I'm going to
8 say the judge got it right. That's my opinion.

9 THE COURT: So it's those two for tomorrow? Okay.

10 MS. KRIEGER: Just those two.

11 THE COURT: So we'll be in adjournment till tomorrow.

12 Just while I'm thinking -- while Professor Donohue's
13 testimony is on my mind, as you-all are doing me that favor of
14 compiling the technology list, I'm just kind of curious. Did
15 either side provide cameras or better microphones to the
16 witnesses who were Zoom, or did you just let them rely upon
17 their own equipment?

18 MR. JACOB: Judge, I think -- I think we might have
19 provided a light to one of the witnesses. But Sean can tell
20 you in more detail.

21 TECHNOLOGY SPECIALIST: And then all we did is we
22 thoroughly checked it two or three times before the daily
23 testimony.

24 THE COURT: So you relied on their own equipment?

25 MR. ALSAFFAR: We did because we didn't need to. But

1 I would -- in our paper, I think we're going to put the --
2 recommendation.

3 THE COURT: Suggest otherwise? Yeah.

4 MR. ALSAFFAR: Yeah. We just happened to be in a
5 good situation where ours had everything checked out. But we
6 have not always been in that situation with other witnesses.
7 So we always -- these are alternate cameras we brought as
8 well. So I would recommend it.

9 MS. KRIEGER: We did have one -- Mr. Breyer, who was
10 withdrawn, did not have the adequate technology. And we had
11 actually arranged for him to go to the local U.S. Attorney's
12 office to testify.

13 THE COURT: Yeah. Thank you.

14 So I couldn't tell what -- if the issue was at
15 Mr. Donohue's end. I think it was. And so I'm assuming he
16 just relied upon his -- the hardware in his laptop, which is
17 why we were having the problem. If you had previously tested
18 him, the broadband would have been strong enough. And so it
19 didn't seem to be that kind of an issue.

20 MR. ALSAFFAR: Ours had microphones attached to their
21 computers, and that helps. That helps a lot.

22 THE COURT: But, nevertheless, I believe the court
23 reporter captured his testimony adequately, and I understood
24 him well enough.

25 Tomorrow morning at 9:00.

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MR. ALSAFFAR: Thank you, Your Honor.

MS. KRIEGER: Thank you.

* * *

(Overnight recess)

1 -oOo-

2 I certify that the foregoing is a correct transcript from
3 the record of proceedings in the above-entitled matter.

4
5 Date: 4/14/2021 /s/ Chris Poage
6 United States Court Reporter
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8 San Antonio, TX 78206
9 Telephone: (210) 244-5036
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 15, 2021

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UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 *(San Antonio, Texas; April 15, 2021, at 9:00 a.m., in open*
2 *court.)*

3 THE COURT: Good morning, ladies and gentlemen.

4 We'll resume with the trial. All counsel, parties,
5 witnesses, participants, and members of the public are
6 reminded that this is a formal proceeding and that they should
7 behave at all times as if they were present in the courtroom.

8 The standing order of the San Antonio Division of the
9 Western District of Texas on remote access to court
10 proceedings remains in effect. Photography, recording, or
11 streaming of this proceedings by any means is strictly
12 prohibited.

13 Though this proceeding is open to the public,
14 technological restraints require that members of the general
15 public request access from the courtroom deputy to participate
16 remotely. Those granted approval to participate remotely must
17 not forward the electronic link to nonparticipating colleagues
18 or persons, and must not post the link on any public forum.

19 As with all proceedings, violations of these
20 instructions are subject to contempt proceedings.

21 Accordingly, please exercise proper decorum at all times.

22 And with that, anything we need to take up before we
23 proceed with the next witness?

24 MR. HILLIARD: Your Honor, good morning. I'd like to
25 just introduce myself to the Court as this is my first

ERIN HIGGINS - DIRECT

1 appearance in front of Your Honor in this matter.

2 My name is Bob Hilliard from Corpus Christi. I'll be
3 doing the cross-examination of this witness this morning.

4 THE COURT: Good morning. Thank you.

5 Anything from the government?

6 MR. STERN: Nothing, Your Honor.

7 THE COURT: Your next witness.

8 MS. CRISTILLES: Your Honor, the United States calls
9 Erin Higgins.

10 (ERIN HIGGINS, having been duly sworn, testified as
11 follows:)

12 DIRECT EXAMINATION

13 BY MS. CRISTILLES:

14 Q. Good morning, Ms. Higgins.

15 A. Good morning.

16 Q. If you feel comfortable, you're free to remove your mask.
17 It is up to you. We are having some issues with the courtroom
18 audio system, so I'll just ask you to speak up so that the
19 court reporter can get down everything you have to say today.
20 Okay?

21 A. Okay.

22 Q. Thank you.

23 I think we met briefly in the hall, but I'm Jacquelyn
24 Christilles. I'm an Assistant United States Attorney here in
25 the San Antonio office.

1 Now, before meeting in the hall, you and I haven't had an
2 opportunity to speak about this case; have we?

3 A. No.

4 Q. Have you spoken to plaintiffs' counsel since you signed
5 the declaration for them on March 21st, 2021?

6 A. Have I spoken to -- I'm sorry?

7 Q. Sure. And that is completely understandable. So
8 plaintiffs' counsel is over here on this side of the table.
9 They represent the plaintiffs in this case. I represent the
10 United States.

11 Have you spoken to anybody on the plaintiffs' side since
12 signing a declaration on March 21st, 2021?

13 A. With you guys?

14 Q. With -- we can start with our side.

15 Have you spoken to anybody since March 21st from our side?

16 A. Well, I spoke to you guys first. And then I talked to the
17 plaintiffs, the other side.

18 Q. Is it fair to say you spoke to the other side on
19 March 21st, 2021?

20 A. I believe that's correct.

21 Q. Have you spoken to them since?

22 A. No.

23 Q. All right. Now, Ms. Higgins, have you reviewed any of the
24 media coverage concerning this case?

25 A. Briefly.

1 Q. Briefly?

2 A. Yes.

3 Q. And what have you reviewed?

4 A. Since the case started, or since the whole event?

5 Q. Let's start with since this case started.

6 Since we've been in this courtroom, have you reviewed any
7 of the media?

8 A. I mean, not very much of it.

9 Q. Okay. Have you reviewed any statements in the media made
10 by the witnesses in this case?

11 A. Only my daughter's.

12 Q. Okay. So you had an opportunity to review — and when you
13 talk about your daughter, are you talking about Danielle
14 Smith?

15 A. Yes.

16 Q. So you've had an opportunity to review the statements that
17 Danielle Smith has made in this trial; is that right?

18 A. Yes.

19 Q. Ms. Higgins, can you promise today to just testify about
20 your knowledge and not take into account any of those
21 statements that you reviewed made by Ms. Smith?

22 A. Well, yes. But all the statements, I already knew.

23 Q. Okay. And that's fair.

24 Now, I'd like you just to state your full name for the
25 record so that the court reporter has that.

1 A. Erin Renee Higgins.

2 Q. And, Ms. Higgins, in what city and state do you currently
3 live?

4 A. Marion, Texas.

5 Q. I think you indicated this just a moment ago, but how do
6 you know Danielle Smith?

7 A. She is my -- well, technically, she was my stepdaughter.

8 Q. And did she previously go by Danielle Kelley?

9 A. Yes.

10 Q. You indicated that she was previously your stepdaughter.

11 Was that because you were married, at one point, to her
12 adoptive father?

13 A. Yes.

14 Q. And who was that?

15 A. Donald Brassfield.

16 Q. Are you currently married to Donald Brassfield?

17 A. No.

18 Q. Did you ever become aware that Danielle had made a sexual
19 assault allegation against Donald Brassfield?

20 A. Yes.

21 Q. When did you become aware of that allegation?

22 A. That's a really complex answer.

23 Q. Sure. Is it fair to say that Danielle made that
24 allegation initially sometime when you were dating Donald
25 Brassfield?

1 A. Yes. But it was dismissed.

2 Q. Okay. And that was my next question.

3 When Danielle originally made this allegation, what
4 happened with that allegation?

5 A. She retracted her statement. It was only ever brought to
6 the attention -- it wasn't -- it went through, I guess, the
7 police and things like that. It was never brought -- like,
8 she never told me at that time. She never vocalized that to
9 me.

10 And Michelle and Donald had a very, very nasty divorce.
11 So it was thought that it was just a child that was acting out
12 and playing the parents at that time.

13 Q. But you knew about the -- at least the allegation when it
14 originally arose?

15 A. I knew that -- yeah. But I didn't know the full context
16 of it or anything like that.

17 Q. Sure. Ms. Higgins, and I'm not going to ask you anything
18 about the details. I promise. Okay?

19 Now, was Donald Brassfield later accused of sexually
20 assaulting a babysitter?

21 A. Yes.

22 Q. What happened with that allegation?

23 A. He got convicted.

24 Q. And then after he was convicted of sexually assaulting the
25 babysitter, did you later learn that he had also sexually

1 assaulted your niece?

2 A. It was my daughter.

3 Q. And there's been some confusion on that, so thank you for
4 clarifying that.

5 Did you adopt your niece?

6 A. Yes.

7 Q. Okay.

8 A. I've had them since they were basically babies.

9 Q. All right. So she was your niece.

10 But now you adopted her, so it was your daughter?

11 A. Yes.

12 Q. Okay. When did you learn about that allegation involving
13 your daughter?

14 A. June 2016. I was the one that reported it.

15 Q. Was Donald Brassfield tried for the sexual assault of your
16 niece?

17 A. My daughter.

18 Q. Your daughter. I apologize.

19 A. Okay. Just to make sure it's correct.

20 Yes, he was tried and convicted for 50 years.

21 Q. And was Danielle part of that criminal case?

22 A. Yes.

23 Q. When was that case originally set for trial?

24 A. I don't recall. It got reset so many times.

25 Q. Was it originally -- was one of those trial dates

1 November 27th, 2017?

2 A. I couldn't give you an exact date.

3 Q. Ms. Higgins, I know you're aware of the shooting that
4 happened at the First Baptist Church of Sutherland Springs on
5 November 5th, 2017.

6 If I refer to that as "the shooting," can we agree that
7 that's what I'm talking about?

8 A. Sure.

9 Q. And I know this is a long time ago, but was one of those
10 original trial settings just a -- supposed to happen just a
11 couple of weeks after the shooting?

12 A. I mean, it got reset so many times. To be -- I can't -- I
13 mean, I can't agree with you; I can't disagree with you.
14 Because I'm sure it's in black and white.

15 I just don't -- I can't say "yes" firmly because I don't
16 remember all the trial court-setting dates.

17 Q. Sure. And that's fair, Ms. Higgins.

18 Was Donald Brassfield eventually convicted of sexually
19 assaulting your daughters?

20 A. My daughter, yes.

21 Q. And I said "daughters" because you called Danielle your
22 daughter, so --

23 A. Right. But the case was specifically only on Marisa
24 Higgins [phonetic].

25 Q. Okay. But Danielle testified at that case?

1 A. Yes.

2 Q. All right. So he was convicted of sexually assaulting
3 your daughter, and Danielle was part of that case?

4 A. That is correct.

5 Q. So is it fair to say that there were two additional sexual
6 assault allegations against Donald Brassfield after Danielle
7 made her original outcry?

8 A. Yes.

9 Q. Now, I think you've talked about it a little bit.

10 Even though you're divorced from Mr. Brassfield, do you
11 still have a relationship with Danielle?

12 A. Yes.

13 Q. Are you pretty close?

14 A. Yes.

15 Q. I think you indicated that you consider her to be your
16 daughter?

17 A. Yes. She was 18 when me and Donald divorced, so...

18 Q. Have you talked to Danielle about this case?

19 A. I mean, yes and no.

20 Q. Okay. What do you mean by that, Ms. Higgins?

21 A. Well, I mean, we talked about how she felt. It was a very
22 vital role after the shooting for her, you know. So, you
23 know, I support my daughter and talked to my daughter, you
24 know, like a mother would, mother and daughter relationship.

25 I mean, we don't get into the nitty-gritty of things, if

1 that's what you're asking, because I respect her space.

2 Q. And I appreciate that. Thank you for letting me know
3 that.

4 Have you spoken to her since she testified in this trial?

5 A. Well, yes.

6 Q. Did you discuss with her any of her testimony?

7 A. No.

8 Q. Ms. Higgins, did you know Danielle Kelley's husband, Devin
9 Kelley?

10 A. Yes.

11 Q. When did you originally meet him?

12 A. I met him when she ran off with him.

13 Q. And when you say "she ran off with him," can you give me a
14 time frame on that?

15 A. Well, she was 18. I don't have an exact year, but I know
16 how old she was. She was 18. She was living in my home at
17 that time, and she -- I guess she ran off with him. Like, she
18 went to go live with him.

19 Q. So prior to his death, is it fair to say that you'd known
20 him for several years?

21 A. That would be correct.

22 Q. During her marriage to Devin, did you have multiple
23 conversations with Danielle about her desire to divorce Devin
24 Kelley?

25 A. Yeah.

1 Q. Was one of those conversations in 2015?

2 A. Probably.

3 Q. Do you remember providing plaintiffs' counsels --
4 plaintiffs' counsel with some text messages between you and
5 Danielle?

6 A. Yes.

7 Q. And in those text messages, do you remember talking about
8 her desire to divorce him?

9 A. Yes.

10 Q. Okay. Do you remember if those text messages were from
11 2015?

12 A. I believe I gave several to them. I mean, there were
13 many, many times for many, many years.

14 Q. So it's fair to say for many, many years, Danielle
15 expressed a desire to divorce Devin Kelley?

16 A. Yes.

17 Q. And what -- was most of the time because he was abusive
18 with her?

19 A. Well, he was very controlling. And he was abusive, and he
20 was mean. And he was -- I don't know. Just -- he was very
21 controlling.

22 Q. Was Devin Kelley abusive with Danielle before they even
23 got married?

24 A. I don't know.

25 Q. I think you've indicated in some of your statements that

1 there was a point where you called the police because you
2 believed that Danielle was being abused by Devin.

3 Is that accurate?

4 A. Yes.

5 Q. And the result of that was the police just thought it was
6 teenage drama?

7 A. Correct.

8 Q. If the police report was from February 2014, does that
9 sound about right?

10 A. I'm not sure.

11 Q. When did Danielle and Devin get married?

12 A. I think it was right around that time. But they ran off
13 and got annulled [verbatim], so I didn't find out about it
14 until after the fact.

15 Q. So they ran off and got married without you even knowing?

16 A. Yeah.

17 Q. Did you also talk to Danielle in the months leading up to
18 the shooting about being aware that Devin Kelley had cheated
19 on her?

20 A. Yes.

21 Q. How did she find out that he had cheated on her?

22 A. She saw it in a video one day on his computer when he left
23 it open.

24 Q. In the time relation to the shooting, when did she tell
25 you about seeing this video?

1 A. I don't remember.

2 Q. I'm going to show you the declaration that you did for
3 plaintiffs' counsel in this case. That's Joint
4 Exhibit 478A-0002.

5 And, Ms. Higgins, that should pop up on the screen for
6 you.

7 This has been previously admitted. If we could go to
8 paragraph 11.

9 Do you recall telling plaintiffs' counsel that Danielle
10 had told you about seeing the video one to three months before
11 the church shooting?

12 A. That seems accurate.

13 Q. Okay. So about one to three months prior to the shooting,
14 Danielle informed you about finding a video on Devin's
15 computer that demonstrated he was cheating on her; is that
16 correct?

17 A. Yes.

18 Q. Okay. Now, we've talked about Danielle confiding in you.
19 Did you ever have conversations with Devin Kelley?

20 A. Yes.

21 Q. Did you talk to him throughout his marriage to Danielle?

22 A. It was a hit-or-miss-type situation.

23 Q. Hit or miss? Sometimes he'd talk to you; sometimes he
24 wouldn't?

25 A. Correct.

1 Q. I want to focus on conversations you had with him in 2017.
2 Okay.

3 In 2017, when you were having conversations with Devin
4 Kelley, did you notice a change in his mental state?

5 A. Yes.

6 Q. What was that change?

7 A. He would do things that were inappropriate, or say things
8 that were just out in left field.

9 Q. Can you tell me about those things that were inappropriate
10 and out in left field.

11 A. So he would send me, like, pictures of body parts, like
12 "private parts," I guess, is the right way to say it, you
13 know, or ask me, "Hey, can you send me a picture with your
14 mouth open?" Or he would be like, you know, "Can I have one
15 of your bras?" Things like that.

16 It was just really inappropriate. So I would have to tell
17 him, like, "I'm not going to talk to you no more. You know,
18 this is inappropriate. You need to realize who I am. You
19 know, you have a wife."

20 I remember one time he told me that people are really
21 demented and that he just didn't like the human race.

22 Q. He didn't like the human race.

23 Did he also talk to you about some topics that were -- he
24 talked about a lot of topics and odd pictures.

25 Did he talk to you about topics that were concerning to

1 you?

2 A. Like?

3 Q. Did he talk to you about cults and television shows on
4 mass murders?

5 A. Yes. He talked to me about cults and different shows that
6 he was watching and how he was all into them.

7 Q. And were some of those shows about mass murders?

8 A. I think so.

9 Q. In response to those mental health changes that you
10 noticed, did you advise him to do anything?

11 A. Yes.

12 Q. What was that?

13 A. I told him that he could go to, like, MMHR to get mental
14 health, that there was free counseling there. I suggested him
15 going to his parents, because he didn't have any health
16 insurance, letting them know. And his parents, you know,
17 would -- should be able to help him because I felt like they
18 were more financially sound.

19 And he said that he didn't want them really involved,
20 didn't know if his parents believed him and felt like he was
21 more lazy than anything.

22 Q. So Devin's response to your advice for getting
23 psychological help and asking his parents was that he didn't
24 want to talk to his parents; is that fair?

25 A. Yes.

1 Q. Now, we've talked about kind of 2017 and this change in
2 his mental behavior.

3 In the weeks leading up to the shooting, did you have any
4 more conversations with Devin Kelley about mental health?

5 A. I know that he was getting some kind of help from a
6 doctor, that he finally went and got put on some kind of
7 medication.

8 Q. Did he indicate why he was discussing these problems with
9 you?

10 A. No.

11 Q. No.

12 Did he feel like he couldn't talk to his parents?

13 MR. HILLIARD: Excuse me, Judge. This part is pretty
14 critical. So leading.

15 THE COURT: Sustained.

16 BY MS. CRISTILLES:

17 Q. Ms. Higgins, did he indicate why he couldn't tell anybody
18 else about his mental health problems?

19 A. Just his parents.

20 Q. What did he indicate about not being able to talk to his
21 parents about his mental health issues?

22 A. That he didn't believe that they'd believe him.

23 Q. Based on your knowledge of Devin Kelley, prior to these
24 conversations, did you notice anything different about the way
25 he was acting in the weeks leading up to the shooting?

1 A. I mean, he was just a strange character all the way
2 around, so...

3 Q. You indicated he was just a strange character all the way
4 around.

5 Was he acting stranger in the weeks leading up to the
6 shooting?

7 A. I would say yeah. Like, just the months before, yeah.

8 Q. Now, at some point in the week prior to the shooting, did
9 Devin Kelley contact you about a discovery that he had made?

10 A. Yes.

11 Q. What had he discovered?

12 A. He found videos.

13 Q. What did he find videos of?

14 A. He found videos of Donald Brassfield and Danielle Kelley
15 in sexual acts.

16 Q. And how old was Danielle in these videos?

17 A. I don't know. He didn't tell me.

18 Q. Was she an adult?

19 A. He didn't tell me. I think she was probably a minor, but
20 he didn't specify.

21 Q. Did he tell you where these sexual acts were occurring in
22 these videos?

23 A. He did not.

24 Q. Where had he found these videos?

25 A. In Michelle's home.

1 Q. And when you say "Michelle," who are you talking about?

2 A. Michelle Shields.

3 Q. And who is Michelle Shields?

4 A. That's Danielle's adopted mother.

5 Q. When did he say he had found these videos?

6 A. The night of the October festival at Sutherland Springs.

7 Q. Do you know what date the fall festival is at Sutherland
8 Springs?

9 A. It was the 31st of October in 2017.

10 Q. So the fall festival was October 31st, 2017, in Sutherland
11 Springs.

12 Where in Sutherland Springs was the fall festival at?

13 A. At the church.

14 Q. And would that be the First Baptist Church of Sutherland
15 Springs?

16 A. Right.

17 Q. Before that day, had Devin or Danielle ever told you about
18 videos existing of Donald Brassfield sexually assaulting
19 Danielle Kelley?

20 A. No.

21 Q. What was your understanding of what Devin did with those
22 videos after he found them?

23 A. Well, he was supposed to bring them to me. And I told him
24 to take them to the attorneys -- the DA's office, that he
25 needed to turn them over.

1 But it's my understanding that -- I found out later, much
2 later, that they were burned. He didn't tell me that.

3 Q. When you told him he should turn them over to the DA, what
4 was his response to that?

5 A. He quit talking to me.

6 Q. He quit talking to you?

7 A. (Nodding head.)

8 Q. When Devin originally shared this discovery with you about
9 finding these videos, did he want you to call the DA?

10 A. No.

11 Q. I think you kind of indicated it, but I just want to be
12 clear.

13 What did he want you to do with this information he had
14 just shared with you?

15 A. He stated that he wanted to give them to me, and I could
16 do whatever I wanted to with them.

17 Q. Okay. What did you do?

18 A. I didn't get them.

19 Q. Did you contact anybody about Devin's discovery?

20 A. I did.

21 Q. Who did you contact?

22 A. I contacted the DA that handled the case in Guadalupe
23 County.

24 Q. And based on your personal knowledge and understanding,
25 what did the DA do with that information?

1 A. The DA sent somebody out to his home just to talk to him.

2 Q. And based on your understanding, did he turn those videos
3 over to the DA?

4 A. No.

5 Q. Now, we've talked about the fact that Danielle ultimately
6 testified in the trial against Donald Brassfield.

7 Did Devin tell you anything about how he felt about
8 Danielle testifying?

9 A. It was kind of a back-and-forth-type thing.

10 Q. What do you mean it "was a back-and-forth-type thing"?

11 A. He wouldn't want her to testify. Then he acted like he
12 wanted her to testify. Then he didn't want her to testify.

13 Q. Did he ever indicate why he didn't want her to testify?

14 A. He just thought it would be too hard on her.

15 Q. When Devin was talking to you about finding these videos
16 of Donald Brassfield sexually assaulting his wife, did he say
17 anything to you about how he felt about finding them in
18 Michelle Shields' home?

19 A. He was enraged. He was upset.

20 Q. And why was he enraged and upset?

21 A. Because he thought it was disgusting and awful that there
22 would be something in her home after all these years that
23 could have convicted him and put the case to bed.

24 Q. Did Devin ever communicate to you what he planned to do
25 because of his discovery?

1 A. No.

2 Q. Ms. Higgins, I'm going to show you JEX 478-001,
3 paragraph 7.

4 You indicated when we were talking initially -- and my
5 questions were very bad -- that you talked to people from my
6 side and people from the plaintiffs' side.

7 Do you remember giving this statement to some folks
8 representing the United States?

9 A. Yes.

10 Q. Do you remember telling them that Devin texted you saying
11 he was going to do something about the videos, that he would
12 make sure it would never happen again?

13 A. Well, he didn't text me.

14 Q. Okay.

15 A. But he did say he was going to do something about the
16 videos and make sure it would never happen again. That is
17 correct.

18 Q. When did he tell you that?

19 A. It had to be the night of the fall festival or the
20 Oktoberfest.

21 Q. Ms. Higgins, who told you the videos had been burned?

22 A. Danielle.

23 Q. When did she tell you that the videos had been burned?

24 A. It was after the shooting.

25 Q. So she told you after the shooting that the videos had

1 been burned.

2 Did she tell you when the videos had been burned?

3 A. I think it's when they -- when Devin found them and took
4 them out to the house. They burned them together.

5 Q. Now, we've talked a little bit about --

6 THE COURT: I'm confused on that point.

7 You said Danielle said the videos had been burned
8 after the shooting?

9 THE WITNESS: Correct.

10 THE COURT: But who were the "they" that burned them
11 then?

12 THE WITNESS: Devin and Danielle.

13 THE COURT: But after the shooting, Devin Kelley
14 died.

15 THE WITNESS: Right. Okay. So let me specify. So
16 they burned them -- Devin and Danielle burned them prior to
17 the shooting, but Danielle told me that Devin and Danielle had
18 burned them after the shooting.

19 THE COURT: Thank you. Go ahead.

20 BY MS. CRISTILLES:

21 Q. Ms. Higgins, you talked about Devin Kelley being enraged
22 about finding these videos in Michelle Shields' house.

23 Did he also tell you anything about what his impression
24 was of how Michelle Shields felt about the investigation into
25 Danielle's sexual assault?

1 A. I don't recall.

2 Q. Okay. I'm going to show you JEX 0599-0002,
3 paragraph 22.7.

4 Ms. Higgins, do you remember talking to the Texas Rangers
5 the day after the shooting?

6 Is that a "yes," ma'am?

7 A. I remember speaking with them. I don't remember the
8 conversation.

9 Q. Sure. But do you remember talking to them?

10 A. Yes.

11 Q. Okay. I'm going to show you this. This is what the Texas
12 Rangers wrote up about your conversation.

13 In the last line, it says, "Kelley further stated that
14 Michelle informed him the investigation into the sexual
15 assault of his wife would not go anywhere."

16 Do you recall telling the Texas Rangers that?

17 A. I told them that?

18 Q. And that's my question: Do you recall telling them that,
19 Ms. Higgins?

20 A. No. Because I don't remember that conversation.

21 Q. Sure. Was a lot going on that day?

22 A. Yes.

23 MS. CRISTILLES: Pass the witness, your Honor.

24 THE COURT: Any questions?

25 MR. HILLIARD: Yes, your Honor. May I proceed?

1 THE COURT: Yes.

2 MR. HILLIARD: Thank you.

3 CROSS-EXAMINATION

4 BY MR. HILLIARD:

5 Q. Ms. Higgins, good morning. My name is Bob Hilliard. I
6 introduced myself to you in the hallway this morning.

7 But before that, you and I have never met, have we?

8 A. No.

9 Q. I'm from Corpus Christi. It's nice to meet you.

10 A. Thank you.

11 Q. I want to go through a few of the areas that you testified
12 to on direct, and then I want to attend to a few other areas
13 with you. Okay?

14 A. Okay.

15 Q. One statement that you made on direct struck me. And you
16 said that all the statements that Danielle had testified to in
17 court, you already knew.

18 And that's because you were living it in real time with
19 Danielle; right?

20 A. Yes.

21 Q. I mean, this is a trial -- we're putting on testimony, but
22 this was actually the truth of your life at the time; correct?

23 A. Yes.

24 Q. And it wasn't easy seeing Danielle with someone like
25 Devin, was it?

1 A. No.

2 Q. Danielle was someone that you loved a lot, still love?

3 A. Yes.

4 Q. And from the time that she met Devin, you knew that the
5 guy was bad news?

6 A. Correct.

7 Q. Trouble?

8 A. Correct.

9 Q. It would be fair to say that from the very beginning --
10 from the very first time he threatened you and your husband,
11 that was real early on, wasn't it?

12 A. Yes.

13 Q. Threatened you with bodily harm?

14 A. Yes.

15 Q. And you're alert to how someone who behaves that way could
16 cause injury to their own spouse or someone they're dating,
17 like Danielle, and that was one of your concerns; right?

18 A. Yes.

19 Q. That this man, Devin Kelley, wasn't just going to threaten
20 you and your husband, but you knew -- were concerned, as a
21 mom, that he could turn on her at any time.

22 That was always a fear of yours?

23 A. Yeah.

24 Q. He was unpredictable?

25 A. Oh, yeah.

1 Q. From the early days?

2 A. Yes.

3 Q. He was dangerous?

4 A. I don't know that I would say "dangerous," but he was just
5 unpredictable and just not -- I didn't feel like he was a good
6 person.

7 Q. He was unstable?

8 A. Yes, that would be a better way.

9 Q. Threatening?

10 A. Yes.

11 Q. In fact, that's your very first experience with him; he
12 was threatening?

13 A. Yes.

14 Q. One of the first?

15 A. Yes.

16 Q. Not just controlling but extremely controlling?

17 A. Yes.

18 Q. And Danielle has already testified to the Court about how
19 she had to earn basic human privileges. She wasn't allowed to
20 assume she could even have those.

21 Are you aware of that?

22 A. Yes.

23 Q. He was manipulative?

24 A. Yes.

25 Q. He was a liar?

1 A. Come to find out, yes.

2 Q. And as you said a few minutes ago, he was just mean?

3 A. Yes.

4 Q. And this wasn't something that happened in the months
5 leading up to the shooting. This was something that -- these
6 labels and these descriptions that you and I just shared,
7 these were feelings that you had about him from very early on
8 when Danielle was 18 and left you to go be with him?

9 A. Yes.

10 Q. And even though you don't like to think this about another
11 human being, one of your fears early on was he was capable of
12 hurting people?

13 A. Yes.

14 Q. And not just a push or a shove, but severely injuring
15 people if he got enraged or lost his temper?

16 A. I don't know that I could forecast that.

17 Q. Well, and that's the problem with someone with that type
18 of -- who exhibits that type of behavior; you just don't know
19 where it's going to go, do you?

20 A. That's correct.

21 Q. All right. This was a guy that had a very short fuse?

22 A. Yeah. He would just cut you off, quit talking to you.

23 Q. Okay. But when I say "short fuse," I mean anything could
24 set him off and you wouldn't even expect it?

25 A. I didn't know him that intimately, I would say.

1 Q. Well, let's talk about that.

2 But based on just your conversations with your daughter as
3 a mom, after she started her life with Devin and what she
4 shared with you, you started to understand that Devin did have
5 a short fuse and he was just unpredictable as to what would
6 set him off?

7 A. I would agree with that.

8 Q. Because that's what Danielle thought about him; right?

9 A. Right.

10 Q. Yeah. And when you're around someone who is that
11 extremely unpredictable, it would be fair to say you were kind
12 of always walking on eggshells?

13 A. Oh, yeah, for sure. Because if I wanted to have
14 communication with Danielle, I had to be super nice and try to
15 act like I was understanding in order not to antagonize that.

16 Q. Did Devin Kelley once say to you, when he threatened you
17 and your husband, that "I've done it before, and I'll do it
18 again"?

19 A. Yes.

20 Q. So you knew early on that he was completely capable of
21 criminal behavior if he chose to?

22 A. I knew that he'd done something. But I did a criminal
23 background check and couldn't find anything, so I didn't know
24 what it was.

25 Q. Right.

1 A. I just knew that he'd done something.

2 Q. Why would you do a criminal background check?

3 A. Because I wanted to know what he had done before.

4 Q. Right. But why?

5 A. Because I wanted my daughter to know. I wanted to -- you
6 know, she was 18, and we all know how an 18-year-old child is.
7 You know, you have to show them verifiable proof in order to
8 get through to them, to show them, hey -- especially when
9 they're telling you that they're in love with somebody.

10 Q. My question is more of -- and I'll ask it this way.

11 The reason that you did the criminal background check is
12 for all the reasons you and I have already talked about, what
13 his personality was like.

14 You were simply concerned that this was someone that might
15 be hiding a past?

16 A. Correct.

17 Q. And if you found out that he was through your criminal
18 background check, what were you intending to do with that
19 information?

20 A. Show it to Danielle, try to get her back home.

21 Q. You know one of the issues in this case is whether the
22 Air Force failed to report Devin Kelley to the FBI?

23 A. I'm aware.

24 MS. CRISTILLES: Objection, Your Honor. That line of
25 questioning is going to be outside the scope of direct

1 examination and outside her personal knowledge.

2 THE COURT: That's overruled.

3 BY MR. HILLIARD:

4 Q. And do you recall what database you searched that you were
5 looking for information about Devin Kelley?

6 A. I went to check the state's website and then to the ones
7 that are online, like People Search and things like that.

8 Q. Ms. Higgins, I want to show you Exhibit 40 — JEX 403,
9 which is a document that was generated while Devin Kelley was
10 in the Air Force. Back in 2013 is when the document was
11 generated, four years before the shooting. And I want to
12 direct your attention, if I could, to paragraph B.

13 If you can highlight that for me and bring it up.

14 So in 2013, four years before the shooting, if you will
15 look at the second full sentence where it says, "This memo
16 documents the violent and dangerous behavior of AB Kelley."

17 My question to you is if, in 2013, the Air Force had
18 become aware of violent and dangerous behavior by Mr. Kelley,
19 that would be consistent with the behavior that you saw from
20 Mr. Kelley four years later; violent and dangerous behavior.
21 Correct?

22 MS. CRISTILLES: Objection, Your Honor. Outside the
23 scope. This witness has no knowledge of this document, and I
24 think she's also testified that that's a mischaracterization.
25 She did not testify that he was violent and dangerous.

1 THE COURT: All of that is overruled.

2 MR. HILLIARD: So I'll start over.

3 BY MR. HILLIARD:

4 Q. So the Air Force, four years before, had become concerned
5 that Devin Kelley -- and based on what you knew about
6 Devin Kelley when you got to know him, that doesn't surprise
7 you, does it?

8 A. Oh, no. I mean, honestly, if -- this really makes me mad.

9 Q. Why is that?

10 A. I haven't ever seen this before. There would have been a
11 lot -- Danielle would never have been with him had this been
12 released.

13 Q. And how do you know that?

14 A. Danielle had been abused from -- the reason that she's
15 adopted is she had been abused and burned and mistreated.
16 And, you know, her adopted dad didn't -- I mean, not that I
17 knew about it at the time, but I just know that she wouldn't
18 have been with somebody that -- I'm sorry.

19 Q. May I ask you a question.

20 Is part of the emotions that you're feeling right now
21 based on the idea that all of this could have been prevented?

22 A. Yes.

23 Q. And you feel that --

24 MS. CRISTILLES: Objection. Speculation.

25 THE COURT: That's overruled.

1 THE WITNESS: Yeah.

2 BY MR. HILLIARD:

3 Q. Prevented by whom?

4 A. I don't understand the question.

5 Q. Let me just withdraw that one and go on to the next
6 sentence that I want you to look at.

7 "Additional evidence of Kelley's high-risk, unpredictable
8 and criminal behavior."

9 So, again, four years before the shooting, the Air Force
10 was documenting Devin Kelley's "high-risk, unpredictable, and
11 criminal behavior."

12 So first, Ms. Higgins, does that surprise you that his
13 behavior was described that way, based on the man you know?

14 A. No.

15 Q. And the high-risk, unpredictable, and criminal behavior
16 that was documented by the Air Force is consistent with the
17 man that you knew when you came to know who Devin Kelley was?

18 A. Yes.

19 Q. And they go on to talk about his history of mental health
20 issues, his preoccupation with weapons, his verbal -- well,
21 let me break this down.

22 Did you know he had a history of mental health issues?

23 A. No.

24 Q. Did you know about his preoccupation with weapons?

25 A. I mean, he was all into guns but not -- I didn't know

1 about this, no.

2 Q. So this one -- this next one, I really want to talk to you
3 about.

4 He made verbal declarations that he has contemplated
5 offensive attack strategies on Air Force personnel.

6 Now, does that sound to you like that's describing a mass
7 shooting?

8 A. Um.

9 MS. CRISTILLES: Objection, Your Honor.

10 THE COURT: Now, that's sustained. That's sustained.

11 BY MR. HILLIARD:

12 Q. Attack strategies -- thank you, Judge.

13 Attack strategies on both Air Force personnel and
14 organizations.

15 When Devin Kelley, on that Sunday, went to the Sutherland
16 Springs Baptist Church and killed and injured so many people
17 and you learned about it, though you were horrified and
18 shocked, was some part of you not surprised?

19 A. That's a really hard question to answer.

20 Q. And hard because it's hard to think that anyone has it in
21 them to do something so evil?

22 A. Yes.

23 Q. And if you can put aside the unfamiliarity with that level
24 of evilness, what you knew about Devin Kelley, though you were
25 horrified and shocked about what he did, part of you was not

1 surprised?

2 A. Yeah, I guess you could say that.

3 Q. I want to visit with you for a few minutes about what you
4 said on the direct examination about a change in his behavior.
5 But you clarified it later, and that's the part I want to talk
6 about.

7 You said he was just a strange character all the way
8 around.

9 So it wasn't as if you had a normal guy who followed the
10 rules and was a law-abiding citizen suddenly, you know,
11 flipping out and turning into someone different than he ever
12 showed himself to be before; right? It wasn't that?

13 A. No. I think it's just because he started talking to me a
14 lot more.

15 Q. It would be fair to say it was just a more extreme type of
16 behavior from an already extreme man?

17 A. Correct.

18 Q. And you don't know why he was talking to you more, do you?

19 A. He said it was because he didn't have any friends, but I
20 don't know.

21 Q. Do you know if Devin Kelley was lying to you when he said
22 he found the videos?

23 A. I don't.

24 Q. But you do know he was a liar?

25 A. I do.

1 Q. And you do know that he wanted to use those videos that he
2 said he found to get you to meet him on the morning of the
3 shooting on his way to the church with his body armor on and
4 his weapons in his truck. He wanted to meet you to give you
5 the videos.

6 That was his goal; right?

7 A. Well --

8 Q. You didn't know he had the guns, and you didn't know he
9 had the armor, but he wanted to meet you Sunday morning;
10 right?

11 A. Right. He wanted to meet me Sunday morning to give me the
12 videos.

13 Q. By yourself?

14 A. That is correct.

15 Q. And you're probably the person Danielle loves the most in
16 the world?

17 A. That would be correct.

18 Q. And if his goal was to hurt Danielle as much as he could,
19 what better way than to start his Sunday morning rampage with
20 you?

21 MS. CRISTILLES: Objection. Speculation, Your Honor.

22 THE COURT: That's overruled.

23 BY MR. HILLIARD:

24 Q. See what I mean?

25 A. Yeah.

1 Q. And I apologize for that, and I can see how it's affecting
2 you.

3 But in reviewing these facts, I want to ask you, do you
4 hold room for the possibility, ma'am, that that was his intent
5 in telling you he had videos and asking you, strangely, to
6 meet him alone in his truck Sunday morning?

7 A. I can see that.

8 Q. And the reason I want to talk to you about how that may be
9 more than a possibility, but a probability, is because
10 Danielle testified in the criminal trial of your ex-husband
11 that she and Devin had found what she said were the
12 photographs of the abuse years before.

13 Did you know that?

14 A. I did not.

15 Q. Let me see if I can find that for you and show it to you.

16 MS. CRISTILLES: Your Honor, is this impeachment or
17 refreshing recollection? I'm not sure what showing her
18 somebody else's testimony -- how that comes in.

19 THE COURT: Yeah, I'm not sure where we're headed
20 with this either.

21 MR. HILLIARD: May I explain, Your Honor?

22 THE COURT: Yes.

23 MR. HILLIARD: Thank you.

24 Danielle testified in the criminal trial -- and I'll
25 show the Court, if I'm allowed to -- that she and Devin found

1 the pictures, and Devin had known about the viciousness of the
2 sexual assault from day one with nothing held back. And that
3 she and Devin burned them together, and they were together
4 when they found them.

5 We have testimony that Devin went on October 31st to
6 find, at the same house where they found them, the videos.

7 And I'm simply using the testimony of Danielle at the
8 criminal trial to show that it's unlikely that Devin was
9 actually as enraged as he was claiming to be by the videos
10 when he used those as a reason to meet Ms. Higgins.

11 THE COURT: But what would be the question to
12 Ms. Higgins on all of this? That's all interesting
13 background, but, I mean, how does she answer any questions --

14 MR. HILLIARD: She confirms.

15 THE COURT: -- and what would be that question to
16 her?

17 MR. HILLIARD: It's how I laid the predicate, Judge.
18 If she confirms that based on that, if Devin -- if
19 Devin Kelley was not as enraged as he appeared to be, because
20 he had known about it for years, it was even more likely that
21 on that Sunday morning, his intent was to do harm to her.

22 THE COURT: Yeah. No, that's speculative.

23 MR. HILLIARD: Okay, Judge.

24 BY MR. HILLIARD:

25 Q. After the October 31st -- it's a fall festival, like a

1 Halloween festival?

2 A. Correct.

3 Q. That weekend, do you know if Danielle had told Devin that
4 she was going to get a divorce from him, and that they were
5 going to go see the divorce lawyer on Monday?

6 A. I don't know because they cut off communication with me.

7 Q. So you have no idea how that information -- if Danielle
8 has testified about it and has testified in this trial about
9 the fact that Devin believed her, that this was the real
10 divorce that was going to happen, you don't know how that
11 might have triggered Devin, do you?

12 A. I don't.

13 Q. You do know that when Devin decided to tie her up and
14 handcuff her, that that was a -- you heard about that; right?

15 A. Yes, I'm aware.

16 Q. I'm sorry, ma'am?

17 A. I'm aware.

18 Q. All right. So when he decided to tie her up and handcuff
19 her, that was, by all accounts, an extreme domestic violence
20 act?

21 MS. CRISTILLES: Objection, Your Honor. Improper
22 opinion.

23 THE COURT: That's sustained.

24 BY MR. HILLIARD:

25 Q. Well, you're aware that he did that?

1 A. Yes. That he handcuffed her, yes.

2 Q. And were you aware after he did that, he intended to come
3 back, and he said, "I'll be back" when he left?

4 A. Yes. She did say that.

5 MS. CRISTILLES: Objection, Your Honor. Speculation.

6 THE COURT: That's overruled.

7 BY MR. HILLIARD:

8 Q. Have you become aware of what the last words of
9 Devin Kelley was to Danielle after the shooting, after Devin
10 was shot, when he called Danielle?

11 THE COURT: You can just say, first of all, "Are you
12 aware?" And then I'll wait for the next question.

13 MR. HILLIARD: Yes, sir.

14 BY MR. HILLIARD:

15 Q. Have you become aware of what he said to her? Just yes or
16 no.

17 A. Yes.

18 Q. Can you tell us what he said to her.

19 MS. CRISTILLES: Objection, Your Honor. That's going
20 to be hearsay. It's going to be double hearsay, because she
21 would have had to hear it from Danielle.

22 THE COURT: That's sustained.

23 BY MR. HILLIARD:

24 Q. When you called the DA to let them know what Devin said,
25 you became aware that they sent some police officers or

1 detectives out to find and collect the information -- the
2 videos or the pictures, whatever they were?

3 A. Correct.

4 Q. Have you seen the video at the gate of the two detectives
5 interviewing Devin about the photographs -- or the videos or
6 photographs after you made the call?

7 A. I was not aware there was one, no.

8 MR. HILLIARD: Can you put that up, please.

9 MS. CRISTILLES: Objection, Your Honor.

10 THE COURT: Yeah. What's going to be the questions?

11 MR. HILLIARD: So the question is, Judge -- as the
12 Court knows, and I know you've seen it a couple times, this
13 witness has not -- Mr. Kelley told the detectives that there
14 are no pictures; the pictures don't exist.

15 THE COURT: That's actually not what he said. The
16 caveat it always -- I've been struck by this -- I'm curious
17 just what happened to the videos. They always kept on saying
18 they're not on this ranch, which always made me wonder are
19 they somewhere else. But both the father and Devin Kelley
20 both were very specific qualifying their answer.

21 MR. HILLIARD: You're right. And I misspoke when I
22 said they don't exist. I apologize for that. They said they
23 don't have them -- they're not here, they wouldn't keep them
24 on the property.

25 And then the question would be after -- if I'm

ERIN HIGGINS - REDIRECT

1 allowed to, after she saw the videos is, if he says he doesn't
2 have them and he told her that he did, you know, is there a
3 lie going on either through -- by Devin Kelley to the
4 detectives or by Devin Kelley to Ms. Higgins?

5 THE COURT: Yeah. So we don't need to see the video
6 again. I mean, I think she can answer just based upon this
7 proffer.

8 So, Ms. Higgins, both Devin Kelley and the father of
9 Devin Kelley kept saying these videos aren't on the property.
10 But Devin Kelley said, at least to you, that he had videos.

11 Do you have any sense of who is lying here?

12 THE WITNESS: No. He did tell me that they weren't
13 on that property later on. So that is correct.

14 THE COURT: But -- so you don't know one way or the
15 other whether videos and pictures actually do exist, do you?

16 THE WITNESS: I don't.

17 THE COURT: Next question.

18 MR. HILLIARD: Thank you, your Honor.

19 Ms. Higgins, thank you very much.

20 We pass the witness, Judge.

21 REDIRECT EXAMINATION

22 BY MS. CRISTILLES:

23 Q. Ms. Higgins, you made a statement. I just want to ask you
24 a little bit about it.

25 You said that Devin Kelley was "all into guns."

1 What do you mean by that?

2 A. Well, I mean, he would always show, like -- you know, some
3 guys are into hunting. Some guys are into, you know, going
4 camping outdoors. Like, his thing was guns and hunting.

5 Q. Guns and what?

6 A. Hunting. He liked to hunt.

7 Q. Okay. I thought you said "honey." So I need to fix my --

8 A. Oh, hunting. He liked to hunt things. Like he was into
9 guns. Like, you know, I'm not saying, like -- he was into,
10 like, guns.

11 I mean, I don't know. I don't know anything about guns.
12 I just know that some people are into guns and some people
13 aren't.

14 Q. And he was into guns?

15 A. He was into guns.

16 Q. Now, you said this a couple of times, and I want to make
17 sure that I understood what you said on direct.

18 Did you say that you later learned that Devin was also a
19 liar?

20 A. Yeah. Yeah. I later learned that he was a liar, correct.

21 Q. And I think I know what you're talking about, but did you
22 later learn that he had lied about why he was in jail in the
23 Air Force?

24 A. He did lie. But nothing came out, like, that he was in
25 jail. Like, the story that was told is that I guess his

1 commanding officer was raping his ex-girlfriend, or whatever
2 she was, and that he beat the crap out of him. That was later
3 on during the relationship, and that was what was told to us.

4 Q. So you all knew that he'd been to jail?

5 A. I don't know that we knew that he'd been to jail. We knew
6 that he was questioned about -- you know, about finding his
7 commanding officer with his girlfriend or his wife and that he
8 beat the crap out of her.

9 Q. Did Danielle ever communicate to you that she'd actually
10 talked to Devin while he was in confinement?

11 A. I don't know that she said in "confinement." She just
12 said while he was in the military.

13 Q. So is it fair to say that you later found out that
14 Devin Kelley had actually concealed why he had gotten in
15 trouble in the military?

16 A. I never knew that he was in confinement or anything like
17 that.

18 Q. Danielle never told you that?

19 A. (Shaking head.)

20 Q. Is that a "no"?

21 A. No. That's a no.

22 Q. Sorry. Just for the court reporter, Ms. Higgins. I can
23 see your response. It's hard for her to type it down.

24 A. Sorry.

25 Q. Now, we've talked a lot about these videos.

1 Danielle actually confirmed that they existed, didn't she?

2 A. Yes. She told me, but --

3 Q. And I think that there was some confusion on direct.

4 Devin tells you on October 31st that he's found them.

5 Am I summarizing that correctly?

6 A. Yes.

7 Q. And then you tell the DA about the videos?

8 A. Right.

9 Q. And then after the shooting, you talked to Danielle about
10 these videos; is that right?

11 A. Yes.

12 Q. And after the shooting, Danielle -- does she confirm that
13 the videos existed at some point?

14 A. Yes.

15 Q. And what does she tell you about where the videos are now?

16 A. They burned them.

17 Q. Okay. So Danielle actually confirms that they existed?

18 A. Well, that's correct. I'm just saying I never saw them.

19 I never physically touched them or anything.

20 So from my perspective, I never saw them. I never touched
21 them. I was told about them. So in retrospect, to me, I
22 don't know whether they existed or not. All I have is people
23 saying that they did.

24 Q. Thank you very much for clarifying that.

25 Now, there was some conversations about Devin wanting to

1 turn these videos over to you.

2 Is that -- was that your understanding of what he wanted
3 to do?

4 A. Yes.

5 Q. Why didn't he want to turn them over to the authorities?

6 A. He didn't want to have nothing to do with them. That's
7 what he told me.

8 Q. And when we say "nothing to do with them," do you mean the
9 videos or the authorities?

10 A. Oh, the videos.

11 Q. Okay. So he wanted to -- I think you said this on direct,
12 and make sure I'm getting this clear.

13 He wanted to give them to you, and you do whatever you
14 need to do with them?

15 A. Correct.

16 Q. And why would you be the person to do something with them?

17 A. That's what I wanted to know.

18 Q. Was it your daughter?

19 A. Yes.

20 Q. Was your daughter the one --

21 MR. HILLIARD: Judge, leading.

22 THE COURT: That's sustained.

23 MS. CRISTILLES: Sure.

24 BY MS. CRISTILLES:

25 Q. Ms. Higgins, we've talked about what these videos

1 depicted, and we've talked about Danielle testifying in that
2 case against Donald Brassfield.

3 If there were videos of Donald Brassfield actually
4 sexually assaulting Danielle, in your opinion, would that help
5 the case against Donald Brassfield that involved your
6 daughter?

7 A. Absolutely.

8 Q. Ms. Higgins, when Devin was telling you that he wanted to
9 meet you and give you these videos, did he ever tell you he
10 wanted to harm you?

11 A. No.

12 Q. Did he ever threaten you when you were talking about the
13 videos and he's telling you he wants to give them to you?

14 A. No.

15 MS. CRISTILLES: Nothing further, Your Honor.

16 THE COURT: Anything based on those questions?

17 MR. HILLIARD: Just one brief question.

18 THE WITNESS: He didn't tell the church either,
19 though. Sorry.

20 RECROSS-EXAMINATION

21 BY MR. HILLIARD:

22 Q. My first question is: What did you just say?

23 A. He didn't tell the church or anybody that he wanted to
24 harm them either, so who's saying he's going to tell me?

25 MR. HILLIARD: I'll leave it there, Judge. Thank

1 you.

2 THE COURT: Thank you, ma'am.

3 There's no need for this witness any further;

4 correct?

5 MS. CRISTILLES: No, Your Honor.

6 THE COURT: May she be excused?

7 MR. HILLIARD: She may, Judge.

8 THE COURT: Thank you, ma'am.

9 (Off-the-record discussion)

10 THE COURT: So the next witness, I believe, is going
11 to be by Zoom. The courtroom deputy is telling me that
12 they're going to need to reboot. I guess this morning, there
13 was some issues.

14 So let's go ahead and take a 10- or 15-minute break
15 until such time as we can reboot.

16 MR. HILLIARD: Your Honor, I will not be taking this
17 witness. And with your permission, may I be excused?

18 THE COURT: Yes, sir. Thank you.

19 MR. HILLIARD: Thank you.

20 (Recess.)

21 THE COURT: Your next witness.

22 MR. DIEDRICHS: Your Honor, at this time, we call
23 Dr. Bursztajn.

24 THE DEPUTY CLERK: I will swear him in, Judge.

25

HAROLD BURSZTAJN - DIRECT

1 (HAROLD BURSZTAJN, having been duly sworn, testified as
2 follows:)

3 DIRECT EXAMINATION

4 BY MR. DIEDRICHS:

5 Q. Good morning, Doctor.

6 A. Good morning.

7 Q. Sir, could you please state your name for the record.

8 A. It's Dr. Harold J. Bursztajn. That's spelled
9 B-U-R-S-Z-T-A-J-N.

10 Q. All right. Doctor, can you tell us what is your
11 profession, sir.

12 A. I practice clinical and forensic psychiatry, which are
13 respectively a specialty and subspecialty of medicine.

14 Q. And are you in the full-time practice of clinical and
15 forensic psychology or psychiatry?

16 A. I'm in the full-time practice of clinical and forensic
17 psychiatry. But beyond that, I also continue to teach and do
18 research in both clinical and forensic psychiatry.

19 Q. And where do you teach, sir?

20 A. At Harvard Medical School where I first became a student
21 in 1972, and I never left.

22 Q. All right. And what types of courses do you teach there,
23 sir?

24 A. I'm a founder of the program Psychiatry & the Law where a
25 variety of issues in clinical psychiatry, particularly in

1 forensic psychiatry and in bioethics, are discussed.

2 I also mentor individual Harvard medical students on their
3 dissertations, such as the neuropsychiatry of delusions and
4 identity.

5 Q. And in the field of psychiatry, do you have any special
6 interests?

7 A. I do.

8 Q. What are those?

9 A. My special interests in psychiatry include diagnostic
10 interviewing, especially subsequent to a tragedy occurring;
11 and delusions, prevention of suicide and homicide in patients
12 who are at acute risk of such tragedy events occurring;
13 addiction and the treatment of addiction including how to
14 break the cycle of drug abuse and drug withdrawal, which can
15 be a very vicious cycle.

16 I also have a special interest in psychodynamics of
17 clinical decision-making, and I often consult to physicians
18 and surgeons of specialties regarding clinical decision-making
19 and the conditions of uncertainty, which was the focus of my
20 first book, "Medical Choices." I --

21 Q. In your position -- I'm sorry. Go ahead.

22 A. I also have an ongoing interest in the problem of
23 retrospective analysis, including how people remember and make
24 sense of tragic, traumatic events.

25 In my forensic practice, I focus on forensic psychiatric

1 autopsies wherein, if a tragic event occurs, as part of risk
2 management, a consultant such as myself is asked to review the
3 data and advise the clinicians involved whether and, if so,
4 how it could have been prevented, could it have been foreseen,
5 how to improve our clinical practice. It's also a frequent
6 area wherein I amassed for medicolegal reasons to analyze a
7 tragic event.

8 Q. Okay. Sir, and with regard to your teaching position,
9 what is your title?

10 A. I'm an associate professor of psychiatry, part-time, at
11 the Harvard Medical School Department of Psychiatry, at the
12 Massachusetts Health Center and at the Israel Deaconess
13 Medical Center. And those -- in the Harvard Medical School
14 department.

15 Q. And you mentioned that you first went to Harvard as a
16 student in 1972.

17 How long have you been a professor at Harvard?

18 A. I would have to check my CV, but I believe I was
19 promoted -- let's see here. You can see for how long I've
20 been here.

21 Q. And you're looking at Joint Exhibit 617, which has
22 previously been admitted.

23 A. My curriculum vitae, yes, that's right.

24 So let's see here. I was first promoted to assistant
25 clinical professor in 1984 and then promoted to senior faculty

1 status as an associate clinical professor in 1990. And since
2 the medical school changes titles from clinical to part-time,
3 I'm now officially an associate professor part-time at Harvard
4 Medical School.

5 Q. And you mentioned that -- again, that you went to Harvard
6 in 1972.

7 What degrees have you obtained, sir?

8 A. I obtained the degree of doctor in medicine, and I am
9 licensed to practice medicine in Massachusetts and consult
10 nationally.

11 Q. Are you board-certified in any other areas, sir?

12 A. 1984, I was certified by the American Board of Psychiatry
13 and Neurology in psychiatry. I was subsequently certified in
14 forensic psychiatry by that board in the 1990s. That was a
15 limited certification, and that lapsed because I chose not to
16 take the test again.

17 Q. All right, sir. And you indicated that you teach forensic
18 psychiatry?

19 A. I do teach forensic psychiatry and clinical
20 decision-making. I also give grand rounds in those areas,
21 both locally and nationally.

22 Q. Have you been awarded any honors in your career, sir?

23 A. A variety, but not to go through a whole catalog.

24 The first honors that I was awarded was the Solomon prize,
25 which is the annual prize for the best research, which was

1 given by the Harvard Medical School Department of Psychiatry,
2 the Massachusetts Mental Health Center. My research involved
3 how judges make decisions regarding committing patients.

4 Since then, I have been awarded numerous prizes;
5 including, at the medical school, our most distinguished prize
6 for mentoring students and residents and junior faculty, the
7 Clifford Barger prize.

8 And nationally, I was -- one of my awards includes being
9 invited to give and having given the distinguished Flexner
10 lecture at Vanderbilt Medical School. As an aside, Abraham
11 Flexner was a founder of basically modern American medicine,
12 and he basically turned it from being snake oil into being
13 based on science in the 1920s.

14 Q. On the screen right now is Joint Exhibit 617.

15 That is your CV?

16 A. Let me see if I can see it. I have to change views here.
17 So forgive me.

18 I don't see it right now on my screen, for some reason.
19 I'm not sure why. It is my view -- oh, it's -- but it's not
20 showing up on my screen.

21 Q. Did you have it up before, sir?

22 A. No. When I was watching the testimony, I did see the
23 exhibits being up on my screen, the previous testimony. But,
24 again, I don't see -- let me just see here. Yeah, I currently
25 don't see the exhibits. Hmm. Let me try something else here.

1 "Hide nonvideo participants," and I can see the courtroom,
2 but I still do not see the screen at this point.

3 Q. Can you change your view, sir?

4 A. I'm going to exit the full screen. Yes, I just changed my
5 view, and let me see how I can go ahead -- but now what I'll
6 need to do is I'll need to minimize my view of you to be able
7 to see the exhibits. We may have to go back and forth, I
8 suppose.

9 I could also ask my technical -- my office manager to come
10 for a moment and see if he can do anything better than I am
11 doing right now.

12 But now I can see -- I can see the exhibit now, but how to
13 go ahead and see that also --

14 Q. Do you see the exhibit, sir?

15 A. I do see the exhibit now, but I do not see you. I can
16 only hear you.

17 MR. STERN: Do you mind if we can take five and have
18 his tech person --

19 THE COURT: Go ahead and bring your tech person in,
20 Doctor. We'll wait for you in here. Go ahead, Doctor.

21 THE WITNESS: Thank you.

22 (Pause in proceedings.)

23 MR. DIEDRICHS: I apologize, Your Honor.

24 THE COURT: I think it's just a matter of he needs to
25 be -- on the view options, he just needs to drop down, I

1 think, is where the problem is.

2 (Off-the-record discussion)

3 THE WITNESS: You know, between my much more
4 tech-savvy office manager and myself, I can see both now.

5 THE COURT: Okay. Let's go back on the record.

6 MR. DIEDRICHS: All right. Thank you, your Honor. I
7 apologize.

8 THE WITNESS: Thank you, Your Honor. Please forgive
9 my 20th century technological knowledge.

10 BY MR. DIEDRICHS:

11 Q. Let's see. How long have you been in the medical practice
12 of psychiatry, sir?

13 A. Since -- full-time since 1982. I became -- I first was an
14 attending physician in 1978 before my residency in psychiatry.
15 But beginning from 1979 to 1982, I was a resident in
16 psychiatry. And I've been in full-time practice since 1982,
17 so I'm coming up on my 40th anniversary.

18 Q. On your CV, on page 7, you start listing some
19 publications. And you have articles listed from page 7 to
20 page 13; is that correct?

21 A. Yes. Those are the peer-reviewed articles --

22 Q. Okay.

23 A. -- that are published journals where people have blindly
24 reviewed those before they were published.

25 Q. How many, sir -- I'm sorry. Go ahead, sir.

1 A. No. Please go on. I'm sorry.

2 Q. How many peer-reviewed articles have you published in your
3 career?

4 A. At this point, 98. Two more are in press, so I'll be
5 reaching my 100th sometime in July.

6 Q. And generally what type of subjects do you cover in your
7 publications?

8 A. Clinical and medical decision-making, forensic psychiatric
9 dilemmas, magical thinking, hindsight bias, post-tragic
10 events, addiction, traumas, a variety of special-interest
11 areas which have been special-interest areas since 1982 when I
12 first published the book "Medical Choices, Medical Chances:
13 How Patients, Families, and Physicians Can Cope with
14 Uncertainty."

15 Q. And you mentioned the term "magical thinking."

16 Can you explain that to the Court.

17 A. Yes. Magical thinking, as well as hindsight bias, are
18 species of wishful thinking. When we are very frightened or
19 when a tragedy occurs, we, in hindsight, very often feel that
20 there was something that we could have done because
21 helplessness is so painful.

22 So we very much resort to the idea that folks -- for
23 example, if only the doctor had not prescribed the
24 antidepressant medication which the patient took as an
25 overdose, then the patient would still be alive today, even

1 though the patient could have killed himself or herself in a
2 variety of ways ranging from shooting themselves to, you name
3 it.

4 But instead, we focus on the medication and the doctor's
5 prescription of medication as being the cause of the patient's
6 suicide, irrespective of the facts, because we don't want to
7 feel helpless that someone was actually (audio transmission
8 gap). Someone -- there was no way that we could have
9 either -- and someone, for example, was using concealment.

10 So there was no way that we could have known, someone was
11 very determined, they had plans, there was no way that we
12 could have prevented them killing themselves or killing
13 someone else.

14 And I've written about this. I've been the editor of the
15 "5-Minute Clinical Consult" -- gosh, I'm actually the author
16 of the chapters on both suicide and delusions for the past --
17 oh, it's well over 10 years. But each year, that's revised to
18 be -- in order to help clinicians who are faced with trying to
19 prevent people who are -- delusional people who are suicidal,
20 homicidal from actually carrying out their acts, when
21 possible.

22 It's not always possible. And when it's not possible,
23 then hindsight and magical thinking become very much the rule
24 rather than the exception as a way of making some sense of the
25 tragedy and not feeling helpless about it.

1 Q. And have you published in the area of forensic psychology
2 or psychiatry?

3 A. I have published extensively in the area of forensic
4 psychiatry, again, ranging from how judges make decisions
5 about whether someone is dangerous, whether someone is
6 committable, to issues such as suicide prevention, violence
7 prevention, terrorism prevention by people who are fanatics
8 and who are delusional.

9 My publications include such publications as why do so
10 many young people join terrorist organizations, under what
11 conditions does identity become delusional.

12 Q. Okay. And have you published in the area of clinical
13 psychiatry also?

14 A. I have. Much of what I've published in clinical
15 psychiatry also overlaps with my longstanding special forensic
16 psychiatric interests, which began in 1982, when I cofounded
17 the Harvard Medical School program Psychiatry & the Law, which
18 continues to meet weekly as it has since 1982.

19 It's the longest-running study group of this kind in the
20 medical school. We're approaching our 40th anniversary now.

21 Q. And have you also published on bias in medical
22 decision-making?

23 A. I have, in terms of the temptation to go ahead and to
24 think that one can go ahead and somehow prevent what may not
25 be preventable, the bias to see oneself as having much more

1 power and much more control when one is confronted by a tragic
2 situation, again, especially in hindsight when a tragic
3 situation actually occurs, also how memory serves and how it's
4 revised in hindsight.

5 Q. Okay. And in addition to publishing your own original
6 works, have you served as a peer reviewer for medical and
7 psychiatric journals?

8 A. I have and so continue to serve so, yes.

9 Q. Sir, have you testified as an expert in federal courts
10 before?

11 A. Yes, I have.

12 Q. And have you testified as an expert in state courts
13 before?

14 A. Yes, I have. I've been qualified as an expert in both
15 state and federal courts over 200 times in the course of my
16 forensic psychiatric career and practice since — beginning in
17 1982.

18 Q. Thank you.

19 MR. DIEDRICHS: Your Honor, at this time, we'd like
20 to offer Dr. Bursztajn as an expert in forensic and clinical
21 psychology and clinical decision-making.

22 THE WITNESS: Psychiatry, please.

23 MR. DIEDRICHS: Psychiatry. I'm sorry.

24 MR. JACOB: No objection to that specific.

25 THE COURT: Thank you. Dr. Bursztajn is recognized

1 as an expert in such.

2 BY MR. DIEDRICHS:

3 Q. Dr. Bursztajn, we're here to talk about, in this case,
4 Devin Kelley.

5 What records have you reviewed in preparation for your
6 testimony in this case?

7 A. I've reviewed over 400 documents and I've analyzed over
8 400 documents, including the documents of the mass murder at
9 the Baptist church related to that legal investigation, the
10 police investigation, the sheriff's investigation which
11 followed.

12 I've reviewed a variety of witness statements which were
13 made subsequently.

14 I've reviewed and analyzed the autopsy report which was
15 performed on Devin Kelley.

16 I reviewed and analyzed the variety of depositions which
17 have been taken.

18 I also reviewed Devin Kelley's medical and legal records
19 from the time and mental health records from the Air Force
20 during his two hospitalizations while at the Air Force as well
21 as the criminal proceedings against him.

22 Q. And you mentioned the two hospital stays.

23 Are you talking about the Peak facility?

24 A. Yes.

25 Q. Okay.

1 A. I also --

2 Q. Have -- go ahead.

3 A. -- reviewed subsequent mental health records, including
4 the records from 2016 and 2017 by Candace Marlowe, who is a
5 licensed mental health counselor.

6 Q. Did you also review the Air Force's own medical or --
7 medical and psychiatric records of Devin Kelley?

8 A. Yes, I did.

9 Q. You reviewed the deposition of Danielle Kelley?

10 A. Yes.

11 Q. Devin's father, Michael Kelley?

12 A. I did.

13 Q. And you indicated you reviewed the sheriff's file.

14 By that, do you mean the Texas Rangers' investigation?

15 A. Precisely. And forgive me if I'm not --

16 Q. It's a regional thing, sir.

17 Did you also read the DOD Office of the Inspector General
18 interview of Danielle and Michael Kelley?

19 A. I did.

20 Q. And have you also been watching some of the trial?

21 A. I have. I should also mention I've also reviewed other
22 things, including the Facebook posts that Devin Kelley posted,
23 the iCloud account and what he said in his iCloud account.

24 I basically reviewed what there was to review and analyze
25 in the discovery file, which you freely made accessible to me

1 throughout.

2 Q. Did that include statements as part of the investigation
3 from friends, co-workers, and former co-workers?

4 A. I did review those, yes.

5 Q. And based on the -- now, you mentioned 400 documents.

6 Many of those documents were more than one page, I assume?

7 A. I'm afraid so.

8 Q. Okay. Earlier, you mentioned the term "forensic
9 psychiatric autopsy."

10 Did you perform such a thing on Devin Kelley in this case?

11 A. I did.

12 Q. And can you tell the Court how you do that.

13 A. Well, one tries to differentiate between data which is
14 subject to hindsight, such as witness recollections after the
15 events, from contemporaneous data. And one tries to
16 differentiate subjective data from objective data, such as the
17 toxicology report and his autopsy, for example, which is
18 objective data.

19 One needs to ask questions including was it preventable;
20 beginning with was the mass murder at the Baptist church on
21 November 5th, 19 -- 2017 -- 2017, was that preventable?

22 One also then proceeds to ask the question was there any
23 necessary or sufficient condition which could have
24 specifically prevented that particular mass murder by
25 Devin Kelley at the Baptist church on November 5th?

1 The next question one asks is -- I ask is was it something
2 that could be anticipated either in 2013, 2014, or 2017. Were
3 there any changes between 2013 and 2014 and 2017. And if so,
4 what's the meaning of those changes, and what was also
5 continuous between 2013 and 2014 and 2017.

6 Next I ask whether Devin Kelley had the capacity and,
7 therefore, the responsibility for committing these horrible
8 mass murders at the Baptist church.

9 Finally, I have also looked at the opinions of the other
10 experts in this case and have -- again, I haven't based my
11 opinions on their opinions, but I have found them to be either
12 reliable or not reliable, at least in part, as far as forensic
13 psychiatry methodology is concerned, reliability being
14 determined by questions such as did they consider alternative
15 hypotheses to whatever their actual opinion was?

16 Q. And after performing this forensic autopsy, do you have an
17 opinion whether or not Devin Kelley -- the registration of
18 Devin Kelley's criminal conviction in the NICS system would
19 have prevented Devin Kelley's mass murder of the Sutherland
20 Springs church congregation in 2017, years after leaving the
21 Air Force?

22 A. I do have an opinion.

23 Q. What is that opinion, sir?

24 A. It's my opinion, which I hold to a reasonable degree of
25 medical and psychiatric probability, that that would not have

1 prevented those mass murders at that Baptist church on
2 November 5th, 2017.

3 The failure to report was neither a necessary nor
4 sufficient condition for those when this mass murder was
5 committed.

6 Q. So let's talk about -- you just mentioned a necessary or
7 sufficient condition.

8 What do you mean by "a necessary condition"?

9 A. A necessary condition is a condition which, but for its
10 presence, would have prevented the mass murders at that
11 Baptist church on November 5th.

12 To illustrate -- if I may use Shakespeare as a guide or as
13 a demonstration. In Richard III, it said, "For the want of
14 the nail, the shoe was lost. For the want of the shoe, the
15 horse was lost. For the want of the horse, the rider was
16 lost."

17 The nail is a necessary condition, even though it's a
18 simple nail. Here, there is no such nail. I wish there was,
19 but there is no such nail which would have prevented those
20 horrendous mass murders by Devin Kelley at the Baptist church
21 on November 5th, 2017.

22 Q. And we'll get to that in a minute, sir.

23 But what do you mean by "a sufficient condition"?

24 A. A sufficient condition is one which, by itself, would have
25 caused those horrendous mass murders at that Baptist church on

1 November 5th, 2017.

2 So the fact that he used firearms that were obtained from
3 a licensed dealer was insufficient. The fact that he engaged
4 in domestic violence and was a horrendous person to begin
5 with, from what I can tell. A mean person; that's the way I
6 would describe him. And I agree with her -- was that
7 sufficient to go ahead and to have him carry out and commit
8 those mass murders?

9 Even the fact that Danielle was being asked to testify and
10 not come in trial. Was that, by itself, sufficient? Or was
11 that a passive and convenient focus for a fundamentally
12 delusional or at least fantastic, antireligious hatred that he
13 did not express while at the Air Force?

14 In fact, he was quite religious at Peak hospital but
15 proceeded to begin to express and build up and up and up, to a
16 point where it's -- it has to be described as being a
17 delusional, antireligious, fixed-belief conviction in the
18 context of someone who became -- was using a multitude of
19 drugs, a drug cocktail including barbiturates and including
20 two different types of benzodiazepines, Flexeril.

21 He was using a drug cocktail, which would extenuate any
22 vulnerability to mood swings and, as Candace Marlowe diagnosed
23 it, begin to manifest a symptomology most consistent with
24 Bipolar I Disorder. She diagnosed him in 2016 and 2017. He
25 was not diagnosed this way at the Air Force.

1 Q. And he saw -- while at the Air Force, he did see
2 several -- both licensed health care workers, psychiatrists,
3 and psychologists; is that correct?

4 A. Yes. I mean, he saw a multidisciplinary team. And the
5 evaluations that were done were thorough. They were
6 professional.

7 They showed him to have ADHD; an adjustment disorder; a
8 cluster of personality traits most consistent with antisocial;
9 being someone for whom he felt that the rules didn't apply to
10 him; a mean person. Certainly a person prone to domestic
11 violence. But not just domestic violence; he threatened
12 anyone he had ongoing longstanding relationships with, such as
13 his co-workers, his superiors, and potentially an
14 unpredictable and dangerous person, but not someone who was
15 likely to -- more likely than not, to commit mass murder and
16 focus that mass murder on a church, a place of peace and
17 worship.

18 It did show him to be someone who could conceal. So it's
19 no surprise that neither his parents nor Erin nor Danielle
20 were aware of his plans to go ahead and commit mass murder.

21 The upcoming trial for Danielle, his interaction with --
22 his overall interactions with Michelle Shields are much more
23 likely to be a passive and convenient focus for him rather
24 than a sufficient cause to commit these mass murders.

25 Why not? Because he could have -- individually, he could

1 have killed Erin if he wanted to. He could have killed
2 Michelle at her home if he had wanted to. But, again, instead
3 chose to commit mass murder.

4 As he said in his post in iCloud, "I am the angel of
5 death," and you might as well do something big. It's more
6 consistent with a kind of a fascination in church shootings,
7 which he had beginning, I believe, in 2015, when Dylann Roof
8 committed the horrible mass murder in the South Carolina
9 church.

10 I mean, this was a mass murder committed at a church. And
11 at First Baptist Church, unfortunately, became the -- that
12 focus of that kind of violent, fantastic, delusional,
13 antireligious belief, disdain, hatred.

14 I mean, this is someone who went from loving religion in
15 the Air Force at Peak to absolutely hating religion, and
16 someone who began to go ahead and engage in a drug cocktail,
17 which he apparently was able to hide successfully from most
18 people who knew him. I mean, there's no physician that I know
19 who prescribed -- he took barbiturates. He was stealing his
20 wife's Fiorinal or forcing her to get Fiorinal.

21 I don't know of any physician who will prescribe a patient
22 a barbiturate and two benzodiazepines and Flexeril. He also
23 bragged to his coworker about taking three times as much
24 Clonopin.

25 So what you have is someone with a drug cocktail who may

1 not be intoxicated by the drug cocktail but who is going to
2 nonetheless experience withdrawal symptoms, which include a
3 delirium, a state of affective dysregulation at any point,
4 which is going to turn any overvalued belief into a fixed
5 delusion on which to act on, which he did as the avenging
6 angel.

7 Q. So if I understand correctly, you're saying that in the
8 intervening years between the Air Force -- when he left the
9 Air Force and the murders at the Sutherland Springs church, he
10 underwent some changes?

11 A. I think change is a bit of an understatement.

12 Q. Transformation?

13 A. Actually, "transformation" is much closer to it. He went
14 from being a mean, bad, potentially violent, potentially
15 unpredictable domestic abuser -- and, unfortunately, there was
16 anywhere between 1 million to 3 million instances of domestic
17 abuse violence in the U.S. in a given year -- to a focused,
18 delusionally driven, antireligiously inspired, rationalized as
19 an avenging angel mass murderer at the Baptist church on Guy
20 Fawkes Day, which happens to be the day in which the British
21 Parliament was almost blown up in the early 17th century,
22 which he, in fact, again, bragged about and alluded to in a
23 variety of different ways.

24 He chose the time and the place, and that's objective.

25 The time, November 5th, Guy Fawkes Day. The place, a church,

1 the Baptist church.

2 He had woke up -- was his access to licensed guns,
3 necessarily, what killed them? Well, he had already bought a
4 gun from a friend previously. He didn't use the gun. He used
5 one of the guns that he bought, but that doesn't mean that he
6 didn't have access to guns. He knew about gun shows as well.

7 Q. Well --

8 A. So, again --

9 Q. You mentioned several things -- I'm sorry. I didn't mean
10 to interrupt. Go ahead.

11 A. No, no. Please. Go on. Some of my students say I'm
12 long-winded. I can see why.

13 Q. You mentioned several things; for instance, concealment,
14 his ability to conceal.

15 A. Yeah.

16 Q. You heard Michael Kelley's testimony in this trial;
17 correct? Or you may have read the transcript?

18 A. I read the transcript of his testimony.

19 Q. And that brings up a point.

20 Have you been getting the daily transcripts on this trial?

21 A. Yes. I asked, and you have freely provided these.

22 MR. DIEDRICHS: Okay. And -- well, first, let's look
23 at Joint Exhibit 583A. Pull that up.

24 BY MR. DIEDRICHS:

25 Q. Okay. Doctor, can you see that?

1 A. Yes, I can.

2 Q. And what does that say, sir?

3 A. Here Devin Kelley says, "I am the angel of death. No one
4 can stop me."

5 Q. And just for the record, Ranger Snyder testified that they
6 took this from Devin Kelley's iCloud in July of 2017.

7 A. Yes. That's when he put it up to the iCloud.

8 Q. That's when he put it up. You're correct, sir.

9 What, if anything, does this say with regard to
10 Devin Kelley's mental state at that time?

11 A. At that point in time, he's labeling under a delusion that
12 he is the angel of death and that he's omnipotent, that no
13 one can stop him. And he is, in fact, taking a variety of
14 steps to conceal it, to make sure he doesn't get stopped.

15 But he's identifying himself delusionally with the angel
16 of death. And it's delusional because, on one hand, this is
17 someone who's vehemently antireligious. But on the other
18 hand, he's identifying himself as the angel of death. How can
19 you be both at the same time? Right?

20 Well, the answer is it doesn't make sense if you don't
21 have a thought disorder. But part of having a thought
22 disorder is not to be able to go ahead and see that this is a
23 contradiction. If you're going to be antireligious, you can't
24 identify yourself as the angel of death.

25 Q. And how does that reflect on his planning, preparation, or

1 concealment?

2 A. He is planning a mass murder, not simply domestic
3 violence. He cannot (audio transmission gap) domestic
4 violence. Of the, you know, 1 million to 3 million incidents
5 of domestic violence, most of them -- by far, the great number
6 of them -- will not have someone who will say or will believe
7 this private, you know, belief that he is the angel of death.

8 Some of them may believe that no one can stop them, that
9 it can be control for them. But to be the angel of death --
10 and, again, to be the angel of death while being vehemently
11 antireligious, that just doesn't make any rational sense.
12 It's evidence of a thought disorder, which included delusional
13 elements focused on mass murder.

14 MR. DIEDRICHS: Let's look at the next exhibit, 583B.

15 THE WITNESS: Yeah. Would you mind putting that back
16 up.

17 MR. DIEDRICHS: That's not the right one, Your Honor.

18 THE WITNESS: Okay.

19 MR. DIEDRICHS: Pardon me, Your Honor.

20 BY MR. DIEDRICHS:

21 Q. Can you see that, Dr. Bursztajn?

22 A. Yes, I can.

23 Q. And what does that say?

24 A. "Surprise, speed, violence of action."

25 Q. And how do you interpret that phrase with respect to what

1 Devin Kelley is indicating?

2 A. Again, this is someone who is focused not on an individual
3 act of violence but on an act of mass murder fueled by this
4 delusion that he's the angel of death.

5 Q. And you said "delusion" a number of times.

6 Can he define that for the Court, sir.

7 A. A delusion is a fixed belief which has no basis in social
8 reality but which, nonetheless, includes a conviction,
9 irrespective of any data. Again, in a way, it can be seen is
10 as the most extreme version of wishful thinking but one which
11 is not subject to reason or data.

12 Q. Okay. So this is a thought process that is -- or delusion
13 is a thought process that is not related to reality.

14 Is that what you're saying?

15 A. It may have a grain of reality in it, but it confuses that
16 grain with the whole beach, basically.

17 Q. I'm sorry. "With the" what?

18 A. It may have a grain of sand in it, a grain of reality.

19 But it does not have good enough -- so we're talking about
20 beaches, in Austin; it's the desert outside. It's the grain
21 of sand, which is not the desert.

22 Q. Okay.

23 A. So, yeah. I mean, it's --

24 Q. And does this indicate from a forensic psychiatric

25 perspective that he's doing any planning here or concealment?

1 A. He's -- he is planning to conceal. But notice his
2 emphasis on speed and violence of action is more consistent
3 with mass murder than individual murder.

4 Q. And in the records that you saw at the Air Force, were
5 there any kind of notes by his mental health providers or in
6 his journal that indicated anything of this type of ideation?

7 A. There is no indication that he was repeatedly evaluated
8 and judged to be not psychotic. His thinking might be a bit
9 weird but not psychotic, not delusional.

10 In fact, in his journals, what we have is he's presenting
11 himself as a devout Christian, repentant, the very opposite of
12 someone who would go ahead and identify himself with the angel
13 of death and then proceed to commit mass murder at the Baptist
14 church on Guy Fawkes Day, November 5th.

15 Just -- what continues is the domestic violence, but what
16 the discontinuity here is this is an -- I'm not minimizing the
17 tragedy of domestic violence. It's awful.

18 But this is -- we're talking about mass murder here at a
19 church on Guy Fawkes Day -- that's very different -- by the
20 so-called angel of death, who, by the way, is antireligious.
21 Doesn't make any sense.

22 MR. DIEDRICHS: Let's look at JEX 583C.

23 BY MR. DIEDRICHS:

24 Q. Can you see that, Doctor?

25 A. Yes.

1 Q. You've seen that before?

2 A. Yes.

3 Q. It's something you considered in your opinion?

4 A. Yes.

5 Q. Can you explain what that is?

6 A. He is --

7 MR. JACOB: Objection, Your Honor. Lack of
8 foundation as to any sort of firearms expertise on this
9 individual.

10 THE COURT: That's not what it's being called for.
11 You can answer.

12 THE WITNESS: Thank you, Your Honor.

13 He is focused on modifying weapons for rapid fire
14 for -- basically, weapons that you would use not to commit an
15 individual murder but to commit mass murder.

16 BY MR. DIEDRICHS:

17 Q. And it also has weights next to it; 7 ounces, .75 ounces.

18 Do you have an opinion as to what those weights are there
19 for?

20 A. Again, it's all meant to go ahead and modify the weapon
21 for easy rapid fire and to go ahead and to make sure that
22 there's enough ammunition to commit mass murder as opposed to
23 simply committing individual murder or the murder of a few
24 individuals. Now, I've --

25 MR. DIEDRICHS: Can we go to 583D.

1 BY MR. DIEDRICHS:

2 Q. Do you see that, sir?

3 A. Yes.

4 Q. And that is kind of more of the same?

5 A. Yes.

6 Q. To your knowledge, these were all created after he left
7 the Air Force; is that correct?

8 A. Yes. In fact -- absolutely, yeah.

9 MR. DIEDRICHS: Then 583E.

10 BY MR. DIEDRICHS:

11 Q. Do you see that?

12 A. Yes.

13 Q. And is that further evidence of planning and concealment?

14 A. Yes, planning and concealing relative to a mass murder.

15 Q. It indicates that he needs to get -- it says, "pack pack
16 for more ammo." Is that correct?

17 A. Yes.

18 Q. "Get more PMAGs"?

19 A. Yes.

20 Q. Previously, we had testimony that a PMAG is a magazine
21 that's inserted into the rifle and carries the rounds that are
22 fired.

23 Is that your understanding?

24 A. Yes, that's my understanding.

25 Q. And then it says, "Try on and reorganize gear."

1 A. He's practicing for mass murder.

2 Q. And this is within the -- five months of the actual
3 shooting; is that correct?

4 A. Yes. It's all in 2017, within five months of the
5 November 5th mass murder at the Baptist church.

6 MR. DIEDRICHS: And then 583F.

7 BY MR. DIEDRICHS:

8 Q. Do you see that, Doctor?

9 A. Yes. Yes, I do.

10 Q. And it looks like a list of things to do, if you will?

11 A. Yes.

12 Q. And they -- it says, "Keys, stuff in car, phone print,
13 clean inside, delete Instagram and FB"?

14 A. Yes.

15 Q. We heard testimony previously that FB stands for Facebook.

16 "Destroy phone"?

17 A. Yes.

18 Q. "Clear YouTube and Safari"?

19 A. Yes.

20 Q. "Kids' folder in car, energy powder, block Sarah and David
21 on social media and GoPhone."

22 Do you know who Sarah and David are?

23 A. Can you jog my memory.

24 Q. I don't think we have any testimony on that, sir.

25 A. Then, I don't know.

1 Q. And then "Destroy the old iPhone"?

2 A. Yes.

3 Q. From a forensic psychiatric point of view, what do you see
4 going on there?

5 A. He is planning to go ahead and -- planning concealment and
6 cover up.

7 Q. For what, sir?

8 A. For the purpose of being -- committing a -- that -- that
9 mass murder at the Baptist church.

10 Q. And the previous testimony was that this was from
11 October 28th, 2017.

12 A. Yes. Which, again, predates this visit to the church for
13 the fall festival on October 31st, 2017. So it predates it
14 rather than postdates it.

15 Q. Correct.

16 And then if we could go to 583G.

17 This one says, "Put together .22 kit."

18 Do you know what that is?

19 A. Again, I believe it's an enhancement to a weapon, but I'm
20 not sure what kind of enhancement it is. But it's an
21 enhancement to a weapon so that one can use it more easily to
22 commit a mass murder.

23 Q. And then, "Put it in a backpack." And then "Roll a
24 joint."

25 Why would he want to role a joint in preparation for the

1 shooting?

2 A. If he's going through a cycle of drug abuse and
3 withdrawal, then during the withdrawal phase, marijuana can be
4 used to go ahead and to calm the nerves and to steady one.

5 Marijuana is often used as a form of self-medication given
6 its long half-life for polydrug abusers who are abusing a
7 cocktail of barbiturates and clonazepam and Xanax and so on.

8 So it would be away to steady himself and calm himself so
9 that he can go on and carry out the mass murders even as he is
10 withdrawing from the polydrug abuse, which would, no doubt,
11 increase his mood swings and his tendency to act in a
12 delusional fanaticism.

13 Q. And then a couple down, it says, "Remove all weed stuff
14 from house."

15 Why would he do that in preparation for a shooting, sir?

16 A. Again, this is someone who, it sounds like -- again, since
17 he felt that no one could stop him delusionally, he also was
18 planning to get away. And he did try to get away, in fact,
19 and to cover his -- no one could stop him.

20 Again, it's almost consistent with someone who is
21 delusional enough to believe that he can go ahead and kill
22 everyone and there will no witnesses and he can get away
23 scot-free.

24 Q. And then the last one is "Put mag funnel back on"?

25 A. Yes.

1 Q. Do you know what a mag funnel is, sir?

2 A. Again, not specifically. But I do believe it's another
3 weapons enhancement, which, again, he was obsessed with by
4 this point. Go ahead -- wanting to go ahead and modify his
5 weapons to the point where they would commit mass murder so no
6 one could stop him and he could believe himself to be the
7 angel of death.

8 Q. And this was from October 28th, 2017, at 5:54 p.m., the
9 same date as the previous one; is that correct?

10 A. Yes.

11 MR. DIEDRICHS: And then, lastly, I want to look at
12 Joint Exhibit 5383H.

13 BY MR. DIEDRICHS:

14 Q. Do you see that, sir?

15 A. Yes.

16 Q. And, again, it's kind of a to-do list. And this is from
17 the 30th of October 2017, so the day before he goes to the
18 festival. And I want to look down to the second paragraph, if
19 you will.

20 It says, "Find location for push knife" and then "Put gun
21 stuff in car when Danielle doesn't notice."

22 A. Right.

23 Q. "Rifle in guitar case."

24 A. Right.

25 Q. "And put dog tags for Michael in buried location."

1 He's obviously trying to conceal things; is that correct?

2 A. Yes.

3 Q. And from the testimony you've heard and the records, was
4 he able to pretty much conceal his planning of this from those
5 closest to him?

6 A. Yes.

7 Q. Did his parents know this was going to happen?

8 A. No.

9 Q. Did his co-workers?

10 A. No.

11 Q. Did his wife?

12 A. No. No one expected him to commit mass murder at the
13 Baptist church on November 5th.

14 Q. Okay. Thank you, sir.

15 Let's talk a minute about -- you mentioned in addition to
16 planning, concealment, and preparation that in your medical
17 opinion, that this event was not foreseeable; is that correct?

18 A. Yes. I do have the opinion that this event -- that the
19 mass murder which occurred on November 5th, 2017, was not
20 foreseeable in 2013, '14, or even to Candace Marlowe when she
21 met with him on September 1st, 2017.

22 Q. And I think you indicated there were intervening
23 variables.

24 A. Yes.

25 Q. Tell us what you mean by "intervening variables."

1 A. Again, it changed from his being a devout Christian,
2 devoutly religious, to being a delusional fanatic who is
3 violently antireligious between the -- his time at the
4 Air Force and the subsequent time.

5 The -- even though he was capable of violence planning and
6 concealment in 2014, the violence planning and concealment
7 were intended to be situationally focused. They were not
8 driven by the delusion of being the angel of death and that no
9 one could stop him. That appeared subsequently.

10 And he was able to go ahead and also conceal his polydrug
11 abuse from everyone, including Candace Marlowe, who saw him
12 over 20 times between 2016 and 2017 as a licensed mental
13 health professional, and which, no doubt, fueled the kinds of
14 affective swings between drug abuse and withdrawal and what
15 she considered to be -- and I have no reason to question
16 her -- to be Bipolar Type I, manic-depressive illness type I,
17 which he was not diagnosed with while at the Air Force.

18 Q. Let's talk about that diagnosis, sir.

19 As you indicated, he saw Candace Marlowe.

20 What was her job, if you will?

21 A. She was a licensed mental health counselor.

22 Q. And when did he start going to her?

23 A. In 2016.

24 Q. Okay. Do you recall what the purpose of him seeking her
25 counseling was?

1 A. I would need to refresh my memory, as far as specifics.
2 He stated to her -- he was saying that he was seeking help
3 with --

4 Q. What would you require to do that, to refresh your
5 recollection, sir?

6 A. If I can go ahead and look at a time line that I've
7 prepared, that would be helpful.

8 MR. DIEDRICHS: Your Honor, would it be all right?

9 THE WITNESS: Or one of my reports. It should be
10 there.

11 MR. DIEDRICHS: I'm sorry. I didn't get that.

12 Would it be okay if he refreshed his recollection
13 with his notes?

14 THE COURT: That's fine.

15 MR. DIEDRICHS: Okay.

16 THE WITNESS: Thank you, Your Honor.

17 He began seeing Candace Marlowe, who has a master's
18 degree as a licensed mental health professional, on
19 September 20th, 2016 -- I'm sorry -- on June 6th, 2016.

20 Candace wrote that at that point, "He had severe
21 anxiety in social situations, panic attacks every other day,
22 sometimes is unable to speak. He said that he had taken
23 medication for anxiety with success."

24 And together they came to a conclusion that starting
25 with a medication regime would benefit him in addition to

1 therapy. She began seeing him twice weekly and prescribed
2 Clonopin. And also he said at that point that he was going to
3 seek prescriptions for Clonopin and Xanax because they had
4 worked in the past.

5 On the last session of that particular -- which is
6 August 25th of 2016, a diagnosis of bipolar disorder, which
7 was originally made, was maintained. So we have him seeing
8 Candace Marlowe beginning on June 6th, 2016, at which point
9 she did make the diagnosis of Bipolar Disorder Type I.

10 BY MR. DIEDRICHS:

11 Q. Had he ever been diagnosed with that when he was in the
12 Air Force?

13 A. No.

14 Q. And tell us what Bipolar disease Type I is.

15 A. Bipolar disease Type I is the most severe form of manic
16 depressive illness, marked by exaggerated mood swings, from
17 being very depressed to being hypomanic or manic, which
18 includes a tendency towards omnipotence, violence, and
19 delusion.

20 It is often accompanied by people trying to self-regulate
21 their mood swings by using a drug cocktail, including drugs of
22 abuse, which, unfortunately, only increases the mood swing
23 rather than decreases the mood swings, especially during the
24 withdrawal phase.

25 It is something for which there often is some indication

1 of family history but not always, because very often families
2 tend to go ahead and be and unaware of each other's mental
3 health diagnoses.

4 Q. And you mentioned one of the byproducts of that condition
5 is feelings of omnipotence?

6 A. Yes. Feelings of omnipotence, such as believing that
7 you're the angel of death and that no one can stop you.

8 Q. And another one is violence?

9 A. Another one is violence. There's also -- could be
10 paranoia and concealment of symptoms so that -- very often
11 people who suffer from bipolar illness, when they're hypomanic
12 or manic or questioned, they can appear to be normal because
13 they painted a mask of normality in order to keep themselves
14 together when they are being interviewed.

15 So very often, these delusions, beliefs are only
16 communicated, in this case, to the iCloud, or to their private
17 notes or journals rather than to even a trained and highly
18 qualified mental health professional.

19 Q. And then another attribute of that Bipolar I disorder is
20 delusion?

21 A. Yes. Delusions, fixed beliefs, often of a grandiose
22 character, such as "I am the angel of death" or "I am
23 omnipotent. No one can stop me," and an inability to contain
24 and process the ordinary and the extraordinary stressors of
25 life.

1 Often that inability is rationalized. So when people with
2 bipolar illness become violent, they often have some
3 rationalization for their violence, like "I'm taking revenge
4 for being abused," even if they're not being abused; "I'm
5 doing this to protect my family," even when they're not doing
6 this to protect their family; in fact, they may be harming
7 their family.

8 I mean, in its most extreme form, you have the ideology of
9 fanaticism, people who go ahead and target communities and
10 commit mass murder for reasons of ideology and fanaticism.

11 Q. And, again, during his time in the Air Force, given all
12 the mental health providers that he saw, he was never
13 diagnosed with that condition; is that correct?

14 A. He was never diagnosed with Bipolar Type I while at the
15 Air Force, no, and during the hospitalizations, during
16 evaluation. That was never even part of the differential
17 diagnosis, a diagnosis which was considered to be likely, let
18 alone definitive.

19 Q. And you mentioned earlier that he had a -- I'm going to
20 call it -- an interest in mass shootings; is that correct?

21 A. Yes. Beginning with -- when Kelley was talking with
22 Jessika Edwards, he expressed a great interest in the mass
23 shooting in the South Carolina church by a man by the name of
24 Dylann Roof, I believe -- a young man named Dylann Roof.

25 And he did become more and more preoccupied with church

1 shootings but also antireligious, vehemence, fantastic
2 beliefs.

3 MR. DIEDRICHS: Let's look at the statement from
4 Jessika Edwards that was taken by the Texas Rangers in their
5 investigation.

6 Can we see JEX 510-0003. Go to the fourth paragraph.

7 THE WITNESS: Yes.

8 BY MR. DIEDRICHS:

9 Q. First of all, do you know who Jessika Edwards is?

10 A. Yes. She was someone who was very helpful while she was
11 at the Air Force. I believe she was either -- if my memory
12 serves me right, a supervisor of his. And she wanted to
13 continue to be helpful to him.

14 Q. And after he left the Air Force, she got -- Devin Kelley
15 got in touch with her and they began a correspondence; is that
16 correct?

17 A. Yes, they did.

18 Q. Okay. And, again, this is the statement taken by the
19 Texas Rangers of her after the shooting -- or I'm sorry -- the
20 FBI. I apologize.

21 You reviewed this document before?

22 A. Yes, I reviewed and analyzed this document. Yes.

23 Q. Okay. And if you could start reading the second sentence.

24 A. Um-hum. "Kelley told Edwards he would buy dogs off of
25 Craigslist to train. If the dogs did not listen, Kelley would

1 use the dogs for target practice and dismember them."

2 Q. Doctor, let me stop you there for a second.

3 Well, continue. I'm sorry. We'll cover that in a second.

4 A. "Kelley also obsessed with church shootings and guns.

5 Regarding the church shooting in South Carolina" -- and I

6 believe that's the Dylann Roof shooting -- "Kelley told

7 Edwards, 'I wish I had the nerve to do it.' Kelley also sent

8 Edwards pictures of multiple guns he was building,

9 specifically an AR-15 rifle."

10 Q. First let's talk about the shooting of dogs for target

11 practice.

12 From a forensic psychiatric perspective, does that

13 indicate anything to you?

14 A. The shooting of the dogs for target practice, on one hand,

15 is consistent with his being a very mean person because very

16 mean people tend to engage in animal cruelty.

17 What takes it to another level at this point is that he

18 also dismembers them. After he kills them, he actually goes

19 ahead and chops them up. Now, that goes beyond the usual

20 domestic abuser's level of cruelty and meanness. It's another

21 level of it. It's a level which, again, is well consistent

22 with someone who is delusionally driven, even at that point in

23 time. And --

24 Q. And the next -- I'm sorry.

25 A. No. Please go on.

1 Q. The next sentence discusses his obsession with church
2 shootings and his statement, "I wish I had the nerve to do
3 it."

4 What does that tell you?

5 A. It basically lays the groundwork for understanding his
6 delusion that he's the angel of death. By being the angel of
7 death and by being so vehemently antireligious, he can
8 self-righteously commit a horrendous mass murder at the
9 Baptist church on November 5th, Guy Fawkes Day.

10 Q. And then he also kind of verifies what we already know,
11 his growing obsession with weapons; is that correct?

12 A. Yes, obsession with weapons, especially weapons which can
13 be used to commit mass murder, not just any weapons.

14 Q. And why do you say weapons used to commit mass murder
15 rather than any other weapon?

16 He had other weapons too. He had a Glock 19.

17 A. Right.

18 Q. Go ahead. I'm sorry.

19 A. He did. And, again, it's not unusual for people to become
20 obsessed with guns. Most people who are obsessed with guns
21 are not domestic abusers like a lot of mass murderers. But
22 the fact that he is now focusing on an AR-15 -- which, as I
23 understand it, is a weapon with which one can commit mass
24 murder -- while at the same point talking about mass murder,
25 the mass murders at the church, is indicative of how this

1 delusion was growing in form and dominance, a self-righteous
2 delusion in order to satisfy his wish, "I wish I had the nerve
3 to do it. I wish I had the nerve to commit mass murder at a
4 church," not just any place, but at a church, specifically.

5 Q. And --

6 THE COURT: Counsel, let's go ahead and break for
7 now. This appears that it's going to be going for a while.

8 Doctor, we're going to pause here for a lunch break
9 for everyone. I also have to take up another matter in
10 another criminal case.

11 Let's plan on returning to resuming the testimony of
12 the doctor at 12:45 central time.

13 So, Doctor, we'll be gone for about an hour -- or
14 about on 50 minutes. We'll see you back when we return.

15 I'm staying on the bench -- we're doing this Zoom;
16 right? So I'll be staying on the bench. You all feel free to
17 take your lunch break.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: You may continue.

20 MR. DIEDRICHS: Thank you, Your Honor.

21 BY MR. DIEDRICHS:

22 Q. Dr. Bursztajn --

23 A. Yes.

24 Q. -- the next thing you talked about was the -- his -- and
25 we spoke about it a little bit in one of the previous

1 exhibits -- was the fascination with mass shootings; is that
2 correct?

3 A. Yes.

4 MR. DIEDRICHS: Okay. I'd like to bring up Joint
5 Exhibit 742.0006 and page 2, paragraph 10.21. All right.

6 I'm sorry. Page 6. I apologize. And then paragraph
7 10.21.

8 THE WITNESS: Yes.

9 BY MR. DIEDRICHS:

10 Q. Okay. Now this is a -- another interview that was done
11 after the shooting with a Michael Swanson, a friend of -- or a
12 coworker of Devin Kelley.

13 Have you reviewed this previously?

14 A. Yes.

15 Q. Okay. And paragraph 10.21, can you read that, sir, into
16 the record?

17 A. "Swanson stated that after the Las Vegas mass shooting" --
18 this is on October 21st, 2017 -- "Devin stated something to
19 the effect of 'Devin, if you are going to do it, do it big.'
20 Swanson further stated that Devin described himself as
21 homicidal and suicidal."

22 Q. Now, that obviously is something that was not present
23 while he was in the Air Force; is that correct?

24 A. Correct.

25 Q. This is an event that occurred just prior to this shooting

1 that he apparently either admired or approved of; is that
2 fair?

3 A. Yes.

4 MR. DIEDRICHS: And then if we could go to Joint
5 Exhibit 503-1607.

6 BY MR. DIEDRICHS:

7 Q. And this is a Facebook post. It's the second post on that
8 page. And in that, on November 18, 2016, just under a year
9 prior to the shooting -- oops -- he posted a comment.

10 Can you read that.

11 A. Yes.

12 His comment was "Mass murderers don't do it because of
13 video games. They do it because they are tired of the fucking
14 bullshit in the rigged system and the hate that breeds in all
15 90 percent of humans. And it's time for payback. Most of
16 them anyway. Serial killers do it because they're addicted to
17 the rush of killing and get bored with killing animals."

18 Q. And we've already seen that Devin was killing --
19 gratuitously killing animals; correct?

20 A. Killing and dismembering animals, yes.

21 Q. What does this post in 2016, November -- if anything, what
22 does this say to you as a forensic psychiatrist?

23 A. That he is becoming more and more delusionally focused on
24 committing mass murder in the service of a fanatic ideology.

25 Q. And with regard to being delusional, is that a condition

1 somebody could spot when they see somebody on the street? In
2 other words, can people who are delusional operate within an
3 ordered society?

4 A. Unfortunately, it's not something that even trained
5 clinicians can invariably spot without access to the journals,
6 the postings, the private thoughts of someone who's
7 delusional. Because people who are delusional also take great
8 pains to conceal their delusions so they can go ahead and
9 carry out, in this instance, a plan of mass murder.

10 Q. And we already covered his ability to conceal his
11 preparation for this shooting; is that correct?

12 A. Yes.

13 MR. DIEDRICHS: And then if we could go to Joint
14 Exhibit 503, page 342, the one in the middle there.

15 BY MR. DIEDRICHS:

16 Q. On March 20th, 2017, about eight months before the
17 shooting, he replied to a comment on a post in Facebook.

18 And what does he say there?

19 A. On March 21st, 2017, he says, "You learn to shoot by doing
20 it. So if that was the case it would be like telling someone
21 who has not ever driven before they have to pass the driving
22 test before they learn how to drive. It's idiotic. Plus a
23 lot of mass shooters are impossible to detect.

24 "I am pretty sure they don't go around acting crazy
25 screaming to the world but are very careful, just like serial

1 killers. So they pass psych evals -- evaluations anyway."

2 Q. Okay. And that indicates his fascination with mass
3 shootings again?

4 A. Yes.

5 Q. And this one was, as I said, just eight months prior to
6 the shooting, less than eight months?

7 A. Yep.

8 Q. Is that correct?

9 A. Yes.

10 Q. And you indicated that his atheism would -- also came into
11 play here?

12 A. The fanaticism of his atheism did, yes.

13 Q. Can you tell us how that worked into this.

14 A. Well, it went into actually not just being a personal
15 belief about whether or not God exists, but it was
16 antireligious, disrespectful of anyone else's beliefs, and
17 contradictory in that he identified himself as, on one hand,
18 the angel of death, which is a -- one type of religious belief
19 in some religious. And on the other hand, was vehemently,
20 vehemently antireligious and a fanatical manner.

21 MR. DIEDRICHS: Okay. And, in fact, if we go to
22 JEX 503, page 641.

23 BY MR. DIEDRICHS:

24 Q. In May of 2017, what does he state there?

25 A. Devin says, "I'm an atheist. And they are ignorant

1 self-righteous Christians, or so they claim in public. But
2 behind closed doors, it's drug addiction and domestic
3 violence. My wife was the right person to marry, but the rest
4 of them could get shot in the face and I would laugh."

5 Q. And he's talking about Christians?

6 A. He's talking about Christians, and he's talking about
7 self-righteousness while, in fact, he's projecting. He's the
8 one who's being self-righteous here about religion. Right?

9 I mean, who is being self-righteous here? It's him.
10 Self-righteous and totally ignorant, confused in an ultimately
11 delusional-driven way. It's a delusional kind of
12 self-righteousness.

13 Q. And so that same day -- if you could go to the very first
14 one on that page.

15 A. On the same day -- this is a message we got through a post
16 on May 1st, 2017. He says -- this is Devin saying now, "I
17 believe God is really a sadistic mass murderer. Kinda like
18 the Jew God, if there is one."

19 Q. Evidencing contempt for religion; is that right?

20 A. Evidencing contempt for religion but also an
21 identification with God, because he commits mass murder.

22 Here, delusionally, Devin is playing God. And why would
23 he be antireligious? Because people who play God don't like
24 the idea that God is someone other than themselves. It's a
25 kind of idolatry -- delusional self-idolatry. We call it

1 "projection" in psychiatry.

2 MR. DIEDRICHS: And then if we go to -- back to
3 503-342.

4 BY MR. DIEDRICHS:

5 Q. He has -- they're not posts, but he's liking several -- go
6 down. Go down two.

7 There are several comments where he's -- or several posts
8 where he's liking posts from content owned by Atheist
9 Republic.

10 Do you see that?

11 A. Yes.

12 Q. Now we don't know what the content is, but that's from,
13 again, March 21st, 2017?

14 A. Yes.

15 Q. And how does that differ with the things that we've seen
16 from his opinion of Christianity specifically when he was in
17 the Air Force?

18 A. When he was in the Air Force -- when he was -- and he --
19 he was a devout Christian.

20 Q. And his -- as we previously talked about, he had a journal
21 when he was in Peak which was filled with Christian writings;
22 is that correct?

23 A. His journal at Peak was filled with piety and Christian
24 writings. It was filled with devotion, religious devotion.
25 That's was the way he was presenting himself to himself. When

1 people write in a journal, they are presenting their own
2 self-representations.

3 Q. Okay. And the other thing you talked about is his use of
4 drugs.

5 Tell us what drugs was he using, and what effect did they
6 have in the year prior to the shooting.

7 A. As best that I can tell, which is based on his autopsy, he
8 had in his system clonazepam, he had in his system Xanax; two
9 types of benzodiazepines. He had in his system Flexeril. He
10 had in his system a barbiturate based on taking his wife's
11 Fiorinal. And then it seems as if he was trying to go ahead
12 and manage his control withdrawal via marijuana.

13 Q. Okay. So let's go through each of those and tell us what
14 they do and then what they do in combination with the other.

15 What is Xanax?

16 A. Xanax is a benzodiazepine, a tranquilizer that's well
17 known for causing delirium and even subclinical partial
18 complex seizures when a person associates during the
19 withdrawal phase.

20 Q. And the clonazepam?

21 A. Clonazepam.

22 Q. Clonazepam.

23 A. Again, my daughter says, "Dad, why do you have an accent?
24 You came to the U.S. at the age of nine. I say, I'm a
25 psychiatrist." So forgive me.

1 The clonazepam is a long-lasting benzodiazepine which is
2 well known for having really awful withdrawal symptomatology.

3 Q. And do you recall a statement by Michael Swanson where he
4 indicated that the day before the shooting, Devin told him he
5 was taking three times the dosage?

6 A. Yes.

7 Q. What effect would that have?

8 A. Well, when he was coming off of it, with all the other
9 medications he had -- the barbiturate, the other
10 benzodiazepine -- it would go ahead and likely compound any
11 interaction effects.

12 The likely reason why he was taking three times the dosage
13 at that point was because he was suffering withdrawal from the
14 Xanax itself. Sometimes people use clonazepam to manage their
15 withdrawal from Xanax.

16 However, for someone who's already delusional, it would
17 have gone ahead and increased the domination that the delusion
18 had and potentially steadied him to proceed with -- with
19 carrying out the mass murder that he wishes -- he had wished
20 previously he had the nerve to carry out.

21 Q. And, Doctor, while we're talking about that, I want to
22 bring up the toxicology report of his autopsy.

23 A. Yes.

24 MR. DIEDRICHS: Joint Exhibit 378-0012.

25

1 BY MR. DIEDRICHS:

2 Q. Is that the autopsy report on Devin Patrick Kelley dated
3 December 21, 2017?

4 A. Yes. It's a toxicology page from the autopsy report.

5 Q. Okay. And what does it show there?

6 A. Well, if we go through it, under the "Blood, femoral,"
7 there was a very low amount of Xanax. Again, consistent with
8 someone who has been taking Xanax and has gone through
9 withdrawal.

10 There is a low amount of clonazepam, again, consistent
11 with someone who is trying to manage, although, not
12 successfully, his withdrawal; followed by 7-aminoclonazepam,
13 which is a clonazepam metabolite, again, consistent with
14 having taking clonazepam prior to the shootings and with
15 perhaps -- and in no likelihood being very vulnerable to any
16 withdrawal symptoms.

17 Q. And, Doctor, if I could stop you right there. I don't see
18 anything called Xanax on here.

19 What would that be?

20 A. Oh, the Xanax is the alprazolam, under the blood, femoral.
21 It's the fourth line down under benzodiazepines. If you look
22 at benzodiazepines, it's the --

23 Q. First one?

24 A. The first one, um-hum. Right.

25 Q. Okay.

1 A. So we have that.

2 Under cannabinoids, which is -- the active ingredient in
3 marijuana is THC -- he does have THC, which is consistent
4 with, again, someone who is trying to self-medicate a
5 withdrawal symptom -- symptomatology.

6 Then going down further, under immunoassay, we have some
7 amount detected -- again, probably is a very small amount
8 detected. And the barbiturate, in all likelihood, is the
9 butalbital, which is under the acid-neutral drugs.

10 If I go back to the top, acid-neutral drugs, very top,
11 second one, "Blood, femoral," it's butalbital, which is the
12 active barbiturate ingredient in Fiorinal. He had been
13 complaining of migraine headaches, and apparently he had
14 received -- or taken some Fiorinal from his wife which, again,
15 is illegal. You don't share your Fiorinal.

16 Q. And what is Fiorinal?

17 A. Fiorinal is an anti-migraine barbiturate that's prescribed
18 by physicians but under very careful circumstances and very
19 rarely -- I mean, I've never seen it in combination with two
20 different benzodiazepines at the same time.

21 Q. What effect would that have at the same time?

22 A. It would tend to potentiate the metabolism, basically
23 increase the likelihood of withdrawal.

24 Q. Are there any other drugs in there that are of concern for
25 you?

1 A. Yeah. Under alkaline drugs, you have cyclobenzaprine,
2 which is the generic name for Flexeril. Again, it's an
3 antispasmodic. But, again, that can interact with this whole
4 drug cocktail to increase the likelihood of withdrawal
5 symptomatology.

6 Q. And you mentioned withdrawal symptomatology.

7 What is that, in general? And what was it, in your
8 opinion, in this case, specifically?

9 A. In general, it includes mood swings, irritability, and
10 clinical and subclinical forms of delirium.

11 In this particular instance, when you have an individual
12 who's already prone to violence, prone to fanaticism and
13 antireligiosity, prone to mood swings and irritability, it
14 would have been a catalyst to compound his wishes, his
15 delusional identification as the angel of death into an active
16 form, an identification, a fixed belief, a delusion, a
17 conviction that he could use to act upon to carry out the
18 final pieces of his previously planned mass murders.

19 Q. Now, these are very small amounts of medications?

20 A. Yes.

21 Q. Okay. How long would the withdrawal symptoms last?

22 A. Withdrawal symptoms, given the wide ability and half-life
23 amongst these medications, could last anywhere from 6 to
24 8 hours to -- anywhere to a good number of days, 72 hours and
25 up, even more time than that. Occasionally with clonazepam,

1 one sees withdrawal symptoms which lasts for weeks.

2 MR. DIEDRICHS: Can we look at JEX 503, the iCloud
3 post.

4 BY MR. DIEDRICHS:

5 Q. And you mentioned this phrase before, but I want to show
6 it to you on his post.

7 MR. DIEDRICHS: One second, Your Honor. I apologize.

8 BY MR. DIEDRICHS:

9 Q. Okay. What I'm going to show you is JEX 543-0003. This
10 is from the Texas Rangers -- oh, this is the FBI report. I
11 apologize.

12 And you mentioned this statement before, "Remember,
13 remember the 5th of November." And this is a post made on
14 October 28th, 2017, by Devin Kelley. It's on Devin Kelley's
15 associated Facebook account.

16 Do you see that?

17 A. Yes.

18 Q. And you mentioned it's likely -- you mentioned Guy Fawkes
19 Day.

20 The fact that he posted this seven days before the actual
21 day of the shooting, what does that indicate to you?

22 A. That, at that point, he was planning to do what Guy Fawkes
23 tried to do with the House of Parliament in London in the
24 1600s. He tried to blow it up and to commit mass murder. Guy
25 Fawkes tried to commit mass murder.

1 He is, for many people who have antireligious or who have
2 an antiauthority, in general, bent to them, a hero for people
3 who hate authority, basically; any authority except their own
4 ideas of omnipotence.

5 The fact that he, again, a week before the shooting, was
6 already focusing on that particular day, Guy Fawkes Day, is
7 consistent with his fanatical, ideology-driven mass murder at
8 a place of peace and worship where we all realize that we
9 don't have absolute authority, mainly when we go to church.

10 MR. DIEDRICHS: Okay. Next I want to -- yeah -- show
11 JEX 501-0046 through 47.

12 BY MR. DIEDRICHS:

13 Q. These are two posts from Devin Kelley, November 5th, 2017,
14 at 12:15:22 UTC time, which, as I understand, it is five hours
15 ahead of the current time -- or San Antonio time.

16 Is that your understanding, sir?

17 A. Yes.

18 Q. Okay. So this would actually have been posted on the 4th
19 of November, central time?

20 A. Yes.

21 Q. The night before the shootings?

22 A. Yes.

23 Q. And these are posts by Devin, and the one on the bottom is
24 the first one. Can you read that, sir.

25 A. "Doing" -- Devin is saying, "Doing well. LOL," lots of

1 laughs. "I fake everything because I am far from doing well.
2 The more I fake, the more isolated I become. It becomes my
3 way to survive.

4 "I've learned the more I blend in by pretending I have
5 emotions or even a personality, that people don't catch on
6 that I'm simply not there, a shell of a person. I think some
7 people are catching on, though, which is not good. I am more
8 comfortable around people with my mask on."

9 Q. And that's to his sister?

10 A. That's to his sister.

11 Q. And then the last one he sends, the one on top?

12 A. Here Devin says, "My unusual and irrational thinking, I'm
13 afraid, has plagued my mind constantly. I just don't know if
14 a fake life is worth living. If I was truly free to be
15 myself, they would hunt me down and chain me. So the only way
16 is to hide among the sheeple, but it only propitiates the
17 problem."

18 Q. Given all we've talked about and as you read those two
19 posts by Devin to his sister, from a forensic
20 neuropsychiatrist perspective, how do you interpret those?

21 A. It's, tragically, the sign of someone who's recognizing
22 that he's lost his identity, his sense of self to a delusion,
23 a delusion of being the angel of death.

24 It's his last, perhaps, cry for help, but a cry for help
25 that would be very difficult for anyone who is not trained in

1 mental health to interpret as a desperate cry for help in
2 order to prevent him from committing mass murder for which he
3 would be hunted down for.

4 Q. He indicates in the bottom post he's a shell of a person
5 and --

6 A. Yeah.

7 Q. -- he has to keep his mask on around people.

8 A. Yes. So it indicates that he's capable -- and he has been
9 concealing his delusions; although, he's beginning to lose
10 control to the point where he may not be able to continue to
11 conceal them, which, then, terrifies him even more.

12 Q. And in the top post, he recognizes unusual and irrational
13 thinking?

14 A. Yes. He recognizes that his thinking is unusual
15 irrational; in other words, consistent with a thought
16 disorder.

17 Q. And, again, in reference to the mask and the shell of a
18 person, he says, "I just don't know if a fake life is worth
19 living."

20 A. Yes. Which, again, is consistent with his drive to go
21 ahead and exit life by committing mass murder, in the process,
22 taking innocent people whom he's had no long history of any
23 relationship with, not co-workers, but just taking -- going
24 out in a way -- as he put it, doing something which would -- I
25 believe "big" is the words he was using previously, or

1 something along those lines.

2 Q. Okay. We started off with this, and I just want to verify
3 that your opinion is still the same, Doctor.

4 Do you have an opinion, from a forensic neuropsychiatric
5 perspective, whether Devin Kelley would have been deterred or
6 otherwise prevented from committing the mass murder at the
7 Sutherland Springs church if he had been denied the ability to
8 purchase a firearm at a federal firearm facility -- or
9 licensee? I'm sorry.

10 A. It is my opinion, which I hold to a requisite degree of
11 medical scientific certainty and probability, that that would
12 not have been either a necessary nor sufficient condition to
13 deter him from committing the mass murder that he committed.

14 Q. And do you have an opinion, Doctor, from a forensic
15 neuropsychiatric perspective, whether, at the time, the
16 Air Force should have been submitted Devin Kelley's criminal
17 conviction data to the FBI, whether the Air Force would have
18 reasonably foreseen that Devin Kelley would commit a mass
19 shooting at the Sutherland Springs congregation years after he
20 left the Air Force?

21 A. It is my opinion that only in hindsight can one speculate
22 about that. There is no reliable -- clinically reliable data
23 to support the opinion, the hypothesis, the speculation that
24 the Air Force in 2013-2014 could have foreseen his -- the
25 deterioration his mental status, the drug cocktail-fueled

1 deterioration of his mental status, his fanatical
2 antireligiosity emerging from -- whereas, previously, he had
3 been religious -- to go up and then make the -- that church on
4 November 5th, that Baptist church, be a passive and convenient
5 focus for his hatred and fanaticism -- antireligious
6 fanaticism.

7 MR. DIEDRICHS: Thank you, Doctor.

8 I'll pass the witness.

9 THE COURT: Any cross?

10 MR. JACOB: Cross-examination, Your Honor?

11 THE COURT: Yes.

12 MR. JACOB: May I proceed?

13 THE COURT: Yes.

14 CROSS-EXAMINATION

15 BY MR. JACOB:

16 Q. Dr. Bursztajn -- am I saying that right?

17 A. It's close enough.

18 Q. Well, I want to get your name right.

19 Is it Bursztajn?

20 A. That's the Americanization of it. But since I came here
21 when I was nine years old, we kept our original name. It's
22 Bursztajn.

23 Q. Bursztajn. Did I get that right?

24 A. Bursztajn.

25 Q. Okay. I'm going to try my best, but I can't make any

1 promises. Okay?

2 A. Fair enough. Look, my family proceeded to go ahead and
3 change their name from Bursztajn to Bernstein.

4 Q. Well, my name is Tom Jacob.

5 And you and I have never met before; right?

6 A. We have not met previously.

7 Q. But you have authored a report in this case; right?

8 A. Yes.

9 Q. And you remember you authored this report in July 15,
10 2020?

11 A. Yes.

12 Q. And you had access to Devin Kelley's autopsy at that time,
13 did you not?

14 A. Yes.

15 Q. You had access to Devin Kelley's — specifically, the
16 toxicology results in that autopsy; isn't that correct?

17 A. Yes.

18 Q. I want to show you that report, and it's marked as
19 Government's Exhibit 25. And I'll show you page 1. And you
20 should be seeing it on your screen in a second.

21 Dr. Bursztajn, this is your report, Government Exhibit 25,
22 is it not?

23 A. Yes.

24 MR. JACOB: Let's flip to page 16 of
25 Government Exhibit 25.

1 BY MR. JACOB:

2 Q. And you should see the first paragraph starting with
3 "Moreover."

4 I'll ask you to zoom in on first about ten lines or so or
5 the entire paragraph, either way.

6 A. Hold on for one moment.

7 Q. Can you see that paragraph on your screen, Dr. Bursztajn?

8 A. Yes.

9 Q. The first line of that paragraph reads, "Moreover, Kelley
10 was not intoxicated at the time of the killing."

11 Did I read that correctly?

12 A. Yes.

13 Q. And when you say "the time of the killing," you mean the
14 Sutherland Springs church massacre; right?

15 A. Yes.

16 Q. And then you talk about the autopsy reports confirming
17 certain psychoactive medications, don't you?

18 A. Yes.

19 Q. And then you say, "His blood test was negative for
20 alprazolam and clonazepam."

21 Did I -- I probably butchered those, didn't I?

22 A. No. What happened actually was I left out -- it should
23 have been, "His blood test was negative for alprazolam and
24 clonazepam."

25 Q. Well, let me reask that question, Doctor.

1 Doctor, you wrote here that his blood test was negative
2 for Xanax and Klonopin, respectively; right?

3 A. Yes. But my -- what was omitted was the headline
4 therapeutic levels of Xanax and clonazepam.

5 Q. Doctor, let's go ahead and take this document down.

6 I want to talk about this deterioration idea that you
7 proffered to the Court.

8 You reviewed some of the documents in this case; right? I
9 think you said about 400 documents; right?

10 A. Yes.

11 Q. And you said that what came across to you was that after
12 the Air Force, Devin Kelley became delusional.

13 Do you remember that conversation with Mr. Diedrichs?

14 A. Yes.

15 Q. Let me show you the testimony of Danielle Smith from this
16 trial. And this is from page 25, the first day of testimony.

17 Well -- and while that's being pulled up, do you recall
18 Danielle Smith's testimony, Doctor?

19 A. I do, but not verbatim. So...

20 MR. JACOB: Okay. Well, let's zoom in on lines 4
21 through 9.

22 BY MR. JACOB:

23 Q. Do you remember this conversation where Danielle is
24 testifying that, while in the Air Force, Devin kept calling
25 her and saying how she thought that -- he thought that his

1 wife was cheating on him? Do you remember that?

2 A. Yes.

3 Q. Now, you said that you reviewed hundreds of documents;
4 right?

5 A. Yes.

6 Q. Including the documents from the Air Force; right?

7 A. Yes.

8 Q. They did a thorough investigation of Devin and Tessa
9 Kelley.

10 Do you remember that?

11 A. Yes.

12 Q. You didn't find a shred of evidence that Tessa Kelley was
13 cheating on Devin Kelley, did you?

14 A. Correct.

15 Q. Let me show you a couple of more documents. I want to
16 show you Joint Exhibit 22, page 105.

17 And you know Joint Exhibit 22 at AFOSI file on
18 Devin Kelley? Don't you know that?

19 A. Again, I'm not sure of the exhibit number, but I'll take
20 your word for it.

21 Q. But you did review the AFOSI file on Devin Kelley; right?

22 A. Yes.

23 Q. And, actually, I want to show you page 47 first of Joint
24 Exhibit 22. And I'll zoom in to that paragraph up there.

25 And you see here Tessa Kelley is telling the investigators

1 that Devin Kelley installed a wireless camera in their room in
2 their house -- do you see that? -- the living room?

3 A. Yes.

4 Q. The camera could be accessed remotely; right?

5 A. Yes.

6 Q. Are you aware whether or not the AFOSI investigators
7 confirmed the presence of this camera?

8 A. Again, off the top of my head, I don't remember. But I
9 wouldn't be surprised if it was not confirmed.

10 Q. Right. It was confirmed, wasn't it?

11 A. Right.

12 Q. Let me show you another document here, Joint Exhibit 363.

13 And these are Devin Kelley's -- some of Devin Kelley's
14 medical records while he was in the Air Force. And I want to
15 show you page 415 of Joint Exhibit 363. And specifically, I
16 want to pull out the top right-hand corner where it says, "Do
17 not write in this section. For staff use only."

18 Do you see that?

19 A. I do. Thank you for highlighting it.

20 Q. It says, "frequency of moods. Constant paranoia affecting
21 personal life. Now wife noticed."

22 Did I read that correctly?

23 A. Yes.

24 MR. JACOB: Let's go a couple of exhibits before this
25 to Joint Exhibit 360, page 187. And I want to zoom in on

1 "Thought Content" -- that box that's titled "Thought Content."

2 BY MR. JACOB:

3 Q. Do you see one box is checked?

4 A. Yes.

5 Q. What box is that?

6 A. "Paranoid delusions."

7 Q. Let me show you Joint Exhibit 360, page 20. And I want to
8 zoom in on "History of Present Illness" -- or "Present
9 Illness," rather, that paragraph.

10 And Joint Exhibit 360, page 20, that paragraph starting
11 with "Present Illness."

12 Do you see that paragraph?

13 A. Yes.

14 Q. It says, "This 21-year-old male admitted to the services
15 of Dr. Rodriguez-Chevres on April 30th, 2012, examined
16 April 30th, 2012, this patient who states, 'I've got a lot of
17 stress. I'm scared at work. I'm paranoid, so I ran away.'"

18 Did I read that correctly?

19 A. Yes.

20 Q. Dr. Bursztajn, is it still your testimony that he was not
21 delusional at the Air Force?

22 A. Not delusional in the same manner of identifying with the
23 angel of death, to the same -- delusional jealousy is common
24 in domestic abusers. Many domestic abusers manifest having
25 delusional jealousy, jealousy that's not based in fact.

1 That's not the same as identifying himself with the angel
2 of death and saying that no one can stop you. Very different.
3 One is a fixed delusion. The other one is a belief based on a
4 feeling of extreme jealousy. Very, very different.

5 Q. Okay. So your testimony is that Devin Kelley was
6 delusional in the Air Force, but he became more delusional
7 after the Air Force. That's fair; right?

8 A. I think he certainly was suspicious -- extremely
9 suspicious of his wife, believed that she was having an affair
10 when there was no data to support that. So he was paranoid in
11 the common sense of being paranoid.

12 Did he meet the criteria for delusional disorder at that
13 point in time? No.

14 Q. Well, you would agree with me you have --
15 Were you finished?

16 A. It's the sound. You have no reason to apologize.

17 Q. Well, I do apologize. Any time I interrupt you, it is my
18 fault, not yours. I should know better. Okay?

19 A. We also have a time delay, so it's fine, yeah.

20 What we have in the Air Force is surely symptoms of
21 paranoid jealousy, symptoms of overt suspiciousness of people,
22 being very frightened.

23 But we don't have the kind of grandiose delusion, which is
24 a fixed belief which does meet the criteria for a truly
25 impairing delusion, a delusional disorder, in the context of

1 bipolar type I illness that he manifested later.

2 There's just a world of difference. Many people -- I
3 mean, you'd be surprised how many couples I have when I'm
4 doing some counseling where one person or the other person
5 would be called delusional jealousy.

6 Q. Dr. Bursztajn --

7 A. But that's not the same as saying "I'm the angel of
8 death." That's a grandiose delusion. It's a fixed belief.
9 It's fanaticism. And it's entirely different.

10 Q. Do you have any evidence to dispute the fact that a while
11 in the Air Force, Devin was -- had constant paranoia affecting
12 his personal life?

13 A. His personal life, yes, but not in terms of a grandiose
14 delusion.

15 Q. Now, you said -- one of the examples you gave of this
16 deterioration was Devin Kelley's animal abuse.

17 Do you remember that?

18 A. Well, I went beyond that. It's not that he -- I
19 wouldn't -- look, he certainly had a propensity to abuse
20 animals. I have no question about that. He had it in the
21 Air Force.

22 What's different is he's describing enjoying dismemberment
23 of them. Now, there's many people who commit domestic
24 violence who also commit violence against animals. They abuse
25 their animals.

1 Q. Well --

2 A. May I finish this?

3 Q. Dr. Bursztajn --

4 A. -- and to dismember them --

5 Q. My question was very simple. You mentioned that his abuse
6 of animals was something that supported your conclusion.

7 You did that, didn't you?

8 A. No. What I said -- and I can restate my opinion again --
9 is that it wasn't just that he was abusing animals, it was
10 that he was enjoying dismembering them, which is very
11 different. That's what makes it psychotic.

12 Many domestic abusers also abuse their animals. That by
13 itself is -- unfortunately, is all too common, but it's
14 extraordinarily rare -- in fact, psychotic -- to enjoy
15 dismembering an animal that you've abused.

16 Q. Doctor, isn't the reason that you're making that
17 difference because the Air Force knew Devin Kelley was abusing
18 animals while he was in the Air Force?

19 MR. DIEDRICHS: Objection, Your Honor.
20 Argumentative.

21 THE COURT: That's overruled.

22 THE WITNESS: No. I'm making that statement because
23 that is my understanding. And that's what I said when I
24 testified, and that's what I'm saying right now. There's a
25 big difference between the abuse of a domestic animal and

1 enjoying dismemberment of that animal.

2 BY MR. JACOB:

3 Q. Well, you would agree with me if I said that the Air Force
4 knew when Devin Kelley was in the Air Force that he enjoyed
5 abusing animals?

6 A. Knew that he enjoyed abusing animals -- he was abusing
7 animals, but it did not know that he was psychotic enough to
8 actually enjoy dismembering animals. That's a major
9 difference --

10 Q. Devin Kelley --

11 A. -- mentally and physically.

12 Q. Devin Kelley told the Air Force that he enjoyed abusing
13 animals, did he not?

14 A. Yes.

15 Q. Doctor, I want to talk to you a little bit more about this
16 substantial deterioration.

17 One of the examples that you gave was the threats of
18 violence to Ms. Rowe.

19 Do you remember that conversation with Mr. Diedrichs?

20 A. Not verbatim, but feel free to refresh my memory.

21 Q. Sure. Let me show you a statement from Ms. Rowe. And we
22 can go through that statement, because Mr. Diedrichs showed
23 you one statement. I want to show you an earlier statement
24 from Ms. Rowe.

25 Let me show you Joint Exhibit 173, page 1, on your screen.

1 And I'll tell you, this is a --

2 MR. DIEDRICHS: Your Honor, I'm going to object. We
3 never had a discussion in the direct about threats to anybody.

4 THE COURT: That's overruled.

5 BY MR. JACOB:

6 Q. Doctor, you should see Joint Exhibit 173, page 1, on your
7 screen.

8 Do you see that?

9 A. I see the page. I don't see any particular passage,
10 because the print is too small.

11 MR. JACOB: Let's make that print a little bit
12 bigger. I want to highlight the paragraph that starts with
13 "Interview" and the sentence that begins "Rowe became."

14 BY MR. JACOB:

15 Q. Do you see this paragraph on Joint Exhibit 173, page 1,
16 starts out with "Rowe became Kelley's first-line reporting
17 official supervisor in 2010."

18 I read that correctly; right?

19 A. Yes.

20 Q. It talks about her role.

21 And then do you see the sentence that says, "After that
22 point"?

23 A. Yes.

24 Q. It says, "After that point, she began to observe behavior
25 issues with him or 'red flags.'"

1 Did I read that correctly?

2 A. Yes.

3 Q. And at the bottom of that paragraph, do you see the
4 sentence starting with "Rowe remarked"?

5 A. Yes.

6 Q. It says, "Rowe remarked that Kelley had a coldness about
7 him and that he wasn't all there. Her uneasiness regarding
8 Devin Kelley resulted in telling her supervisor, Sergeant Troy
9 Bizzack, 'We need to watch this guy because he's the kind of
10 person who will come in and shoot everybody.'"

11 Did I read that correctly?

12 A. Yes.

13 Q. Okay. And I wanted to go to page 2 of this document,
14 Joint Exhibit 173, and highlight the first paragraph for you.

15 And the judge has already actually seen portions of this,
16 so I just want to comment on the last line.

17 Do you see it says, "Rowe was unsure if these fears were
18 ever raised to their squadron commander's level"?

19 Did I read that correctly?

20 A. Yes.

21 Q. Doctor, you know that Rowe's fears were raised to the
22 commander squadron's level, don't you?

23 A. I understand that, yeah.

24 Q. Let me show you the squadron commander's comment, and I
25 want to show you Joint Exhibit 52, page 1.

1 And let's highlight the paragraph that starts with
2 "Background."

3 Do you see the second full paragraph, "Background," up
4 there on the screen, Doctor?

5 A. Yes.

6 Q. This is Joint Exhibit 52, and this is the statement of
7 Lieutenant Colonel Bearden; right?

8 A. Yes.

9 Q. He's the commander of the 49th Logistics Readiness
10 Squadron at Holloman Air Force Base; right?

11 A. Yes.

12 Q. Isn't it interesting, Doctor, that upon arrival, the first
13 thing his outgoing commander briefs him about is Airman
14 Devin Kelley?

15 MR. DIEDRICHS: Objection. That misstates the
16 evidence. Nothing in there says it was the first thing. It
17 says he was briefed.

18 THE COURT: That's overruled.

19 THE WITNESS: Again, I don't see anything which says
20 "first thing." So I'm not sure how you -- would you like to
21 confirm that?

22 BY MR. JACOB:

23 Q. Well, what we do know is that upon arrival to his
24 49th LRS, he was briefed by the outgoing commander about
25 Airman Devin Kelley; right?

1 A. Yes.

2 Q. Let's look at some of the things that he was briefed
3 about. Let's go to page 2 of Joint Exhibit 52, and I want to
4 zoom in on the first full paragraph starting with "Lieutenant
5 Colonel Bearden said he remembered" -- and he's talking about
6 threats.

7 Do you see that?

8 A. Yes.

9 Q. And now I want to look at that second sentence, starting
10 with "The Threats Lieutenant Bearden clarified."

11 It says, "The threats, Lieutenant Bearden clarified, were
12 of an active shooter-type, shooting individuals within the
13 squadron, possibly the commander."

14 Did I read that correctly?

15 A. Yes.

16 Q. "Prior to Kelley's release from confinement, there was a
17 discussion that Colonel Bearden should take more precautions
18 to protect service members from Kelley upon his return.

19 Lieutenant Colonel Bearden recalled this was why he issued the
20 conditional barment memorandum to the Security Forces Squadron
21 in March of 2013."

22 I read that correctly; right?

23 A. Yes.

24 Q. "At the time, Lieutenant Colonel Bearden said he requested
25 extra assistance from Security Forces Squadron to escort and

1 maintain Kelley upon his return. When Kelley returned from
2 NAVCONBRIG Miramar, Lieutenant Colonel Bearden recalled a
3 security forces person assisting in addition to a member of
4 the squadron who was assigned to stay with Kelley the night he
5 returned."

6 Did I read that correctly?

7 A. Yes.

8 Q. Doctor, isn't it fair that Lieutenant Colonel Bearden is
9 taking this briefing and the threats of Devin Kelley very
10 seriously here?

11 A. Yes.

12 Q. He's asking for extra security; right?

13 A. Yes.

14 Q. He actually had someone guard Kelley while he was asleep?

15 A. Yes.

16 Q. Let's examine why this might be.

17 And let's take that document down.

18 The reason individuals were so concerned is that
19 Devin Kelley had a very troubling mental health history in the
20 Air Force; isn't that true?

21 A. He had a history of criminal conduct and violence, yes.

22 Q. And you know that history of criminal conduct, prior
23 violent history, is a substantial risk factor for future
24 violent criminal history; isn't that true?

25 A. It can be. In the short term, for sure.

1 Q. Okay. Well, continuing our conversation about whether
2 Devin Kelley deteriorated after he left the Air Force, how
3 many times after he left the Air Force was Devin Kelley
4 hospitalized in a mental institution?

5 A. He never was rehospitalized.

6 Q. In the Air Force, Devin Kelley was hospitalized in a
7 mental institution on two separate occasions; isn't that true?

8 A. Right.

9 Q. And not only was he hospitalized on two separate
10 occasions, he actually went AWOL on two separate occasions?

11 A. That's fair to say.

12 Q. I want to show you some of those records and show you what
13 the Air Force knew at the time.

14 Let's go to the -- well, let me establish the first, the
15 time line real quick. I want to show you JEX 361, page 1.

16 And, Doctor, what you're seeing on your screen, JEX 361,
17 page 1, is the first volume of his first inpatient
18 hospitalization with the Air Force; right?

19 A. Yes.

20 Q. You can see the admission date is 2/23/2012; right?

21 A. Yes.

22 Q. And the discharge date is 3/8/2012; right?

23 A. Yes.

24 Q. Okay. Doctor, you know there are some troubling mental
25 history in this volume; right?

1 A. Yes.

2 Q. I want to get -- I don't want to belabor the point, but
3 let's look at his second inpatient hospitalization, Joint
4 Exhibit 360.

5 You've reviewed both of these records; right?

6 A. Yes, I have.

7 Q. Joint Exhibit 360 is his second inpatient hospitalization
8 while he was in the military; right?

9 A. Yes.

10 Q. His admission is on 4/30/2012; right?

11 A. Yes.

12 Q. And this time, he stays for about a month in the hospital;
13 right?

14 A. He's treated for about a month in the hospital, yes.

15 Q. Now, the reason he was discharged from this inpatient
16 hospitalization was not because he got better; right?

17 A. No. He absconded. He left against medical advice.

18 Q. Right. And they had to go and capture him; right?

19 A. Yes, at the Greyhound bus station.

20 Q. And that was the second time he went AWOL; right?

21 A. Yes.

22 Q. Let's take a look at page 6 of Joint Exhibit 360, and what
23 you should be seeing is his discharge summary.

24 Discharge summary is a good place in medical records to
25 kind of see the history of what happened in a patients'

1 inpatient stay; right?

2 A. Sometimes. I mean, sometimes yes; sometimes no. It
3 depends.

4 Q. Well, let's take a look at his reason for hospitalization.
5 Do you see that?

6 A. Yes.

7 Q. And on Joint Exhibit 360, the reason for hospitalization
8 is that he had been going through stress at home with his
9 wife.

10 Do you see that?

11 A. Yes.

12 Q. And this was the same reason for hospitalization as his
13 first inpatient stay at Peak; right?

14 A. Yes.

15 Q. And you see it discusses how "he decided to leave Holloman
16 Air Force Base and go absent without leave. He left for
17 San Antonio Texas with his parents."

18 Did I read that correctly?

19 A. Yes.

20 Q. That was his first AWOL; right?

21 A. Yes.

22 Q. And in looking -- now let me pull that back and look at
23 the next paragraph that's "Hospital Course and Stay."

24 See the "Hospital Course and Stay," here he discusses his
25 second AWOL, right, on June 7th?

1 A. Yes. It says that although he was doing well in treatment
2 and was complying with his medications, he had eloped from the
3 facility on June 7th after hearing of a potential military
4 confinement and also of his pending divorce. He was
5 apprehended at the Greyhound bus station in El Paso and
6 brought back to the facility where he was placed on elopement
7 precautions.

8 Q. Doctor, isn't this another example where Devin Kelley is
9 demonstrating his fear of prison?

10 A. Yes.

11 Q. So he escapes to El Paso, right, and he's brought back by
12 force; right?

13 A. Yes. Yeah.

14 Q. I want to show you -- well, let's talk about what he did
15 on that escape, in particular.

16 Let me show you page 7, the very next page of Joint
17 Exhibit 360 and the first actual paragraph starting with "The
18 patient tolerated his medications."

19 And you see he's on multiple medications; right?

20 A. He's on antidepressant and a relatively mild antianxiety
21 agent. He's on ADHD medication and a very mild antidepressant
22 for sleep.

23 Q. He's on a medication for insomnia is what it says; right?

24 A. Yeah. The doxepin is a very low dosage of medication for
25 sleep, because he's not sleeping.

1 Q. And this is not the first time he's been on medications
2 for insomnia; right?

3 A. Right.

4 Q. He's been on medications for insomnia for a large portion
5 of his life, hasn't he, throughout the Air Force?

6 A. He has been on medications for lack of sleep previously,
7 sure.

8 Q. It says, "The patient had also been confronted during
9 treatment team about him searching the web for purchasing
10 weapons when he was in much legal trouble at home, but he
11 minimized and was evasive as to the reasons he was searching
12 the web other than he was a hunter and liked to have weapons
13 so he could hunt."

14 Did I get that close?

15 A. You read it correctly.

16 Q. "The patient, during his hospitalization, also made
17 threats that if he was discharged to the military police, he
18 would try to disarm the police and either be killed or kill
19 someone. At that point, measures were taken to prevent that
20 from happening."

21 Did I get that right?

22 A. You read that correctly.

23 Q. Now, that's just the summary.

24 There's actually more detailed records as to exactly what
25 he was doing; right?

1 A. Yes.

2 Q. Let me take -- let me show you some Air Force records on
3 point, and I want to show you Joint Exhibit 21, page 10. And
4 I'll just zoom in to the paragraphs numbered 2 and 3.

5 Do you see that?

6 A. Yes. What's the date on that?

7 Q. Yeah. Let's zoom back out.

8 And you see the date is March 22, 2013?

9 A. Okay. Thank you.

10 MR. JACOB: And zoom back out so we know who is
11 speaking, if we could. Just, yeah, the bottom part.

12 BY MR. JACOB:

13 Q. Do you see who signed that?

14 A. Yeah. Robert Bearden.

15 Q. Colonel Bearden.

16 That's the same individual we were talking about earlier;
17 right?

18 A. Right.

19 Q. This document says, "AB Kelley has repeatedly threatened
20 to kill his leadership." Right?

21 A. Yes.

22 Q. "While he was assigned to the military ward, he created a
23 diversion and jumped outside of a recreational fence."

24 Did I read that correctly?

25 A. Yes.

1 Q. You don't just create a diversion on the fly, do you?

2 A. No. It's planned.

3 Q. Right.

4 "He later was apprehended by the Peak staff at a local bus
5 station." Right?

6 A. Yes.

7 Q. And then they talk about the computer searches; right? Is
8 that correct?

9 A. Yes.

10 Q. And you see he's searching for body armor and guerilla
11 tactics; right?

12 A. Yes.

13 Q. And it's documented that he was training his
14 cardiovascular system; right?

15 A. Yes.

16 Q. Colonel Bearden concludes, "I view this airman as a threat
17 not only to myself but to my staff and the other airmen in
18 this squadron. I have communicated my concerns to the
19 security forces/commander Lieutenant Boyd. And he will be
20 providing the unit an armed escort during his out-processing."

21 Did I read that correctly?

22 A. Yes.

23 Q. So what we know as of March 22, 2012, is that Devin Kelley
24 is creating a diversion to escape a mental institution; right?

25 A. Yes.

1 Q. He is searching for body armor; right?

2 A. Yes.

3 Q. He is researching guerilla tactics; right?

4 A. Correct.

5 Q. He is training his cardiovascular system; isn't that true?

6 A. Correct.

7 Q. And are you aware of evidence that he was actually
8 contemplating and talking about offensive attack strategies on
9 the Air Force?

10 A. Yes.

11 Q. Doctor, isn't it true that a person who creates a
12 diversion to escape a mental institution, searches for body
13 armor, is researching guerilla tactics, is training his
14 cardiovascular system, and talking about offensive attack
15 strategies, that's a person who's planning to commit a mass
16 murder?

17 A. It's a person who's planning to go ahead and carry out --
18 potentially carry out an attack against his co-workers, his
19 superiors, planning to go ahead and try to escape from a
20 mental institution and escape from jail.

21 Q. Do you know why Devin Kelley was not able to complete his
22 attack on his co-workers and superiors?

23 A. I'm not sure I understand the question.

24 Q. Well, sure. You just said that this is a person who is
25 possibly planning an attack on his co-workers and superiors.

1 That's what you said; right?

2 A. Yeah.

3 Q. That's a mass attack; right?

4 A. Yes.

5 Q. Do you know why Devin Kelley was not able to commit that
6 mass murder on Holloman Air Force Base?

7 A. He was not able to target the individuals he was hoping to
8 target because he was in detention.

9 Q. He was apprehended; right?

10 A. Yeah.

11 Q. Someone reported him fleeing; right?

12 A. Yeah.

13 Q. They caught him?

14 A. Yeah.

15 Q. They brought him back?

16 A. Yeah.

17 Q. And they said -- they concluded that this was an
18 individual who was a foreseeable risk of future violence;
19 right?

20 A. Yes.

21 Q. And they said, "We need to keep him contained to prevent
22 that future violence." Right?

23 A. Yes. He had targeted some individuals and needed to be
24 kept confined.

25 Q. Let's talk about -- so he's captured, confined at the

1 Air Force; right?

2 A. Yes.

3 Q. We know that while he was confined at the Air Force, he
4 went through outpatient medical care -- mental care at the
5 Holloman mental clinic; right?

6 A. Yes.

7 Q. You've reviewed those records; right?

8 A. Yes.

9 Q. And what Devin Kelley says in those records is very
10 serious mental health concerns; isn't that true?

11 A. Yes.

12 Q. Let's look through some of those records. Okay?

13 I want to show you Joint Exhibit 363, and this is going to
14 span a couple of pages -- page 337 to 338. It will be two
15 pages. And I want to talk to you about this note that's
16 written there.

17 Do you see here that this is a note written on the 21st of
18 June 2012?

19 A. Yes.

20 Q. And we see an encounter information -- encounter
21 background information?

22 A. Yes. Although, again, it's a little bit difficult.

23 Okay. Now I see it.

24 Q. Okay. And it spans two pages.

25 It says, "The patient seen while in confinement." Right?

1 A. Right.

2 Q. He was "placed in segregation status on 15 June '12 due to
3 his report that he would kill himself if he had a gun."

4 Right?

5 A. Yes.

6 Q. And "He apparently was persistent that he should be back
7 at Peak hospital because he was so distressed."

8 Did I read that correctly?

9 A. Yes.

10 Q. And do you see how, in brackets, they note something
11 there?

12 A. Yes.

13 Q. It says, "The SM had escaped from Peak prior to this
14 confinement with what was determined to be homicidal and
15 suicidal ideation and intent."

16 Did I read that correctly?

17 A. Yes.

18 Q. Doctor, this is not the first time, nor is it the last
19 time, that an individual in the Air Force is noting
20 Devin Kelley's homicidal and suicidal ideation and intent, is
21 it?

22 A. Yes.

23 Q. I apologize that was a little unclear, and it's probably
24 my fault.

25 Throughout his medical records, the providers are noting

1 that Devin Kelley has homicidal and suicidal ideations and
2 intent while in the Air Force; isn't that true?

3 A. Yes.

4 Q. And not only that, but he was put on a high-risk,
5 high-interest list as a result of his homicidal and suicidal
6 ideations.

7 We can go ahead and take that down.

8 Let me ask you that question again.

9 A. Yes.

10 Q. Throughout his stay at Holloman Air Force Base and while
11 providers at Holloman Air Force Base were seeing him, they put
12 him -- the folks at the Air Force put him on a high-risk,
13 high-interest list for homicidal and suicidal ideations;
14 right?

15 A. They did.

16 Q. And they convened a high risk -- on top of that, they
17 convened a high-risk violence response team; right?

18 A. They did.

19 Q. You know that the AFOSI were involved in there -- in that
20 team?

21 A. That's my understanding.

22 Q. The security forces were involved?

23 A. Yes.

24 Q. The leadership of the Air Force was involved at Holloman?

25 A. It was.

1 Q. They had a big meeting?

2 A. They did have a meeting, yes.

3 Q. With several of those groups: AFOSI, security forces, and
4 the leadership; right?

5 A. Yes.

6 Q. And they decided that Devin Kelley was high risk for
7 suicidal and homicidal ideations; right?

8 A. That's what they decided, yeah.

9 Q. Now, you understand that during this time, he was
10 evaluated for his competency to stand trial; right?

11 A. Yes.

12 Q. And they did find that he was competent to stand trial;
13 isn't that true?

14 A. Yes.

15 Q. They decided that he was not -- he knew exactly what he
16 was doing when he was doing all of these things that we were
17 talking about; right?

18 A. Yes.

19 Q. But did you notice, Doctor, that they gave him several
20 psychiatric testing during that competency determination?

21 A. He did have multiple psychological tests during that, yes,
22 and evaluations, yeah.

23 Q. Did you review the results of those evaluations?

24 A. I did.

25 Q. Let's go through some of those evaluations.

1 I want to show you Joint Exhibit 363, and I'll show you
2 page 1 so we all know what we are looking at.

3 Page 1 of Joint Exhibit 363.

4 And this is the Air Force file, and we'll be able to find
5 his competency in here. So let me take you to page 181.

6 All right. I'll zoom in on the highlighted portion,
7 "Defendant Psychiatric History."

8 A. Just to make sure I have it, what's the date of that
9 again?

10 Q. This is the -- you see -- and let's pull that back, and
11 let me show you -- show him the first part.

12 You see it's United States versus Devin Patrick Kelley,
13 the sanity board determination report?

14 A. Right.

15 Q. Let's go back to that psychiatric history here.

16 This is Joint Exhibit 363, page 181, "Defendants
17 Psychiatric History."

18 And they describe some of his history; right?

19 A. When was the report issued? If you can just jogged my
20 memory.

21 Q. I'm sorry, Doctor. I couldn't hear you?

22 A. When was this report issued?

23 Q. Doctor, would it surprise you to learn this report was
24 issued in August of 2012?

25 A. No. That confirms what I thought.

1 Q. Okay. Let's go back to page 181 of this report.

2 And you see he's talking about abusing animals again here;
3 right?

4 A. Yes.

5 Q. Look at that second paragraph.

6 Do you see it says, "He reported that from childhood into
7 his teen years, he had been in as many of 30 fistfights
8 without the use of weapons. He reportedly received training
9 in the martial arts and remarked on being proud of this yet
10 somewhat fearful of how violent he could be"?

11 A. Yes.

12 Q. Does that sound a little delusional to you, Doctor?

13 A. It sounds sociopathic, for sure, someone who doesn't think
14 that the rules of society apply to him, which is different
15 than delusional, for sure.

16 Q. Okay. Well, I promised you we'd talk about his test
17 results, so let me show you that, page 188 of Joint
18 Exhibit 363.

19 And let's look at that first test, the Beck Depression
20 Inventory; right?

21 A. Yes.

22 Q. It says, "The results of this assessment revealed that
23 AlC Kelley is experiencing a level of depression that is
24 clinically significant and moderately severe to severe. On
25 clinical exam, however, he does not present as a major

1 depression, which suggests his symptoms are likely to be worse
2 when alone than when he is in the company of others. He did
3 confirm this interpretation during the clinical interview."

4 Did I read that correctly?

5 A. Yes. I think that's a fair assessment on that date.

6 Q. Okay. Let pull back, and let's look at the personality
7 assessment inventory.

8 The first sentence of this personality assessment
9 inventory of Devin Kelley reads, "The clinical profile
10 indicates a broad range of clinical features that involve
11 multiple diagnoses."

12 Did I read that correctly?

13 A. Yes.

14 Q. Now skip that next sentence, and I want to look at that
15 sentence that says, "He also describes a personality style."

16 Do you see that sentence?

17 A. Yes.

18 Q. It says, "He also describes a personality style that is
19 consistent with a number of antisocial character features
20 having their roots in a conduct disorder during adolescence."

21 Did I read that correctly?

22 A. Yes.

23 Q. "He is likely to be reckless impulsive, physically
24 aggressive towards others, and likely to entertain risks that
25 are potentially dangerous to himself and those around him.

1 Regarding the latter issue, A1C Kelley admitted to engaging in
2 three rounds of Russian roulette with a loaded handgun and
3 actually pulling the trigger with the gun pointed at his head
4 with his wife in the same room."

5 Did I get that right?

6 A. Yes.

7 Q. "Each time, he reportedly challenged her to work out their
8 problems with him or he would pull the trigger. He stated
9 that he pulled the trigger three times before she finally
10 agreed to his demands."

11 Did I read that correctly?

12 A. Yes.

13 Q. Doctor, Joint Exhibit 636 [verbatim], his sanity board
14 determination and the results of his psychological test, go on
15 like that for pages, don't they?

16 A. Yes.

17 MR. JACOB: Let's take that down.

18 BY MR. JACOB:

19 Q. Doctor, the Air Force knew that Devin Kelley sexually
20 assaulted at least four women before he set on foot of the
21 Holloman Air Force Base; isn't that true?

22 A. Yes.

23 Q. He raped at least two women before he set foot on Holloman
24 Air Force Base.

25 The Air Force knew that, didn't they?

1 A. That's my understanding.

2 Q. You talked in your direct examination about how
3 Devin Kelley, after the Air Force -- you know, during the
4 Air Force, he was very Christian in his attitudes. But after
5 the Air Force, he became very antireligious or anti-Christian.
6 Do you remember that conversation?

7 A. Yes.

8 Q. Let me show you Joint Exhibit page 22 -- page 63.

9 And this is -- I'll let you know this is from the AFOSI
10 file, the Air Force Office of the Special Investigations file,
11 and it's an interview of one of Devin Kelley victims.

12 And I don't want to belabor the point, but I'll just zoom
13 in on some of the conduct that Devin Kelley committed that the
14 Air Force was aware of.

15 You've reviewed this conduct, haven't you?

16 A. Yes.

17 Q. You know that this is one of Devin Kelley's rapes; right?

18 A. Yes.

19 Q. This is heinous conduct, isn't it, Doctor?

20 A. Horrible. Absolutely horrible.

21 Q. This is not the conduct of a devout Christian; is it?

22 A. Absolutely not.

23 Q. I want to show you page 65 of Joint Exhibit 22. And this
24 time, I want to just zoom in on the last ten or so lines.

25 Again, this is the -- interviews of one of Devin Kelley's

1 victims that the Air Force is conducting.

2 You've seen this document, have you not?

3 A. Yes.

4 Q. You see that subject Kelley -- do you see the "Subject
5 Kelley confessed to victim"?

6 A. Yes.

7 Q. "Subject Kelley confessed to victim that he had messed
8 with his sister."

9 Do you see that?

10 A. Yes, I do see that yeah.

11 Q. And then it goes on to say, "And he would spy on her in
12 the shower. Subject Kelley touched his sister's breasts on at
13 least one occasion and enjoyed watching her without a shirt
14 on."

15 Did I read that correctly?

16 A. Yes.

17 Q. "Subject Kelley also confessed to victim that he had a
18 hidden video camera in his parents' bedroom to spy on them."

19 Did I get that correctly?

20 A. Yes.

21 Q. "Victim thought he did the aforementioned things because
22 Kelley is perverted and enjoyed masturbating to the sight of
23 his sister and parents."

24 Did I read that correctly?

25 A. Yes, you did.

1 Q. This is horrific conduct that the Air Force knew of;
2 right?

3 A. Absolutely horrific.

4 Q. Not the conduct of a devout Christian; right?

5 A. Not the conduct of a devout Christian or any other decent
6 human being.

7 Q. And you know the Air Force had evidence supporting the
8 statements of this victim and Devin Kelley's conduct in this
9 statement? You know that, don't you?

10 A. Yes.

11 Q. You know that other victims came forward and said that he
12 had similar -- or reported similar conduct of Devin Kelley's;
13 right?

14 A. That's my understanding.

15 Q. Okay. Let me ask you this -- and I'll take this down.

16 Doctor, you're aware, aren't you, that not more than two
17 months after Devin Kelley was released from prison, he raped
18 another woman?

19 A. That's my understanding.

20 Q. Let me show you that record. I want to show you Joint
21 Exhibit 752, page 4.

22 I apologize. It's Joint Exhibit 572, page 4.

23 And what you should be seeing on your screen, Doctor, is
24 the statement of yet another victim of Devin Kelley's. And
25 I'll zoom in on the handwritten portion of this statement.

1 You see it says, "On Saturday before 7:00 p.m. on the
2 15th of June 2013" -- okay. Let me just pause right there.

3 That is two months after Devin Kelley is released and
4 separated from the Air Force; right?

5 A. Yes.

6 Q. -- "I went to hang out with Devin Kelley. We were in his
7 room, separate from his parents. He would try kissing me, and
8 I would turn away. At some point, he had me sit on the bed
9 with him and he forced me to lay down. Devin then sat on my
10 chest with his -- with my arms restricted underneath. He
11 pulled out his penis trying to have me suck him off. I
12 repeatedly told him no. He told me that if I didn't open my
13 mouth, he would choke me."

14 Did I read that, so far, correctly?

15 A. Yes, you did.

16 Q. "When I would bring my hands up to stop him, he would
17 restrict them again. He choked me with his hands until I
18 opened my mouth. When my mouth was open, he shoved it in my
19 mouth and proceeded to move back and forth because I did
20 nothing. He did this till I choked on his penis.

21 "When I tried biting down on his penis to get him to stop,
22 he slapped me. He told me that he would hurt me when I didn't
23 do what he said. He forced himself in my mouth and came. I
24 spit it out. And this was somewhere before 7:00 p.m."

25 Did I read that correctly?

1 A. Yes, you did.

2 Q. Again, horrific conduct by Devin Kelley; right?

3 A. Absolutely.

4 Q. Not the conduct of a devout Christian; isn't that true?

5 A. Not the conduct of a devout Christian, by any stretch of
6 the imagination, nor of anyone who has any respect for
7 individuals.

8 Q. Doctor, wouldn't you agree -- let's talk about Tessa --
9 Danielle Kelley for a second.

10 Wouldn't you agree that Devin Kelley's treatment of
11 Danielle Smith mirrored almost identically his treatment of
12 Tessa?

13 A. Yes.

14 Q. Wouldn't you agree that the Air Force knew in detail about
15 Devin Kelley's treatment of Tessa Kelley?

16 A. Yes.

17 Q. You know that Devin Kelley want to control Danielle's
18 money; right?

19 A. Yes.

20 Q. You know that Devin Kelley controlled Tessa's money; isn't
21 that true?

22 A. Yes.

23 Q. One thing I didn't know -- and maybe you knew this before
24 this trial.

25 Do you remember Danielle Smith's testimony?

1 A. Again, I do. But can you go ahead and tell me about which
2 piece of it or which part you're referencing to?

3 Q. Absolutely.

4 Do you remember when Danielle -- she was actually here in
5 court. She sat there on the stand, and she told us about the
6 signals that Devin Kelley would give to control her?

7 A. Yes.

8 Q. Do you remember that?

9 A. I remember her talking about it.

10 Q. She said that he had these signals where he would have one
11 finger or two finger, three fingers.

12 And that would mean something; right?

13 A. Yeah. I did see that in the transcript, yes.

14 Q. Doctor, Devin Kelley had that same system, or a nearly
15 identical system, with Tessa; isn't that true?

16 A. That's my understanding.

17 Q. Devin Kelley would touch Tessa on her shoulder, and that's
18 when Tessa would know "I need to shut up"?

19 A. That's my understanding that that's what he --
20 Devin Kelley did.

21 Q. Devin Kelley choked, kicked, slapped, and shoved Tessa
22 around; right?

23 A. Yes.

24 Q. Same as Danielle Smith?

25 A. That's what he did to each.

1 Q. And you remember -- you've seen the testimony today that
2 Devin Kelley threatened to eliminate Danielle Smith's entire
3 family?

4 A. That's my understanding.

5 Q. You know that Devin Kelley threatened to kill Tessa's
6 family too, don't you?

7 A. That is also my understanding that that's what he
8 threatened to do.

9 Q. Let me show you that testimony because that's pretty
10 important.

11 Let me show you Joint Exhibit 366, and I want to show you
12 page 44 first. And you should see at the top -- if we can
13 zoom that in -- that's the summarized testimony of Tessa
14 Kelley.

15 You've reviewed these documents; right?

16 A. Yes.

17 MR. JACOB: Let's go to page 45, and let's pull out
18 that highlighted section from the first full paragraph of
19 page 45 of Joint Exhibit 366.

20 BY MR. JACOB:

21 Q. Do you see how Tessa is saying, "Although I spent more
22 than two and a half hours with the investigators, I did not
23 repeat what I told my sister about the abuse because Devin had
24 threatened to kill both me and the Air Force security forces
25 if I ever reported the abuse."

1 Did I read that correctly?

2 A. You did read that correctly.

3 Q. Does that sound like Danielle Smith to you?

4 A. Very much.

5 Q. Let me show you another handwritten statement, this time
6 from Tessa Kelley. I'm going to show you Joint Exhibit 22,
7 page 545.

8 A. Yes.

9 Q. And what you should be seeing here is a statement from
10 Tessa Kelley; right?

11 A. Yes.

12 Q. And Joint Exhibit 22, page 545, is given on 12 -- May 3,
13 2012; right?

14 A. Yes.

15 Q. Let's go to -- we're going to skip to the third page of
16 Tessa's statement. It's page 547 of Joint Exhibit 42, and I'm
17 going to zoom in on that highlighted section.

18 Do you see how Tessa is telling the Air Force, "Devin
19 choked me multiple times where I almost passed out. He kicked
20 me, shoved me, slapped me, punched me. He threatened to kill
21 me if I ever say anything. He threatened to kill my aunt
22 Tracy and my cousin Brandon."

23 Did I read that correctly?

24 A. Yes, you did.

25 MR. JACOB: Let me pull that down.

1 BY MR. JACOB:

2 Q. Doctor, you've reviewed this file extensively, I assume;
3 right?

4 A. Yes, I have.

5 Q. Did you notice anything similar, other than the abuse,
6 about Danielle Smith and Tessa Kelley?

7 A. There are many similarities in terms of his hatred, his
8 anger, his meanness, the way he tries to dominate and control
9 people, the way he threatens the victim's family.

10 Again, very characteristic of the 1 to 3 million incidents
11 of domestic violence that occur in the U.S. every year
12 basically. These are characteristics of domestic abusers.

13 Q. So I guess we could see one thing that Tessa and Danielle
14 had in common was Devin.

15 They were both his wives, and they were both horrifically
16 abused by Devin Kelley; right?

17 A. Yes.

18 Q. Do you know if they had anything in common in terms of
19 their childhoods?

20 A. They themselves had been abused, which, again, many
21 domestic abusers pick as their victims.

22 Q. That's right.

23 A. Women, usually, who had themselves been abused as children
24 so that the cycle of abuse continues. It normalizes the
25 abuse. It's very characteristic of domestic abuse, usually of

1 men -- of women. It's horrible.

2 Q. Tessa Kelley had been raped as a minor too; right?

3 A. Yes.

4 Q. Tessa Kelley had been raped as a minor by someone close to
5 the family; isn't that true?

6 A. That's my understanding as well, yeah.

7 Q. And Tessa Kelley became pregnant as a result of that rape;
8 right?

9 A. That's my understanding as well.

10 Q. And Tessa Kelley's rapist was prosecuted and put in
11 prison; right?

12 A. Yes.

13 Q. Doctor, I want to show you -- I want to talk to you a
14 little bit about this idea -- you ended your conversation with
15 Mr. Diedrichs about Guy Fawkes Day.

16 Do you remember that?

17 A. Yes.

18 Q. I want to show you Joint Exhibit 545. Joint Exhibit 545,
19 what you should be seeing is a map from the Texas Rangers that
20 shows Devin Kelley's residence circled in red and the site of
21 the massacre also circled in red.

22 Do you see that?

23 A. Yes.

24 Q. Now, you talked a little bit about Guy Fawkes Day.

25 Guy Fawkes was an individual who targeted the British

1 Parliament; right?

2 A. Yes.

3 Q. Are you familiar with the Texas geography, sir?

4 A. Not as well as you are, by any stretch of the imagination.

5 Q. Well, I have the benefit of being from around these parts.

6 Do you know that Devin Kelley lived right south of Austin,
7 Texas?

8 A. That makes sense to me, yes.

9 Q. Yeah. What you also know is that Devin Kelley did not
10 target the Texas capitol for a massacre, did he?

11 A. He did not.

12 Q. Do you know how many movie and churches are between his
13 residence, as you see on Joint Exhibit 545, to the site of the
14 massacre?

15 A. A godly number, no doubt.

16 Q. Multiple.

17 And he didn't target any of those movie theaters and
18 churches between his residence and the First Baptist Church,
19 did he?

20 A. Correct.

21 Q. I want to show you -- you also talked about Facebook
22 photos.

23 Do you remember that? Facebook posts of Devin Kelley?

24 A. Yes.

25 Q. You focused, wouldn't you say, on all of the Christian

1 postings, the anti-Christian postings that Devin Kelley made?

2 A. I focused on each of the postings in my review and
3 analysis.

4 Q. Well, isn't it --

5 A. I did focus on his move from being -- at least the way he
6 represented himself, not by his behavior, but the way he
7 represented himself to himself in his journal -- being a
8 devout Christian to being an antireligious fanatic.

9 Q. Isn't it true, Doctor, that he also had Islamophobic posts
10 in his Facebook?

11 A. Absolutely.

12 Q. This is horrific Islamophobic content that Devin Kelley is
13 posting on page 27 of Exhibit 503, isn't it?

14 A. Absolutely.

15 Q. Do you know how many mosques are between New Braunfels and
16 the Sutherland Springs church?

17 A. Again, I assume some, at least.

18 Q. He didn't target a mosque on November 5th, 2017, did he?

19 A. He did not.

20 Q. Do you know how many synagogues -- you talked about his
21 anti-Jewish sentiment.

22 Do you remember that?

23 A. Yes.

24 Q. How many synagogues are there between the -- New
25 Braunfels, where his residence was, and the Sutherland Springs

1 church?

2 MR. DIEDRICHS: I'm going to object to this line of
3 questioning. We don't have any testimony that there's any
4 synagogues or mosques or other churches between those two
5 points.

6 THE COURT: That's overruled.

7 THE WITNESS: I don't know how many, no.

8 BY MR. JACOB:

9 Q. Doctor, are you familiar with the Catholic church abuse
10 scandal of minors?

11 A. I'm familiar with some of those events. I've evaluated
12 some of the people who have been abused by priests.

13 Q. He didn't target any Catholic churches, did he?

14 A. No.

15 Q. He targeted the First Baptist Church of Sutherland
16 Springs?

17 A. Yes.

18 Q. And he did that because that's where Danielle's family
19 was, wasn't it?

20 A. He did that because he knew that that place was a place
21 where he could go ahead, in a self-aggrandizing manner,
22 portray himself as being somehow Danielle's avenger or
23 protector from people who supposedly had -- who he
24 delusionally believed had not taken her reports of abuse
25 seriously or had teased her in some way.

1 That's the way he rationalized it to himself. He was
2 delusionally self-righteous, focused on that church in
3 particular to commit mass murder as part of his antireligious
4 conviction.

5 That self-righteousness and the focus on the church is
6 basically characteristic of someone who is using an event
7 which is tragic as a passive and convenient focus for their
8 own self-aggrandizement and for self-righteously acting out
9 criminal conduct.

10 Q. Doctor, one difference between the Sutherland Springs
11 massacre and Devin Kelley's conduct in the Air Force is that
12 we were never able to interview Devin Kelley after his
13 massacre at the church; isn't that true?

14 A. That's true.

15 Q. But you know that the Air Force got a full confession
16 video after his abuse and conduct; correct?

17 A. Yes.

18 Q. Now, I can't remember. Will you help me, Doctor.

19 Did you read the transcript of that video?

20 A. I believe I did. But, again, in the 400 documents, I
21 wouldn't swear absolutely by it. I would have to go ahead and
22 check my document list.

23 Q. Did you watch that video?

24 A. Again, I can't specifically recall that video, no.

25 MR. JACOB: Let me show you a clip from that video,

1 and it's Joint Exhibit 43. And I want to show you
2 Devin Kelley's confession.

3 Okay. And I'll play you from 20 minutes and
4 17 seconds to 21 minutes and 20 seconds.

5 (Clip was played.)

6 BY MR. JACOB:

7 Q. Doctor, do you know who Devin Kelley made that video for?

8 A. I believe for his wife.

9 Q. That's not true, is it?

10 A. No. No. Can you jog my memory, actually?

11 Q. Yeah. Let me play you -- let's ask Devin Kelley who he
12 made that video for.

13 I'm going to play you Joint Exhibit 43, minute 3:34 to
14 minute 4:12.

15 (Clip was played.)

16 THE WITNESS: I can't quite understand it.

17 MR. JACOB: We're working on it.

18 (Clip was played.)

19 BY MR. JACOB:

20 Q. Doctor, he's making that documentary so the OSI, the Air
21 Force Office of Special Investigations, and the military know
22 exactly what he did to his son and his wife; right?

23 A. That's what he claims. But what I see is a self-righteous
24 way of making excuses, basically, for himself.

25 Q. Doctor, I want to fast-forward in time to November 5th,

1 2017, the day of the shooting.

2 Would you agree with me that Devin Kelley's last act
3 before going to the Sutherland Springs church was an act of
4 spousal abuse?

5 A. Yes, which he couched as a way of protecting his spouse,
6 actually. Again, the delusional self-righteousness comes
7 through in what he says and what he does. I mean, it's --

8 Q. His last act of spousal abuse was to hogtie his wife in
9 bed; right?

10 A. That's precisely what he did. And then he delusionally
11 and, in a self-aggrandizing manner, told her it was basically
12 to protect her.

13 Q. He held a gun to Danielle Smith's head; right?

14 A. He did.

15 Q. And, Doctor, not only is that last act an act of spousal
16 abuse, wasn't it also an act of child abuse?

17 A. Can you be more specific, please. I'm not sure I
18 understand your question.

19 Q. You've seen the photos of that apartment; right?

20 A. Yes.

21 Q. You know that when Devin Kelley took that gun and hogtied
22 his wife, he had two children under the age of two in that
23 apartment?

24 A. Yes.

25 Q. And one was a toddler; right?

1 A. Yes.

2 Q. The other was an infant?

3 A. Yes.

4 Q. He hogtied his wife at gunpoint and then locked his
5 toddler and infant in that one-bedroom efficiency apartment;
6 isn't that true?

7 A. Yes.

8 Q. And that's an act of child abuse, is it not?

9 A. In my book, it is. From his -- from everything that he
10 said, he was rationalizing it. He was being self-aggrandizing
11 about it.

12 Again, was it an act of child abuse? Absolutely, from my
13 perspective, and, I hope, from your perspective as well.

14 Q. Doctor, this child abuse and spousal abuse that
15 Devin Kelley committed on November 5th, 2017, before going to
16 the Sutherland Springs church were the same crimes that the
17 Air Force convicted him of; isn't that true?

18 A. It was -- they were the same crimes and the same behavior.
19 However, in this instance, part of the modus operandi was when
20 he was able to go ahead and delusionally and in a
21 self-aggrandizing manner, as the angel of death, justify those
22 because, in his book, he was preparing -- I mean, which is,
23 again, delusional. I mean, as the angel of death, he was
24 sparing them. He was protecting them.

25 MR. JACOB: Pass the witness, Your Honor.

HAROLD BURSZTAJN - REDIRECT

1 THE COURT: Is there any redirect?

2 MR. DIEDRICHS: Yes, your Honor, if I could have a
3 few minutes.

4 THE COURT: Doctor, do you need a moment break? I
5 know we've been at it for a couple hours.

6 THE WITNESS: Thank you, Your Honor. I could use
7 that.

8 THE COURT: So let's go ahead and take a ten-minute
9 break.

10 (Recess.)

11 THE COURT: Any redirect?

12 MR. DIEDRICHS: Yes, your Honor.

13 Let's go to JEX 22-0599.

14 REDIRECT EXAMINATION

15 BY MR. DIEDRICHS:

16 Q. Doctor, counsel, in cross-examination, intimated that
17 Devin Kelley, while he was at Peak, was searching weapons and
18 body armor, and then escaped from Peak to go do some harm to
19 somebody; is that correct?

20 A. Well, that was counsel's implication, but he was
21 actually -- he wanted to go home.

22 Q. Correct. If you look at the exhibit there, it says, "He
23 searched online for weapons, for body armor, and for transport
24 to San Antonio."

25 A. Yes. I mean, this was something he was doing to go

1 ahead --

2 Q. And -- I'm sorry?

3 A. And he did. He went home.

4 Q. Yeah.

5 A. It wasn't designed to hurt people. It was designed to
6 allow him to escape to home.

7 Q. And he went to the Greyhound station there; correct?

8 A. Yes.

9 Q. And the first time he absconded from Peak, where did he
10 go?

11 A. Again, he was heading away, rather than towards, anyone
12 that he might harm.

13 Q. He was headed home; right?

14 A. He was headed home again. So in a flight-or-fight mode,
15 in all of those instances -- his posting and his threats
16 aside -- he would flee rather than fight.

17 Q. Right. And just to be clear, on the day of the shooting,
18 Devin Kelley was not intoxicated by any drugs; correct?

19 A. On the day of the shooting, Devin Kelley was not
20 intoxicated by the cocktail of drugs he had previously taken,
21 but he was most likely experiencing some withdrawal.

22 Q. And it's the withdrawal that caused his delusions and his
23 inappropriate going beyond boundaries?

24 A. It was the withdrawal, which compounded his delusions.

25 This inhibited him sufficiently so that he would go out and

1 act out in a criminal way.

2 MR. DIEDRICHS: Let's go to JEX 156, page 4, and the
3 second paragraph and then -- yes. There.

4 BY MR. DIEDRICHS:

5 Q. Doctor, when Devin Kelley tied up Danielle on the morning
6 of the shooting, he didn't do it to abuse her, did he?

7 A. That was not his intention, even though it was abusive.
8 But it was not what he was representing to himself.

9 Q. Right. And what did he say to Danielle when he did that?

10 A. He kept on saying I'm sorry. He kept on crying. He kept
11 on apologizing.

12 Q. And what does it say on that document he said?

13 A. Danielle said he kept crying and saying I'm sorry.

14 Q. It says, "I'm sorry I have to do this. I'm just trying to
15 protect you. I have to tie you up." Correct?

16 A. Absolutely. He was telling her and telling himself in a
17 self-righteous delusional manner that he was abusing her, in
18 my book, to protect Danielle in his book. I mean, that's
19 delusional.

20 Q. And, whereas, a person who wasn't self-righteous and
21 delusions would definitely consider this abuse. He, in his
22 self-righteous delusions, did not.

23 He thought he was protecting her; correct?

24 A. Anyone in his right mind would consider this to be abuse.

25 But he was not in his right mind. He was delusional. He

1 considered it protection.

2 Q. And then when he got to the church before he started
3 shooting anybody, he told his parents to untie her; correct?

4 A. He did. Before the shootings began, he told his parents
5 to untie Danielle. Again, if he simply wanted to go ahead and
6 come back and kill her, then that's not -- he wouldn't have
7 done that.

8 Q. Correct. It is clear that Devin Kelley was a bad person?

9 A. Devin Kelley was a sociopath, a very bad person who
10 eventually became a psychopath, a bad and mad person.

11 Q. Right. And what does "antisocial behavior" mean, or a
12 diagnosis of being antisocial?

13 A. Antisocial behavior refers to a series of traits wherein
14 the individual thinks they are above and beyond the social
15 rules. The social rules don't apply to them. If they don't
16 get what they want, they are willing to go outside them. They
17 go for the quick fix to any feelings, any frustrations, any
18 unsatisfied desires that they may have.

19 They are characteristic of domestic abusers, of rapists,
20 of people who shoot up their workplaces.

21 Q. Devin was -- in addition to being antisocial, he also, in
22 your expert opinion, was delusionary?

23 A. Yes. He went from being antisocial to being antisocial
24 and psychotic, delusional. He went from being simply
25 antisocial to psychopathic and delusional.

1 Q. And Mr. Jacob went over a laundry list of assaultive
2 behavior that Devin had to both his first wife; his first
3 child -- or his stepchild; and his wife at the time, Danielle.
4 Correct?

5 A. Yes.

6 Q. And then he went through a couple of attacks on other
7 women, to include a rape; is that correct?

8 A. Yes.

9 Q. And then there were threats against co-workers?

10 A. Yes.

11 Q. His command?

12 A. Yes.

13 Q. Is that the same general type of violence as he committed
14 at the church in Sutherland Springs in November -- on
15 November 5th, 2017?

16 A. What's similar is that they're both violent. But what's
17 very, very, very different is that, in one instance, the
18 violence is targeted at individuals who are unsatisfying and
19 ungratifying of -- in one way or another.

20 And in the other instance, it's targeted at people with
21 whom he has no relationship with but in order to go ahead and
22 to delusionally reinforce one's identity as the angel of death
23 who no one can stop.

24 In one instance, what you have is criminal antisocial
25 behavior, behavior that's bad. In the other instance, what

1 you have is psychopathic behavior, which is not only horribly
2 bad but also very, very mad.

3 Q. Do you know how many rapists turn into mass murderers that
4 would go into a church with an assault rifle and kill 26
5 people?

6 A. Again, in my forensic psychiatric experience, again, very
7 unusual, very, very -- miniscule -- miniscule amount of
8 rapists. I mean, it's something -- not anyone that I could --
9 that one thing would reasonably predict or, for that matter,
10 necessarily prevent, in any way or shape.

11 Q. So being a rapist is not a predictor for somebody who is
12 going to commit a mass murder?

13 A. It's not by any stretch of forensic reliability, no.
14 That would be an invalid, unreliable inference.

15 Q. And a rape and a mass murderer are not violence of the
16 same general type, are they?

17 A. They are not. Rapes are focused on individuals. Mass
18 murders, as in this instance, are focused by people to make a
19 name for themselves. They're driven by ideology. There may
20 be some personal content, but that's by way of being
21 self-righteous and making some delusional excuse which one
22 simply cannot buy.

23 I mean, his representation that he was -- I mean, his
24 story might well be that he was shooting up -- committing mass
25 murder at the church to get revenge for Danielle, to protect

1 Danielle. But that is a delusional self-aggrandizing,
2 self-righteous rationalization.

3 Q. And with respect to the conversation we were about -- we
4 were having about rapists and mass murderers, the same would
5 hold true for a spousal abuser; right?

6 A. Absolutely. Again, the incidence of domestic violence in
7 a given year, anywhere between a million to 3 million, and
8 it's probably underreported, much of it is, spousal violence.

9 In terms of these kinds of mass murders, even ones with a
10 family issue, you have 600. So you have from 1 to 3 million
11 to 600.

12 Again, that's -- that's simply an invalid, unreliable for
13 any forensic purpose or any clinical purposes, I know,
14 inference.

15 Q. He did make threats to shoot or kill his co-workers?

16 A. Yes.

17 Q. And his command?

18 A. Yes.

19 Q. Is that the same as the act of preparing for over several
20 months, going to a church with a -- heavily armed with a
21 combat-style weapon and shooting people you don't know at all
22 or barely know?

23 A. Very, very different. In one instance, it's an antisocial
24 act by someone who's feeling frustrated and ungratified by the
25 people with whom he has a direct relationship with or who he

1 blames for his workplace situation.

2 In the other instance, it's a self-proclaimed angel of
3 death, no-one-can-stop-me mass murder of people with whom one
4 has no relationship with, driven by a fanatical ideology.

5 Q. Those are --

6 A. Now, again, the fact that he was -- that he found an
7 excuse for himself in terms of -- or may have found an excuse
8 for himself, to the extent that he visited the place and
9 Michelle Shields there was there, that was an excuse that he
10 was using. It's a rationalization. Again, you just can't buy
11 his excuses.

12 MR. DIEDRICHS: Okay. And in that regard, let's look
13 at Joint Exhibit 452, page 474. If we could go to line 10 and
14 11.

15 BY MR. DIEDRICHS:

16 Q. This is -- I'm sorry.

17 This is the Department of Defense OIG interview with
18 Danielle Kelley and Michael Kelley in May of 2018.

19 Can you start reading at page 5, sir -- I'm sorry --
20 line 5.

21 A. Line 5. Thank you.

22 "Devin knew that during the process of the abuse I went
23 through" -- this is Danielle speaking -- "that the church and
24 her knew and they made fun of me for that and they didn't
25 support and help. They mocked me and said I deserved it and

1 that I should have died when I tried to commit suicide."

2 Q. Okay. Stop right there.

3 And then let's go to line 17 and then down to line 24.

4 A. "Before I got adopted, I was burned and have scars on my
5 body. And I got made fun of that from the church and the
6 youth. Some of the adults saying I was a plague, and they
7 didn't want their children hanging out with me because I would
8 rub off on them, and how I deserved to be raped and molested."

9 Q. Then if we could go to page 76, lines 17 through 25.

10 A. "Devin knew everything. And, well, my adopted mother, a
11 lot of times, didn't want to deal with me or anything, so I
12 would try hanging out with the church, trying and have
13 friends. None of that ever worked out because I was a
14 burden."

15 Q. Okay. You can stop there.

16 Devin Kelley did not pick this church at random; correct?

17 A. He did not pick this church at random. It was a passive
18 and convenient focus for his self-aggrandizement and
19 self-rationalization as the avenging angel of death.

20 Q. You said this was a rationalization.

21 Explain why this was a rationalization versus an act of
22 domestic violence.

23 A. In an act of domestic violence, there is some social
24 reality. There is no evidence to support Danielle's claims
25 that she was, in fact, mocked by the church. If she did make

1 those claims to Devin, there were other ways of dealing with
2 it besides considering himself to be the avenging angel of
3 death who no one could stop.

4 That is delusional. So it became a passive and convenient
5 focus where he would be self-righteous and commit a mass
6 murder.

7 Q. And he had an obsession with mass murders?

8 A. He had an obsession with mass murders. He had an
9 obsession with church shootings. He was devoutly
10 antireligious and to a fanatical point of view.

11 Q. And if I understand what you've indicated, he picked this
12 church because he could carry out his delusional fantasy and
13 still pretend to himself that he was a hero when he did it?

14 A. Precisely, he could. Even as he was committing mass
15 murder at the Baptist church, he could go ahead and see
16 himself as his own hero. He could worship himself.

17 Q. He could, in effect, be the "Punisher"?

18 A. He could, in effect, be the "Punisher," which is one of
19 his identifications that eventually became the avenging angel.

20 Q. And the mask he was wearing when he committed this act was
21 a "Punisher" mask; correct?

22 A. The mask that he was wearing when he committed this act
23 was a "Punisher" mask, which is based on a -- what used to be
24 a Netflix series before it got canceled.

25 MR. DIEDRICHS: I have no more questions, Your Honor.

HAROLD BURSZTAJN - RECROSS

1 THE COURT: Anything based on those?

2 MR. JACOB: Yes, your Honor.

3 RECROSS-EXAMINATION

4 BY MR. JACOB:

5 Q. Doctor, you talked to Mr. Diedrichs about JEX 156, and I
6 just want to show you that real quick.

7 A. I'm sorry. But for some reason, what you just said was
8 garbled.

9 Q. Sure. You talked to Mr. Diedrichs about JEX 156, and I
10 want to show you the first page of that.

11 You remember this conversation, don't you?

12 A. Yes.

13 Q. This is a summary of a Danielle Shields-Kelley interview;
14 right?

15 A. Yes.

16 MR. JACOB: Zoom in so we see the page and we see the
17 date.

18 BY MR. JACOB:

19 Q. You see it's May 15th, 2018; right?

20 A. Correct.

21 Q. But you know this is an unsigned summary; right?

22 A. Yes.

23 Q. And you talked to Mr. Diedrichs about a specific quote in
24 here that Devin said about protecting Danielle.

25 Do you remember that quote?

1 A. Yes.

2 Q. And you obviously reviewed the transcript of that very
3 same interview; right?

4 A. Yes.

5 Q. Let's look at that transcript at JEX 452.

6 Right, you reviewed this transcript of Danielle Kelley's;
7 correct?

8 A. I did.

9 MR. JACOB: Let's zoom in so we can see it's from the
10 same date, same time, everything.

11 BY MR. JACOB:

12 Q. This is the transcript of the audio interview, JEX 452,
13 that you reviewed; right?

14 A. Yes.

15 Q. Nowhere in this transcript does that quote appear?

16 A. Not specifically.

17 Q. Not generally?

18 A. True.

19 MR. JACOB: Pass the witness, Your Honor.

20 THE COURT: Okay. Anything based on that question?

21 MR. DIEDRICHS: No, Your Honor.

22 THE COURT: Any further need for the witness, or can
23 he be excused?

24 MR. DIEDRICHS: He can be excused.

25 MR. JACOB: Not from us, Your Honor.

HAROLD BURSZTAJN - RECROSS

1 THE COURT: Thank you very much, Doctor. You're
2 excused.

3 THE WITNESS: Thank you, Your Honor. I appreciate
4 your courtesy.

5 THE COURT: There are no more witnesses for today; is
6 that correct?

7 MR. STERN: Correct, Your Honor.

8 THE COURT: So for tomorrow, then, we have scheduled
9 James Fox.

10 So you all know my schedule. Will we be able to
11 begin and conclude with Mr. Fox, beginning at 9:00 and
12 concluding no later than 12:30?

13 MR. STERN: Your Honor, we may suggest to start a
14 little earlier tomorrow, just to make sure.

15 THE COURT: 8:00 or 8:30?

16 MR. ALSAFFAR: Either one is fine with me, Your
17 Honor, whatever they think they need for their time.

18 THE COURT: How much time do you think you need?

19 MR. STERN: Let's start at 8:00 to make sure we're
20 okay.

21 THE COURT: We're going to finish him up. Okay.

22 So then tomorrow morning, we will resume at 8:00 with
23 the testimony of James Fox.

24 Anything else we need to take up today before I --

25 MR. STERN: Not at this time.

HAROLD BURSZTAJN - RECROSS

1 MR. ALSAFFAR: No, your Honor.

2 THE COURT: And so we're adjourned for the day.

3 (Proceedings continued in progress.)

4 -o0o-

5 I certify that the foregoing is a correct transcript from
6 the record of proceedings in the above-entitled matter. I
7 further certify that the transcript fees and format comply
8 with those prescribed by the Court and the Judicial Conference
9 of the United States.

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11 Date: 04/15/2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 16, 2021

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GIGI SIMCOX, RMR, CRR
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OFFICIAL COURT REPORTERS
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 (*San Antonio, Texas; April 16, 2021, at 8:00 a.m., in open*
2 *court.*)

3 THE COURT: Good morning, we'll resume with 18 Civil
4 555.

5 All counsel, parties, witnesses, participants, and
6 members of the public are reminded that this is a formal
7 proceeding, and that they should behave at all times as if
8 they were present in the courtroom.

9 The standing order of the San Antonio Division of the
10 Western District of Texas on remote access to court
11 proceedings remains in effect. Photography, recording, or
12 streaming of this proceeding by any means is strictly
13 prohibited.

14 Though this proceeding is open to the public,
15 technological restraints requires that members of the general
16 public request access from the courtroom deputy to participate
17 remotely. Those granted approval to participate remotely must
18 not forward the electronic link to nonparticipating colleagues
19 or persons, and must not post a link on any public forum.

20 As with all proceedings, violations of these
21 instructions are subject to contempt proceedings.

22 Accordingly, please exercise proper courtroom decorum at all
23 times.

24 And with that, your next witness.

25 MR. STERN: Just one housekeeping matter to close up

1 the government exhibit list. The government moves Plaintiffs'
2 Exhibit 771 into evidence.

3 THE COURT: Plaintiffs' 771?

4 MR. STERN: Yes. It was an oversight that we
5 objected to it.

6 THE COURT: Any objection to that?

7 MR. JACOB: No, Your Honor.

8 THE COURT: That's admitted.

9 (Plaintiffs' Exhibit 771 received into evidence.)

10 MR. STERN: With regards to Government's Exhibit 240,
11 which is the government's key documents, we sent the Court a
12 binder at the start of the trial, and based on Your Honor's
13 previous rulings, we're willing to withdraw some of the
14 documents within those binders and then move the rest into
15 evidence, if that is okay.

16 MR. JACOB: Yes, Your Honor, parties have agreed to
17 the specific documents that need to be withdrawn before that
18 can be admitted.

19 THE COURT: 240 is admitted. It will consist of all
20 the exhibits offered by the government that have been admitted
21 into evidence and only those.

22 (Government's Exhibit 240 received into evidence.)

23 MR. STERN: Thank you, Your Honor.

24 THE COURT: Anything else?

25 MR. STERN: Nothing.

JAMES ALAN FOX - DIRECT

1 THE COURT: Your next witness?

2 MS. KRIEGER: The United States calls Dr. James Alan
3 Fox.

4 (JAMES ALAN FOX, having been duly sworn, testified as
5 follows:)

6 DIRECT EXAMINATION

7 BY MS. KRIEGER:

8 Q. Dr. Fox, can you please -- I'm sorry. Are you ready,
9 Dr. Fox?

10 A. Yes, I am.

11 Q. Can you please introduce yourself to the Court.

12 A. Sure. My name is James Alan Fox. And that's James,
13 normal A, Alan, A-L-A-N, and Fox, F-O-X.

14 Q. Dr. Fox, what is your present employment, including your
15 title and the nature of your work?

16 A. My title is the Lipman Family Professor of Criminology Law
17 and Public Policy at Northeastern University in Boston.

18 Q. How long have you been at Northeastern?

19 A. I've been there for 44 years. I started in 1977.

20 Q. What positions have you held at Northeastern University?

21 A. I started as an assistant professor. I was tenured and
22 promoted early to associate professor. Also, early tenured --
23 early promotion to full professor, later became the director
24 of the graduate school and then the dean of the college
25 criminal justice, which I remained for eight years, two terms,

1 and then stepped away and was awarded the endowed share, the
2 Lipman share.

3 Q. Do you teach?

4 A. I'm sorry. Speak up.

5 Q. Do you teach?

6 A. Can I see?

7 Q. I'm sorry. Do you teach at -- do you teach students?

8 A. Do I teach students. I'm sorry, yes.

9 I do teach students. Thousands over the years, yes.

10 Q. And you also do research?

11 A. I do research. That's actually a -- 50 percent of my
12 workload is research as opposed to teaching and service.

13 Q. What field do you consider yourself to be in?

14 A. What fields do I teach or --

15 Q. What fields do you teach and research?

16 A. Well, I teach, of course, violence, homicide, death
17 penalty, as well as statistics, and my research is both in
18 quantitative methods and homicide, particularly multiple
19 homicide: serial murders, school shootings, mass shootings,
20 workplace killings, domestic intimate partner homicides.

21 Q. Would you say that your field is generally criminology?

22 A. Criminology, and in addition quantitative criminology with
23 my own specialization in multiple homicide.

24 Q. Let's talk a little bit about your educational background.

25 Can you tell the Court what degrees you hold?

1 A. Yes. I received my bachelor's in sociology from the
2 University of Pennsylvania. And then after that, I had a
3 master's degree also in criminology from the University of
4 Pennsylvania with distinction.

5 Master's degree in statistics. Although, they didn't have
6 a distinction in the Wharton School, I did win the prize as a
7 top student, as I did also in criminology.

8 And then a Ph.D. in sociology with specialization in
9 criminology, also with distinction, all degrees from the
10 University of Pennsylvania.

11 After undergraduate school, I did go to Michigan for a
12 year, taught at Eastern Michigan University as a lecturer
13 while I was studying at the Institute for Social Research and
14 that was the quantitative survey research aspect of my -- of
15 my interest. So it's really a combination of statistics and
16 criminology, and I obviously applied my statistical methods in
17 criminology quite a bit.

18 Q. I think you mentioned this, but as far as specialties go,
19 I think you said you have two.

20 Can you just repeat those?

21 A. Yes. Quantitative methods. In fact, I was the founding
22 editor of the Journal of Quantitative Criminology, which now
23 is a second-ranked journal in the discipline. So statistical
24 methods and then criminology.

25 Q. And within criminology -- within criminology, do you have

1 a particular specialty -- do you have a particular speciality
2 within criminology?

3 A. Yes, multiple homicide.

4 Q. How does a criminologist, how do you conduct research
5 on -- particularly on multiple homicide?

6 A. Well, I do a combination of case studies. A number of my
7 books will lay out case studies to illustrate certain theories
8 and points, but I combined that with data. It's not enough to
9 just to speculate, opine, and just -- and do sort of a
10 psychological autopsy of a case.

11 It's important also to combine that with data to confirm
12 what you are seeing and saying about such things as trends,
13 patterns of characteristics of the perpetrators,
14 characteristics of the victims, et cetera.

15 So a combination of case studies and data analysis.

16 Q. Case studies are focused on individual cases?

17 A. Yes. Yes. I do in-depth analysis of individual cases,
18 yes.

19 Q. And when you are doing these -- these data based research,
20 where does that data come from?

21 A. Well, there are three major databases -- actually four,
22 that I use. First of all, I'm -- I use -- with grants from
23 the Bureau of Justice Statistics and the American Statistical
24 Association, I created methods for -- for, you know, doing
25 imputation, missing -- filling in missing data on the

1 supplementary homicide report from the FBI. So each year, I
2 get from the FBI, the latest records, and I maintain a
3 cumulative database from 1976 to right now, 2019, of virtually
4 on all homicides in the United States, 92 percent of them.

5 The data set is used quite frequently by criminologists
6 and others around the country, actually including Professor
7 Webster, who was one of the plaintiffs' experts, has used my
8 data in some of his research, as well as his colleague, April
9 Zeoli.

10 So that's one data set that I work with, both for homicide
11 generally as well as for multiple homicide.

12 And then I'm -- I'm one of the principals in the
13 development and maintenance of the Associated Press, USA
14 Today, Northeastern University Mass Killing Database. It's a
15 database of every -- every mass killing since 2006, all
16 weapons, all kinds, all places, four or more people killed.
17 That data set is issued quite frequently.

18 In fact, because of the shooting, unfortunately a shooting
19 last night in Indianapolis, the 11th mass killing this year,
20 I've been quite busy when I got up providing most of the data
21 for the press.

22 And then in addition to that, I developed with some
23 colleagues a three-year grant from the National Institute of
24 Justice a database of particularly mass public shootings as
25 opposed to the other database which is all mass killings.

1 This is a case of four or more people killed in a public
2 place, like the Sutherland Springs shooting, and that database
3 of incidents, victims, offenders, characteristics is from 1976
4 to the present.

5 Q. Just, you mentioned --

6 A. I did mention a fourth one.

7 Q. I apologize.

8 A. I've also been one of the developers of a national
9 database on serial killers that I use also for some of my
10 research. Not the research like I'm talking about here, but
11 that's another database that I use.

12 Q. You mentioned that you -- one of your datasets that you
13 use is funded by the Bureau of Justice Statistics and you work
14 with the FBI.

15 Does that have any connection; does your work -- your
16 testimony today have any relationship? Is there any
17 connection between -- I'm sorry. I apologize. I'm stating
18 this badly.

19 The funding that you receive and the support from the FBI
20 on that database, is that in any way contingent on your
21 testimony here today?

22 A. No.

23 Q. Are your research methods commonly accepted in the
24 criminology field?

25 A. Yes, they are.

1 Q. Have you published?

2 A. Yes. I've published 18 books, not all on multiple
3 homicide. Four of them on multiple homicide; one on homicide
4 generally; and the others on various topics, statistics. So
5 18 books and dozens of peer-reviewed journal articles, book --
6 book chapters, open-end columns. I publish frequently.

7 Q. You mentioned some peer-review articles.

8 Can you give some examples of your peer-reviewed
9 publications on mass shooters?

10 A. Sure. The one that's an exactly cited perhaps most often
11 probably, because it's been out for a few years, too, was a
12 publication in the journal called Homicide Studies. It was
13 called, "Mass Shooters in America, Moving Beyond Newtown." It
14 was written after the Newtown Sandy Hook shooting, and it
15 was -- basically went through the major myths that people hold
16 about mass shootings and mass killings.

17 Then in 2020, I had a publication in the Journal of Law
18 and Human Behavior with some colleagues. This was -- this was
19 part of the grant. It was an analysis of state gun laws and
20 its impact on rapes, of mass shootings, public mass shooting,
21 state by state.

22 Then I also had a publication in the Journal of
23 Quantitative Chronology, which is a forecast of the severity
24 of mass public shootings, looking to the future, what's the
25 likelihood of there being another shooting as big as Las Vegas

1 or even larger.

2 Also, I had a paper that came out a couple months ago in
3 the Homicide Studies on the newsworthiness of mass shootings,
4 looking at the characteristics of mass shootings that tend to
5 generate the most press.

6 And then I have a paper that's under review now -- I mean,
7 it should be -- with a journal called Statistics and Public
8 Policy, which looks at the copycat effect and social contagion
9 of mass shootings.

10 Q. Other than your academic work, do you have any other
11 experiences related to mass shootings?

12 A. Yes. Probably most prominent, I would say, is about 15
13 years ago in Seattle, a person by the name of Kyle Huff
14 killed two and wounded two at a rave after-party and then shot
15 himself. Because he was deceased, the police would not be
16 doing an investigation, yet the families of the victims wanted
17 to understand what happened, were their children just chosen
18 at random.

19 And so the chief of police in Seattle, knowing about my
20 background, hired me to run an investigation, and head of a
21 small team. Investigating that homicide, I spent months in
22 Seattle as well as Montana, where the shooter had grown up.

23 Investigating it and writing a lengthy report for the
24 city, which was on the city's website, the police departments
25 website, the newspaper websites, gave presentations to the

1 community, and, eventually, the report was published in a peer
2 review journal.

3 Q. And were you able to come to conclusions about that, why
4 that mass shooting happened?

5 A. Yes. You know, even though the victims, he only met the
6 victims that night, it's clear that it was not indiscriminate,
7 it was not random, that he was focusing on a certain type of
8 victim, which was the rave community.

9 I have -- through my understanding about his life -- and I
10 had come to the conclusion that he was, indeed, specifically
11 targeting the rave community, which is quite strong in
12 Seattle.

13 I won't go into the reasons why I came to that conclusion,
14 but weeks later, a letter was found in a dumpster that he
15 had -- that was recovered. A letter to his brother, laying
16 out exactly why he did what he did, and he felt that the rave
17 community, they were hypocrites, they were promiscuous, and
18 they were going to ruin the morals of society, and he felt he
19 had to take charge and punish them for that.

20 So that was a major activity.

21 I've also been on communities. I was on President Bill
22 Clinton's advisory committee on school shootings in the late
23 1990s when there were eight multiple-victim shootings in
24 schools across America. I also worked with Janet Reno. I
25 briefed her, traveled with her, featured on homicide trends.

1 I also, briefed Donna Shalala, the Secretary of Health and
2 Human Services at the time on intimate partner homicide.

3 Q. Have you previously testified as an expert witness?

4 A. Yes, I have.

5 Q. How many times have you testified in court?

6 A. In court, nine times.

7 Q. How many times have you testified at depositions?

8 A. Ten.

9 Q. Do those overlap very much?

10 A. Not that much. Some, but not that much.

11 Q. Have you testified on subjects related to multiple
12 homicides?

13 A. Yes, I have.

14 Q. Is that in court or in depositions?

15 A. Both. In court it was a criminal case involving a
16 multiple homicide, and in Florida, Fort Myers' area, Florida.

17 And then two civil cases, one related to the mass shooting
18 in Louisville, Kentucky at the Standard Gravure Printing Plant
19 where Joseph Wesbecker went in and killed twelve and wounded
20 eight.

21 And also, I was involved in and deposed in the mass
22 shooting at Jacksonville of a man who killed ten, including
23 eight at the GMAC office that had repossessed his vehicle.

24 Q. Your testimony on subjects specific to mass shootings,
25 were those in court or in depositions?

1 A. Those were in depositions.

2 I should also add that a number of the cases that I've
3 been deposed were multiple-homicide cases in which there were
4 litigation against the gun industry, and I was working for the
5 Brady Center in those days, and some of them were multiple
6 homicides, including one -- the Brooklyn Bridge case.

7 Q. You said that you were -- you only testified in
8 depositions for the cases involving mass shootings.

9 Why was that?

10 A. They were settled.

11 Q. Have you testified on -- you -- I think you were starting
12 to talk about this.

13 Have you testified on behalf of plaintiffs or defendants?

14 A. Both. And I would say probably about half and half.

15 Q. Have you been accepted --

16 A. In fact, I have a case now. I've been retained for a mass
17 shooting in Jacksonville at a -- at a video game competition,
18 killed two, wounded 11 others, and that's for the plaintiffs.

19 Q. Have you been accepted in federal and state court as a
20 qualified expert witness?

21 A. Yes.

22 Q. Have you ever been excluded from testifying?

23 A. No.

24 Q. I'm going to direct your attention to Joint Exhibit 618.

25 It should come up on your screen.

1 A. Um-hum.

2 Q. And just as a preliminary, if you have any issues seeing
3 the documents, please let us know. We can make them bigger,
4 as you can see we've just done, but there's also a paper copy,
5 a paper binder if you need to reference that.

6 A. For those that might be watching by Zoom, I'm legally
7 blind, so I may be going like this (indicating), which to them
8 I may look weird because I may be out of frame.

9 Q. Is this document that's up on the screen, is this your
10 curriculum vitae?

11 A. Yes, it is, as of February.

12 Q. Is your experience and education accurately reflected on
13 this CV?

14 A. Yes.

15 Q. You were retained in -- specifically for this case;
16 correct?

17 A. Sorry?

18 Q. Were you retained for that case?

19 A. Yes.

20 Q. What were you generally requested to do?

21 A. I was requested to read a variety of documents,
22 depositions, interviews, expert reports for the plaintiffs'
23 experts, certain videos, audio recordings, and to render
24 opinions with regard to that material. In addition to the
25 material that was provided by counsel, I also utilized data

1 from the AP USA Today Mass -- Northeastern University of Mass
2 Killing Database on the 77 mass public shootings that had
3 occurred since 2006.

4 Q. And you mentioned a variety of documents that were given
5 to you by the government.

6 Do you have a sense of about how many pages of documents
7 you've reviewed?

8 A. Thousands.

9 Q. Did you review documents from the Air Force?

10 A. Yes.

11 Q. Did you review the -- the case file from the Air Force
12 Office of Special Investigation, investigation into Kelley?

13 A. I did.

14 Q. Did you review Kelley's mental health records from his
15 time in the Air Force?

16 A. Yes.

17 Q. Did you review his mental health records from after he
18 left the Air Force?

19 A. Yes.

20 Q. Did you review documents from the Texas Rangers and FBI
21 investigation into the shooting?

22 A. I did.

23 Q. Do you know how many pages you might have reviewed from
24 that Texas Rangers file?

25 A. No. Hundreds, I'm sure.

1 Q. Did you review deposition testimony taken in this case?

2 A. I did.

3 Q. Do you recall some of the depositions that you might have
4 reviewed?

5 A. Yes. Danielle, Devin Kelley's wife, Danielle Smith,
6 Michelle Shields, Michael Kelley, Rebecca Kelley, some of the
7 personnel in the Air Force, depositions for them as well, for
8 example.

9 Q. Have you watched or reviewed the trial testimony thus far?

10 A. I've watched 95 percent of it, and the other 5 percent,
11 I've read.

12 Q. These documents that you've reviewed, do they contain the
13 type of information that someone in your field would normally
14 rely on in forming conclusions?

15 A. Yes.

16 Q. Did you write a report disclosing your opinions?

17 A. I wrote a report and then later a supplementary report.

18 Q. Did you use your knowledge, experience, and training in
19 coming to the opinions that you disclosed in your report and
20 supplemental report?

21 A. Yes, I did.

22 Q. The opinions that you came to in your report and your
23 supplemental report, do you hold them to a reasonable degree
24 of scientific certainty?

25 A. I do.

1 MS. KRIEGER: Your Honor, at this time, we offer
2 Dr. Fox as an expert in criminology and mass shootings.

3 MR. ALSAFFAR: No objections, Your Honor.

4 THE COURT: He's recognized as such.

5 THE WITNESS: Thank you.

6 BY MS. KRIEGER:

7 Q. Dr. Fox, in brief, can you give an overview of the
8 opinions that you came to in this case?

9 A. Sure.

10 Essentially, two areas. One having to do with
11 foreseeability, that it was not foreseeable on the part of the
12 Air Force during Devin Kelley's time in the Air Force that he
13 would have -- that he would, five years later, commit the mass
14 shooting at the church in Sutherland Springs. Based on what
15 they knew of him, this still was not foreseeable.

16 And secondly, that had the Air Force submitted the
17 conviction, domestic violence conviction, Devin Kelley to the
18 FBI that would then appear in NICS, that -- and if he, in
19 fact, was not allowed and barred from purchasing weapons at
20 FFLs, that he would have purchased weapons from other sources
21 and still have committed this crime.

22 Q. Let's talk about your foreseeability opinion.

23 A. Um-hum.

24 Q. You stated, I think, that it was not foreseeable to the
25 Air Force during Kelley's time there, that he would later

1 commit the mass shooting that he, in fact, committed on
2 November 5th, 2017?

3 A. Sure.

4 Q. Did I summarize that correctly?

5 A. Yes.

6 I'm fully aware of -- of the crime that for which he was
7 convicted, domestic violence incidents. I'm also aware of the
8 sexual assaults that the Air Force also knew about, and
9 generally his -- his difficult manner and behavior,
10 threatening manner, et cetera, yet what happened on
11 November 5th, 2017 was qualitatively different in character
12 and severity from all of the bad acts he had committed prior
13 and during his time in the Air Force.

14 Q. Was your -- did you come to that opinion to a reasonable
15 degree of scientific certainty?

16 A. Yes, I did.

17 Q. Okay. You said that Kelley's actions in the Air Force
18 were different in character and severity from his later
19 action. Can you explain the ways in which it was different?

20 A. Well, we'll take "severity," that's the easier one.
21 Twenty-six killed and 20 plus injured, the number of people
22 that he attacked, certainly, are far greater than any prior
23 bad acts he had committed. And that also involved deaths,
24 fatalities, as opposed to injuries and sexual assaults that he
25 had committed previously. So severity was many times greater.

1 But also the character of the crime. For example, the
2 domestic violence against his first wife and stepson, those
3 were situational responses to such things as the stress of
4 dealing with a crying baby, arguments, and disputes with his
5 wife, his perception that she had -- had cheated on him with
6 someone else. That's very different than the planned,
7 methodical, indiscriminate crime that he occurred -- that he
8 committed at the church.

9 The domestic violence and the sexual assaults were clearly
10 in the residences, private spaces compared to public space
11 such as a church. And -- so that -- then we had basic
12 admission planning. That I don't see any of his prior acts
13 having been planned. They were all in response to situations.
14 Basically, someone who had -- well, I'll deal with that later.
15 As opposed to the premeditated nature of the crimes that he
16 committed at the -- at the church.

17 So very different, in terms of the weapon, using, firing a
18 gun hundreds of times. Previously, he had a gun, used it as a
19 threat. So the weapon, his -- compared to sexual assaults and
20 slapping and beating.

21 So it's different. Weapon, different severity, different
22 number of victims, different in premeditation, and
23 coldblooded, dispassionate shooting, as compared to a crime of
24 passion and very emotional response to a situation that
25 happened at various situations at the Air Force.

1 Q. Let's break that down a little bit.

2 A. Yeah.

3 Q. Let's start -- you mentioned differences in planning.

4 A. Um-hum.

5 Q. Is there research about mass shooters and planning?

6 A. Yes. You know, there is this idea that -- always with the
7 general public -- they say, "Well, what made the guy snap."

8 Well, mass shooters just don't suddenly snap and go
9 berserk, they just so happen to have two AR-15s and a thousand
10 rounds of ammunition in the trunk of their car just for such
11 an occasion. They are well-planned executions.

12 A particularly excellent study from the FBI led by James
13 Silver, who is now a professor at Worcester State University,
14 looked at preattacked behaviors of active shooters. Now,
15 active shooters are a larger class of individuals who are
16 wannabe mass killers. Many of them succeed. Certainly,
17 Devin Kelley was an active shooter who killed -- who carried
18 out his crimes as he desired, not all active shooters are
19 killed.

20 Q. Can you --

21 A. But --

22 Q. I'm sorry. You mentioned this FBI study.

23 A. Yes.

24 Q. Can we just pull that up on the screen. It's GEX 203.

25 A. Sorry.

1 Q. You don't have to apologize.

2 A. I just wanted to clarify the difference between active
3 shooter and a mass shooter. One is a subset of the other.

4 Yes, this is the study from the FBI.

5 Q. Do you consider this study, GEX 203, to be a reliable
6 authority?

7 A. Yes, it's often cited.

8 Q. Let's turn to page 13, and can we pull out the top
9 paragraph or two?

10 A. I'm very familiar with it, yeah.

11 Q. Now, in these paragraphs, the article distinguishes
12 between planning and preparing.

13 What's the difference?

14 A. Planning is a cognitive process. Thinking about,
15 imagining, fantasizing about committing a mass shooting.
16 Preparation are the actual steps toward execution of that
17 crime. Steps including such things as purchasing weapons and
18 ammunition, choosing a location. So that -- one is just
19 cognitive and the other is actual steps.

20 Q. Can we --

21 A. And preparation obviously comes after planning.

22 Q. Can we take down that paragraph and pull up the chart at
23 the bottom of the page, in the middle of the page, I guess.

24 A. Yeah, I'm familiar with it.

25 Q. So looking at this Figure 6., what percentage of active

1 shooters spent more than a week planning?

2 A. More than a week was 77 percent, planned for more than a
3 week. 62 percent planned for more than a month. Of course,
4 Kelley would fit into that category. And only 12 percent
5 planned for less than a day. And that's sort of consistent
6 with this idea that they just don't come up with the idea that
7 day and go ahead and commit the crime. They tend to think
8 about it for weeks or months.

9 Q. And can we now go to page 14. And if we could pull up
10 that chart there.

11 This chart says, "Time spent preparing." Based on this
12 chart, how many shooters spend more than a week preparing?

13 A. 48 percent, almost half, more than a week. 13 percent, at
14 least three months preparing. And given what we know about
15 some of Kelley's purchases, that he would fit into that very
16 small group who plan -- who prepare and plan for a long period
17 of time. Only I would say 28 percent prepare for hours.

18 Again, it's not a spontaneous sudden decision to kill lots
19 of people. It's something they think about and plan and
20 prepare for a period of time, which again distinguishes
21 incidents of domestic violence like Kelley committed against
22 his first wife and stepson which were not planned --

23 Q. I was just --

24 A. And what happened at the church, which was planned.

25 Q. So you just said that Kelley's acts of violence against

1 his first wife and stepson were not planned, but he did plan
2 the mass shooting?

3 A. Yes.

4 MR. ALSAFFAR: Objection, Your Honor. Speculation.

5 First of all, it's contrary to the evidence and we
6 have quite a bit of evidence that his -- the way he beat his
7 wives and women were very planned. He's not a psychiatrist.

8 THE COURT: You can clean it up on cross.

9 That's overruled.

10 BY MS. KRIEGER:

11 Q. Let me show you some documents about the planning of the
12 mass shooting. Can you pull up JEX 700. And can we zoom in
13 on that first bullet point.

14 Are you able to read that?

15 A. This is from Texas Ranger Snyder, who said the shooting
16 had been planned as early as July of 2017.

17 Do you want me to read the exact --

18 Q. I think that it's been read into the record already.

19 A. Okay.

20 Q. Can we -- we can pull down just that. Pull out -- can we
21 pull out the middle column there, or at least the top part of
22 the middle column. It's very small.

23 Are you able to read what -- what this is about?

24 A. It's very fuzzy, but I know it's about the Columbine
25 shooting and school shooters.

1 Q. Does that show evidence of planning?

2 A. It shows evidence of the fact that he's thinking about
3 mass killings, the -- he's becoming obsessed with it, perhaps.
4 Yes. And this is, again, months prior to the crime and prior
5 to his preparations.

6 Q. Let's pull that down.

7 I'm going to show you a couple of Kelley's iCloud notes.
8 JEX 583 -- sorry. JEX 583, page 5.

9 A. There's a lot on there about mass shooters and he's
10 speculating and theorizing about it, too, about them as well.

11 Yes, "I am the angel of death. No one can stop me."

12 Q. Did you hear Ranger Snyder testify that this document was
13 created in July 2017?

14 A. I did.

15 Q. Let's pull that down. Let's go to JEX 583-10.

16 A. That's the -- that's the planning part, that note, seeing
17 himself as an unstoppable force to be reckoned with.

18 Q. Do you see this iCloud note?

19 A. Yes. This is all about preparation, things he is planning
20 to do and must do are reminders to himself in advance of the
21 shooting.

22 Q. Did you hear Ranger Snyder testify that this note was
23 created on October 30th, 2017?

24 A. Yes.

25 Q. It says in here, "Put gun stuff in car when Danielle

1 doesn't notice. And rifle into guitar case."

2 Is that indicative of the preparation?

3 A. Yes. He was, indeed, trying to conceal what he was doing
4 from his wife. Certainly, did not want her to intervene
5 towards his plans, which is -- sometimes happens in those who
6 are thinking about mass shootings, that they -- well, I'll
7 leave that for now.

8 Q. You can take down this document.

9 Are you aware that Kelley purchased body armor via eBay?

10 A. Yes.

11 Q. Is that indicative of planning for a mass shooting?

12 A. Yes. Let's of preparation.

13 Q. Do you know if body armor is illegal for felons to possess
14 in Texas?

15 A. It's illegal.

16 Q. Let's pull up JEX 734. Can you go to the second page.
17 Can you pull out the third paragraph. The third paragraph.

18 A. Okay.

19 Q. Are you able to read this?

20 A. Yes.

21 Q. What is this document? What event is this document
22 discussing?

23 A. This talks about the two 100-round drum magazines that he
24 purchased. He had seen this on Facebook and contacted the
25 Hill County Truck Supply Company to order them, came in for

1 them on the 28th of October. Brought them home. They didn't
2 quite fit.

3 He went back to return them and ordered the right ones.
4 It would take some time, but he called day, after day, after
5 day. Even came in, I believe, the day before the shooting to
6 see if they had arrived.

7 Q. Is this indicative of Kelley preparing for the mass
8 shooting?

9 A. Yes. He was looking to acquire sufficient ammunition to
10 commit a bloodbath. In fact, he had previously in response to
11 the Las Vegas shooting, made a remark that if you're going to
12 do it, you do it big, and having such large-capacity magazines
13 would enable him to "do it big."

14 Q. Let's take down that document.

15 Have you heard any testimony that Kelley surveilled the
16 location of his crime in advance?

17 A. Could you repeat that?

18 Q. Have you heard any testimony indicating that Kelley
19 surveilled the location of his crime in advance?

20 A. Yes.

21 Apparently, according to Michelle Shields, a friend of
22 hers from the church, Mr. Green, Rob Green [phonetic], noticed
23 that Kelley, when he came to the festival on the 31st, was
24 walking around, looking at the church and the location. It
25 was surprising, first of all, that he was even there since he

1 was not a fan and didn't attend the church, so people were
2 surprised that he was there. But he took the time to look
3 around.

4 Now, this is very common, that mass killers, they need to
5 have a clear sense of the location, the layout, both in terms
6 of executing the crime, and, perhaps, even escaping from the
7 crime. Now, there are some mass shooters who don't have to do
8 surveillance because they work at the place, such as we may
9 find out last night's shooting in Indianapolis was an
10 employee.

11 So those who know the location would be a workplace or a
12 school, they don't have to do surveillance. But those who are
13 unfamiliar will conduct surveillance to assist them when they
14 carry out the crime. Of course, the only came --

15 THE COURT: We really need to go to Q and A here.

16 THE WITNESS: I'm sorry.

17 MS. KRIEGER: If I can ask my next question.

18 BY MS. KRIEGER:

19 Q. Kelley had been planning and preparing the shooting for
20 some time; is that right?

21 A. Yes.

22 Q. Do you have an opinion on whether Kelley had chosen his
23 target when he began planning or preparing?

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

25 Q. When, in your opinion, did he choose his target?

1 A. Well, it would be at least, I would say, about a week
2 prior to. So that's the -- that was the last piece. And, in
3 fact, that's -- he took the opportunity to go to the festival
4 to do surveillance and I should add that -- that, of course,
5 the fact that he was surveilling, scoping out the place would
6 only be clear to those who saw him after the fact, after the
7 shooting. Then it all made sense. It's often the case that
8 things -- things -- hindsight is 20/20.

9 THE COURT: So the question was: Did he choose his
10 target and when. So let's give responsive answers to
11 questions.

12 THE WITNESS: Okay. I apologize.

13 BY MS. KRIEGER:

14 Q. I think you said he chose his target about a week in
15 advance.

16 Why do you believe that's when he chose his target?

17 A. Well, at that point in time, he was exceedingly focused on
18 the experiences that his wife, Danielle, had -- had had at the
19 church, in regard to sexual assault by Donald Brassfield. She
20 was ridiculed, bullied, tormented, also related to her abuse
21 from her birth mother.

22 And then she was about to testify at the Brassfield trial,
23 which would be traumatizing for her, which would be
24 embarrassing for her, so he was really focused on that. In
25 fact, in the very same day of the festival, he called Erin

1 Brassfield to talk to her about the videos he found, and so he
2 was clearly thinking about it.

3 Q. You've reviewed the testimony of Michelle Shields;
4 correct?

5 A. Yes, I did.

6 Q. Do you recall testimony regarding threatening text
7 messages sent to Ms. Shields in May 2017 by Devin Kelley?

8 A. Yes.

9 Q. In your opinion, did those text messages have any
10 relationship to Kelley's planning or preparing to commit the
11 mass shooting?

12 A. No. He was really in a threatening stage that he -- in
13 fact, he threatened Valerie Rowe in May as well as March as
14 well as the previous November. So it seems like he was into
15 threatening lots of people. It was something he often did.
16 He talked big. He used his words to intimidate.

17 Q. Had Kelley -- do you think that Kelley had begun planning
18 the mass shooting before those text messages?

19 A. Yes. I -- the level of obsession with mass shootings,
20 talking and communicating with Jessika Edwards, talking about
21 the -- the church shooting in South Carolina, "I wish I had
22 the nerve to do something like that," which is sort of
23 probably the beginning stage of getting into his acceptance of
24 the idea that he was going to do something of that magnitude.
25 So that -- that would have been even late 2016.

1 Q. In your opinion, is there a link between a history of
2 domestic violence and mass shootings?

3 A. Usually not.

4 Q. Are there any types of mass shootings that are associated
5 with a history of domestic violence?

6 A. Well, the family massacres, for example, the guy who kills
7 his wife and all the children, those -- although, a majority
8 don't have a history of domestic violence -- a larger
9 percentage of those mass shooters, the family annihilators
10 have a history of domestic violence as opposed to, for
11 example, those who commit massacres in public places against
12 strangers.

13 Q. Are there any studies that you considered when looking at
14 the link between the history of domestic violence -- between
15 having a history of domestic violence and mass shootings?

16 A. Studies, yes, there are.

17 Q. What studies did you look at?

18 A. Well, several.

19 They will tend to define incidents of domestic violence
20 somewhat differently, whether they look for only physical
21 violence versus -- versus, for example, violence of verbal
22 abuse and whether they focused on convictions and restraining
23 orders as opposed to just hearsay about fighting and abuse.
24 So they vary in their results, but there are several.

25 Q. Can you name a couple of the ones that you looked at?

1 A. Sure.

2 Well, I know that -- I know that the -- the plaintiffs'
3 expert brought up The Violence Project of Hamline University,
4 and I'm very familiar with those. I have the data. And, yes,
5 the claim is slightly more than 35 percent of mass public
6 shooters, those are just public, had a prior history of
7 domestic violence.

8 But I looked very closely at that, and if you eliminate
9 the nonphysical, for example, the verbal abuse, if you look
10 just at physical abuse, it's down to 20 percent. And, for
11 example, there's one guy, for example, who was screaming at
12 his wife in a shopping mall.

13 Then of the 20 percent, look at some of those, and you
14 would see one case for example, someone said, "Oh, yeah, they
15 were fighting all the time." Wasn't clear -- wasn't clear at
16 all that the fighting was physical. So my belief is that it's
17 probably south of 20 percent.

18 Q. Did you also look at data from every town for gun safety?

19 A. Yes.

20 It's a very reputable organization. Their data show that
21 25 percent of mass shooters, that's all mass shooters, have a
22 history of domestic violence. And when they looked at the
23 family annulations, it was 41 percent.

24 So that would then mean that the public mass shootings,
25 although, this statistic wasn't particularly reported, public

1 mass shootings would have to be on the other side of 25, far
2 less than 25 percent.

3 And then a third study, by Emma Fridel, professor at
4 University of Florida who looked at convictions and
5 restraining orders and public mass killers, 7 percent had a
6 history of domestic violence.

7 Q. Let's just go back for one second to Everytown.
8 Plaintiffs read a quote on Wednesday about Everytown for Gun
9 Safety, and said something to the effect of 54 percent of mass
10 shootings had a connection to domestic violence.

11 In your opinion, is that statistic misconstrued?

12 A. Absolutely. That statistic was talked a lot about after
13 the Sutherland Springs shooting, and many experts in domestic
14 violence and many journalists use that 54 percent to say,
15 54 percent of mass killers had a -- mass shooters had a
16 history of domestic violence, but that's not what it was.

17 It's 54 percent were connected to domestic violence. Most
18 of those were that the shooting itself was an act of domestic
19 violence. Nearly half, about 45 percent, of mass shootings
20 are within the family. That's domestic violence.

21 That's not a history of domestic violence. That's an act
22 of domestic violence. So that 54 percent, sure, it makes
23 sense, just because of the fact that so many mass shootings
24 are domestic violence. But as far as history, that's very
25 different. As I indicated, it's 25 percent for all mass

1 killings and even less for public mass killings.

2 Q. You've mentioned the term "public mass killings" a couple
3 times. Can you define a "public mass killing"?

4 A. Sure.

5 A public mass killing is a shooting in a public location:
6 a school, church, concert, restaurants, so forth, workplace,
7 as opposed to a private residence. And, usually, not always,
8 but usually — well, they can involve strangers such as the
9 church where he hardly knew most of those victims. Sometimes,
10 they are co-workers and schoolmates, but those are public
11 locations as opposed to private residences.

12 Q. Let's pull up GEX 196. This is the study by Emma Fridel
13 that you've just mentioned.

14 Do you consider Emma Fridel a reliable authority in your
15 field?

16 A. Yes. And this was published in peer-reviewed journals and
17 several of her other papers, that same data had been published
18 in peer-reviewed journals.

19 Q. Actually, can we pull up that title again. It's called a
20 Multivariate Comparison of Family, Felony, and Public Mass
21 Murders in the United States.

22 Are those three categories of mass murders?

23 A. Yes, they are the primary categories. There's a
24 miscellaneous other, but those are the primary three.

25 Q. Can you explain the differences between those three

1 categories?

2 A. Sure.

3 A family mass killing is as it says. The victims, all or
4 almost, all are family members. Typically, immediate family.
5 Sometimes others who perhaps live there, other relatives who
6 might live with the family are present at an event like
7 Easter.

8 Felonies, that's -- that's basically a mass shooting that
9 is connected to some other criminal activity, robbery, killing
10 victims to cover it up, gang warfare, drug-related --
11 drug-crime-related massacres.

12 And then public, as I indicated, often strangers, but in
13 public places as opposed to residences that family massacres
14 occur in.

15 Q. Let's turn to page 13 of this document. Can we --

16 A. Oh, and the public ones do not have that element of being
17 connected to some other crime.

18 Q. Can we pull up that -- make that chart a little bigger.
19 It's kind of a big chart. Let's just do the top half so that
20 it's large enough to read.

21 Are you able to read that chart?

22 A. Yes.

23 Q. Okay. You can see there's three -- the names of three
24 kinds of mass killings and kind of halfway out of the pullout,
25 it says, "Domestic violence history."

1 Which of these categories had the highest rate of
2 offenders with a history of domestic violence?

3 A. Family massacres, not surprisingly, because that is an act
4 of domestic violence, and they have had previous acts of
5 domestic violence, not quite as traumatic in the past.

6 Q. Which of these categories -- I'm sorry. How -- what
7 percentage of public mass murderers had a history of domestic
8 violence?

9 A. I would say just under 7 percent.

10 Q. Take that down.

11 In your opinion, is a history of domestic violence a
12 warning sign that a person might go on to commit a public mass
13 killing?

14 A. No.

15 Q. Why not?

16 A. Well, there are as many as 10 million incidents of
17 domestic violence every year, unfortunately, and public mass
18 shootings happen around six per year. Most have been 10 in
19 one year. So if you tried -- and of those public mass
20 killings, many do not have a history of domestic violence.

21 So if you look at the millions of people who commit
22 domestic violence and the very small handful who later commit
23 mass shootings, if you try to predict, there would be almost
24 100 percent false positives, and many false negatives because,
25 as I said, there are mass shooters who do not have a history.

1 Some even live alone.

2 Q. Plaintiffs have suggested that the mass shooting on
3 November 5th, 2017 was itself an act of domestic violence.

4 Do you agree with that?

5 A. No, I don't.

6 Q. And why not?

7 A. Well, I understand that one of the victims was Danielle's
8 grandmother. And I've actually, I've looked at the hundreds
9 of mass shootings in the AP U.S.A. Today Northeastern Database
10 since 2006, and out of the nearly 300 mass shootings, there
11 were 19 victims of all of those. 19 total victims who were
12 either mother-in-laws, or grandmother-in-laws.

13 And of those 19, 16 of the cases, it was the wife,
14 ex-wife, girlfriend, ex-girlfriend who was the primary target
15 and the more distant relative was killed in the process
16 because they were there. There's another case where the
17 primary target was not around, others got killed, but the
18 primary target did not happen to be home.

19 One other case, which was a robbery, actually stealing
20 marijuana from in-laws. There was only one case that didn't
21 have the primary target being a spouse or girlfriend or
22 ex-spouse, ex-girlfriend, and that was the shooting of
23 Lula White, the grandmother of Danielle. That's one case out
24 of hundreds.

25 Q. When you say --

1 A. And it's hundreds of incidents and then thousands of
2 victims.

3 Q. When you say that in 16 of those cases, and I think you
4 actually say 17, but the primary target wasn't there.

5 When you say the wife was the primary target, does that
6 mean that she was actually shot or otherwise harmed?

7 A. I'm sorry. Say --

8 Q. In the 16 cases, where the wife was the primary target --

9 A. Oh, yes.

10 Q. -- or girlfriend, was that wife killed?

11 A. Killed or injured.

12 Q. How does domestic violence differ from what happened at
13 the church?

14 A. Well, domestic violence occurs among intimates. What
15 happened at the church, the victims are strangers, virtual
16 strangers. May have met them once or twice, but they really
17 weren't -- were hardly intimates. And that's really one of
18 the large differences.

19 And domestic violence tends to be episodic, tends to be
20 spontaneous, a response to conflicts, arguments, jealousy,
21 committed in a state of rage as opposed to the very cold,
22 calculated, methodical, deliberate, indiscriminate shooting at
23 the church.

24 Q. It's been suggested that Michelle Shields was the specific
25 target of the shooting.

1 Do you agree with that?

2 A. No, I don't.

3 Q. And it's also been suggested that Danielle's family, more
4 generally, including her stepfather, her brother, and her
5 grandmother as well as Michelle Shields, might have been
6 targets.

7 Do you agree with that?

8 A. No.

9 Q. Why not?

10 A. Well, given the level of planning and preparation that
11 Kelley had gone through, it would have been advantageous for
12 him to choose a time when family members were gathered at
13 Michelle Shields' home. He would have been -- had much
14 greater assurance that his intended victims would be there,
15 and also would have a greater chance of making a getaway
16 without being shot.

17 Then also when you look at the shooting itself with the
18 church, according to Ranger Snyder, when you do the math, I
19 think, 55 percent of the shots were outside the church before
20 going in and that is incredibly indiscriminate.

21 Yes, people can be harmed on the other side of the wall
22 and the windows, but he couldn't -- wouldn't know who, and
23 wouldn't be able to select out individuals such as Michelle
24 Shields.

25 Q. Dr. Webster actually -- or Professor Webster stated that

1 the shooting was motivated by domestic violence; do you agree?

2 A. No, I don't.

3 Q. And why is that?

4 A. I think it's quite the opposite. I mean, from what we
5 understand about the upcoming trial of Donald Brassfield and
6 concern about what happened with his wife in the past, and the
7 mistreatment at the church, he was basically protecting her,
8 defending her, not offending against her. She was not a
9 victim of a shooting, and the shooting, in fact, was done as I
10 indicated to prevent her from trauma and embarrassment, and
11 the response to what happened to her.

12 So it was for her benefit, not against her.

13 Q. Let me ask more broadly. Do you have an opinion on
14 Kelley's motivation for committing the shooting?

15 A. Yes, it's twofold. I've already discussed and need not go
16 through it again, all the issues about what happened to his
17 wife and -- at the church, but also he had developed intense
18 hostility towards religion in Facebook posts. And he talked
19 about hypocrites, and was very hostile towards religion and
20 also was very much focused on the substance on the Charleston
21 shooting, so there's a certain copycat element as well.

22 So part of it was anti-religion. Now, that also helps
23 understand why he would just shoot at the building. It's less
24 accurate by shooting at the building, then going inside, but
25 more than half of his gunshots were at the building. You

1 can't kill a church, but symbolically, I guess, by shooting
2 the church, it's really an attack against the church.

3 Q. I'm going to show you a couple documents. Let's start
4 with JEX 543. You've seen this document before?

5 A. Yes.

6 Q. Let's go to page 3, and can we make bigger the red parts
7 under social media exploitation.

8 Can you read -- do you see where it says, "I'm an
9 atheist"?

10 A. Yup. "I'm an atheist and they are ignorant,
11 self-righteous, Christians, or so they claim in public."
12 That's sort of the hypocrisy he talked about. In fact, he saw
13 himself as an atheist, so part of the motivation is indeed
14 anti-religion, anti-church.

15 Q. And let's actually look at the bottom of this section
16 where it says, "You learn to shoot by doing it."

17 A. Where is it?

18 Q. It's the very bottom here.

19 A. Oh, yep. I see that.

20 Q. All right. Can you read that?

21 A. Yes. "You learn to shoot by doing it" -- and he often did
22 go and practice -- "a lot of the mass shooters are impossible
23 to detect."

24 Q. And going on to the next page.

25 A. "I'm pretty sure they don't" -- something or other.

1 Q. Can you pull up the top there?

2 A. "I'm pretty sure they don't go around, acting crazy,
3 screaming to the world, but they are very careful. Just like
4 serial killers. So they pass psych evals anyway."

5 Q. And I've moved away from the page, but do you know when
6 that Facebook post, when that comment was made on Facebook?

7 If we can go back a page --

8 A. Yeah.

9 Q. You don't need to guess.

10 A. 2016.

11 That was in March of 2017.

12 Q. And then, sorry, going back to that last page. You
13 mentioned a post in the end of 2016. Let's pull that out.
14 It's the same red section.

15 Can you read the post that Kelley made on
16 11/19/2016 starting with "mass murderers"?

17 A. Yeah, "Mass murderers don't do it because of videos games.
18 They do it because they are tired of the" expletive, expletive
19 "in the rigged system. And the hate that breeds in all
20 90 percent of humans, and it's time for payback. Most of
21 them, anyway. Serial killers do it because they are addicted
22 to the rush of killing and get bored with killing animals."

23 So, again, that was in 2016. So he's thinking a lot about
24 mass shooters, mass killers. This is also about the time when
25 he communicated with Edwards about the Charleston shooting,

1 and "I wish I had the nerve to do it." So he's beginning the
2 process of taking on this persona and heading down the road
3 toward mass -- mass killing.

4 Q. And you mentioned -- you've already discussed it quite a
5 bit, so just very briefly, why do you believe that Kelley's
6 motivation was related to the sexual abuse of his wife?

7 A. Why do I think it's related to it?

8 Q. Yes.

9 A. Because he chose -- it's apparent, as I said before, it
10 looks like the last piece of his preparation was to settle on
11 the location, partially because of his hatred for religion,
12 but also because of the issue with -- history of his -- his
13 wife and the videos and photographs that he had talked about
14 and talked to Erin Brassfield about.

15 Q. So you are not saying -- you don't think that he chose the
16 church at random; is that correct?

17 A. No. There are other churches, but he chose that one, and
18 it wasn't right next door to his home. He chose that one for
19 a reason.

20 Q. I'm going to --

21 A. So he chose church for a reason and that church for a
22 reason.

23 Q. And what was -- and what was the reason that he chose
24 churches?

25 A. Well, he chose church because of the hostility towards

1 religion and also gave an example of Dylann Roof in
2 Charleston, South Carolina. And he chose that church because
3 of the connection with the ridicule and mistreatment and
4 bullying that his wife had suffered there when she was
5 younger.

6 Q. Let's pull up JEX 477. It's the transcript of the
7 interviews with the -- of the Kelleys and the Texas Rangers.
8 Can we go to page 16, and let's pull out lines 14 through the
9 end.

10 A. Which line?

11 Q. I'm sorry. Starting at line 14.

12 A. Yes.

13 Q. And I think we've had this -- we've heard this several
14 times, so we don't need to read it into the record. But can
15 you see that Texas Ranger Barina asks, "Do you-all know of any
16 reason why he would go down there and do it?"

17 Do you see that?

18 A. Yeah. That was -- that was in the aftermath, I believe,
19 of the shooting that Michael Kelley referred to the
20 experiences and history that his -- that Danielle had suffered
21 in days gone by, abused as a child by her birth mother and
22 also sexually abused by Donald Brassfield.

23 Q. Yeah. And let's turn to the next page, and pull out lines
24 1 through 10.

25 A. Yeah.

1 Q. And here Michael Kelley --

2 MR. ALSAFFAR: Objection, Your Honor.

3 THE COURT: I haven't heard the question yet.

4 MR. ALSAFFAR: It's actually -- I'll let her ask the
5 question. It's coming. Go ahead.

6 BY MS. KRIEGER:

7 Q. Here Michael Kelley states that -- is talking about the
8 abuse that Danielle suffered?

9 A. Yes, sexually.

10 MR. ALSAFFAR: Objection.

11 THE COURT: One second -- at a time.

12 So he's -- he sees what you've pointed out. What's
13 the next question?

14 BY MS. KRIEGER:

15 Q. What effect did this document have on your opinion as to
16 Kelley's motivation?

17 MR. ALSAFFAR: Okay. That's calling for speculation,
18 Your Honor, based on -- based on double hearsay. It's based
19 on Michael Kelley's understanding of what he heard or says he
20 heard from somebody else.

21 THE COURT: Yeah, the question is, "What effect did
22 it have, if any, on your opinion?"

23 Did it have an effect?

24 THE WITNESS: Yes.

25 THE COURT: Next question.

1 BY MS. KRIEGER:

2 Q. What is that effect?

3 A. Well, this is in the early hours after the shooting, and
4 questions about why you think he did it, and I think some of
5 the statements by Danielle and Michael Kelley at that point in
6 time --

7 THE COURT: Well, I'm not sure, Professor, I'm
8 getting an answer to, "What effect did it have on your
9 opinion?"

10 THE WITNESS: Okay. It -- it had the effect of
11 the -- it confirmed this idea that it was connected to the
12 sexual abuse that Danielle had suffered.

13 THE COURT: Okay. Stop.

14 Next question.

15 BY MS. KRIEGER:

16 Q. Why did it have that effect on your opinion?

17 A. Well, it's consistent with the location, in terms of the
18 ridicule that his wife had received at the church, related to
19 the experience that she had had where she had been abused by
20 Donald Brassfield. So it all sort of fits into the -- to why
21 that church --

22 THE COURT: Okay. Stop.

23 THE WITNESS: -- why that time --

24 THE COURT: Next question.

25

1 BY MS. KRIEGER:

2 Q. Does the timing of the statement have any impact on your
3 opinion?

4 A. It does.

5 Q. What does the timing have to do with the effect on your
6 opinion?

7 A. Well, sometimes, as months go by, people have different
8 views of what happened, but in the immediate aftermath, I
9 think this is probably fairly accurate.

10 Q. Let's turn to page 90 of the same document.

11 MR. ALSAFFAR: On --

12 THE COURT: So any objections that you have on that
13 is overruled. He's just testifying as to what -- how his
14 opinion was affected and in what manner, so I'll allow it in
15 for that limited purpose.

16 BY MS. KRIEGER:

17 Q. And looking at line 17 through 24, Texas Ranger Barina now
18 asks Danielle, "Was there any reason why he would go there,"
19 and Danielle responds, "Well, what I went through as a kid."

20 Again, did this have any effect on your opinions as to
21 Devin's motivation?

22 A. Yes.

23 Q. What was that effect?

24 A. It confirmed the notion that the church was selected
25 because of the abuse, the ridicule she received with regard to

1 her experiences, the abuse that Danielle had received at the
2 hands of Mr. Brassfield and --

3 Q. And --

4 A. And she --

5 THE COURT: Let's stop there. Let's stop, Professor.
6 Let's wait for another question now.

7 THE WITNESS: Okay.

8 BY MS. KRIEGER:

9 Q. Why did this have this effect on your opinion?

10 A. Because it occurred right in the aftermath of the shooting
11 and I think there is some honest answers at that point.

12 Q. Did you -- you can take that one down.

13 Did you review the testimony that was given by Danielle
14 Smith and also Michael Kelley to the Department of Defense
15 Investigator General's office?

16 A. Yes.

17 Q. Do you know if Danielle was under oath at the time she
18 made those statements?

19 A. She was.

20 Q. Let's turn to page 74 of JEX 157. This is that testimony
21 that she gave to the IG; is that right?

22 A. I'm sorry?

23 Q. This is the testimony that Danielle gave to the Inspector
24 General; correct?

25 A. Yes.

1 Q. Let's pull out lines 5 through 11. And Danielle says --
2 the witness is Danielle; do you agree?

3 A. Yes, Danielle.

4 Q. She says, "Devin knew during the process of the abuse I
5 went through, that the church and her knew and they made fun
6 of me for it," and then she -- a little further down she says,
7 "They mocked me and said I deserved it, and I should have died
8 when I tried committing suicide."

9 A. Yes.

10 Q. Let's also turn to page 80. Pull out lines 14 through 20.
11 I'll just read this. It says, "The witness, which is
12 Danielle, I mean, who else is going to listen? Nobody really
13 will. Everybody is always going to see him as a person that
14 murdered people in an innocent church. They don't want to
15 take the time to figure out why my husband went bat-shit
16 fucking crazy. They won't take the time to know he was an
17 actual human being who loved and who was an amazing person."

18 A. Um-hum.

19 Q. Do these statements have an effect on your opinion as to
20 Kelley's motivation?

21 A. Yes, from her point of view, that this was an act that he
22 committed in defense of her, as I indicated previously.

23 MR. ALSAFFAR: Objection. Speculation. That is not
24 what she said in that paragraph.

25 THE COURT: Yeah. That's overruled.

1 BY MS. KRIEGER:

2 Q. Let's look at JEX 4. -- I'm sorry. JEX 742. Let's turn
3 to page 3, and we can pull up the paragraph 10.14. Can you
4 just highlight the second sentence in that paragraph.

5 A. "Swanson stated he was aware of Devin having issues with
6 his wife's, Danielle Kelley, side of the family as it related
7 to her pending criminal court case with her father in
8 Guadalupe County."

9 Q. Do you know who Swanson is?

10 A. Yes. He's a coworker.

11 Q. And what effect does -- what effect, if any, does this
12 statement have on your opinion as to Kelley's motivation?

13 A. Well, even the day before the shooting, Kelley was talking
14 about his concern with this upcoming trial. So it's clearly
15 on his mind.

16 Q. Did you listen to the testimony yesterday by Erin Higgins?

17 A. Yes.

18 Q. Did that testimony have any effect on your opinion of
19 Kelley's motivation?

20 A. Yes.

21 Q. What was that effect?

22 A. Well, that he contacted her on the 31st of October,
23 right -- days before the shooting, right -- the same day as
24 the festival and seemed to be really focused on videos, photos
25 of the sexual abuse that would be extremely embarrassing to

1 his wife if they came out.

2 Q. Did you hear testimony that Devin Kelley hog-tied Danielle
3 before he went to commit the mass shooting?

4 A. I did, yes.

5 Q. Did you hear testimony that Devin Kelley texted his
6 parents to untie Danielle?

7 A. Yes.

8 Q. What was the effect of Kelley tying up his wife, those two
9 actions, the effect first of him tying up his wife and then
10 texting his parents to untie her?

11 A. Well, tying up the wife partially was as he got ready, as
12 he got dressed in his body armor and mask, et cetera, from the
13 black box tub that she could not intervene, could not stop
14 him. But more than that, that it's often the case in mass
15 shootings that in the aftermath, spouses, parents are
16 sometimes blamed in the court of public opinion because they
17 didn't intervene, didn't do anything to stop him so --

18 THE COURT: Are we answering the question, "Why did
19 he tie up Danielle?"

20 THE WITNESS: The effect is that she would not be
21 blamed for not having intervened.

22 THE COURT: Next question.

23 THE WITNESS: And that -- about the untie part?

24 THE COURT: Let's just wait for the next question.
25

1 BY MS. KRIEGER:

2 Q. Did the texting of his parents to untie her, would that
3 have had an effect, a similar effect?

4 A. Yes. Apparently, it would seem that prior to going into
5 the church that he texted them to untie her, because she
6 was -- she was not his victim that day. He was not -- she was
7 not the target. The tying her up was for a purpose of
8 avoiding her intervening, but once that was all over, he
9 didn't want her to suffer anymore.

10 Q. Do you agree with plaintiffs, that Devin committed the
11 shooting because Danielle asked for a divorce that weekend?

12 A. No.

13 Q. Why not?

14 A. He had been planning and preparing and even focusing on
15 the videos and pictures well in advance of her request for a
16 divorce, and -- so no.

17 Q. I want to just go back a little bit to Kelley's time in
18 the Air Force. Are you aware that Kelley made a variety of
19 threats during his time in the Air Force?

20 A. Yes.

21 Q. Are you aware that Kelley told his wife, Tessa, that, "My
22 work is lucky I don't have a shotgun. I would go in there and
23 shoot everyone"?

24 A. Yes, I am. Yeah.

25 Q. Are you aware of Kelley making comments to the effect

1 that, "If he were picked up by Security Forces, he would go
2 for their guns"?

3 A. I am.

4 Q. Are you aware that Kelley was barred from Holloman Air
5 Force Base for making those threats and for threatening
6 leadership?

7 A. Yes.

8 Q. What effect did these threats have on your opinion of
9 foreseeability by the Air Force?

10 A. Well, he does threaten a lot and particularly threatened
11 women. We know that. And I understand that they were
12 nervous, rightfully so. And it was better safe than sorry not
13 to -- since he also had guns, that they were concerned about
14 their safety, and took steps to make sure that he didn't do
15 anything, didn't act out violently, didn't do more than just
16 threaten them.

17 But that's not what happened in 2017. In fact, he didn't
18 threaten those victims, those people who were killed. You
19 know, interesting, there's also a study by the FBI that
20 looked -- I'm sorry -- that looked at mass shooters who made
21 threats.

22 And in every single case, the threats were made against
23 the people they eventually shot. So his -- sorry. I
24 understand the concerns they had and the steps they took, but
25 that's not anything like the methodical planned event on

1 November 5th, '17.

2 Q. Are you aware that in their investigation of Devin Kelley,
3 the OSI agents uncovered a history of sexual assault in
4 Kelley's past?

5 A. Yes.

6 Q. What effect does that history of sexual assault have on
7 your opinion of foreseeability by the Air Force?

8 A. Well, if it were foreseeable, he would commit future acts
9 of sexual assault, which he did, and his domestic violence is
10 indicative of likelihood of committing future domestic
11 violence, which he did. But sexual violence and domestic
12 violence would not be predictive of the indiscriminate
13 shooting of strangers in a well-planned execution.

14 Q. Are you aware that while Kelley was at Peak, he was found
15 to be in the maximum risk range on both the control and
16 violence scales in psychiatric tests?

17 A. Yes.

18 Q. What effect did this have on your opinion as to
19 foreseeability by the Air Force?

20 A. And I -- it's clear, given his words and his gun
21 possession, interest, and looking at guns online, et cetera,
22 that he given a situation where he felt criticized, provoked,
23 he would indeed be at risk of committing a violent act.

24 But that wasn't what happened at the church. He was not
25 provoked. It was not in response to a -- a slight and a

1 criticism. It was something he planned in advance.

2 Q. Are you aware of a statement by Kelley's supervisor,
3 Valerie Rowe, that Kelley had a coldness about him, and that
4 she said -- she told a colleague, "We need to watch this guy
5 because he's the kind of person who will come in and shoot
6 everybody"?

7 A. Yes.

8 Q. Did this statement affect your opinion on foreseeability
9 by the Air Force?

10 A. No. I understand it that this is a statement made after
11 he was a mass shooter, reflecting back. Now, I understand
12 that at the time --

13 THE COURT: I'm sorry. You think this is a statement
14 that was made after the shooting?

15 THE WITNESS: The statement.

16 MS. KRIEGER: We can clear this up.

17 BY MS. KRIEGER:

18 Q. Dr. Fox, the document that you read that statement in --
19 was that a statement made by Ms. Rowe to the Rangers or the
20 FBI?

21 A. Yes.

22 Q. And in that statement, she's reflecting back on her time
23 with Devin Kelley; is that right?

24 A. Yes.

25 Q. So the statement that she --

1 THE COURT: Let me make sure I remember the evidence
2 right. Isn't there evidence in this record already that she
3 made that statement to her supervisors at the time that he was
4 still in the Air Force.

5 MS. KRIEGER: Yes, Your Honor, that is --

6 THE COURT: And that's why I think he's incorrect.

7 MS. KRIEGER: Excuse me. If I may, Your Honor, she
8 told the FBI after the shooting that, yes, that she had at the
9 time made that statement to her supervisor back in 2012.

10 THE COURT: But, Professor, she made that statement
11 to her supervisors at the time Mr. Kelley was still in the
12 Air Force. Does that change your opinion?

13 THE WITNESS: I understood that she was concerned and
14 she said something. I don't know exactly what she said at the
15 time.

16 THE COURT: She said that she was concerned --

17 THE WITNESS: She was concerned about -- yes.

18 THE COURT: -- that he was going to shoot everybody
19 up.

20 THE WITNESS: I understand that.

21 THE COURT: So does that change your opinion?

22 THE WITNESS: No, because this -- this was
23 co-workers, supervisors. He was a person who did not obey,
24 did not like authority, did not like orders, who was
25 belligerent to those who had power over him.

1 That's not the same kind of event that happened at
2 the church. So I understand his threatening behavior, and it
3 was understandable and prudent to take the steps that they did
4 at the time for fear that he might shoot leadership, but
5 that's not what happened at the church.

6 BY MS. KRIEGER:

7 Q. Is there anything that changed about Kelley's actions
8 after he left the Air Force?

9 A. Yes. He changed considerably.

10 Q. Can you tell us what -- how he changed?

11 A. Yes. Well, he became much more hostile, according to
12 Danielle, as time moved on toward the -- up to 2017. He began
13 to abuse medications or -- considerably, taking three times
14 the doses he should be taking. He became obsessed with mass
15 shooters. We saw lots of evidence of that. Particularly,
16 church shooter. He became obsessed with guns. Danielle said
17 once they moved to Colorado, he became intensely interested
18 and fascinated with guns, babying his guns, she said.

19 In fact, one of his friends, Joey Mizell [phonetic], I
20 think is his name, also talked about the fascination with guns
21 developing after he left the military.

22 After the military, he also started hanging out with a
23 biker gang, and then his personality and his composure began
24 to deteriorate. So he had changes in personality, drug use,
25 fascination with guns, mass killing. All this happened after

1 the Air Force, and would not have been anticipated and
2 foreseen by those in the Air Force.

3 Q. Let's move on to your second opinion.

4 Your second opinion, if I may summarize it, was that even
5 if the Air Force had submitted Kelley's information to the
6 FBI, he, nonetheless, would have found a way to acquire a
7 firearm and commit -- to ultimately commit the mass shooting;
8 is that correct?

9 A. Yes.

10 Q. Briefly, what are your bases for this opinion?

11 A. That Kelley was aware of many avenues for obtaining a
12 weapon without going through a background check. And given
13 clear indication of his persistence, and I can give you
14 examples if you wish, that he would not have taken no for an
15 answer.

16 He didn't take no for an answer from girlfriends when they
17 said no to sex. He didn't take no for an answer when he had
18 guns confiscated in the military. He didn't take no for an
19 answer when he couldn't get the firearm at Dick's Sporting
20 Goods. He said, "Okay, well, I'll try again." So he's not
21 the type of person who wishes to be denied, and he would find
22 a way and he knew ways to do it.

23 Q. Is there research on how common it is for gun owners to
24 buy weapons without a background check?

25 A. Yes.

1 Q. I'm going to show you GEX 197.

2 Can we just pull up the title and the author?

3 A. It's a Matthew Miller survey.

4 Q. Are you familiar with this study?

5 A. Yes.

6 Q. The author is Matthew Miller, and it's published in the
7 Annals of Internal Medicine; is that correct?

8 A. Yes.

9 Q. Do you consider this study to be a reliable authority in
10 your field?

11 A. Yes, it's frequently cited.

12 Q. Let's look at page 2 of this document.

13 A. Yes.

14 Q. Can we pull up the last section, that last column, that
15 second column. Further down, I apologize.

16 A. I'm aware of the findings if you want to ask me.

17 Q. Do you know what this -- this study found as to what
18 percentage of sales nationally, gun sales, were done without a
19 background check?

20 A. Yes. It was about a survey of 1600 individuals who had
21 purchased a gun within the past two years, and of those,
22 22 percent had purchased their most recent gun without going
23 through a background check.

24 Q. Do you know what percentage of private sales were
25 conducted without a background check nationally?

1 A. Half. Half of private sales without a background check.

2 Q. Do you know in states without regulations on private
3 sales, what percentage of private sales were done without a
4 background check?

5 A. Fifty-seven percent.

6 Q. Do you know if the results were any different in Texas?

7 A. No. Through private communication with Matthew Miller, he
8 indicated that the results were the same.

9 MR. ALSAFFAR: Objection. I think he's trying to get
10 in hearsay from a private conversation with the author.

11 THE WITNESS: Oh.

12 THE COURT: That's sustained.

13 BY MS. KRIEGER:

14 Q. Did you conduct an analysis for your report to determine
15 how mass shooters get their weapons?

16 A. Yes.

17 Q. What did you do to make that determination?

18 A. I looked at all 77 public mass shooters since 2006, used
19 the dataset I referred to, AP U.S.A. Today Northeastern
20 dataset. 77 cases. And of those, surprisingly, the majority
21 actually were not prohibited purchasers. About 36 percent
22 were prohibited. And, yet, those 36 percent still committed
23 mass killings in public places.

24 Q. The analysis that you did, is that how analyses are
25 typically done in your field?

1 A. Yes.

2 Q. Is this how you've previously conducted analysis in your
3 peer-reviewed work?

4 A. Say again.

5 Q. Is this how you've previously conducted analyses in your
6 peer-reviewed work?

7 A. Yes.

8 Q. In addition to your finding about, I think you said
9 36 percent of mass shooters were prohibited, did you make any
10 findings regarding the sources of firearms used in mass
11 shootings that were committed by those prohibited purchasers?

12 A. Yes. I looked at the guns purchased by those prohibited
13 individuals, and the overwhelming majority were purchased not
14 through FFLs. I believe it's 77 percent, 78 percent. I don't
15 recall the exact number, but the overwhelming majority of more
16 than two-thirds were purchased through other means than an
17 FFL.

18 Q. You said you don't recall precisely.

19 Is there something that would refresh your recollection?

20 A. It's in my report.

21 Q. Can we pull up GEX 27, and we can go to page -- I'm sorry.
22 Page 23.

23 A. I think it's Table 2, I believe. Probably in this binder,
24 if you want me to look.

25 Q. No, no. We got it.

1 A. Okay.

2 Q. Just take a second, a minute to look at that.

3 A. Seventy-nine percent.

4 Q. We can --

5 A. Close.

6 Q. -- take that down.

7 A. It says 21 percent purchased at an FFL. The rest did not.

8 Q. You just saw it on the -- on the table.

9 What were some of the sources from which these prohibited
10 mass shooters obtained their firearms?

11 A. Theft, ghost guns, straw purchases, for example.

12 Q. Did you make any findings for the sources of different
13 types of firearms used by prohibited mass shooters?

14 A. I looked specifically at the prohibited purchasers who had
15 used a semiautomatic rifle, similar to that used by Devin
16 Kelley, the AR. And there were -- there were nine of such
17 weapons used by prohibited purchasers.

18 Eight of those were purchased not through an FFL, only one
19 was purchased at an FFL, and that was Kelley's at -- from
20 Academy. So eight of the nine were obtained not through an
21 FFL.

22 Q. Are you aware of other mass shooters or would-be mass
23 shooters who were denied at FFLs and, nonetheless, obtained
24 firearms?

25 A. Yes.

1 Q. Can you name one or two of those?

2 A. Well, there are actually two here in Texas. One would be
3 the Seth Ator shooting of seven in Odessa/Midland area. He
4 was denied.

5 And then also the shooting by Keith Kinnunen at the
6 church, the White Settlement Church, where he killed two. He
7 likely would have killed more, were it not for the fact that
8 he was shot by a bystander. But he also obtained his weapon
9 not through an FFL, not with a background check. And was
10 denied.

11 Q. And he had also been denied previously?

12 A. Yeah, they both were.

13 Q. We've already heard a lot of testimony about the various
14 ways a person can acquire a firearm without a background
15 check. So based on your review of the documents and the
16 testimony, in your opinion, did Kelley have the knowledge to
17 acquire firearms without a background check?

18 A. Absolutely.

19 Q. How do you know he had that knowledge?

20 A. Well, he visited gun shows frequently, according to
21 Danielle. He knew he could purchase one privately because he
22 did purchase a gun at a previous time through a private sale.
23 He was also aware of the guns available on the internet since
24 he had looked at them.

25 He was also aware that his father owned the same weapon,

1 and like other mass killers have, used their parents weapons.

2 He knew that the father had one, and then also there is a
3 possibility of the straw purchase. He could have coerced
4 Danielle into purchasing one for him.

5 And then finally, although, I don't have evidence that he
6 actually looked at kits, there would be the possibility of
7 purchasing kits or ghost guns.

8 So there are a lot of different ways.

9 Q. Is it your testimony that Kelley bartered for a gun?

10 A. Yes, a shotgun.

11 Q. Does this show any kind of knowledge?

12 A. Yes.

13 Q. We've already talked about Kelley purchased body armor on
14 eBay. Does that show any kind of knowledge from Kelley?

15 A. Yes.

16 Q. Now, there was testimony from Danielle and the Kelleys,
17 where they both said -- they all said that they would not have
18 purchased firearms for Devin, and, in fact, that he never
19 asked them.

20 Does that testimony change your opinion?

21 A. No.

22 Q. Why not?

23 A. Well, first of all, he didn't have to ask them because he
24 was able to. But if he wasn't able to, he likely would have.

25 As far as Danielle denying that she would have purchased one

1 if he'd asked, she did all sorts of things by coercion, even
2 including some sexual acts that -- that he wanted and for
3 someone who was a previous sex -- a victim of sexual abuse.
4 I'm sure that was quite distasteful.

5 So it's easy to say that you wouldn't, but if forced, if
6 coerced, I'd suggest that she may have complied. In fact,
7 Emily Willis indicated that she also believed that Danielle
8 would have done anything, including buying a gun for him.

9 As far as Michael, Kelley's father, there was testimony
10 from him during interview where he said that his son did have
11 access. And I know all the evidence about the cabinet,
12 et cetera, but Mr. Kelley also didn't believe that Devin had
13 abused his stepson. He thought it was -- that he had just
14 taken the fall.

15 So I don't see if -- if Devin had insisted, I think there
16 is a fairly good chance that they would have complied.

17 Q. I'm sorry. You mentioned Emily Willis.

18 Who is Emily Willis?

19 A. That's someone they lived with previously in Colorado, I
20 believe.

21 Q. You said that Kelley had the knowledge to acquire other
22 firearms. In your opinion, would Kelley have found means of
23 acquiring firearms if he couldn't have gone to an FFL?

24 A. Yes.

25 Q. Why do you believe that?

1 A. He's a very persistent individual. We saw the persistence
2 in going to a second FFL when denied at Dick's because of the
3 driver's license. He was persistent in his pursuit of
4 Danielle, in courting her. I think she referred to it almost
5 as stalking.

6 He was persistent in the days leading up to the shooting
7 and calling the -- the store where he had ordered the two
8 100-round magazines. He called daily, persistently at Hill
9 County. And during the military when guns were confiscated,
10 almost immediately he was back online purchasing or attempting
11 to purchase.

12 So he's not someone who took no for an answer. It's not
13 like he would have gone into an FFL, been denied, and said,
14 "Oh, I can't have a gun. I guess I'm just not going to do it.
15 I'm just not going to do that shooting."

16 That's not -- that's not typical of mass killers. The
17 36 percent I mentioned, or even Ator and Kinnunen, I mean,
18 these are individuals who have a plan and are not -- despite
19 being denied, they are still going to find a way to do what
20 they set out to do and there are avenues for that.

21 Q. Have you heard testimony that Devin Kelley preferred new
22 guns?

23 A. Yes.

24 Q. What does this tell you about his likelihood -- the
25 likelihood that he would acquire guns from a non-FFL source?

1 A. Well, I understand the purpose for new guns. Makes sense.
2 Lots of people want things that are new. If he couldn't get
3 it from the FFL, well there are new guns available elsewhere,
4 even at gun shows.

5 And if he couldn't get a new gun, still also like wouldn't
6 have just said, "Okay. Forget it. I just won't do what I've
7 set out to do because I can't get a new gun." He was going to
8 find a way to get the weapon needed to commit this crime.

9 Q. Based on the research that you've seen and conducted, can
10 mass shootings be prevented?

11 A. Not in an absolute sense, no.

12 Q. Are some -- are some mass shootings prevented?

13 A. Yes, some are thwarted. And the typical way that a mass
14 shooting is thwarted is by what is called "leakage."

15 Q. Can you define "leakage"?

16 A. Leakage is when an individual -- a would-be assailant
17 tells or hints to people around, usually family members, about
18 what they are thinking of doing. And those individuals then,
19 you know, drop a dime, as it were, call the police, and they
20 are thwarted. So that's generally how they are stopped.

21 Q. Would Kelley's comments or threats that he made in the
22 Air Force be considered "leakage"?

23 A. No. No, because --

24 Q. Why not?

25 A. Because he wasn't leaking during the Air Force any

1 intention of committing a massacre at a church five years
2 later.

3 Q. In your opinion, do you think that Kelley could have been
4 prevented from carrying out the mass shooting?

5 A. No.

6 Q. Why not?

7 A. Because he had -- he had the intent, the desire,
8 persistence through his determination to carry out this crime,
9 and he certainly had the interest in weapons and he would have
10 found a way, were it not through an FFL, he would have found
11 another way, either through a private sale, straw purchase,
12 borrowing, taking a gun from his dad, he would have found a
13 way.

14 MS. KRIEGER: I pass the witness, although, if we
15 could take a five-minute break.

16 THE COURT: Yeah. Let's go ahead and take a
17 ten-minute break.

18 (Recess.)

19 THE COURT: Your cross?

20 MR. ALSAFFAR: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. ALSAFFAR:

23 Q. Good morning, Doctor.

24 A. Good morning.

25 Q. Never met before until this morning; correct?

1 A. Yes.

2 Q. I want to start with this idea that you talked about with
3 the U.S. Attorney about, you've -- you've not seen any history
4 of planning from Devin Kelley. Remember that conversation?

5 A. History of planning for a shooting.

6 Q. That's --

7 A. Yeah.

8 Q. I'm sorry?

9 A. No. A history of planning for a shooting for a violent
10 outburst, yes.

11 Q. That's not true; is it?

12 A. Well, not that I'm aware of, so if you have evidence
13 otherwise, I'd like to hear it.

14 Q. Devin -- Devin Kelley, at least the Air Force knew --
15 nobody else but the Air Force knew that Devin Kelley -- can
16 you hear me okay?

17 A. A little. That's better.

18 Q. Is that better?

19 A. Yeah.

20 Q. Okay. Please tell me if you can't hear me.

21 A. I will.

22 Q. Devin Kelley --

23 A. That's better.

24 Q. At least the Air Force knew that Devin Kelley was planning
25 a mass shooting; didn't they?

1 A. I'm not sure I agree with that. I understand threats, I
2 understand looking at guns.

3 Q. You talked -- I want to talk to you about that, then. On
4 direct examination, you said that none of the acts that the
5 government were aware of were planned. They didn't involve
6 planned, methodical preparation; is that right?

7 Did I get that right?

8 A. I was talking about the domestic violence, the sexual
9 assaults, yes.

10 Q. So I want to be very, very, very, very clear here.

11 A. Okay.

12 Q. I'm not talking about the domestic violence and the sexual
13 assaults. I will. We'll get into that. What I'm talking
14 about is his specific threats and planning for a mass shooting
15 while he was in the Air Force; is that clear? Do you
16 understand --

17 A. I understand what you said, yeah.

18 Q. Okay. So my question for you is: It is not correct that
19 the Air Force was unaware that Devin Kelley was planning a
20 mass shooting?

21 A. I would disagree.

22 Q. Okay. That's okay. You can disagree with me.

23 A. I understand --

24 THE COURT: Let's just ask another question.
25

1 BY MR. ALSAFFAR:

2 Q. So let me ask you another question, okay?

3 A. Yes.

4 Q. You looked at the various detailed documented memoranda
5 written by Devin Kelley's supervisors and commanders in the
6 Air Force; correct?

7 A. Yes, I did.

8 Q. And -- and in fairness, they documented a lot of stuff
9 that Devin Kelley did, his domestic violence, his sexual
10 assaults, his mental health, his -- his extensive mental
11 health history, but they also talked about other threats and
12 plans he planned to engage in against other people, including
13 strangers; correct?

14 A. I don't quite agree with "including strangers."

15 Q. Okay.

16 A. I don't recall that, so...

17 Q. Well, let's just go through the facts of this case.

18 A. Okay.

19 Q. I think I heard you said that you did, in fact, review
20 both the Air Force security file on Devin Kelley; correct?

21 A. Yes.

22 Q. You also reviewed the Security Forces file; is that
23 correct?

24 A. Yes.

25 Q. You also reviewed the commander's file from the 49th Wing

1 as well?

2 A. Yes.

3 Q. Okay. Can we put up JX 21, page 61.

4 Dr. Fox, can you see on your screen, and we will blow it
5 up for you, but I just want to make sure there is something
6 showing on your screen.

7 A. Yes, something is showing.

8 Q. If we can go to the last paragraph, No. 6, highlight
9 starting with "after."

10 A. Starting with "after," okay.

11 Q. We'll get there, I promise.

12 A. Do you want me to read it?

13 Q. No. Just -- you are welcome to read it to yourself. If I
14 need you to read something out loud, I'll tell you to do that,
15 okay?

16 A. Yep.

17 Q. This is Devin Kelley's commander, Major McLeod-Hughes, and
18 he states, "After learning that he might be released from the
19 mental health facility, he deliberately planned to obtain
20 another gun, the other gun having been taken away from him,
21 and body armor, after making threats to kill his wife and
22 threats to take away the guns of any security forces member.
23 I am convinced that he is dangerous and likely to harm someone
24 if released."

25 Did I read that correctly?

1 A. Yes.

2 Q. All right. And I believe on direct examination, and,
3 again, if I misstate this, please tell me, you said one of the
4 key factors for you in determining whether someone, there's
5 evidence of somebody planning a mass shooting was searching or
6 getting or obtaining body armor; correct?

7 A. That was one of the things that he did, yes.

8 Q. But it's one of the things that he did in the Air Force?

9 A. That he was looking online, yes.

10 Q. And it's one of the things he did in the Air Force while
11 he was in a mental hospital; correct?

12 A. Yes, he was looking online, yes.

13 Q. All right.

14 A. Go ahead.

15 Q. Researching?

16 A. Yes.

17 Q. Thank you.

18 A. But in August of 2017, he purchased body armor online.

19 Q. So he was researching and looking for body armor while in
20 a mental hospital --

21 A. Yes.

22 Q. -- in the Air Force?

23 A. Yes.

24 Q. All right. Let me show you another letter from a
25 commander it's JEX 403-001. This is from Captain McQuillan,

1 who is the chief of civil law at the 49th Wing at Holloman Air
2 Force Base in March of 2013. And that's right around the time
3 that Devin Kelley was in the Air Force and incarcerated;
4 correct?

5 A. Yes.

6 Q. I want to show you paragraph 3. We'll start with "Facts"
7 and then we'll go down to paragraph B on this issue.

8 So we'll start with paragraph 3, "Facts."

9 A. You have to blow it up.

10 Q. We are. We are. Thank you, though. And anytime you
11 can't see anything, please let me know.

12 A. Right.

13 Q. And we'll work with you, Doctor.

14 A. Um-hum.

15 Q. And by the way, Doctor, if you have trouble seeing
16 anything, what I did -- I went and deliberately made multiple
17 copies just for you because I heard it might be difficult, and
18 if you need that, I have that as well.

19 A. I appreciate that.

20 Q. No problem. No problem.

21 Okay. Under "Facts," "AB Kelley has a history of severe
22 mental health problems."

23 Did I read that correctly?

24 A. Yes.

25 Q. Okay. Let me take a pause right there. You mentioned on

1 direct examination that one of the things that made you form
2 the basis of your opinion that something was different about
3 this Devin Kelley after the Air Force than the Devin Kelley
4 before the Air Force was that your opinion is that he had a
5 personality change, a change in mental status; correct?

6 A. Yes.

7 Q. Okay.

8 A. That it -- it deteriorated.

9 Q. Okay. That he deteriorated?

10 A. Yes, it wasn't good during the military, I agree.

11 Q. Well, actually, during the military it wasn't just he had
12 mental health problems, he had severe disturbing mental health
13 problems. Do you agree with that?

14 A. I see what it says. I'm not a psychiatrist, so I only go
15 by what -- what others have said in his medical files, yes.

16 Q. Well, I'm asking because you seem to be able to -- you
17 were willing to opine on that in direct examination, about his
18 personality, so I'm only asking what you are comfortable
19 doing.

20 Are you comfortable agreeing with me that the evidence,
21 well, the facts of this case, are that the Air Force were
22 aware prior to him leaving that he had severe and disturbing
23 mental health history?

24 A. He had severe mental health problems, yes.

25 Q. Okay. Next sentence, "He openly carried a firearm on

1 Holloman Air Force Base and placed a weapon to his wife's
2 head."

3 So you agree with me that the Air Force was aware that
4 Devin Kelley was using guns violently in the Air Force?

5 A. Yes. It was directed against his wife. As I have
6 indicated, his threats were to people who were in his life,
7 people close to him, supervisors, people who confronted him,
8 for example, the Security Force.

9 I mean, he said, "If they came after me, I would take
10 their guns away." That's because he's confronted, he feels
11 provoked. I understand that. This is all connected to people
12 with whom he feels -- he's frustrated, stressful, provoked.
13 It's all situational. It's very different than what happened
14 in 2017. This is reactive. He's reacting to things that
15 occurred.

16 Q. Do you agree with me that the Air Force was aware that
17 Devin Kelley used guns violently while he was in the
18 Air Force?

19 A. I understood that he -- that he pointed a gun at his
20 wife's head, yes.

21 Q. Is that an act of gun violence in your opinion or not?

22 A. It's not the same as shooting it. Let's keep that in
23 mind, it's not the same as killing someone with a gun.

24 Q. I agree.

25 A. But it's a threat. People will often, unfortunately, make

1 threats. And sometimes it's verbal, sometimes it's with an
2 instrument. But, fortunately, threats don't always end in
3 injury.

4 Q. This wasn't an instrument; was it, Doctor?

5 A. On what?

6 Q. This wasn't an instrument; was it, Doctor?

7 A. It was a weapon.

8 Q. It was a gun?

9 A. I said -- yes.

10 Q. Okay.

11 A. Did I say "instrument?" I didn't mean that. I meant
12 weapon.

13 Q. Thank you.

14 A. Um-hum.

15 Q. The next sentence. "He has repeatedly threatened to kill
16 his leadership". Right?

17 A. I see that.

18 Q. Okay. So the Air Force was aware that he had a severe
19 disturbing mental history. He was using guns in a violent
20 manner and he was threatening to kill leadership, not family
21 members?

22 A. Right.

23 Q. Let's read the next paragraph. We're going to go down to
24 paragraph B. This goes back to what I was talking with you to
25 begin with. Remember when we were discussing the planning and

1 how this was different because in the Air Force, he wasn't
2 planning and this mass shooting was a planned event.

3 Do you remember that discussion?

4 A. Yes.

5 Q. Okay. And that's important to your opinion -- isn't it?
6 -- that you don't think there's any evidence while he was in
7 the Air Force that Devin Kelley was planning any type of a
8 mass shooting?

9 A. Correct.

10 Q. So the chief of civil law of the 49th Wing at Holloman Air
11 Force Base in 2013, paragraph B.

12 A. Where are you reading from?

13 Q. It should be highlighted in front of you. Can you see it?

14 A. It says, "Verbal." Starts with the word "verbal"?

15 Q. It starts with, "his." Yes. I'm going to read it to you
16 and we'll ask you about it.

17 "His verbal declaration that he has contemplated offensive
18 attack strategies on both Air Force personnel and
19 organizations, including his leadership and Security Forces,
20 his online research of body armor and guerrilla tactics,
21 warfare tactics while a patient in a military mental health
22 facility, his possession of, and purchase of weapons, and his
23 successful escape from the mental health facility."

24 Do you see that?

25 A. Yes.

1 Q. So in 2013, the Air Force was aware that Devin Kelley was
2 planning offensive attack strategies; correct?

3 A. Well, I see the words there. For example, the "Security
4 Force." "Take away the guns." That's reactive.

5 Q. That wasn't my question, Doctor. I apologize if I wasn't
6 clear, so that's probably my fault. But let me ask it a
7 different way.

8 The Air Force was aware in 2013 and documented their
9 awareness that Devin Kelley was planning offensive attack
10 strategies?

11 A. That's what they said here.

12 Q. All right. Now, unlike you and definitely unlike me, the
13 people that are making these conclusions are not civilians;
14 are they?

15 A. No.

16 Q. The people that are making these conclusions that while he
17 was in the Air Force planning offensive attack strategy and
18 warfare tactics are trained military men and women; aren't
19 they?

20 A. Yes.

21 MS. KRIEGER: Objection. Misstates the evidence.

22 THE COURT: That's overruled.

23 MS. KRIEGER: It says, "contemplated."

24 THE COURT: That's overruled.

25 MS. KRIEGER: Okay.

1 BY MR. ALSAFFAR:

2 Q. The major, the commander, the colonels, they have been
3 trained extensively in warfare and weaponry in attack
4 strategies; correct?

5 A. Yes.

6 Q. They -- fair to say, they have more experience in that
7 kind of area than me or you?

8 A. Yes.

9 Q. Okay.

10 A. But mass shootings -- mass shootings is different.

11 Q. Let me ask a question.

12 THE COURT: Professor, wait for a question.

13 THE WITNESS: Certainly.

14 BY MR. ALSAFFAR:

15 Q. Let me talk to you a little bit about an article you
16 mentioned.

17 A. An article I mentioned?

18 Q. I'm sorry. This is an article you mentioned in direct
19 examination.

20 A. Okay.

21 Q. It was the FBI -- I'll put it up for you. It was the FBI
22 study from the Department of Justice. It was GEX 2013.

23 Do you remember talking about that study, sir?

24 A. Yes, sir. The preattack behavior.

25 Q. I'm going to put that up for you. And what I'd like you

1 to look at, I'll show you page 7 first, if we could. Page 7.
2 No. No. No. It might have 202 -- 203, I'm sorry. I meant
3 203. It's the FBI article. That one. That one. Thank you,
4 Sean. I'm sorry. Page 7, the "Key Findings." I want to show
5 you the "Key Findings."

6 All right. Key finding Number 6 -- that's good, Sean. If
7 we could highlight that for Dr. Fox so he can see it. Thank
8 you.

9 "On average, each active shooter displayed four to five
10 concerning behaviors over time that were observable to others
11 around the shooter. The most frequently occurring concerning
12 behaviors were related to the active shooter's mental health,
13 problematic interpersonal interactions, and leakage of violent
14 intent." Correct?

15 A. Yes.

16 Q. This is one the key findings of the FBI, the Department of
17 Justice?

18 A. Yes.

19 Q. Right?

20 A. Yes.

21 Q. The Air Force -- let's go back to the Air Force again.
22 The Air Force, speaking of these "most frequent occurring
23 concerning behaviors related to mass shootings" --

24 A. Yes.

25 Q. The Air Force were more aware than anybody else in

1 Devin Kelley's life about Devin Kelley's problematic mental
2 health history; correct?

3 A. Yes.

4 Q. The Air Force, more than anybody else involved in
5 Devin Kelley's life, were aware of his problematic
6 interpersonal interactions; correct?

7 A. Well, I'm sure that Tessa was, but, yes, they were very
8 aware.

9 Q. Well, you know what? I think you're right. And let me be
10 a little bit more clear. Probably, what Tessa, would you
11 agree with me, Tessa Kelley was not aware of, of how many and
12 how frequent and how depraved Devin Kelley's other acts of
13 violence were; correct?

14 A. Particularly the sexual assault, yeah.

15 Q. All right. So my statement: Is it fair that the
16 Air Force at the time he was, Devin Kelley, was there, knew
17 more than anyone else in his life about his -- the extent of
18 his problematic interpersonal interactions?

19 A. Correct.

20 Q. All right. And you talked about "leakage of violent
21 intent." The Air Force was very well aware that Devin Kelley
22 had made threats of mass gun violence on more than one
23 occasion; right?

24 A. Well, I do know that -- what he said to Tessa, which is
25 sort of the, "they are lucky that I" -- "people at work are

1 lucky that I didn't have a shotgun," which is sort of an
2 indirect offhand comment not made directly to the target,
3 which is important when you -- when you look at threats. And
4 I'm aware of the threat about disarming the Security Force.
5 And I also know, for example, from Troy Bizzack --

6 Q. Bizzack.

7 A. -- Bizzack, yes. He said specifically that, "threats
8 toward leadership based on reports by Tessa, his wife," which
9 is that comment. I realize that.

10 Q. And, you know, you didn't -- you didn't really say what
11 the comment was specifically. You et cetera'd a very
12 important part. What he said was, "They are lucky I don't
13 have a shotgun because I would blow everybody's head off."

14 Right?

15 A. I don't -- I recall up to the shotgun part, so if he did,
16 okay. But he didn't -- again, he didn't --

17 Q. Doctor -- Doctor, let me interrupt you.

18 A. Sure.

19 Q. I'm going to -- I'm going to give you -- I'm giving you a
20 little time here, but what I would ask you to do is please
21 listen to the question that I'm asking, and answer the one
22 that I'm asking. And if you need clarification, I'm sure you
23 have very able counsel who will clean that up for you.

24 A. Sure. Certainly.

25 Q. Okay. So Tessa reported that he would "threaten to blow

1 everybody's head off at work."

2 A. Yeah.

3 Q. Valerie Rowe reported to her supervisors at this -- at the
4 time that she was there that this guy is the kind of guy
5 that's going to shoot everybody.

6 A. Um-hum.

7 Q. The Security Forces Chief -- I'm sorry. The chief lawyer
8 for the 49th Wing reported that he was contemplating active
9 warfare tactics and offensive strategies; correct?

10 A. Um-hum.

11 Q. And then his commander also reported that the Air Force
12 was aware that he had made threats to kill his leadership
13 specifically; right?

14 A. Yep.

15 Q. And then when he was in the mental hospital, he
16 specifically threatened the police, the Security Forces;
17 right?

18 A. Yes.

19 Q. Okay. Four different threats; correct? Yes?

20 A. Yes.

21 Q. If we -- thank you.

22 If we look at -- you know what? That's all for the FBI
23 document. Thank you.

24 When you studied the history of mass shootings, you know
25 that mental health history is very important in understanding

1 when, why, and how people commit these terrible acts like
2 Devin Kelley did --

3 A. Yes.

4 Q. -- right?

5 We touched on the severity of mental health problems that
6 the Air Force was aware of and the Court has heard through the
7 last week several disturbing acts of sexual violence that
8 Devin Kelley committed and that the Air Force was aware of,
9 but we haven't heard of all of them.

10 And I would like to -- to talk to you about it and see if
11 you knew the extent and the nature of that mental health
12 deterioration. Because that's important -- isn't it? -- in
13 forming your opinion, to know what the extent is of his mental
14 deterioration before he left the Air Force as compared to
15 after; correct?

16 A. Yes.

17 Q. Okay. Now, we all know about the -- the minor women that
18 he committed sexual violence against, those were JEX 22, page
19 63, JEX -- do you remember reviewing this record? Right?

20 A. Yes.

21 Q. I'm not going to go into detail on it. We've already
22 talked about it in court. JEX 22-65. Do you remember
23 reviewing this record? Right?

24 A. Actually, last night.

25 Q. First time?

1 A. No, I reviewed it last night.

2 Q. Again. You reviewed it again. Fair. Fair.

3 A. The long list of sexual assault.

4 Q. JEX 22, page 67. You are familiar with that one as well;
5 right?

6 A. It looks familiar. I can't see what it says, but --

7 Q. Of course. Of course. Of course. The style. I take
8 your word for it. I'm sure you did.

9 But that's not all that the Air Force knew about his acts
10 of sexual violence; is it?

11 A. Well, you have to tell me what --

12 Q. Do you know if there were more than three?

13 A. Acts of sexual violence in his life?

14 Q. That the Air Force was aware of -- specifically aware of
15 when he was there.

16 A. I believe so, but I don't recall how many.

17 Q. All right. Did you know that the Air Force also knew of
18 an act of sexual violence assault that Devin Kelley committed
19 just two days after he entered the Air Force?

20 A. I don't recall --

21 Q. Okay.

22 A. -- the timing.

23 Q. Would it help you if I showed that to you?

24 A. I -- if it's probably consistent with his sexual assault
25 behavior of the past, I'm not sure it would change my opinion

1 or --

2 Q. Let's see if it does.

3 A. Okay.

4 Q. Did you know as early as June -- this is June 29th, 2011.

5 A. Yeah.

6 Q. The supervisory case agent who is investigating
7 Devin Kelley, this is June 29th, 2011, made -- his name was
8 SAIC Hoy, that stands for Super Agent in Charge Hoy.

9 Are you familiar with that name?

10 A. Yes.

11 Q. Did you know that he discovered in June 29th, 2011.

12 And we'll pull it up, JEX 22, page 126. This is 22, 126.

13 Let me pull it up for you. That's fine. Now hold it there.

14 Hold it there. I want to ask the doctor about this page.

15 First of all, the reason I'm showing you this is so that I
16 can show you that this document I'm showing you is part of the
17 AFOSI case file, and I wanted to confirm for you that this is
18 the document you reviewed, or one of the documents you
19 reviewed in forming your opinions in this case.

20 A. Yes.

21 Q. Okay. And if we could go to JEX 22, page 127. And if we
22 look at the bottom there. First, you'll see -- pull up the
23 bottom half of, yeah, the last paragraph.

24 We will see that this was conducted by James Hoy, like I
25 told you; right?

1 A. Yes.

2 Q. If we look at the last paragraph -- do you see that?

3 "June 19th, 2012, a New Braunfels Police Department Texas
4 record check was conducted on subject Kelley. The record
5 checks revealed subject Kelley was the subject of an
6 allegation involving indecency with a child, sexual conduct on
7 January 3rd, 2010."

8 A. Yes.

9 Q. You understand in reviewing -- did you review
10 Devin Kelley's military, like, personnel file records?

11 A. Yes, I did.

12 Q. So you know he started on January 5th, 2010 in the
13 Air Force?

14 A. I don't know the date in my head, but I do know the year,
15 so yes.

16 Q. Okay. And if you see the incident number that Mr. Hoy
17 puts down there. It's Incident Number 1, lots of zeros, 464?

18 A. Yes, I see that.

19 Q. And if we can go to JEX 410, this is JEX 410, page 9.
20 Have you ever seen this before, Doctor?

21 A. I believe so. There are a lot of documents.

22 Q. Yes, sir.

23 A. That talk about a lot of things, yes.

24 Q. Do you see the incident number is the same one I
25 referenced you in the AFOSI case file?

1 A. Yes.

2 Q. And if you can, I will -- I won't read through all of
3 this.

4 MR. ALSAFFAR: And, Your Honor, the name on this
5 record is Justeen, but that is not the actual name of the
6 victim. The New Braunfels used a pseudonym and that's a
7 pseudonym. So we are not revealing any privacy issues here.

8 BY MR. ALSAFFAR:

9 Q. Okay. Second paragraph, starting with, "When Gabriel."

10 "Justeen stated her friend, identified as Devin Kelley,
11 assaulted her in the past. Justeen told Gabriel her and Devin
12 went for a walk around the neighborhood. After Justeen and
13 Devin completed their walk, they returned to vehicle, which
14 was parked at the end of the street near the field. When they
15 got into Devin's vehicle, he held her arms and wrapped her.
16 Gabriel stated, he attempted to clarify what she meant by
17 'wrapped' which Justeen could not explain. Justeen sent
18 several text messages to her sister, which corroborated the
19 story she told him."

20 Going down just a little bit to the next paragraph.
21 Paragraph that starts with, "Justeen told Karen."

22 A. Where are you?

23 Q. We're scrolling for you, sir. I'm sorry.

24 "Justeen told Karen." I'm going to start with "after
25 Justeen."

1 "After Justeen and Devin completed their walk, they
2 returned to his vehicle. It becomes" -- clear -- "unclear at
3 this point. At one point in the vehicle, Devin grabbed
4 Justeen's hand, forced her to touch his penis. Karen stated
5 Devin's penis was exposed when he forced Justeen to touch it.
6 Justeen then pulled her hand away, exited the vehicle, and ran
7 home."

8 So that is another incident of sexual violence. Well,
9 first of all, let me ask you: Do you agree that's an act of
10 sexual violence?

11 A. Yes.

12 Q. So that is another incidence of sexual violence that the
13 Air Force was aware of; correct?

14 A. Yes.

15 Q. Did you also know that the Air Force was aware of another
16 minor girl that Devin Kelley sexually assaulted?

17 A. Yes.

18 Q. I'll show you very quickly. This was October 1st, 2012.
19 October 1st, 2012. JEX 22, page 170.

20 Have you seen this document before?

21 A. Yes.

22 Q. I won't -- I'm not going to go into details too much here,
23 but I will ask you if you will agree with me that this is
24 another example of sexual assault on a 14-year-old girl
25 committed by Devin Kelley, that the Air Force was aware of;

1 correct?

2 A. Yes.

3 Q. Did you also know that on September 28th, 2012, the Air
4 Force Office of Special Investigations learned that
5 Devin Kelley sexually assaulted another woman while he was in
6 the Air Force?

7 A. I believe so.

8 Q. He sexually assaulted a woman on leave when he was in New
9 Braunfels; correct?

10 A. Yes.

11 Q. And it was not before. It was while he was married and
12 while he was in the Air Force; correct?

13 A. Correct.

14 Q. Can we go to JEX 22-176. 22, page 176. So we'll start
15 with if we could highlight in January 12th. I want to orient
16 the doctor to time and place here.

17 Do you see it states in January 2012, so that's still
18 while he was in the Air Force as an active-duty Air Force
19 member; correct?

20 A. Yes.

21 Q. "At approximately 300 hours and during a home visit to New
22 Braunfels, Devin Kelley attempted to put his hands down
23 XXXXXXX XXXXXX's pants"?

24 MR. ALSAFFAR: I'm sorry. We're going to have to
25 scratch that for the record.

1 THE COURT: The record will be sealed on that.

2 MR. ALSAFFAR: I apologize, Your Honor.

3 I had the wrong copy. I'll just read from my screen.

4 Thank you.

5 BY MR. ALSAFFAR:

6 Q. "Kelley persisted, pulled his penis out, and masturbated
7 in front of the victim, subject Kelley attempted to grab the
8 victims' breasts"; do you see that?

9 A. Yes.

10 Q. This is another act of vile, sexual violence that the
11 Air Force was aware of?

12 A. Yes.

13 Q. That he was doing while he was in the Air Force?

14 A. Correct.

15 Q. And this is another example -- would you agree with me
16 that this is another example of extreme and severe mental
17 deterioration?

18 A. These are examples of sexual violence, disgusting, sexual
19 violence that he committed previous, prior to the Air Force,
20 during the Air Force, and after the Air Force.

21 He's just --

22 Q. Same Devin Kelley?

23 A. Sexual predator of sorts. But that's different than the
24 shooting that occurred at the church. I agree that -- that
25 you could predict that he would continue to sexually abuse,

1 assault, his second wife, which he did. Stranger, I mean
2 girlfriends, people he met, yes. That's a pattern of sexual
3 violence, which is different than mass shootings.

4 Q. You know, you mentioned earlier some statistics about
5 domestic violence, people who have a history of domestic
6 violence also have a history of mass shootings. There's
7 statistics that show people who commit mass shootings have
8 also had a history of domestic violence?

9 A. Some, a minority.

10 Q. Also, independently, the statistics show that people who
11 commit acts of sexual violence also have a history of mass
12 shootings?

13 A. People commit sexual violence have a history of mass
14 shooting?

15 Q. People who committed mass shootings also have a history of
16 sexual violence.

17 A. Few, not many.

18 Q. And people who have committed mass shootings have also had
19 a history of mental health problems; correct?

20 A. Not the majority. Minority. In fact, there's a recent
21 publication, very detailed --

22 Q. Dr. Fox, I didn't ask you about a number. I said: Is it
23 true that some people who committed mass shootings also have a
24 history of mental health problems?

25 A. Yes. Some do. Most don't.

1 Q. All right. And Devin Kelley had a history of mental
2 health deterioration, a history of sexual violence, and a
3 history of domestic violence, all three?

4 A. But they don't necessarily cumulative in the data --

5 Q. I didn't ask you that.

6 A. Okay. Yes.

7 Q. Does Devin Kelley have a history of -- mental health
8 history, domestic violence, and sexual violence, all of which
9 the Air Force was well aware?

10 A. Yes.

11 Q. And then you throw on top of that, he threatened mass
12 shootings as well?

13 A. He made verbal threats of -- to -- to leadership,
14 unspecified individuals.

15 Q. So before the Air Force released, in terms of his sexual
16 violence history, we now know that before the Air Force
17 released him, they were aware that Devin Kelley had sexually
18 committed sexual violence against six different women?

19 MS. KRIEGER: We object to this demonstrative. It
20 was not produced to the United States ahead of time.

21 THE COURT: So there's no question. Take down the
22 demonstrative.

23 BY MR. ALSAFFAR:

24 Q. Six different women?

25 A. I can't see it up there, but we went through several, so

1 I'll accept your number.

2 Q. I want to announce some transition, if you don't mind. I
3 want to talk about another part of your opinion that relates
4 to prevention, I think is what you were talking about.
5 Prevention of these kinds of shootings or these kinds of acts
6 of violence.

7 Are you aware that there have been some -- I'm sure you're
8 aware. You probably know better than anyone that there have
9 been some tragic mass shootings committed on military bases
10 and military installations around the country?

11 A. Yes.

12 Q. Fort Hood just up the street has had a few?

13 A. Another November 5, 2009, yes.

14 Q. So that's a yes; right?

15 A. Yes. Thirteen killed.

16 Q. Now, you know that by March 2013 that the Air Force knew
17 enough about Devin Kelley's dangerousness that they protected
18 the Holloman Air Force Base community by barring him from ever
19 being allowed to enter the base again; correct?

20 A. Yes.

21 Q. I want to show you Joint Exhibit 422, page 001. This is
22 the barment record produced by the government. This is JEX
23 422-001. If you look at the very first line, just so you know
24 what this document is, it says, "Devin Patrick Kelley Access
25 Transaction Status and Credentials History."

1 I assume you've reviewed this in forming your opinions in
2 this case; right?

3 A. Yes.

4 Q. So what this document is, is telling us how many times
5 Devin Kelley tried to access the base -- the base after he was
6 barred from the base; right?

7 A. Yes. He's not someone who likes no for an answer.

8 Q. That's right. So what I said was correct?

9 A. Yes.

10 Q. All right. Now, do you know that he tried, Devin Kelley
11 tried just two weeks after being escorted off base by armed
12 security personnel to enter Holloman Air Force Base?

13 A. I don't recall the exact time.

14 Q. Let's show 422-001, the April 9th entry.

15 "April 9th, 2013, attempted access following barment
16 status in DBIDS and was denied."

17 A. Yes.

18 Q. All right. So this is just two weeks after being barred;
19 correct?

20 A. Yes. He does not -- is not one to follow rules,
21 or orders, or doesn't like being told no.

22 Q. Even though he doesn't like to follow rules and orders and
23 being told no, Dr. Fox, he was stopped; wasn't he?

24 A. He was, what? Stopped.

25 Q. He was stopped; wasn't he?

1 A. Yeah, he was stopped.

2 Q. This is an example of the reporting system working; isn't
3 it. You need me to explain?

4 A. No. He was stopped because he wasn't allowed to be on the
5 base. I understand that.

6 Q. He was stopped because the internal Air Force reporting
7 system reported him and returned a denial when he tried to
8 access illegally --

9 A. Right.

10 Q. -- that Air Force Base. You agree with that; don't you?

11 A. Yes.

12 Q. So the Air Force, at least internally, reported that
13 Devin Kelley was dangerous, and by reporting it at least
14 internally, they were able to keep him from coming back onto
15 the base and doing harm to that community; correct?

16 A. They were -- they took precautions to protect the
17 community.

18 Q. They protected that community; didn't they?

19 A. Yes.

20 Q. And despite Devin Kelley being stopped by the reporting
21 system, there's no evidence that after being stopped, that he
22 tried to illegally jump the base fence to get in; correct?

23 A. Yes.

24 Q. There's no evidence that he tried to illegally sneak onto
25 base after being stopped by the reporting system; correct?

1 A. Correct.

2 Q. There's no evidence that he used a friend or family member
3 to try -- or another military member he knew to try to sneak
4 him on base; correct?

5 A. Correct. This, of course, is very different than talking
6 about purchasing guns.

7 Q. I'm not talking about purchasing guns, Dr. Fox.

8 A. Okay.

9 Q. I'm asking you about a reporting system that worked to
10 stop Devin Kelley. And it worked; didn't it?

11 A. Yes.

12 Q. And he didn't do anything illegally or use a friend to try
13 to get around that system; did he?

14 A. Correct.

15 Q. Did you know that Devin Kelley, after this attempt failed
16 and he was denied by the reporting system, that the Air Force
17 internally upgraded his threat status after that?

18 A. I don't recall specifically, but I'll accept it.

19 Q. Show him -- okay. Will you accept that?

20 A. Yes.

21 Q. Okay. Thank you.

22 A. If you are saying it and it's true, then it's not
23 surprising.

24 THE COURT: Give me the date for that.

25 MR. ALSAFFAR: I'll actually show it to, Your Honor.

1 I'll give you the date. It's April 26th, 2013.

2 And let me go ahead and show it. It's the April 26,
3 2013 entry and that's on Exhibit 422-001.

4 BY MR. ALSAFFAR:

5 Q. You see it states, "Remarks added from March 30th, updated
6 to 'barred indefinitely,' caution, possess firearm, threat to
7 U.S. Air Force members and Security Forces."

8 This remark was added to personnel status.

9 A. Yes.

10 Q. Do you see that?

11 A. I see that.

12 Q. Did you know that Devin Kelley tried to access another
13 base in another place after this one?

14 A. I don't recall.

15 Q. All right. This time it was actually as late as 2015; did
16 you know that?

17 A. I don't recall.

18 Q. Did you know it was here in San Antonio?

19 A. I don't recall that.

20 Q. Let me show it to you. It's Exhibit 422, page 1.
21 August 26th, 2015.

22 A. Okay.

23 Q. August 26th, 2015. The data shows that Devin Kelley
24 accessed here at San Antonio Air Force Base and a "deny"
25 recommendation was returned; do you see that?

1 A. Yes.

2 Q. Again --

3 A. Again, by "persistence," you mean he didn't try Holloman,
4 but he tried a different one, yes, and he was denied and the
5 system worked. I agree.

6 Q. Just like you said, you know, he kept persisting. He
7 wanted to get onto the Air Force Base. And this time, he was
8 trying a different Air Force Base. And this time, the
9 Air Force, because they had updated internally their threat
10 status, had spread this warning about Devin Kelley to all the
11 Air Force bases; correct?

12 A. Yes.

13 Q. And because they internally reported his threat status,
14 including that he was someone who shouldn't have guns, he was
15 denied access to the San Antonio Air Force Base; wasn't he?

16 A. He was denied access.

17 Q. And our troops in the San Antonio Air Force Base and that
18 community in that Air Force Base were kept safe because the
19 Air Force internally reported him and they denied him access;
20 right?

21 A. Yes.

22 Q. It's an example, is it not, Doctor, of a reporting system
23 of dangerous people working for our community?

24 A. Yes.

25 Q. Despite Devin Kelley being stopped from entering the

1 San Antonio Air Force Base here, he did not -- a second time,
2 I might add -- he did not try to illegally enter; did he?

3 A. Apparently not.

4 Q. Same questions as before. He didn't try to use a friend
5 to get illegal access? He didn't try to use another creative
6 avenue to get illegal access; did he?

7 A. No.

8 Q. He stopped. He just stopped.

9 A. Well, he tried multiple times.

10 Q. Yeah. And that's as far as it got after the denial;
11 right?

12 Let me show you a third time. February 2016. But now
13 we're at February 2016, we're getting closer to the shooting
14 event too; aren't we?

15 A. Yes.

16 Q. Okay. Devin Kelley, let's pull that up. I'm sorry. It's
17 Joint Exhibit 422. Page 1.

18 In February 17th, 2016, he tries to get back to Holloman
19 Air Force Base, tries to get back in; right?

20 A. Okay. Yes.

21 Q. Is that correct?

22 Thank you.

23 Is that correct? I'm sorry? Did you say yes?

24 A. February 17th --

25 Q. Can you make it a little bigger for the doctor.

1 A. I can read it. It's kind of choppy in the wording.

2 Q. Sure. Sure. But you see that the system returned a
3 "deny" again; correct?

4 A. Yes.

5 Q. And this is -- this is now twice that he is, Devin Kelley,
6 after being convicted by the Air Force, that the Air Force is
7 aware that he's trying to get back to the Air Force Base,
8 where he had made threats to kill a lot of people in there;
9 correct?

10 A. Yes.

11 Q. And the system kept him out, the denial system kept him
12 out a second time at Holloman Air Force Base; didn't it?

13 A. Yes.

14 Q. We can take that down. Thank you.

15 You were talking a little bit -- I'm going to transition
16 here a little bit, just be very quick on this, but you were
17 talking about online guns as being a source. Did I get that
18 correctly?

19 A. Online guns a source?

20 Q. A source for Devin Kelley.

21 A. That he did look online for guns. Yes, he could have
22 purchased online.

23 Q. Is it fair for me to say, and I don't want to
24 mischaracterize it, but when you were talking to Ms. Krieger
25 about all these other avenues, whether it be straw, whether it

1 be gun shows, whether it be ghost guns, or online, what you
2 were really saying is it's possible that he could have gotten
3 access to guns that way; right?

4 A. He could have, and he likely would have, had it been
5 necessary.

6 Q. So let's look at the evidence, though, if you don't mind.
7 You did look at the Texas Rangers file; right?

8 A. Yes.

9 Q. And actually they looked into this specifically. They
10 looked into specific websites, I think some of which you
11 mentioned in your report. They looked at those websites
12 specifically relating to Devin Kelley; correct?

13 A. Yes.

14 Q. And they looked all of his online purchases, not just for
15 guns. They looked up every single thing they could find,
16 including knives, and Etsy accounts and eBay accounts,
17 everything in his life online; correct?

18 A. As I recall, the financial report, yes.

19 Q. No evidence of an Armslist.com log in; correct?

20 A. Not that I recall.

21 Q. No evidence of a Texas Gun Traders log in; correct?

22 A. Again, he got them --

23 Q. No evidence of a Texas Gun Traders log in; correct?

24 A. Correct.

25 Q. No evidence that he bought anything on Armslist or Texas

1 Traders -- Gun Traders; correct?

2 A. I'll take your word for it.

3 Q. All right. Thank you.

4 You talked about this church not being an act of domestic
5 violence because it was an attack on strangers; do you
6 remember that?

7 A. Virtual strangers, yes.

8 Q. I'm sorry?

9 A. I said virtual strangers. Yes.

10 Q. Virtual strangers meaning?

11 A. Meaning that he had encountered some people previously.
12 They were, all intents and purposes, strangers to him. They
13 hardly were --

14 Q. The truth is they were not strangers to him at all, you
15 now know that; right? Now you know that?

16 A. That he had been the same place with them on occasion,
17 rare occasion --

18 Q. Well, let me --

19 A. But I wouldn't call them --

20 Q. Sorry. Go ahead.

21 A. They are virtual strangers. Sure, he -- virtual
22 strangers.

23 Q. He knew many of the people --

24 A. He met them, but he had little contact with them.

25 Q. He knew many of the people in that church; correct?

1 A. Define "knew". I mean, he knew of them. He met some
2 people previously.

3 Q. Okay. You have reviewed the trial testimony of the family
4 members, Danielle Kelley, Michelle Shields, Michael Kelley,
5 Rebecca Kelley, Erin Higgins. You have reviewed all of their
6 testimony; correct?

7 A. Yes.

8 Q. So you know that Devin Kelley, he actually attended the
9 church every once in a while?

10 A. Rarely, but he did.

11 Q. Second, you remember he used to live with Michelle
12 Shields?

13 A. Yes.

14 Q. And you remember Michelle Shields said that she would hold
15 parties at her house?

16 A. She --

17 Q. Hold on. I know, it's Texas. I talk a little slow
18 sometimes. But I'll get there, I promise.

19 A. And I talk fast being from --

20 Q. That's all right. Gigi, the court reporter, thinks I talk
21 fast sometimes too.

22 Do you recall that Michelle Shields said while
23 Devin Kelley was living with her, and Danielle Kelley was
24 living with her, that they would have family gatherings where
25 many, many members of the church would come over to the house;

1 correct?

2 A. True.

3 Q. Okay. And Devin Kelley knew that and saw them and was a
4 part of those parties; correct?

5 A. He saw them. He was there, yes. Still, I would call them
6 very -- again, almost strangers.

7 Q. Doctor, I'm not saying that Devin Kelley was best friends
8 with these people.

9 A. Not even friends.

10 Q. I'm just saying that they weren't strangers; were they?

11 A. Not even friends.

12 Q. That's fine. That's fine. That's what you're comfortable
13 with?

14 A. Acquaintances. Distant. Yes.

15 Q. Mere acquaintances; okay.

16 A. He had met them.

17 Q. Okay.

18 A. Met some of them. That's all.

19 Q. And she also -- Michelle Shields also testified that in
20 addition to the family gatherings she would have like
21 birthdays and Devin Kelley and Danielle Kelley would be there,
22 and always the church family would be there as well with
23 Devin Kelley?

24 MS. KRIEGER: Objection. I believe that misstates
25 the prior testimony of Michelle Shields.

1 THE COURT: That's overruled.

2 BY MR. ALSAFFAR:

3 Q. Do you recall that?

4 A. Repeat the question. I'm sorry.

5 Q. Do you remember that Michelle Shields testified that, for
6 example, she would have a birthday party for her autistic son
7 and she would invite the church family where Devin Kelley
8 would be there as well; correct?

9 A. Yes.

10 Q. Okay. And do you also recall the testimony from Danielle
11 Smith that this church wasn't just any church to her, this
12 church, the entire church was like her family, her entire
13 life?

14 A. When she was growing up, yes.

15 Q. And the only reason it wasn't after she reached adulthood
16 was because Devin Kelley tried to keep those types of people,
17 people close to her, away from her; correct?

18 A. Yes.

19 Q. Okay. He was threatened by people in the church. He was
20 threatened by his her mother, both of them; correct?

21 A. I wouldn't agree that he was threatened by them. I think
22 he wanted to control everything about Danielle's life. He
23 wanted to isolate her. I wouldn't say he was threatened by
24 them.

25 Q. Well, Doctor, I think you probably know very well that

1 people who domestically abuse their spouses try to control
2 access to their abused wives because they don't want those
3 people being in contact and knowing about the abuse; correct?

4 A. That's the isolation. I agree with that. But that's not
5 feeling threatened by them.

6 Q. All right. That's fine.

7 So you agree that Danielle Kelley testified, and you
8 accept her testimony that that church was her family church?

9 A. When she was growing up, yes.

10 Q. And that she -- a lot of the people, a lot of the children
11 that were shot and killed were children that she helped raise;
12 correct?

13 A. Some, yes.

14 Q. And you recall the testimony from both Michelle Shields
15 and Danielle Kelley that the week before the shooting that
16 Devin witnessed the church being very welcoming and loving to
17 Danielle Kelley at the fall festival; right?

18 A. Yes.

19 Q. Now, you testified about something on direct examination
20 and I want to make sure we clear up, because it was about --
21 you said that, you know, part of the reason this massacre
22 happened at this church was because Devin was avenging the
23 abuse and the hate that Danielle Kelley had received at this
24 church?

25 A. I didn't say "hate". I said --

1 Q. Mistreat?

2 A. Ridicule. Mistreatment.

3 Q. Humiliation?

4 A. I didn't use that word either.

5 Q. Oh, you didn't? I'm sorry. I don't mean to misquote you.
6 Please tell me the phrasing.

7 A. If I recall, I used she was ridiculed, tormented,
8 mistreated, bullied. Yeah.

9 Q. Okay. You are aware that Michelle Shields doesn't agree
10 with you that that's not how it happened. Did you remember
11 her testimony in trial?

12 A. I'm talking about Danielle's perception, what Danielle
13 would tell Devin. Whether Michelle denies it or not is not
14 the issue. It's what he perceived.

15 Q. Well, let's talk about Danielle. Danielle actually talked
16 a lot about this in trial testimony. Do you remember that?

17 A. I saw her testimony.

18 Q. And she testified under oath in this courtroom that there
19 was just one kid that ridiculed her, and it was the parents of
20 that kid. And that was it. The rest of the church was always
21 loving to her. Do you remember that?

22 A. I saw that.

23 Q. Do you remember reading it as well?

24 A. I don't recall reading it -- in trial testimony?

25 Q. Yes.

1 A. Well, I saw that her testimony.

2 Q. Do you believe her?

3 A. Not necessarily. I don't necessarily believe it.

4 Q. You don't believe Danielle Smith?

5 A. I don't necessarily believe it is just one family. Yeah.

6 Q. Ms. Krieger didn't bring up the trial testimony. She
7 brought up the statement she gave to the Texas Rangers, and
8 that was a -- that formed the basis of your opinion that
9 Danielle was mistreated by many members of the church, and
10 that that -- her telling that to Devin is why, in part, he
11 committed this act; correct? Do you remember that? It was
12 based on that interview.

13 A. Not just interview, also deposition.

14 Q. Let's talk about what it was based on, that interview, and
15 then I'll talk about the second interview Ms. Krieger asked
16 you about, which was not a deposition, it was an interview
17 with the federal agents. Okay.

18 Let's start with the Texas Rangers' deposition. Do you
19 remember the setting of that -- I'm sorry -- that interview?

20 A. Yes, I saw the video.

21 Q. Oh, you did so the video, okay. So you know that that
22 was -- first of all, that was a mere hours after she was
23 assaulted; correct?

24 A. That she was assaulted?

25 Q. Yes.

1 A. Oh, you mean, it was after she was tied up? Is that what
2 you mean?

3 Q. Yes.

4 A. It was hours after the shooting, yes.

5 Q. It was hours after Danielle Kelley was hog-tied with a gun
6 to her head in front of her children?

7 A. Yes.

8 Q. And that was an assault and an act of domestic violence;
9 was it not?

10 A. Hardly like the act that he committed against the people
11 that he shot.

12 Q. Hardly like the act that he committed against the people
13 that he shot?

14 A. Yeah.

15 Q. Okay.

16 A. He didn't shoot her.

17 Q. That's true.

18 A. He shot lots of other people.

19 Q. My question, though was: Do you agree that it was an act
20 of domestic violence, at the very least?

21 A. Yes. Technically, it is domestic violence --

22 Q. Technically?

23 A. -- but not a severity of shooting someone.

24 Q. I'm just asking if you think it's an act of domestic
25 violence. Is it?

1 A. Yes.

2 Q. It's an act of child abuse too; isn't it?

3 A. Well, because the child witnessed it.

4 Q. I would say so.

5 A. Yes.

6 Q. Yes.

7 Do you agree with that? You don't have to. I'm asking
8 you. Do you agree?

9 A. I understand. It's obviously -- it can be traumatic to a
10 child. I understand that.

11 Q. Do you remember the child was screaming?

12 A. Yes.

13 Q. Until the very moment someone broke in and found her?

14 A. Correct.

15 Q. All right. Going back to your testimony on your
16 foundation. That Texas Rangers' interview that you are
17 relying on, Danielle Smith, it was just within hours of this
18 horrible event, within hours of being hog-tied and had a gun
19 to her head, and she was not alone in that room; was she?

20 A. No.

21 Q. She was in a corner; correct?

22 A. Yes.

23 Q. Michael Kelley, the father of Devin Kelley, was sitting
24 inches away from her; correct?

25 A. Yes.

1 Q. Arm drapped around her; correct?

2 A. I saw that.

3 Q. And two police officers with guns were sitting a mere few
4 feet from her interviewing her; correct?

5 A. Yes.

6 Q. She had no lawyer there representing her interest; did
7 she?

8 A. No.

9 Q. Okay.

10 You are a lawyer; right?

11 A. No.

12 Q. You're not a lawyer?

13 A. Ph.D.

14 Q. I'm sorry. I thought you had a law degree. I apologize.
15 I won't ask you about lawyer stuff then.

16 A. I have four kids who are lawyers, and one a judge, but not
17 me.

18 Q. You must be proud. You should be.

19 THE COURT: Let's just ask a question.

20 BY MR. ALSAFFAR:

21 Q. The second interview, the second interview that
22 Ms. Krieger showed you was from the Department of Defense
23 federal agents; correct?

24 A. Okay. I believe so.

25 Q. Okay. That interview that you based your opinion on was

1 also -- first of all, are you aware that at that point in time
2 the federal agents, in fact, to this day have never offered
3 any kind of immunity to Danielle Kelley or Danielle Smith?

4 MS. KRIEGER: Objection. Relevance.

5 THE COURT: That's overruled.

6 BY MR. ALSAFFAR:

7 Q. Are you aware that to this day the government, the federal
8 government has offered no immunity to prosecution to
9 Ms. Smith?

10 A. It's not something I looked at.

11 Q. So she's now being interviewed by another law enforcement
12 agency, now the federal government, and do you know who else
13 was at that interview with her, sitting right next to her?

14 A. Michael.

15 Q. Michael Kelley; right?

16 She wasn't alone. She wasn't represented by counsel. She
17 wasn't even offered that option; was she?

18 A. I don't know what she was offered, but go ahead.

19 Q. Is that the kind of interrogation you would expect someone
20 to give reliable information on, who is a potential target for
21 a federal investigation?

22 A. I don't see why she would tell a story that wasn't true.
23 If she was concerned that Michael Kelley was there, Michael
24 Kelley knew that his son killed 26 people. Anything that
25 he -- she would say with him there is hardly going to shock

1 him, after what his son already did.

2 Q. Going back to the members of this church. Okay. Are you
3 aware that just a few months before the shooting that
4 Devin Kelley made a specific threat to Michelle Shields?

5 A. You mean in May? And we talked about that on direct, yes.

6 Q. May 2017 correct; right?

7 A. Yes.

8 Q. Okay. And he told Michelle Shields that if she didn't
9 stop interfering with Danielle, that he would wipe out her
10 entire family; do you remember that?

11 A. I recall that, yes.

12 Q. Do you know who at the time, at least, was her family at
13 that time when he said that?

14 MS. KRIEGER: Objection. Vague.

15 BY MR. ALSAFFAR:

16 Q. Do you know who Michelle Shields' family was at the time
17 that that threat to her to "wipe out her entire family" was
18 made?

19 A. Yes.

20 Q. Let's talk about that. It's Michelle Shields; right?

21 A. Yes.

22 Q. Ben Shields, who is her husband?

23 A. Yes.

24 Q. Her son, David Shields; right?

25 A. Yes.

1 Q. Her grandmother, Lula White; correct?

2 A. Correct.

3 Q. All four of whom Devin Kelley knew went to that church
4 regularly every Sunday usually?

5 A. Yes.

6 Q. And you know that it's only by accident, by mere accident,
7 that Michelle Shields, Ben, and her son were not in that
8 church on that day?

9 A. Correct.

10 Q. Okay. But Lula White was?

11 A. Um-hum.

12 Q. Are you aware that she was shot 78 times by Devin Kelley?

13 A. I don't recall the number. I recall she was killed.

14 Q. And you know that Lula White and Devin Kelley
15 specifically, Devin Kelley specifically had multiple
16 confrontations with her; right?

17 A. I don't recall specifically.

18 Q. Do you remember when Lula simply wanted to visit Danielle,
19 when she had the birth of both her grandchildren?

20 A. Yes, I recall, at the hospital.

21 Q. I'm sorry. Do you recall that?

22 A. Yes, I do.

23 Q. Okay. And in response to Lula White simply wanting to see
24 her grandchildren, he threatened to kill her?

25 A. He threatens lots of people, and particularly women. I

1 mean, that's his style.

2 Q. I'm not talking about lots of people, Dr. Fox.

3 A. Okay.

4 Q. I'm talking about the family of Danielle Kelley and
5 Danielle Smith, who were in that church that day.

6 A. Yes, sir.

7 Q. He threatened to kill Lula White?

8 A. Yes.

9 Q. He threatened to kill Michelle Shields?

10 A. Yes.

11 Q. He threatened to kill Ben Shields?

12 A. Well, part of the family, yes.

13 Q. He threatened to kill Michelle's autistic son?

14 A. Yes, by the family.

15 Q. There's also somebody else who was in that church, who
16 stood up to Devin Kelley and confronted him as well. Do you
17 know who that is?

18 A. I'm sorry. Repeat the question.

19 Q. Sure. There's also somebody else in that church family
20 who stood up to Devin Kelley and confronted him. Do you know
21 who that is?

22 A. Not offhand, no.

23 Q. Okay. It's the pastor, the head of the church.

24 MS. KRIEGER: Objection. I actually think the pastor
25 was not at the church.

1 THE COURT: Well, that's not the question.

2 MR. ALSAFFAR: Thank you, Your Honor.

3 THE WITNESS: I recall that now.

4 BY MR. ALSAFFAR:

5 Q. And Pastor Pomeroy, you reviewed the Rangers records, you
6 know that in the months before the shooting he had confronted
7 Devin Kelley specifically about his domestic violence against
8 Danielle Smith; right?

9 A. Yes, I recall that.

10 Q. Do you recall that?

11 A. Yes, I do.

12 Q. Okay. And it is by accident that Pastor Pomeroy was not
13 there that day; is that correct?

14 A. That's correct.

15 Q. Devin Kelley didn't know he wasn't going to be there;
16 right?

17 A. That's correct.

18 Q. And you recall that one of the first shots that he made in
19 that church were right at the head of the pulpit?

20 A. Yes, I recall that too.

21 Q. You also said that Devin Kelley had a unique hatred of
22 religion that motivated him; correct?

23 A. Unique?

24 Q. Yeah. That he developed this unique hatred of religion?

25 A. I wouldn't say "unique." There are other people that hate

1 religion too.

2 Q. I'm sorry. I meant unique to him. Like he had developed
3 a unique hatred for religion. That's one of the reasons he
4 may have been --

5 A. Yes.

6 Q. Okay. Are you familiar with the size of New Braunfels or
7 San Antonio?

8 A. I've seen the maps, yes.

9 Q. Austin, lots and lots of churches?

10 A. Yes.

11 MS. KRIEGER: Objection, Your Honor. He's already
12 testified that he doesn't believe the church was chosen at
13 random.

14 THE COURT: That's overruled.

15 BY MR. ALSAFFAR:

16 Q. Lots and lots of churches, mosque, synagogues much closer
17 this small church in Sutherland Springs Texas; correct?

18 A. Yes.

19 Q. All right. You also said one of the bases for your
20 opinions was that Devin Kelley was -- let me get this right --
21 protecting and defending her to prevent her from trauma and
22 embarrassment; right?

23 A. I did. That was in regard to the upcoming trial, yes.

24 Q. Was he protecting her when he hog-tied her?

25 A. In a sense, yes.

1 Q. Doctor, couldn't he have just --

2 A. Do you want me to explain?

3 Q. No. Your counsel can do that.

4 Doctor, couldn't he have just tied her to the bed with her
5 hands in front of her?

6 MS. KRIEGER: Objection. Speculation.

7 THE COURT: That's overruled.

8 THE WITNESS: He could have.

9 BY MR. ALSAFFAR:

10 Q. Couldn't he have just -- did you see that there's a water
11 heater, a big water heater right across from the bedroom,
12 bolted to the ground. Couldn't he have just tied her to the
13 water heater to protect her?

14 A. He could have.

15 Q. And if he wanted to protect her, couldn't he have just
16 tied her to one of the posts in this barndominium?

17 A. He could have.

18 Q. But he didn't; did he?

19 A. No. That's what he did. There were lots of options.
20 That's what he did.

21 Q. When he put a gun to her head, was he protecting her?

22 A. That's -- I wouldn't say that part is protecting her. It
23 was intimidating her, controlling her, like he did throughout
24 his marriage.

25 Q. Couldn't he have just told her, "Hey, Danielle, stay here

1 with the kids. I'm going to go run a few errands. I'll see
2 you in a few hours" and he could have avenged her at the
3 church and she would have been none the wiser?

4 A. No, because when he started to get ready and take the
5 accessories out of the black tub, she would have seen that
6 and --

7 Q. Couldn't he have done it the night before, when she was
8 asleep, or the day before, or the week before, when she wasn't
9 in the room with him?

10 A. No. He was getting dressed that day for the event that
11 day, getting -- putting on his body armor and mask, et cetera.
12 A week before wouldn't have --

13 Q. If he wanted to protect her, couldn't he have just told
14 her, "I'm going to run a few errands," got in his car -- I
15 mean, they were on a 27-acre, in the middle of the country,
16 pulled off on the side of the road, and put on his gear then?
17 She would be none the wiser; right?

18 A. Could have.

19 Q. He didn't do that, though?

20 A. This is how he did it.

21 Q. He made her watch?

22 A. He made her watch, yes.

23 Well, he didn't make her watch. She was in the room.

24 Q. Well, she had no choice after being to hog-tied; did she?

25 Right?

1 A. I can't say that that was his purpose so she would watch
2 him.

3 Q. Okay. Well, let's just do it by time sequence. He
4 hog-tied her with a gun to her head, and then he put on his
5 clothes and armory and guns in front of her; didn't he?

6 A. Correct.

7 Q. He made his kids watch; didn't he?

8 A. I'm not sure that was his purpose. They were in the room,
9 yes, and --

10 Q. Screaming. They were screaming; weren't they? Crying?

11 A. Yes.

12 Q. He was protecting her, though; right?

13 A. That's what I said.

14 Q. You said you don't think this fact was foreseeable by the
15 Air Force; correct?

16 A. Yes.

17 Q. You don't think -- what's your definition of
18 foreseeability?

19 A. That -- I'm not a lawyer, so I'm not going to give you a
20 legal definition; okay?

21 Q. Tell me your definition.

22 A. Well, that based on what the Air Force knew that they
23 could not have anticipated that he would commit the shooting
24 at the church. They understood that he was a risk of
25 violence. It was foreseeable that he would commit domestic

1 violence in the future, which he did. It was foreseeable that
2 he would commit sexual assault, which he did.

3 But a methodical, dispassionate execution of individuals
4 with whom, although he may have known them at some point, they
5 were not people in his life. They had no control over him
6 like supervisors at the Army did.

7 They weren't in his life like Danielle -- I mean, like
8 Tessa was, or a child. Or girlfriends. They were virtual
9 strangers. So that was not foreseeable.

10 Q. Okay. So in order for this to be foreseeable, you have to
11 see some evidence that would allow the Air Force to actually
12 to predict this mass shooting?

13 A. Well, keep in mind that there are lots of people who make
14 threats. Very few actually occur. However, he didn't leak
15 his intentions to commit the massacre at the church. So I
16 don't see where that type of violence of that severity and
17 that character was foreseeable. Violence of other sorts were
18 foreseeable, but not of that sort.

19 Q. So violence of other mass shootings was foreseeable to the
20 Air Force, just not the church shooting?

21 A. That's not what I said.

22 Q. Well, he made mass shooting threats at the Air Force;
23 correct?

24 A. Well, you're interpreting that. He threatened. He made
25 these verbal threats regarding his supervisor, regarding

1 leadership.

2 Q. Organizations too?

3 A. What's that?

4 Q. Members of organizations as well?

5 A. Yeah. Yeah.

6 Q. Attack strategies as well?

7 A. He made?

8 Q. Planned attack strategies as well?

9 A. He conceived of them. Contemplated them was the word that
10 was used.

11 Q. Was it -- let me ask you a different question, because I'd
12 like to talk to you about what some of the Air Force
13 investigators and commanders, ask about their view of
14 Devin Kelley.

15 Did you review their depositions that were taken in this
16 case from the Air Force commanders and the Air Force
17 investigators?

18 A. Some of them.

19 Q. I'd like to play one for you and ask you your opinion.
20 This is actually the lawyer, staff judge advocate, Colonel
21 Tullos, page 229. Page 10.

22 A. I'm sorry. Colonel?

23 Q. Colonel Tullos.

24 A. I don't believe I saw a deposition from him.

25 Q. That's okay. It's page 229, page 10 through 19. It's

1 also been admitted as Plaintiffs' Exhibit 106.

2 MS. KRIEGER: I want to note for the record that I
3 don't believe a video of this has been admitted as an exhibit.

4 MR. ALSAFFAR: Same testimony, Your Honor.

5 May I play it, Your Honor.

6 THE COURT: One second.

7 This is 106?

8 MR. ALSAFFAR: Yes, Your Honor.

9 THE COURT: So 106 has been admitted.

10 MS. KRIEGER: I'm sorry. The transcript was
11 admitted, Your Honor. I don't believe a video has been.

12 THE COURT: That's overruled.

13 MR. ALSAFFAR: Can you play it? Thank you.

14 (Clip was played.)

15 BY MR. ALSAFFAR:

16 Q. Was it reasonable for Colonel Tullos to conclude that
17 Devin Kelley was a foreseeable risk of committing criminal --
18 future criminal violence?

19 A. It was foreseeable that he would commit domestic violence,
20 sexual violence, yes.

21 Q. Can we play Colonel Bearden? This is his commander. This
22 is the one that issued the barmment letter to protect the
23 Air Force. Do you remember that?

24 (Clip was played.)

25 A. I missed the last sentence.

1 Q. I'm sorry?

2 A. I missed the last sentence.

3 Q. Do you agree with Colonel Bearden that it was --

4 (Clip was played.)

5 Was it reasonable for Colonel Bearden to conclude that
6 Devin Kelley -- that it was foreseeable that Devin Kelley
7 would engage and flee again and engage in serious criminal
8 misconduct?

9 A. Yes.

10 Q. Major McLeod-Hughes was another commander at the Air Force
11 Base. Do you remember reading his deposition?

12 A. I don't believe so, but --

13 Q. Page 113, line 18 through page 114 line 2, from Major
14 McLeod-Hughes, please.

15 (Clip was played.)

16 Do you agree or think it was reasonable for Major
17 McLeod-Hughes to conclude that it was foreseeable that
18 Devin Kelley would engage in serious criminal misconduct and
19 was a threat and danger to the public at large?

20 A. Well, he did commit sexual violence and those were to
21 members of the public.

22 Q. Do you agree?

23 A. With that caveat, sure. It's not foreseeable that he was
24 going to commit a massacre at a public location against in
25 indiscriminate fashion against people who were not confronting

1 and provoking him.

2 Q. I want to show you Special Agent in Charge James Hoy. You
3 might remember he was the one on many of those records and
4 investigated Devin Kelley specifically, and he was one of his
5 supervising agents, one of the supervising at OSI. 152.

6 MS. KRIEGER: Objection, Your Honor, this is getting
7 cumulative.

8 THE COURT: That's overruled.

9 MR. ALSAFFAR: Thank you.

10 BY MR. ALSAFFAR:

11 Q. Page 152.

12 (Clip was played.)

13 THE COURT: Remind me again who was that.

14 MR. ALSAFFAR: That was Special Agent in Charge James
15 Hoy of the AFOSI.

16 THE COURT: Thank you.

17 BY MR. ALSAFFAR:

18 Q. Do you think it was reasonable for Special Agent in Charge
19 Hoy to conclude based on his investigation of Devin Kelley
20 that it was foreseeable that if Devin Kelley got a gun he
21 would commit a mass shooting?

22 A. This was 2020. They already knew that he was a mass
23 killer. Hindsight is 20/20. So I understand that people
24 oftentimes will alter their perceptions of things in the past,
25 knowing how what the outcome is. When you know someone has

1 committed a mass killing, it alters your interpretation of
2 past events. So I agree that it was foreseeable he would
3 commit violence, particularly domestic violence, sexual
4 violence, but not this kind of mass shooting.

5 Q. Okay. Let me show you another OSI Special Agent in
6 Charge, one of the supervising agents in this case, Randall
7 Taylor. Do you remember Randall Taylor's deposition?

8 A. Vaguely, I do.

9 Q. You probably remember his name from all the records that
10 he was involved in this investigation at OSI; correct?

11 A. Yes.

12 Q. Let's play page 63 to page 64. Actually stop.

13 Sorry. I forgot I wanted to ask you something
14 specifically about Randall Taylor because I don't know if you
15 know this. I want to show you JEX 321. This is Randall
16 Taylor's CV.

17 A. CV?

18 Q. CV. His resume. I'm sorry. His resume.

19 A. Yeah.

20 Q. And if you look on page 2 of his resume, I want to show a
21 highlighted part of that for you. Do you see that Randall
22 Taylor, while he was investigating Devin Kelley, was a
23 recognized active shooter expert and key member of the 2011
24 Air Force Active Shooter Threat Working Group. Do you see
25 that?

1 A. Yes.

2 Q. So at the time that he was investigating Devin Kelley, he
3 was -- the Air Force had deemed him an expert in active
4 shooters?

5 A. Yes.

6 Q. Let's play Randall Taylor's deposition, page 63 line 6 to
7 page 64 line 4.

8 (Clip was played.)

9 Do you think it was reasonable for Special Agent in Charge
10 Randall Taylor to conclude that it was a -- based on what he
11 knew of Devin Kelley when he was in the Air Force, that it
12 would be foreseeable that he could commit a mass shooting?

13 A. No. Again, this is -- interview was in 2020. In fact, he
14 even started off by saying, "Was it foreseeable in 2017...What
15 you knew about Kelley."

16 This is, again, hindsight aided by a knowledge of what he
17 did at the church. It certainly impacts one's interpretation
18 of the past.

19 Q. You don't know any of these gentlemen; do you?

20 A. No, I don't.

21 Q. And every single one of the people that we just showed you
22 at some level have some kind of high-level command, are
23 trained soldiers, trained in warfare, trained more than any
24 general members of the public in violence, in working in
25 violent areas, and also in war; correct?

JAMES ALAN FOX - REDIRECT

1 A. Yes. Though, I'm not sure what --

2 Q. Well, I'm asking, is that true of the background of these
3 folks, military folks?

4 A. Yes.

5 MR. ALSAFFAR: Pass the witness, Your Honor.

6 THE COURT: Anything else?

7 MS. KRIEGER: I do, but could we just take a
8 five-minute break?

9 THE COURT: Five minutes.

10 MS. KRIEGER: Thank you.

11 (Recess.)

12 THE COURT: Any redirect?

13 MS. KRIEGER: Yes, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. KRIEGER:

16 Q. Dr. Fox, we ended by talking about these Air Force
17 depositions. First, we were talking about Mr. Taylor and his
18 credentials in active shooters. What's the difference between
19 an active shooter and a mass shooter?

20 A. An active shooter is a wannabe mass shooter, someone who
21 has the desire and intent to kill lots of people in a public
22 place. They don't necessarily succeed, in fact, about a
23 quarter of the time no one gets killed. Half the time, they
24 kill one. The small percentage are able to carry out the kind
25 of rampage that Devin Kelley did.

1 Q. Do you know if any of those Air Force personnel that were
2 interviewed, are any of them trained in psychology or
3 psychiatry?

4 A. Not that I'm aware.

5 Q. Do you know if any of them have studied mass murders?

6 A. Not that I'm aware.

7 Q. We spent some time talking with plaintiffs' counsel about
8 Danielle Smith's testimony, and I believe you said that you do
9 not credit the testimony that she gave in court, at least some
10 of it. Why is that?

11 A. Well, there has been time to reconsider, consult with
12 others, and I just find the stories that she gave earlier
13 multiple times to be more honest.

14 Q. You said the stories she gave previously. Has her story
15 changed over time?

16 A. Yes.

17 Q. Do you recall Danielle saying in her testimony that she
18 wanted to help the plaintiffs?

19 A. Yes, I heard that.

20 Q. Does that have any impact on the credit you give her
21 testimony?

22 A. Yes. It suggests that the desire -- outcome that she
23 desires sometimes that can change what someone says and
24 recalls and reports.

25 Q. Do you recall Danielle saying that she met with some of

1 plaintiffs' counsel?

2 A. Yes.

3 Q. Does that have an impact on the credibility you give
4 her testimony?

5 A. Yes. I recall, I believe, something she had only told to
6 plaintiffs' counsel, but not to others, in various interviews
7 and depositions.

8 Q. And how does the fact that she only told plaintiffs'
9 counsel impact your opinion on her credibility?

10 A. Well, I don't want to imply anything about the interaction
11 between counsel and Danielle, but it is possible that in
12 interactions with plaintiffs' counsel that she has a different
13 outlook on things.

14 Q. When you were talking about Devin Kelley hog-tying
15 Danielle and you said in a sense he was protecting her. Can
16 you explain that a little more.

17 A. Yes. That oftentimes the person closest to a mass shooter
18 is blamed. The general public, why didn't you know something?
19 Why didn't you see it coming? Why didn't you stop the person?

20 Well, actually Danielle did not see it coming. She said
21 she had no idea what he was going to do. Nor did the
22 Devin Kelley's parents had any idea or could foresee what he
23 was going to do at the church.

24 And the fact that she was tied up meant that she couldn't
25 stop him. And for the general public who might want to look

1 for someone to blame because Devin Kelley is dead, and when
2 that happens, oftentimes we try to deflect blame upon other
3 people. And those closest to the deceased killer oftentimes
4 are the targets of that kind of blame.

5 So I think by tying her up it would mute any attempts by
6 the general public to say, "Well, she should have stopped him.
7 When he was putting on the gear, she should have stopped him."

8 She couldn't.

9 Q. And does the fact that Devin Kelley texted his parents to
10 untie her, does that affect your opinion?

11 A. Yes. He didn't want her to be -- to suffer any longer
12 than was necessary. It was not his intent to harm her
13 physically, to -- was not his intent to shoot her, that as
14 soon as it was safe for him for her to be released, he wanted
15 that to happen.

16 Q. Let's pull up JEX 403, page 1 again. I think it was page
17 1 that we were looking at.

18 It says that the "verbal declaration that he has
19 contemplated offensive attack strategies?"

20 A. You are looking away. I'm not hearing you.

21 Q. I'm sorry. I was just trying to find the sentence which
22 is now pulled up.

23 This is the document that said "verbal declaration, he has
24 contemplated offensive attack strategies on both Air Force
25 personnel and organizations." I think you started to say

1 this, do you know what those statements were?

2 A. The verbal declaration?

3 Q. Yes.

4 A. Yeah. I recall it was a statement to Tessa Kelley that
5 they were lucky that he didn't have this weapon, which again,
6 is not very specific. You know, the most likely threats to be
7 carried out are ones that are identified, the specific
8 individual, and made to that individual, so...

9 Q. Was there also another verbal declaration that you were
10 aware of?

11 A. Yes, about the military police, the security, that he
12 would take away their weapons. It's a, you know, it's a
13 situation where he would feel provoked, necessary to protect
14 himself by doing that. So I don't see that as an offensive
15 move.

16 Q. And I think you started to say to plaintiffs' counsel
17 something about how mass shootings are different. Can you
18 explain that statement?

19 A. Different from?

20 Q. When you were looking at this document, the contemplated
21 offensive attack strategies. You started to say to
22 plaintiffs' counsel that mass shootings are different from
23 what he did. Can you explain that?

24 A. Well, the public mass shootings are different. I mean,
25 this is all talking about interactions with individuals that

1 have control over him, whether it be the MP, military police,
2 or supervisors, leadership. And he's a rather disobedient
3 individual. He doesn't like to take orders.

4 That's different than the public mass shooting. He wasn't
5 taking orders from the parishioners. The parishioners weren't
6 threatening him with guns to arrest him. So that's why it's
7 different.

8 Q. And --

9 A. Significantly so.

10 Q. And plaintiffs' counsel also said something about mass
11 shooters and mental health and you started to talk about the
12 connection between mass shooters and mental health problems.
13 What is the connection between mass shooters and mental health
14 problems?

15 A. Well, there are some obviously mass shooters who are
16 severely mentally ill. Most aren't. The data basically show
17 that a minority of mass shooters have documented histories and
18 evidence of severe impairment.

19 Not to say that they are happy people. I mean, a person
20 can be depressed, unhappy, out of a job, lots of --
21 frustrated. Lots of things. Lots of reasons why people
22 commit rampages, but not severely mentally ill.

23 And one other thing, too. On cross-examination, one of
24 the key findings of the FBI's preattack behavior study was
25 brought up four out of five of these active shooters had a

1 constellation of characteristics.

2 But doesn't mean that four out of five people who have the
3 constellation of characteristics commit mass shooting. It's
4 the direction we are talking about. So it is clear that if
5 someone commits a mass shooting they will have these -- they
6 will likely have these things, but people who have these
7 things are not likely to become mass shooters.

8 Q. So let me ask it to you this way. Is mental illness a
9 predictor that someone will commit a mass shooting?

10 A. No. Although, there are some that are mentally ill. Most
11 mentally ill are not violent.

12 Q. How about a history of sexual assault? We've heard that
13 Devin Kelley had a lengthy history of sexual assault. Even
14 that extreme of a history of sexual assault, is that
15 associated with mass shootings?

16 A. Not typically.

17 Q. And I think this is what you were trying to say. Having
18 multiple of these risk factors, mental illness, sexual
19 assault, domestic violence, is there some kind of cumulative
20 effect when it comes to predicting mass shooters based on
21 those?

22 A. Not necessarily. Let's just say, for example, that
23 20 percent had A, and 10 percent had B, and 5 percent had C.
24 Doesn't mean that if you have all three, that it would be
25 35 percent. So they are not necessarily cumulative.

1 They are separate indicators. And Kelley, of course, had
2 the sexual violence, had domestic violence, and he had mental
3 health issues. I agree with that. But that does not make it
4 likely that he would commit a rampage, a methodical, planned
5 rampage against people who were not provoking him at all.

6 Q. Look at -- pull up JEX 422, which plaintiffs' counsel just
7 showed you. And I'm sorry. It's a little hard for me to see,
8 so can we just enlarge those bullet points.

9 So plaintiffs' counsel pointed out to you that
10 Devin Kelley attempted to access a base -- I think it was
11 probably Holloman, although I'm not sure how clear that is --
12 in April of 2013, after he was barred; is that correct?

13 A. Yes.

14 Q. And they said he tried to access the base in San Antonio
15 after he was barred; correct?

16 A. Yes.

17 Q. And after he had previously been denied access to
18 Holloman; right?

19 A. Yes.

20 Q. And I think at that point plaintiffs' counsel actually
21 said "He just stopped." Is that -- am I remembering that
22 correctly?

23 A. Yes.

24 Q. And then plaintiffs' counsel showed you that he actually
25 tried to access Holloman again in 2016; correct?

1 A. Yes.

2 Q. So it's not the case that Devin Kelley just stopped, when
3 he was barred from the Air Force Base?

4 A. He was stopped.

5 Q. He was stopped?

6 A. He was stopped.

7 Q. Do you know if every base has armed guards?

8 A. I'm not in the military. I would assume that most, if not
9 all, do.

10 Q. Do you know if there's any alternative ways of getting on
11 an Air Force Base or accessing things on Air Force bases?

12 A. Maybe by parachute? No, there is not.

13 Q. The fact that Devin Kelley tried repeatedly to access
14 Air Force bases, does that have any impact on your opinion as
15 to whether he would have tried to get a firearm, if he was
16 denied at FFLs?

17 A. If FFLs was the only way to get a weapon, then being in
18 the NICS system would have prevented him. But it wasn't the
19 only way.

20 So the analogy to trying to get onto the base, if he's
21 sealed off because he's denied access and the systems work
22 there to keep him off military bases, but that doesn't keep
23 him away from other types of places, that arm power, that
24 system. So that's sort of an analogy to NICS.

25 So the Air Force has a system to keep -- to bar him. He's

1 barred. He can't get in. He tries repeatedly. Can't get in.

2 But that's not the same thing as buying a gun. He had
3 ways to do it without being barred had he been in NICS. There
4 were other ways he could achieve that.

5 MS. KRIEGER: No further questions, Your Honor.

6 THE COURT: Anything else based on those?

7 MR. ALSAFFAR: Very brief. Very brief.

8 RECROSS-EXAMINATION

9 BY MR. ALSAFFAR:

10 Q. Ms. Krieger asked you about this protection opinion of
11 yours?

12 A. About what opinion?

13 Q. I'm sorry. Ms. Krieger asked you about this protection
14 theory that you have about the shooting?

15 A. Yes.

16 Q. Was Devin Kelley also protecting Danielle's second mother,
17 Erin Higgins, when he asked Erin to meet him alone in his
18 truck that he took to the church, without her husband, on the
19 morning of the shooting?

20 MS. KRIEGER: Objection. Speculation. Frankly,
21 relevance.

22 THE COURT: That's overruled.

23 BY MR. ALSAFFAR:

24 Q. Was he protecting her too?

25 A. I don't see the connection. No, I guess not. It wasn't a

1 protective move.

2 MR. ALSAFFAR: No further questions, Your Honor.

3 THE COURT: Anything based on that?

4 MS. KRIEGER: No, Your Honor.

5 THE COURT: Any further need for this witness, or can
6 he be excused?

7 MS. KRIEGER: He can be excused, Your Honor.

8 THE COURT: Thank you, Professor. You are excused.

9 THE WITNESS: Thank you.

10 THE COURT: So with that, are there any other
11 witnesses from the government, or does the government rest?

12 MS. KRIEGER: The government rests.

13 THE COURT: Is there going to be a rebuttal?

14 MR. JACOB: Yes, Your Honor.

15 But before we do — and starting Monday. But before
16 we do, we would like to move for judgment under 52(c)
17 concerning the John Does 1 through 10. The government hasn't
18 even put on the identity of these responsible third parties,
19 and therefore we should receive a judgment as a matter of law
20 on those.

21 THE COURT: Your response to that.

22 MR. STERN: I believe at this time the United States
23 isn't pursuing the third-party actions against John Doe 1
24 through 10, so we can remove those third-party actions.

25 THE COURT: So that is granted.

1 MR. JACOB: Thank you, Your Honor.

2 THE COURT: Any other motions you want to make at
3 this time?

4 MR. JACOB: No, Your Honor.

5 THE COURT: Okay. Then with that, we'll take to your
6 rebuttal witness on Monday morning at 9.

7 Metzner; is that right?

8 MR. JACOB: Dr. Metzner, yes.

9 THE COURT: So Dr. Metzner at 9:00.

10 Otherwise, we are in recess until that time.

11 (Proceedings continued in process.)

12 -o0o-

13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled matter. I
15 further certify that the transcript fees and format comply
16 with those prescribed by the Court and the Judicial Conference
17 of the United States.

18

19 Date: 04/16/2021

/s/ Gigi Simcox
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 19, 2021

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REPORTED BY:

GIGI SIMCOX, RMR, CRR
OFFICIAL COURT REPORTERS
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 *(San Antonio, Texas; April 19, 2021, at 9:00 a.m., in open*
2 *court.)*

3 THE COURT: Good morning. We'll resume with 18 Civil
4 555.

5 All counsel, parties, witnesses, participants, and
6 members of the public are reminded that this is a formal
7 proceeding, and that they should behave at all times as if
8 they were present in the courtroom.

9 The standing order of the San Antonio Division of the
10 Western District of Texas on remote access to court
11 proceedings remains in effect. Photography, recording, or
12 streaming of this proceeding by any means is strictly
13 prohibited.

14 Though this proceeding is open to the public,
15 technological restraints requires that members of the general
16 public request access from the courtroom deputy to participate
17 remotely. Those granted approval to participate remotely must
18 not forward the electronic link to nonparticipating colleagues
19 or persons, and must not post a link on any public forum.

20 As with all proceedings, violations of these
21 instructions are subject to contempt proceedings.

22 Accordingly, please exercise proper courtroom decorum at all
23 times.

24 With that, we'll turn to the plaintiffs for any
25 redirect.

1 MR. JACOB: Yes, Your Honor. Plaintiffs call Jeffrey
2 Metzner to the stand.

3 MR. STERN: I'm sorry, Your Honor, before -- one
4 housekeeping matter, if you don't mind.

5 THE COURT: Yes.

6 MR. STERN: Late last night, several of the
7 plaintiffs represented by Brett Reynolds filed a motion to
8 strike Academy as a responsible third party.

9 THE COURT: Yes.

10 MR. STERN: The motion really speaks to the heart and
11 the merits of the third-party action against Academy. So for
12 purpose of judicial economy, we ask to be able to address any
13 of those issues in the post-trial findings of fact and
14 conclusions of law.

15 MR. REYNOLDS: May I respond, Your Honor?

16 THE COURT: No. It's getting, frankly, annoying.

17 Mr. Reynolds, I know you have an inconsistent
18 position with some of the plaintiffs' group on the liability
19 of Academy, but as I made clear in the last order, you know,
20 this is a post-trial proceeding, not properly handled by a
21 motion to strike.

22 It's more properly handled as a brief, a post-trial
23 briefing as to whether Academy has any liability. If any,
24 again. And so I'm going to turn your motion to strike, that's
25 denied, but I will consider it as a post-trial briefing on

1 this matter as to whether Academy has any proportionate
2 liability.

3 MR. REYNOLDS: Understood. Thank you, Your Honor.

4 THE COURT: Anything else we need to take up?

5 MR. STERN: Nothing, Your Honor.

6 THE COURT: Your witness.

7 MR. JACOB: Plaintiffs call Jeff Metzner, Your Honor.

8 (JEFFREY METZNER, having been duly sworn, testified as
9 follows:)

10 DIRECT EXAMINATION

11 BY MR. JACOB:

12 Q. Dr. Metzner, can you hear us okay?

13 A. I can.

14 Q. Would you mind introducing yourself to the Court, please.

15 A. Yes. My name is Jeffrey Metzner.

16 Q. And who is your employer?

17 A. I'm actually sell -- I'm getting an echo. I'm not sure
18 why. Are you guys getting an echo?

19 Q. No, we're not.

20 A. Okay. I can live with it.

21 I'm essentially self-employed. I have my own professional
22 corporation.

23 Q. What's your occupation?

24 A. I'm a psychiatrist with a specialty in forensic
25 psychiatry.

1 Q. Would you mind giving the Court a little of your
2 educational background, please?

3 A. Yes. I graduated from the University of Maryland School
4 of Medicine in January of 1975. I then did a six-month
5 medical internship through what used to be called the
6 University of Colorado Health Sciences Center, which was
7 followed by a three-year psychiatric residency at the same
8 medical school, which included an extra year working at the
9 state hospital on the forensic division.

10 I am -- I've been board-certified by the American Board of
11 Psychiatry and Neurology with a specialty in psychiatry since
12 1981. I'm also -- have additional certification in the field
13 of forensic psychiatry from the American Board of Psychiatry
14 and Neurology as well.

15 Q. If you wouldn't mind, let me show you Joint Exhibit 616,
16 which should be your CV, and has been entered into evidence
17 already; okay?

18 A. Yes.

19 Q. First, do you recognize Joint Exhibit 616 as your CV?

20 A. I do.

21 Q. And does your CV accurately reflect your credentials in
22 this case, your background, education, training, and
23 experience?

24 A. Yes.

25 Q. And you mentioned that you are board-certified.

1 Are you licensed to practice medicine?

2 A. I am. I am licensed in the States of Colorado,
3 California, New Mexico, and Pennsylvania.

4 Q. And could you remind me which boards are you
5 board-certified in?

6 A. I'm board -- it's by the American Board of Psychiatry and
7 Neurology and I have lifetime board certification in general
8 psychiatry. And I have now time-limited certification in
9 forensic psychiatry, and I'm active with my certification in
10 additional qualifications in forensic psychiatry.

11 Q. Do you hold any leadership positions related to those
12 boards?

13 A. Yes. For ten -- for about ten years I've been on the
14 committee of the American Board of Psychiatry and Neurology
15 that writes the questions for the board certification in
16 forensic psychiatry. And for about six years I've chaired
17 that committee.

18 Q. And have you been the president of any of these
19 organizations that you mentioned?

20 A. Well, you're actually asking me, I think, about my
21 professional organizations.

22 Q. Yes.

23 A. And the professional organizations that I've been active
24 in, the two main ones are American Psychiatric Association and
25 the American Academy of Psychiatry and Law. I'm a past

1 president of the American Academy of Psychiatry and Law, and
2 within the American Psychiatric Association I've held
3 leadership positions within committees relevant to forensic
4 psychiatry.

5 Q. And let me take down your CV so we can talk to you
6 directly. Are you published in these fields?

7 A. Yes. Within -- yes. I'm published, and probably most of
8 my publications have to do with correctional psychiatry. That
9 is, mental health systems in jails and prisons.

10 Q. And what about honors and awards, have you been the
11 recipient of honors and awards in the field of psychiatry?

12 A. Yes. I've been fortunate to receive awards by both the
13 American Psychiatric Association, the American Academy of
14 Psychiatry and Law, the National Commission on Correctional
15 Health, the Colorado Psychiatric Society among others.

16 Q. And then turning a little bit to your -- your work
17 background, could you give us a little bit of information
18 about your clinical practice?

19 A. Yes. And it really depends on what decade you are talking
20 about. I'm old enough to be talking about decades now, and in
21 the '80s, I had a robust clinical practice which included
22 inpatient -- inpatient psychiatry. I began doing forensic
23 psychiatry in the early '80s.

24 In the '90s and to the present, I've done less clinical
25 psychiatry, much more forensic psychiatry. And within

1 forensic psychiatry, my specialty has been correctional
2 psychiatry, and I've worked for judges and special masters
3 around the country in evaluating and monitoring mental health
4 systems in jails and prisons that have been found to not
5 provide constitutionally adequate care.

6 Q. Have you ever consulted for the United States Government?

7 A. Yes. I've been a consultant since 1980 to the Civil
8 Rights Division Special Litigation Section of the U.S.
9 Department of Justice, and that's been mainly involving
10 evaluating and monitoring mental health systems in jails and
11 prisons.

12 For about the past five years, I've had the sole
13 psychiatric contract with the Department of Homeland Security,
14 the section on CRCL, which is Civil Rights and Civil
15 Liberties, in which I do evaluations of ICE institutions in
16 the context of whether they are providing adequate mental
17 health services.

18 Q. Okay. And do you teach?

19 A. I do teach. And, again, you've got to talk about which
20 decade. In the '80s, I taught medical students, psychiatric
21 residents, and forensic fellows. I pretty much limit my
22 teaching now to the forensic fellowship program. In addition,
23 I presented some national conferences, but I prefer playing
24 golf right now than to teach.

25 Q. Have you worked on any cases in your forensic practice

1 involving mass shooters?

2 A. I have. I was one of the court-appointed psychiatrists in
3 the Aurora theater shooting, which occurred -- the shooting
4 actually occurred in July 2012, and I'm -- also been involved
5 in another mass shooting case, in which my involvement hasn't
6 been disclosed yet, so I really can't say which case that is.
7 Those are the two major cases that I've been involved with.

8 MR. JACOB: Your Honor, at this time, plaintiffs
9 offer Dr. Metzner as an expert in psychiatry and forensic
10 psychiatry.

11 MR. DIEDRICHS: No objection, Your Honor.

12 THE COURT: He's recognized as such.

13 BY MR. JACOB:

14 Q. Dr. Metzner, the first thing I'd like to do with you in
15 discussing your opinions is go through how you went about
16 reaching those opinions. First, when we were here earlier or
17 late last week, a Dr. Bursztajn testified concerning doing a
18 forensic psychiatry autopsy; do you remember that?

19 A. Yes.

20 Q. Do you know what that is?

21 A. Well, I'm not exactly sure what he was talking about.

22 When you talk about psychological autopsies, most -- my
23 understanding of psychological autopsies are specific to when
24 there's a suicide, and you do a psychological autopsy, which
25 essentially means you try to figure out why the person

1 committed suicide and whether there were factors that were
2 predictive of that and whether there were things that you
3 could have done to have prevented that.

4 When I heard Dr. Bursztajn talk about forensic autopsy,
5 what I understood him to really be talking about is when you
6 do a forensic evaluation, regardless of the context, whether
7 it's in a civil case or a criminal case, and within both of
8 them, there's a lot of subtypes of those cases.

9 The methodology used in doing a forensic evaluation is
10 different than the methodology used for doing a clinical
11 evaluation. I think that's what he was referencing. There's
12 nothing specific about a forensic autopsy.

13 Q. Well, then, could you tell us how you went about
14 approaching your rebuttal to Dr. Bursztajn?

15 A. Yes. Well, first of all, you've got to look at all the
16 relevant records, and I reviewed all the records that
17 Dr. Bursztajn reviewed. In addition to that, there were some
18 records that became available after his evaluation, so I
19 reviewed them as well.

20 I also observed probably 90 percent of all the testimony
21 in the case. And of the testimony that I didn't directly
22 observe, except for one day, I got trial transcripts, and I
23 read the transcripts of what I hadn't observed.

24 Q. Do you believe that you had enough information and
25 background to reach reliable opinions on the subject matters

1 that Dr. Bursztajn covered in his testimony?

2 A. Yes.

3 Q. Okay. What I'd like to do with you is I'd like to cover
4 sort of the three areas that Dr. Bursztajn covered in his
5 testimony. First, Devin Kelley's religious views. Second,
6 Dr. Bursztajn's testimony concerning Devin Kelley's diagnoses,
7 including Bipolar Type I. And then third, this -- whether
8 Devin Kelley's motivation as to whether it was a crime of
9 domestic violence on November 5th of 2017.

10 Let me ask you. Have you been able to reach opinions on
11 all these issues?

12 A. Yes.

13 Q. And are all of the opinions that you're going to be
14 providing this Court today to a reasonable degree of medical
15 probability?

16 A. Yes.

17 Q. Okay. Then let's start with that first area, the --
18 Dr. Bursztajn testified about Devin Kelley's religious views.

19 Do you remember that testimony?

20 A. I do.

21 Q. And what I'd like to do is -- is talk in sort of two parts
22 in this -- in this conversation. First, Dr. Bursztajn
23 compared Mr. Kelley's religious views in the Air Force with
24 his religious views outside the Air Force.

25 Do you remember that testimony?

1 A. I do.

2 Q. Okay. So I'd like to take each of those in turn starting
3 with the -- his -- Mr. Kelley's religious views in the
4 Air Force. Were you able to form opinions on his religious
5 views or motivations while in the Air Force and what was known
6 to the Air Force at the time?

7 A. Yes.

8 Q. And when Dr. Bursztajn was talking about Mr. Kelley's
9 religious views in the Air Force, did you watch that
10 testimony; did you watch Dr. Bursztajn testify?

11 A. I did.

12 Q. Did he actually show you or the Court evidence that
13 Devin Kelley was devoutly religious while in the Air Force?

14 A. I do not think he did.

15 Q. Okay. Are you aware of any evidence known to the
16 Air Force that would indicate that Mr. Kelley had some
17 religious tendencies while in the Air Force?

18 A. Yes, I am.

19 Q. And can you tell us what that evidence is, if -- if any?

20 A. Yes. There's two pieces of evidence that I saw. One is
21 when he was first hospitalized at Peak, which I think it was
22 in -- I think it was February of 2012 until early March.
23 Yeah.

24 Part of his treatment there, they apparently asked him to
25 do a daily journal. And so if you look in his journal there's

1 some journal entries, which certainly says something about his
2 religious beliefs at that particular time. And then --

3 Q. I apologize. Go ahead.

4 A. And then the second one was if you look at his Facebook
5 postings, that there are some religious passages in his
6 Facebook postings.

7 Q. Well, I'd like to talk about what was known to the
8 Air Force at the time that Devin Kelley was in the Air Force.
9 And so let me show you Joint Exhibit 357, which -- and I'll
10 have you identify Joint Exhibit 357 for the Court, please.

11 A. Okay. That's the journal that I was referencing when he
12 was at Peak in February of 2012.

13 Q. And I believe you said that this journal was the first of
14 the two hospitalizations?

15 A. That is correct.

16 Q. In the second time Mr. Kelley was hospitalized in a mental
17 institution by the Air Force, are you aware if he created a
18 journal?

19 A. Well, discovery did not include any journal, so I'm
20 assuming he did not.

21 Q. Let me show you a passage and I'll show you page 2 of
22 Mr. Kelley's journal Joint Exhibit 357.

23 Do you see page 2 on your screen?

24 A. I do.

25 Q. And if you wouldn't mind, we can zoom into the highlighted

1 portion. And read the highlighted portion to the Court.

2 A. "I can finally fight my fears and go in unison with God.
3 I'm really going to enjoy the peaceful time with my Bible. I
4 always had something better to do than connect with God."

5 Q. What, if anything, does this type of writing in
6 Mr. Kelley's journal tell you about Mr. Kelley's religious
7 motivations?

8 A. Well, it tells me at least when he was at Peak, he was --
9 religion was on his mind. And I think the second sentence I
10 read, "I always had something better to do than connect with
11 God," says to me that prior to this, he wasn't connecting with
12 God very often.

13 Q. Let me ask you this. Does the -- have you read the entire
14 journal, Mr. Kelley's entire journal?

15 A. I have.

16 Q. Does it -- does that -- reading that journal, lead you to
17 conclude that Mr. Kelley is devoutly religious?

18 A. No. What it leads me to conclude, similar in one of his
19 assessments that ask about religion, is that he considers
20 himself to be a Christian and nondenominational.

21 Q. Let me show you some other portions of this journal and
22 let's go through a couple of examples. I want to show you
23 Joint Exhibit 357, page 9. And, again, we've got some
24 highlight portions. Are you able to read the highlighted
25 portions?

1 A. I am.

2 Q. Would you mind reading those highlighted portions?

3 A. "I just found out Tessa is hanging out at some guy named
4 Chris' house. It enrages me. I don't like that she is
5 hanging out with a guy. If I was there, I would kill him.
6 She told me to stop harassing her. Maybe I have a mental
7 disorder. But now that I'm pretty sure she has been seeing
8 people behind my back, unless she proves to me she loved me,
9 I'm going to do whatever it takes to destroy all of this.
10 I'll play along and wait out my time here."

11 Q. This topic of Tessa cheating has come up before. In your
12 review of the materials, did you find any evidence that Tessa
13 Kelley was cheating on Devin Kelley?

14 A. I did not.

15 Q. And, similarly, comparing and contrasting Tessa to
16 Danielle Smith, did you find any evidence that Devin Kelley
17 believed that Danielle was -- was cheating on him?

18 A. I did. The -- he had said that to Candace Marlowe, who
19 provided treatment the summer of 2016, and for, I think, one
20 session during September 2017. He had said that she was
21 cheating.

22 Q. Okay. And we'll take a look at those records in a bit,
23 but before we do, I want to go through one more passage from
24 Mr. Kelley's journal and I want to show you Joint Exhibit 357,
25 still his journal, and then I'll -- it's page 15 and I'll --

1 I'll bring out the highlighted portions, so you can read them
2 a little better.

3 First, are you able to see page 15 of Mr. Kelley's
4 journal?

5 A. Yes.

6 Q. And would you read the highlighted portions of
7 Mr. Kelley's journal for us, please?

8 A. "I'm going to cut myself on my leg. Tessa keeps going and
9 hanging out with people she doesn't even know that well. This
10 hurts. I need to get out of this place. I know what I'm
11 going to do now. It's kind of hard to cut yourself with a
12 spork, but the pain does help. I just want to be numb to
13 everything. I'm seriously going over in my mind what it would
14 be like if I actually did suicide-homicide. I don't want to,
15 but if this doesn't work out, I have no other alternative for
16 myself until death do us part."

17 Q. Did you review the Air Force files on -- on Devin Kelley,
18 the AFOSI files?

19 A. Yes.

20 Q. The Air Force interviewed dozens of people that -- that
21 knew Devin Kelley while he was in the Air Force.

22 Are you aware whether any of those interviews revealed
23 that Mr. Kelley was devoutly religious?

24 A. I found no evidence from any of those interviews that he
25 was devoutly religious.

1 Q. And is it fair to say that Tessa Kelley, Mr. Kelley's
2 wife, gave numerous statements to the Air Force?

3 A. Correct.

4 Q. What evidence in those numerous statements from his wife
5 did you find that Mr. Kelley was devoutly religious while he
6 was in the Air Force?

7 A. I found none.

8 Q. In watching the trial, are you aware of any witnesses that
9 testified, fact witnesses, that testified that Mr. Kelley was
10 devoutly religious in the Air Force?

11 A. No, I am not.

12 Q. Do you have any opinion on whether Mr. Kelley's religion
13 was a motivating factor while he was in the Air Force?

14 A. I do have -- well, "motivating factor," what context?

15 Q. In his relationships with Tessa Kelley, for example.

16 A. Yes. I have an opinion. And my opinion is that just his
17 beliefs were not much of a factor in his relationships, based
18 on everything that I've looked at.

19 Q. Let's turn now to -- we talked about his religion in the
20 Air Force. I want to talk about his religion following the
21 Air Force.

22 Dr. Bursztajn testified that he became fanatically
23 anti-religious following the Air Force, and I want to show you
24 some of the documents that he relied on to reach that
25 conclusion.

1 Let me show you Joint Exhibit 503, page 641, and I'm going
2 to -- these are Facebook posts that Mr. Kelley made, and I'm
3 going to zoom in on the fourth block from the top. This is a
4 Facebook post where he's saying he's atheist, and noting that
5 they are ignorant, self-righteous Christians.

6 Do you remember this testimony, Dr. Metzner?

7 A. I do.

8 Q. My question to you, Dr. Metzner, is: Does this type of
9 evidence from Facebook convince you that Mr. Kelley is
10 fanatically anti-religious following his service in the
11 Air Force?

12 A. Does not.

13 Q. And why is that?

14 A. Well, you really have to look at this particular posting
15 in context. There are at least two or three other postings
16 right before that, within minutes before that, which gives
17 this much more context.

18 And what the context is, if you look down at the bottom,
19 where it says, "Yeah, for real, all I know is if any of my
20 wife's family are going to heaven, I def don't want to spend
21 eternity with them."

22 And then that's the one right before the one that you just
23 showed me that Dr. Bursztajn appeared to be relying on. And
24 when you look at those two together, it's clear that he's not
25 talking about all Christians. He's talking about Michelle

1 Kelley, and her family.

2 And then if you look at the very top one, which, again, is
3 done within minutes, "No offense if you believe in heysus" —
4 as I understand that, he's saying that if you believe in
5 Jesus, I'm not meaning to offend you.

6 So this does not look to me like a fanatical
7 anti-religious zealot. This looks to me like someone is very
8 angry at Michelle Shields in saying that she's a hypocrite.

9 Q. And you said that they were made within minutes of each
10 other. The first post where he's saying, "Yeah, for real, all
11 I know is, any of my wife's family are going to heaven I def
12 don't want to sped eternity with them."

13 Can you tell the Court when that post was made?

14 A. '17 05 UTC.

15 Q. And how many minutes passes before he makes the next post
16 about being an atheist?

17 A. Two minutes and 24 seconds.

18 Q. And what about the next post saying "no offense"?

19 A. Almost two minutes.

20 Q. Okay. Are you aware of any other threats that
21 Devin Kelley made in that May 2017 time frame when these posts
22 on Joint Exhibit 503 page 641 were made?

23 A. Yes. And I know it's been testimony — and I — there's a
24 text to Michelle Shields, and it was May. I forget which day
25 in May of 2017, but basically it's saying, "Stay out of my

1 family." It was a very threatening text.

2 Q. Do you have an opinion on whether religion motivated
3 Mr. Kelley's conduct on November 5th of 2017?

4 A. Yes, I have an opinion. And my opinion is that religion
5 was not the motivation of his conduct on November 5th, 2017.

6 Q. Okay. So moving on from religion, I want to switch gears
7 a little bit and talk to you about Dr. Bursztajn's testimony
8 concerning of the diagnoses and mental health of Mr. Kelley
9 following the Air Force. And on this point, he talked about
10 two issues that I'd like to address with you.

11 First, the drug cocktails that Dr. Bursztajn discussed in
12 his testimony. And then second, the Bipolar Type I diagnosis
13 and associated delusional issues that Dr. Bursztajn discussed.

14 First, have you reached opinions on those two issues?

15 A. I have.

16 Q. Let me talk to you first about the drug cocktail that
17 Dr. Bursztajn discussed, and he -- and I want to show you two
18 documents that he looked at and shared with this Court. Let
19 me put up on the screen Joint Exhibit 742 and Joint Exhibit
20 378. And I've got page 3 of Joint Exhibit 742 and page 12 of
21 378. First, let me zoom in on paragraph 10.19 of page 3 of
22 742 and the other portions.

23 First, before we get any further, can you identify what
24 you are looking at in Joint Exhibit 742?

25 A. Well, I have four things up on my screen. I'm looking at

1 one, a highlight of a statement from Mr. Swanson.

2 Q. Yes.

3 A. And I'm also looking at some blood levels of some
4 Benzodiazepines that came from the autopsy of Mr. Kelley.

5 Q. And the blood levels that Dr. Bursztajn discussed are from
6 his autopsy, Joint Exhibit 378; is that correct?

7 A. Yes.

8 Q. Okay. So let me look back at the two paragraphs or the
9 two-part portions of these records. And first, in the first
10 record, on paragraph 10.19, could you briefly summarize for us
11 what is the -- what's happening there?

12 A. Yes. Mr. Swanson had reportedly told the Texas Rangers
13 that he had talked with Mr. Kelley the day before the
14 shooting, and that Mr. Kelley told him that -- where they both
15 apparently were taking Klonopin, which is clonazepam, and that
16 Devin Kelley told him that on that particular day he had taken
17 three times the amount than what had been prescribed to him
18 due to a headache he was having.

19 Q. And what day was it that this testimony occurred on -- or
20 this statement occurred from Mr. Kelley, rather?

21 A. The day before. November 4, 2017. The day before the
22 shooting.

23 Q. And looking at the toxicology evidence from the autopsy,
24 Joint Exhibit 378 below, when was that toxicology taken, to
25 your knowledge?

1 A. That was at the time of his death on November 5th.

2 Q. Would the -- if Mr. Kelley took three times the dose the
3 day before the -- before his death, would his toxicology and
4 his autopsy look as we see it in Joint Exhibit 378?

5 A. I don't believe so. And the reason I say I don't believe
6 so is these levels are not very large levels. And,
7 unfortunately, I don't know the exact therapeutic doses for
8 that particular lab, but I'm almost positive, 90 percent sure,
9 that these are more trace amounts. And clonazepam has a long
10 enough half-life that had he taken even a therapeutic dose,
11 let alone three times what he was supposed to be taking, the
12 next day, these levels would have been higher.

13 Q. In his testimony as well as his report, Dr. Bursztajn
14 opined that Mr. Kelley was not intoxicated at the time of the
15 shooting, and his blood tests were negative for Xanax and
16 clonazepam. Let me ask you two questions.

17 First, Xanax, is Xanax reported on the toxicology reports
18 on Joint Exhibit 378?

19 A. Yeah. Xanax is the trade name for alprazolam.

20 Q. And if -- is Dr. Bursztajn's testimony in his report
21 concerning Mr. Kelley not being intoxicated, is that
22 consistent with the toxicology reports you found in
23 Mr. Kelley's autopsy?

24 A. Yes.

25 Q. And one issue that Dr. Bursztajn briefly mentioned that I

1 want to make sure we're very clear about, do you see how
2 Mr. Kelley reported a headache on the day before?

3 A. Yes.

4 Q. Based on your review of the records from the Air Force,
5 was headaches something that Mr. Kelley suffered throughout
6 his life?

7 A. Well, he certainly suffered from them in the Air Force,
8 yes.

9 Q. Based on the toxicology and autopsy report, what
10 pathological evidence did you find that Mr. Kelley
11 deteriorated following his -- his conduct -- bad conduct
12 discharge from the Air Force?

13 A. The toxicological report doesn't give any evidence that
14 there was deterioration.

15 Q. But Dr. Bursztajn said that maybe Mr. Kelley was suffering
16 some sort of withdrawal symptoms.

17 Do you have any opinions on that?

18 A. Yes. The -- I don't think that you can say that he was
19 experiencing withdrawal symptoms for a number of reasons.

20 First of all, we don't know what medications he was taking
21 in the previous weeks, other than there's some evidence -- we
22 know that he took some clonazepam. He took some Xanax based
23 on the toxicology results, which showed trace amounts, but the
24 fact that he took them, you can't then say, "Well, he
25 obviously was withdrawing."

1 We don't know how often he was taking it. We don't know
2 what his history of tolerance was. We don't know what his
3 history of past withdrawal. Him withdrawing from Xanax and
4 Klonopin is as likely as he was withdrawing from heroin. I
5 mean, there's no evidence, and anything is possible, but
6 there's no evidence to say that he was withdrawing.

7 Q. Are you aware whether Mr. Kelley took similar types of
8 drugs while in the Air Force?

9 A. Yes. During the Air Force, he was prescribed Xanax. He
10 was prescribed the Klonopin. He was also prescribed
11 antidepressant medication.

12 Q. Okay. I want to now switch gears again and -- and talk,
13 move on to Dr. Bursztajn's testimony concerning the Bipolar I
14 diagnosis. Do you know what Dr. Bursztajn's conclusion
15 concerning Bipolar I was based on?

16 A. Well, I think it was based on two things. One, he said --
17 one, it was based on the diagnosis made by Candace Marlowe --
18 I think was her last name -- and he said he had no reason to
19 doubt that diagnosis.

20 And the second thing I think it was based on is in his
21 testimony, he basically said that Mr. Kelley had a delusional
22 belief, that he was grandiose, that he was psychotic. And
23 that was consistent, I think from Dr. Bursztajn's perspective,
24 of being a manic episode.

25 Q. Okay. If we could, let's take each of those in turn. So

1 starting, you said, with the diagnosis in Candace Marlowe's
2 records.

3 First, could you tell the Court who Candace Marlowe is.

4 A. Yes. She is a therapist who has -- who is a licensed
5 professional counselor, and she provided individual therapy to
6 Mr. Kelley during the summer of 2016 and for one session
7 during September 2017.

8 Q. A licensed counselor. Is that the same as a psychologist?

9 A. No.

10 Q. What's the difference?

11 A. Well, again, it depends on the state. Most states, not
12 all states, but most states, to be a licensed psychologist,
13 just from an educational background, you need a Ph.D. Now,
14 there are some states that if you are master's level, you can
15 be a licensed psychologist.

16 Licensed professional counselor in most states is a
17 master's degree in some counseling field. It could be family
18 marriage. It could be just a counseling degree. It could be
19 a master's in psychology.

20 So that's the difference.

21 Q. Did you review Ms. Marlowe's mental health records for
22 Mr. Kelley?

23 A. I did.

24 Q. And can you tell the Court how extensive were those
25 records, in terms of the number of pages of actual therapy

1 notes?

2 A. I think there are about 20. It was either 20 or 27 pages
3 of therapy notes in contrast to about 47 pages of billing
4 records.

5 Q. Are you aware of how extensive the mental health records
6 of the Air Force were on Mr. Kelley?

7 A. Yes.

8 Q. Could you --

9 A. They were -- I think they were over a thousand pages.

10 Q. Okay. Well, let's go through -- well, before we get to
11 Ms. Marlowe's medical records, let me ask you this: Does the
12 field of psychiatry have any publications that can tell us
13 definitively or help us understand what the criteria for
14 diagnosing someone with Bipolar I -- Type I is?

15 A. Yes. The American Psychiatric Association develops and
16 publishes the DSM-5, which is the Diagnostic and Statistical
17 Manual of the American Psychiatric Association, and it's how,
18 I would say 95 percent of all mental health professionals, not
19 just psychiatrists, in this country use that to structure how
20 you make a diagnosis, because it provides the criteria that
21 needs to be satisfied for any particular psychiatric or mental
22 health diagnosis.

23 Q. Okay. Let me show you Plaintiffs' Exhibit 775, and lay
24 some foundation first before we discuss it; okay?

25 A. Yes.

1 Q. First, can you identify Plaintiffs' Exhibit 775 for the
2 Court, please.

3 A. Yes. That's -- that's the cover page for the DSM-5.

4 Q. Is the DSM-5 a reliable authority in the field of
5 psychiatry?

6 A. Yes.

7 Q. And you said that this is published by the American
8 Psychiatric Association?

9 A. Correct.

10 Q. And is that the same organization that you've held
11 leadership roles in?

12 A. Yes.

13 Q. Okay. Let's talk about what the DSM-5 says about bipolar
14 disease, Bipolar Type I. Let's go to page 5 of Joint Exhibit
15 775.

16 And can you tell us what this chapter on page 5 is
17 referencing?

18 A. Yes. This is referencing bipolar and related disorders.
19 It gives both a narrative, but it also gives specific criteria
20 for making diagnoses of either a bipolar disorder or its
21 related disorders.

22 Q. I want to zoom in on Bipolar Type I, and, briefly, could
23 you tell the Court why we're focusing on Type I bipolar
24 disease?

25 A. Yes, for a number of reasons. First of all, that's the

1 diagnosis that Dr. Bursztajn states Mr. Kelley had, as well as
2 the diagnosis that Ms. Marlowe stated that he had. And
3 there's what's called Bipolar I and Bipolar II.

4 And the distinction between the two is to have a Bipolar I
5 disorder, you've had to have met the criteria for a manic
6 episode. In contrast to Bipolar II, rather than having a
7 manic episode, you'd have had to meet criteria for what's
8 called a hypomanic episode.

9 And the difference between the two is a manic episode is a
10 more severe form than a hypomanic episode.

11 Q. And did Dr. Bursztajn, or anyone else, were they concerned
12 with Bipolar II for Mr. Kelley?

13 A. No. They -- the diagnosis was Bipolar I, and, in part,
14 because -- I think in part -- because Dr. Bursztajn was
15 essentially saying that he had a manic episode that was
16 characterized by delusional beliefs and paranoid thinking and
17 grandiose thinking.

18 Q. All right. Well, let's go through this and see if we can
19 work through it. On page 5 of Plaintiffs' Exhibit 775 -- I'm
20 sorry. Page 1. Going back to page 1. And going to page 5,
21 yes, and zooming back in on the Bipolar I disorder.

22 Could you read to the Court the highlighted portion of
23 page 5 of 775?

24 A. For a diagnosis of Bipolar I disorder, it is necessary to
25 meet the following criteria for a manic episode.

1 Q. So if Mr. Kelley doesn't meet the following criteria,
2 which we'll discuss in a second, can he have Bipolar I
3 disorder per the APA?

4 A. No.

5 Q. Okay. Let's look at page 6 of Plaintiffs' Exhibit 775 and
6 see what is required for a manic episode. First, could you
7 read the paragraph labeled A on page 6 of Plaintiffs' 775?

8 A. Yes. This is the first criteria for a manic episode, "A
9 distinct period of abnormally and persistently elevated
10 expansive or irritable mood and abnormally -- and persistently
11 increased goal-directed activity or energy lasting at least
12 one week and present most of the day, nearly every day."

13 Q. So let me ask you this: If this type of activity or
14 character is present only for a day or a couple of days, would
15 that meet the APA's diagnostic criteria for Bipolar Type I?

16 A. It does not.

17 Q. Okay. Could you read the paragraph labeled "B" for the
18 Court, please.

19 A. "During the period of mood disturbance and increased
20 energy or activity, three or more of the following symptoms,
21 four if the mood is only irritable, are present to a
22 significant degree and represent a noticeable change from
23 usual behavior."

24 Q. I see that the APA lists seven criteria.

25 Could you take us through the criteria listed in the

1 DSM-5?

2 A. Yes. So you need -- you need to meet three or four of the
3 following criteria.

4 The first one is, "Inflated self-esteem or grandiosity.
5 The second one is decreased need for sleep. That is, the
6 person feels rested after only three hours of sleep. More
7 talkative than usual or pressure to keep talking. Four,
8 flight of ideas or subjective experience that thoughts are
9 racing. Five, distractibility. Attention too easily drawn to
10 unimportant or irrelevant external stimuli as reported or
11 observed. Six, increase in goal activity. Either socially at
12 work or school, or sexually, or psychomotor advocacy, i.e.
13 purposeless, non-goal-directed activity. And seven is
14 excessive involvement in activities that have a high potential
15 for painful consequences. For example, engaging in
16 unrestrained buying sprees, sexual indiscretions, or foolish
17 business investments."

18 Q. Now, if the mood is only irritable, you need four criteria
19 is what the paragraph B says?

20 A. Yes.

21 Q. And could you explain that to us, please?

22 A. Well, there's a difference between an elevated expansive
23 mood and an irritable mood. Most -- well, I won't say -- most
24 people, I would say -- most people who have manic episodes,
25 have persistently elevated, expansive moods, and you don't

1 have to be a psychiatrist to see that. It is obvious to most
2 people.

3 And because irritable mood -- I think the reason they have
4 four criteria for irritable mood rather than three is a lot of
5 people who aren't manic have irritable moods, and so you're
6 going to need to have more of the B criteria symptoms to
7 demonstrate that it's more than just, you know, you're having
8 a bad day or you have an irritable personality kind of
9 attitude.

10 Q. And is this a type, this set of criteria listed in the
11 DSM-5, is that the type of thing that we can cherrypick and
12 say he had an increased self-esteem one day, and then the next
13 week he had a decreased need for sleep, and, therefore -- and
14 then maybe three days later, he has a flight of ideas, we can
15 say, "Oh, he is now having a manic episode because he's had
16 these symptoms, disparate symptoms across various times"?

17 A. No. That is why, when you read A and B., first of all,
18 the elevated mood has to be persistent for at least a week and
19 present most of the day, nearly every day.

20 And then when you look at B, whether it's three symptoms
21 or four, they have to be present to a significant degree
22 throughout the period of the mood disturbance, which is
23 required to be at least a week for most of the time.

24 Q. And do they have to be?

25 A. And --

1 Q. I'm sorry.

2 A. And then, in addition, if you just scroll down a little
3 bit, where it says -- Yeah, go to -- go to "D" where it says
4 those symptoms need to be -- aren't attributed to either drug
5 ingestion, drug abuse, or another medical condition.

6 So, for example, some of these symptoms in category D,
7 Mr. Kelley had related to other medical conditions. For
8 example, his -- if you will take D off and let me look at B
9 again. If you look at 5, "Distractibility." He had ADHD and
10 had symptoms, and one of the symptoms of ADHD is
11 distractibility. So you would have to make a judgment if he
12 had distractibility for a week during this period of time, was
13 it due to ADHD or was it due to a manic episode.

14 Q. And let me follow up on that. Do all of the symptoms, you
15 know, the cluster of symptoms, have to be present at the same
16 time during the manic episode for a week?

17 A. Yes. Yes. And I'll just give you one other example.

18 If you look at 4, "Flight of ideas or subjective
19 experience that thoughts are racing," he never demonstrated
20 flight of ideas. He did demonstrate, both in the Air Force
21 and to Ms. Marlowe, complained of racing thoughts, and both --
22 in the Air Force, that was attributed to his anxiety. And
23 that's one of the reasons he got anti-anxiety medications.

24 Q. And let's look back at all the criteria, taking down
25 paragraph D, and I want to ask you: Dr. Metzner, do you have

1 an opinion on whether Mr. Kelley met the criteria for a manic
2 episode at any time in his life?

3 A. I do have an opinion. And my opinion is I don't think
4 it's a close opinion, I don't think he ever met criteria for a
5 manic episode.

6 Q. And let me show you one more section of Mr. Kelley's -- of
7 the DSM-5 and talk to you about that. I want to show you page
8 9 of Plaintiffs' Exhibit 775, and zoom in on the diagnostic
9 features.

10 And could you read the diagnostic features from page 7 of
11 775, the highlighted portion?

12 A. Highlighted portion, I assume.

13 "Mood in a manic episode is often described as euphoric,
14 excessively cheerful, high, or feeling on top of the world.
15 In some cases, the mood is of such a highly infectious quality
16 that it is easily recognized as excessive, and may be
17 characterized by unlimited and haphazard enthusiasm for
18 interpersonal, sexual, or occupational interactions."

19 Q. Dr. Metzner, in your review of the records and the
20 testimony, has anyone described Mr. Kelley in this manner or
21 even close to this manner?

22 A. No. The -- I found no descriptions even approximating
23 that.

24 Q. And if we could, let me take you -- I want to step back to
25 page 6 of 775, so to the previous record that we were looking

1 at. And just zooming in on the -- on the criteria -- back in
2 on the criteria.

3 Are you -- Dr. Metzner, looking at these criteria for
4 manic episode, are you aware of any evidence from the records
5 or the testimony that you would review -- that you reviewed
6 that contradicts, that is evidence of the opposite of the
7 symptoms presented in the manic episode?

8 A. I am.

9 Q. And could you briefly --

10 A. They include the following: B2 where it says, "Deceased
11 need for sleep, feels rested after only three hours of sleep."

12 Well, he had sleep disturbances. He had trouble sleeping.
13 And it was problematic. He wasn't resting. That's why it was
14 called a sleep disturbance.

15 Number 3, "More talkative than usual or pressure to keep
16 talking." Well, if you look at one of Ms. Marlowe's notes,
17 she describes him as having trouble speaking in certain
18 circumstances, being inhibited.

19 Q. Well, let me -- this might be a good point to actually
20 look at those records, and show the Court that evidence. So
21 let me show you Joint Exhibit 63, and I'll show you page 1
22 first. And this has been previously entered into evidence as
23 Ms. Marlowe's records.

24 And I want to show you the last page, page 47 of Joint
25 Exhibit 63. And zooming in on the initial assessment.

1 Doctor, are you aware this is the initial assessment where
2 Ms. Marlowe diagnosis Bipolar Type I?

3 A. Yes.

4 Q. And you said one of the -- the criteria was the decreased
5 need for sleep, and you said Ms. Marlowe's records contradicts
6 that.

7 Can you explain?

8 A. Yes. She lists one of the symptoms as "sleeping poorly."
9 So that's -- again, that's a sleep disturbance. I'm having
10 trouble either going to sleep or staying asleep, as opposed to
11 decreased need for sleep. When you're manic, you don't -- you
12 feel -- you don't feel like you need to be sleeping because
13 you have so much energy and you're not tired.

14 Q. Okay. That was going to be my question, is: Why is it
15 that Bipolar Type I individuals, when they are manic, have a
16 decreased need for sleep as opposed to sleeping poorly?

17 A. That's part of the neurochemistry of bipolar. You have
18 people who have a manic episode, sometimes and frequently,
19 it's very disruptive.

20 They go on spending sprees and they do things that they
21 thought made a lot of sense at the time, but made no sense.
22 And then there's some people who become incredibly productive
23 during a manic episode because they have so much energy.

24 Q. Let me show you another record from Ms. Marlowe's notes,
25 and I want to show you Joint Exhibit 63, page 40. And I'll --

1 this has been admitted into evidence. Let me zoom in on that
2 first paragraph.

3 First, could you tell the Court, Dr. Metzner, what we are
4 looking at on page 40 of Joint Exhibit 63?

5 A. Yes. This is a treatment summary written in July of 2016
6 by Ms. Marlowe of what treatment up to that point had been.

7 Q. And do you see any evidence here that -- that is contrary
8 to a having a manic episode?

9 A. Yes. If you -- one of the symptoms she reports is that he
10 was having sometimes the inability to speak. And if you
11 remember, one of the manic episodes is called "pressured
12 speech," and that is -- or flight of ideas.

13 And flight of ideas is people are just saying whatever
14 comes to their mind, and it's very -- sometimes it's hard to
15 connect what their last thought was to the current thought.

16 Pressured speech means, you know, someone is talking
17 rapidly like they feel a lot of pressure to say what they are
18 thinking. The inability to speak is just the opposite of
19 pressured speech or flight of ideas.

20 Q. From the evidence that you've reviewed in this case, are
21 you aware whether anyone has described Mr. Kelley as a
22 particularly talkative individual?

23 A. I have not seen that.

24 Q. Okay. Let me take down this record and ask you a couple
25 of more questions about the Bipolar Type I.

1 What are the treatment interventions available for a
2 person who is diagnosed with Bipolar Type I?

3 A. It's very clear that bipolar disorder is a biological
4 disorder and the treatment is medication, mood stabilizing
5 medication. And therapy, talking therapy, can be helpful in
6 someone dealing with having bipolar disorder, and having to
7 take medication. But talking therapy by itself, if you're
8 bipolar, is not going to impact either the manic phase of
9 bipolar disorder or the depressive phase.

10 Q. Are you aware whether Mr. Kelley was put on any medication
11 specifically to treat or address Bipolar Type I disease?

12 A. Yes. He was not either -- he never has been.

13 Q. Are you aware of whether Mr. Kelley was ever referred to a
14 psychiatrist or other medical doctor to address Bipolar Type I
15 in specific?

16 A. He's never -- he was never referred to address that. He
17 has been evacuated [verbatim] by psychiatrists and within that
18 evaluation, included a determination of whether he had bipolar
19 disorder in the Air Force, but he has not otherwise been
20 referred for treatment of bipolar disorder to a psychiatrist.

21 Q. And that was going to be my next question.

22 Dr. Bursztajn testified in court that while in the
23 Air Force, the providers never considered bipolar disease or
24 Bipolar Type I in particular; is that true?

25 A. That -- that is not accurate.

1 Q. And why is that not accurate?

2 A. Well, there's two reasons it's not accurate. If you look
3 at his records in Peak, he -- in Peak, some of the symptoms
4 that were described included mood swings, racing thoughts, and
5 it was noted that he reported that his sister had bipolar
6 disorder.

7 So when you see that documented in the records, I think
8 you can say with a reasonable degree of medical certainty that
9 they considered bipolar disorder because you wouldn't be
10 documenting those symptoms without thinking about bipolar
11 disorder.

12 But to get very specific, if you look in August when he
13 had the sanity board evaluation in the Air Force, he had a --
14 he had multiple psychological tests done. And in one of those
15 tests, it talked about potential diagnoses. And one of the
16 diagnoses to be ruled out that was specifically stated was
17 bipolar disorder.

18 And that got ruled out because those psychological tests
19 were ordered as part of the sanity board, and the psychiatrist
20 who eventually wrote the -- the final report had access to
21 those records.

22 Q. Okay.

23 A. Psychological tests that said, "Rule out bipolar
24 disorder."

25 Q. I want to take your answer in two parts.

1 First, other than Mr. Kelley's self-report of his sister
2 having bipolar, do you have any evidence to suggest that his
3 sister actually had bipolar?

4 A. No. I do not.

5 Q. And then I want to talk about the underlying medical
6 records or the Air Force records of Mr. Kelley as you
7 discussed, but before I do, do you have an opinion as to
8 whether at any point in Mr. Kelley's life he had bipolar
9 disease?

10 A. Yes. My opinion is he did not have bipolar disorder, that
11 symptoms that would make you think of bipolar disorder are
12 explained by other diagnoses.

13 Q. Okay. And you said -- you talked about the underlying
14 Air Force records, and this goes to the second part of our
15 earlier discussion about the actual conduct and the
16 symptomatology that Mr. Kelley presented with, and I'd like to
17 talk to you about the specific conduct and symptomatology that
18 Mr. Kelley had in the Air Force related to this subject.

19 Are you aware whether, and you said that the Air Force
20 gave him psychiatric testing -- do you remember that
21 conversation?

22 A. Yeah. Just to be totally accurate, part of the sanity
23 board examination testing and part of the testing done at Peak
24 was psychological testing done by a psychologist in contrast
25 to a psychiatrist.

1 Q. Let's go through some of those tests and see what those
2 tests revealed. I want to show you Joint Exhibit 363. And
3 I'll show you page 1 first, so we know -- we can orient
4 ourselves to it. So what you should be looking at is Joint
5 Exhibit 363, and that should be the first page of some
6 Air Force records.

7 Is that correct?

8 A. Yes.

9 Q. Okay. Let's take a look at page 80 of Joint Exhibit 363,
10 and could you tell us what page 80 of Joint Exhibit 363 is
11 showing?

12 A. Yes. It's the cover page for the interpretative report of
13 the results of the MMPI-2, which is a Minnesota Multiphasic
14 Personality Inventory, which is a well known widely used
15 psychological test.

16 Q. Is that a test on Mr. Kelley?

17 A. Yes. That -- that was dated April 6, 2012.

18 Q. Okay. Is this a reliable test?

19 A. Yes.

20 Q. Okay. Let's take a look at some of -- of the results of
21 this test, and I want to show you page 84 of Joint Exhibit
22 363, and let's first start with that first highlighted
23 paragraph under, "Symptomatic Patterns," if we could.

24 First, could you read the highlighted portion of the
25 results of the MMPI the Air Force gave Mr. Kelley?

1 A. Yes. "Individuals with this MMPI-2 clinical profile tend
2 to be chronically mal-adjusted. The client is apparently
3 immature and self-indulgent, manipulating others for his own
4 ends. He may behave in an obnoxious hostile and aggressive
5 way, and he may rebel against authority figures."

6 "Despite these difficulties with others, he refuses to
7 accept responsibility for his problems. He may have an
8 exaggerated or grandiose idea of his own capabilities and
9 personal worth."

10 Q. Dr. Metzner, does this evidence support Dr. Bursztajn's
11 testimony that Mr. Kelley deteriorated and became delusional
12 only after the Air Force?

13 A. I wouldn't say this by itself supports or doesn't support.

14 What I would tell you, what this does do is, one of
15 Dr. Bursztajn's opinions, as I understood it, was that his
16 so-called psychotic or manic episode post-Air Force was
17 characterized by grandiose thinking, and that that was
18 different than what he had in the Air Force.

19 This test, and you'll see -- we'll see it, I think, in
20 other testing, shows you that if you have a grandiose idea of
21 yourself, it can be due to a number of causes. And in this
22 case, this is implying that his grandiose thinking is related
23 to a personality disorder as opposed to a psychotic episode.

24 Q. Let's talk -- let me show you the -- the bottom set of
25 highlights and I'll have you read a portion and we'll discuss

1 it; okay?

2 A. Yes.

3 Q. Could you -- there's a lot of highlight here.

4 Could you read for us the only full paragraph, the middle
5 paragraph starting with, "He endorsed."

6 A. "He endorsed a number of extreme and bizarre thoughts,
7 suggesting the presence of delusions and/or hallucinations.
8 He apparently believes that he has special mystical powers or
9 a special mission in life that others do not understand or
10 accept."

11 Q. Okay. If what Dr. Bursztajn testified is true, that in
12 November of 2017, that Devin Kelley was delusional, is that a
13 change that the Air Force tested and knew?

14 A. Well, the best way to answer that, again, what
15 Dr. Bursztajn was saying that was different in his so-called
16 deterioration is he now had a thought disorder post-Air Force,
17 and he also had delusional thinking and bizarre thinking. And
18 that was presented, at least in my understanding of how
19 Dr. Bursztajn presented it, is that this was different, never
20 had before in the Air Force.

21 That's not accurate. Here in the Air Force, he has
22 extreme bizarre thoughts. They wondered whether it was to the
23 extent of delusion. And, again, you see this omnipotent
24 grandiose thinking, where he thinks he has special mystical
25 powers or a special mission in life.

1 And, again, when someone has grandiose thinking or
2 omnipotent thinking, there's a differential -- it's a
3 differential diagnosis. It could be caused by a number of
4 things. It could be caused by psychosis, but it also could be
5 caused by significant narcissism, meaning you have an inflated
6 perception of yourself, that you're the only one who can do
7 this.

8 And so this, again, is not consistent with Dr. Bursztajn's
9 description that there was a significant change and
10 deterioration and a new disorder that he never had in the
11 Air Force.

12 Q. Okay. And let me take that down for a second and ask you
13 questions.

14 Did the Air Force provide multiple psychiatric testing or
15 psychological testing to Devin Kelley while he was in the
16 Air Force?

17 A. Yes.

18 Q. And what I'm getting at is -- is what we are looking at,
19 the only evidence of Devin Kelley's psychiatric situation or
20 condition that the Air Force had?

21 A. No. What we're looking at right now, I believe, was from
22 his first hospitalization at Peak. Then he had a longer
23 hospitalization at Peak, and then he had -- he had an
24 extensive psychological testing in August of 2012, which was
25 part of the Air Force's sanity board examination.

1 Q. Okay. And I kind of want to compare and contrast his
2 April test results to his August 2012 test results, both given
3 by the Air Force. So let me show you Joint Exhibit 363, and I
4 want to show you two pages from Joint Exhibit 363, pages 69
5 and 29, and it should pop up on your screen in a second.

6 And I'm going to zoom in on the results of these tests and
7 have you discuss them; okay?

8 A. Yes.

9 Q. Okay. So, first, let's orient ourselves. Tell us what we
10 are looking at, at Joint Exhibit 363, pages 69 and 29.

11 A. Okay. We're looking at excerpts of the interpretative
12 report from the MCMI-3, which is commonly known as the Millon
13 inventory. And Millon inventory is often used to assess
14 personality characteristics, personality disorders.

15 Q. Okay.

16 A. And this testing -- okay. So we are looking at two.

17 One -- one on the left is -- the Millon was administered
18 in April. Then Millon was again administered in August, both
19 in 2012.

20 Q. And is the Millon testing results that we see on Joint
21 Exhibit 363; are they reliable tests?

22 A. Yes.

23 Q. Okay. Could you compare and contrast the tests from the
24 profile from 4/6 -- April of 2012 to August of 2012 for
25 Mr. Kelley.

1 A. Yes.

2 Both of the tests are consistent with differential
3 diagnosis of a personality disorder and they actually narrow
4 down the personality disorders to be a borderline personality
5 disorder, and anti-social personality disorder, and also
6 having negativistic personality traits.

7 There's really not such a thing as called a negativistic
8 personality disorder, but there's certainly negativistic
9 personality traits, and they specifically are referencing what
10 is called passive/aggressive traits.

11 Q. And I want to look at some of Mr. Kelley's actual
12 responses to the August 2012 test. So let me show you page 36
13 of Joint Exhibit 363, and I am going to zoom in on the
14 noteworthy responses to the August 2012 test.

15 Could you tell the Court why are these noteworthy
16 responses for Mr. Kelley in August of 2012?

17 A. Yes.

18 Part of Dr. Bursztajn's testimony formulation around his
19 opinion that Mr. Kelley demonstrated significant clinical
20 deterioration post-Air Force as opposed to while in the
21 Air Force, included his assessment of Facebook postings
22 apparently between Mr. Kelley and his sister, and I believe
23 the date was November 4, 2017.

24 And one of those -- part of what he was saying about those
25 Facebook postings is that this is evidence of clinical

1 deterioration, and now insight that he has a thought disorder
2 and he's, in lay terms, "crazy."

3 And what's very interesting in one of those postings,
4 Mr. Kelley, assuming it was Mr. Kelley who was writing this,
5 and I don't have any reason to think it wasn't, Mr. Kelley
6 described himself as feeling "empty" and "hollow" inside. And
7 Dr. Bursztajn was saying this is clear evidence of clinical
8 deterioration.

9 Well, if you look at what's on the screen right now, look
10 at 142, "I frequently feel there's nothing inside me. Like
11 I'm empty and hollow." That's pretty close word-for-word what
12 he described in that Facebook presentation. And what this
13 tells you is, you know, he felt that way in the Air Force.

14 The other thing, that when you look at the April and May
15 Millon testing results, one of the reasons that there's very
16 little change in that is one of the characteristics of a
17 personality disorder is that it's long-standing and very
18 difficult to change.

19 So it's not surprising to me that his symptoms, from a
20 personality disorder perspective in August, were very similar
21 to his symptoms in April. And, in my opinion, his symptoms of
22 his personality disorder post-Air Force, including up to
23 November 5, 2017, were very similar to what we're looking at
24 here.

25 Q. Okay. Let me take that down, then, and then I want to

1 switch gears to our -- the third area that Dr. Bursztajn
2 commented on and whether Devin Kelley's conduct on
3 November 5th of 2017 was motivated by or was a crime of
4 domestic violence.

5 Do you have an opinion on whether Mr. Kelley's conduct was
6 a crime of domestic violence?

7 A. I do, and it's my opinion that the shooting on November 5,
8 2017 was a crime of domestic violence.

9 Q. And what is your definition of "domestic violence"?

10 A. Well, the definition that I use is, it's a pattern of
11 abusive behavior in a relationship that is used by one of the
12 partners to either gain or maintain control of an intimate
13 partner.

14 And that abuse can take many different forms. The
15 physical abuse; it can be sexual abuse; it can be emotional
16 abuse; it can be psychological abuse; it can be economic
17 abuse; it can be threats; it can be stalking; it can be
18 cyber-stalking.

19 And I'll also say that the definition of domestic violence
20 used to be described as "spousal abuse," and for many years,
21 it's been recognized that it's not just wife abuse, that the
22 victims of domestic violence can be not only wife, but it can
23 be a girlfriend, it can be a family member, it can be a
24 friend, it can be other people living within the household.

25 Q. Is that definition well accepted in the psychiatric

1 community?

2 A. Yes. In fact, that definition that I'm -- I've just
3 summarized comes from the Department of Justice, the section
4 or division of violence against women.

5 Q. And was that the definition that you held in 2017 of -- of
6 domestic abuse?

7 A. Yes.

8 Q. Okay. Can you tell me, in terms of Devin Kelley's
9 personality disorder diagnosis, does that diagnosis prevent
10 him or excuse him from committing acts of domestic violence?

11 A. No.

12 Q. Let's -- let me show you a portion of Dr. Bursztajn's
13 testimony on -- concerning the shooting, and I want to show
14 you the trial testimony, pages 1497, lines 11, to 1498, line
15 10.

16 Do you remember Dr. Bursztajn testifying to this?

17 A. I do.

18 Q. And, briefly, he testifies that these activities that
19 Devin Kelley was -- was undertaking in the Air Force,
20 searching for body armor, researching gorilla tactics,
21 training in offensive strategies, that's a person who intends
22 to commit a mass attack.

23 Do you remember that discussion?

24 A. I understood him to say that that was the actions of
25 someone who is planning a mass attack. Yes, I remember that.

1 Q. Do you agree with that testimony of Dr. Bursztajn, that
2 Mr. Kelley was planning a mass attack while in the Air Force?

3 A. I do.

4 Q. And in response, the government said that, "Well, you
5 know, he went to a Greyhound, and his intent was to go home."

6 Do you remember that conversation?

7 A. I do.

8 Q. Doctor, does a person need, you know, to research guerilla
9 tactics, or body armor to take a Greyhound?

10 A. No.

11 Q. Let's take that down and I want to ask you some questions
12 about domestic violence, as it relates to what the Air Force
13 knew. I want you to assume with me -- I want you to assume
14 for a second that foreseeability, the definition of
15 "foreseeability," does not require that you predict the
16 particular injury in question or the precise manner in which
17 the injury will occur, only the general character of the
18 injury, or the danger of the injury might be reasonably
19 anticipated in light of the attendant circumstances known to
20 the defendant.

21 Can you assume that for our conversation here?

22 A. Yes.

23 Q. Based on that definition, was Mr. Kelley's conduct on
24 November 5th, 2017, foreseeable to the Air Force?

25 A. My opinion, yes.

1 Q. And -- and why?

2 A. Because I think that the shooting at the church was a form
3 of domestic violence.

4 Q. Okay. And could you explain why you believe the shooting
5 at the church was a form of domestic violence?

6 A. Yes. I don't -- from all the testimony I've seen, which
7 is consistent with my own opinion, everyone is in agreement
8 that the selection of the Sutherland Springs Church or the
9 church at Sutherland Springs was not random.

10 So then Mr. Kelley had to drive 60 miles to that Baptist
11 church. So then the question is: Why did he select that
12 church? And I think there's four possibilities, and here are
13 the possibilities.

14 One possibility is that it was related to Danielle Kelley
15 telling -- telling her husband at the time on that Saturday
16 that "I want to get a divorce and I'm leaving on Monday."

17 Another possibility is, is that he was wanting to kill
18 Michelle Shields and family, related family, including
19 Michelle Shields' mother and husband. And I'll just tell you,
20 because I know there's been testimony, you just need to look
21 at the May 2017 text threatening Michelle Shields.

22 A third possibility, which I think is unlikely but it's
23 still a possibility, is that he was trying to preserve, as
24 several people have testified, Ms. Kelley's honor because
25 there were church members who had (audio transmission gap) her

1 and bullied her when she was a child.

2 And I think the fourth possibility, which I think is most
3 likely, it was some combination of the above.

4 And the key factor is with any of those possibilities,
5 there's one common theme, and it's Danielle Kelley, Danielle
6 Smith, and that this was another form of control and abuse of
7 Danielle Kelley. And that's why I say that it's domestic
8 violence, and it fits within the definition of domestic
9 violence that I've already discussed.

10 Q. Okay. I want to talk about that third possibility that
11 you mentioned, because that's been talked about by government
12 witnesses, and, particularly, Dr. Bursztajn in particular.

13 This protector, avenger, preserve Danielle Kelley's honor,
14 you said that you don't ascribe -- you don't believe that that
15 is a very likely possibility. And why is that?

16 A. For a number of reasons. Let me start with, I think, the
17 most obvious one is not only did he tie her up that morning,
18 hog-tied her, and he could have done all of this without
19 Danielle Kelley even knowing what he was doing, so there was
20 no reason to tie her up. That's number one.

21 Number two, there was, I think, somewhat confusing
22 testimony or unclear testimony about the phone call with --
23 between Mr. Kelley and Erin Higgins on, I think, it was
24 October 30th in which he said that he had photographs of
25 Danielle being sexually abused by her stepfather, and that he

1 was enraged by this, and that this was tied in somehow with
2 this is why I'm now going to get back at the church members.

3 The reason I say that it was unclear or confusing, he was
4 lying about that. There was clear statements from Danielle
5 Kelley and also from Air Force investigation that there was
6 such a video, but that video was found years ago and was
7 destroyed together by Danielle Kelley and Devin Kelley years
8 ago. And this was not new, and, in fact, it appeared to be a
9 ruse to get Erin Higgins to come see Mr. Kelley on the day of
10 the shooting.

11 So that -- and the other reason I think it's very unlikely
12 is there was subsequent testimony that the Court heard and I
13 heard from both Danielle Kelley and Michelle Kelley, that the
14 so-called widespread abuse by church members or harassment by
15 church members when Danielle was much younger was not
16 widespread. It was -- it was specific to one family, one
17 child, and her parents.

18 So the -- so that's the reason -- there are the reasons
19 why I think it's very unlikely that that was the motivation
20 for the church shooting.

21 Q. Dr. Metzner, if an abuser beats his or her partner and
22 tells his or her partner that he or she is doing that for his
23 or her partner's benefit, does that make it not domestic
24 abuse?

25 A. Does not.

1 Q. Okay.

2 A. And it's a common dynamic in domestic abuse.

3 Q. Okay. And was Devin Kelley's treatment of both Tessa and
4 Danielle Kelley similar in the sense of control and domestic
5 abuse?

6 A. Similar in both control and physical abuse and sexual
7 abuse as well.

8 Q. Okay. To a reasonable degree of medical probability, what
9 do you believe the most likely reason for Devin Kelley
10 targeting the Sutherland Springs Church?

11 A. I think the most likely reason had to do with killing
12 Michelle Shields, perhaps her husband, her mother, and I think
13 it was probably fueled by the "I'm going to get a divorce"
14 statement, that "I'm leaving you on Monday."

15 MR. JACOB: Pass the witness, Your Honor.

16 THE COURT: Let's go ahead and take a 15-minute
17 break. Let's resume at 10:45.

18 (Recess.)

19 THE COURT: Any cross?

20 MR. DIEDRICHS: Yes, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. DIEDRICHS:

23 Q. Doctor, I want to start with where you ended, the basis or
24 the motivations for the shooting. You indicated that the
25 divorce was a potential cause or fueled the shooting at the

1 church; is that correct?

2 A. Correct. Fueled. Correct.

3 Q. Fueled. What do you mean by "fueled"?

4 A. What I mean by that, it was icing -- perhaps, icing on the
5 cake, because I subsequently, from observing in the trial
6 where it's additional information, I think it's clear that by
7 the time he was at the church fall festival, he was planning
8 the shooting.

9 So I think at that time, he didn't know about the divorce,
10 (audio transmission gap) for the divorce because it was going
11 to happen later on, but I think it probably reinforced his
12 decision.

13 Q. So you think that at the fall festival is when he made his
14 decision that he was going to start the shooting?

15 A. No, I didn't say that. I think by the time he was at the
16 fall festival, it's very likely that he had already planned on
17 doing the shooting. What I think is unclear is when he made
18 the decision of what day he was going to do it, because you
19 can -- you can go back to 2016, and say that he planned the
20 shooting then as well, a shooting then, because he was taking
21 steps at that time.

22 Q. I want to go back and I want to look at some of the things
23 that happened as we approach November of 2017.

24 Can you pull up Joint Exhibit 583, page 2.

25 So this was in May. And I assume this is one of the

1 things you rely upon where you indicate that there was
2 evidence that he was planning?

3 A. I wouldn't say that I relied on that. I would say that's
4 consistent with planning, but it's hard to know what that
5 means, what that meant to him without talking to him about
6 that.

7 Q. Okay. What about in July 2017, when he posted, "I am the
8 angel of death. No one can stop me"?

9 A. Well, that's a very interesting one because Dr. Bursztajn,
10 I understood from his testimony, says that this is a clear
11 evidence of a delusional belief. I don't think it's clear
12 evidence of a delusional belief. I don't know what that meant
13 to him.

14 You can -- you know, there is a heavy metal band called
15 Slayer that wrote a song that's called, I am the angel of
16 death, and so -- and if you Google, "Angel of Death," there
17 are 20 different possibilities of what "Angel of Death" means,
18 so I don't know what it meant to him.

19 Q. All right. And then on October 26th, 2017, he posted in
20 the iCloud, a note -- a to-do list, if you will, which
21 includes "get a pack pack for ammo, get more PMAGS, try on and
22 reorganize gear".

23 Is that correct?

24 A. That's correct. And the question is?

25 Q. Oh, the question is: Is that evidence that he was

1 preparing to do something violent?

2 A. I -- I think that's much clearer evidence than what you've
3 shown me thus far, yes.

4 Q. And, again, on the 28th of October, he posts another, or
5 at least, it's a document in his iCloud where he says, "Keys,
6 stuff in car, delete Instagram, and Facebook. Destroy old
7 phone and block Sarah and David on all social media, and
8 GoPhone."

9 A. I think that's clearer evidence as well.

10 Q. Of what? Of planning?

11 A. Of planning.

12 Q. Okay.

13 A. Planning the shooting.

14 Q. Okay. And then again on the 28th, he posts, "Put together
15 the .22 kit, put it in the backpack, put mag funnel back on".

16 Is that correct?

17 A. Yes. And I have the same opinion about that's clearer
18 evidence of planning.

19 Q. Okay. Then he posts on that same date on Facebook.

20 "Remember, remember the 5th of November."

21 Correct?

22 A. Right. And that's particularly concerning since it's the
23 same day.

24 Q. And he's also telling me what day he's going to commit
25 this attack; correct?

1 A. Well, easy to say since we know that that's what he did,
2 so that's not unreasonable to say that.

3 Q. Okay. You don't think it's pure happenstance that he says
4 this a week before the shooting?

5 A. No. I don't think it's pure happenstance.

6 Q. Okay. And then again on the 30th of October on his
7 iCloud, another to-do list. "Check tire pressure, find
8 location for push knife, put gun stuff in car when Danielle
9 doesn't notice. Rifle in guitar case."

10 Further evidence of preparation; correct?

11 A. Correct.

12 Q. And all of this is before Danielle allegedly tells him
13 about a divorce; is that correct?

14 A. Correct. That's correct.

15 Q. And then on the 28th of October, he also went online and
16 saw an advertisement by Hill Country Trucks and purchased two
17 100-round magazines; is that correct?

18 A. Correct.

19 Q. Also before he knew about any divorce; correct?

20 A. Correct.

21 Q. And then returned them the same date because they didn't
22 fit?

23 A. That's accurate.

24 Q. And then that same day, reordered ones that would fit his
25 rifle; correct?

1 A. Yes.

2 Q. Called every day to see if they had come in; correct?

3 A. Accurate.

4 Q. And then actually on the 4th, he went to see if they were
5 in; correct?

6 A. Correct.

7 Q. And then on the 31st of October is the fall fest. Now,
8 this is still before Danielle allegedly told him she was going
9 to divorce him; correct?

10 A. Correct.

11 Q. And Danielle testified in her deposition that it was Devin
12 who suggested going to the fall fest; do you recall that?

13 A. In her deposition, that's what she states.

14 Q. And she was under oath there?

15 A. Yes.

16 Q. And at the fall fest, Michelle Shields testified that
17 Devin left Danielle alone with her, which was very unusual.
18 In fact, it was the only time during their entire marriage he
19 had ever done that; correct?

20 A. Yes.

21 Q. And we're still four days before Devin (verbatim) tells
22 him about a divorce?

23 A. Yes.

24 Q. Michelle also testified that another member saw

25 Devin Kelley casing the place, walking around the church;

1 correct?

2 A. Yes.

3 Q. More evidence of planning; correct?

4 A. Potential, yes.

5 Q. He's looking how to get in, how to get out, which way to
6 approach, all those kinds of things?

7 A. Likely.

8 Q. And all of this planning was done prior to
9 November 4th when Danielle allegedly said she wanted a
10 divorce?

11 A. Correct.

12 Q. Now, Danielle never told the Texas Rangers that she had
13 asked Devin for a divorce; correct?

14 A. Yes.

15 Q. And she never told the Department of Defense Office of the
16 Inspector General that she asked for a divorce; correct?

17 A. Yes.

18 Q. One of the things she did say in her deposition testimony
19 and here in court, that she was testifying to help the
20 plaintiffs in this case; correct?

21 A. Yes.

22 Q. Given all of that evidence of preparation and planning,
23 all of -- all of that prior to the date she allegedly asked
24 for a divorce, her failure to tell either the Texas Rangers or
25 the DODIG that she asked for a divorce, and the fact that a

1 week before the shooting and six days before Devin allegedly
2 told him that she wanted a divorce, he posted, "Remember,
3 remember the 5th of November."

4 Given all of that, it is your opinion that the divorce
5 fueled the attack?

6 A. Let me tell you what I mean by "fueled the attack."

7 As I previously testified, I think that he made the
8 decision to do the shooting prior to knowing about the
9 divorce, for reasons that you just went over. And what I mean
10 by "fueled the attack," is I think he had made that decision,
11 and when she then tells him, "I'm going to leave you," I think
12 that reinforced/fueled his decision to what he was going to do
13 before he even knew about her decision to leave.

14 And so, yes, that is my opinion.

15 Q. Well, Doctor, isn't it fair to say that he had done
16 everything he needed to do to carry out this attack, including
17 name the date prior to the 4th of November when Danielle
18 allegedly said she wanted a divorce?

19 A. Yes. I -- I agree with that.

20 Q. So it's clear -- isn't it? -- that with or without the
21 allegation of a divorce, he would have carried out this attack
22 on the 5th of November?

23 A. No, I don't think that's clear. I think it's likely, but
24 I don't think that's clear. You know, what if, say, something
25 happened on Friday where she wasn't angry at him and she was

1 very loving towards him? Maybe, he wouldn't have done that.
2 That's all speculation.

3 Q. Doctor, it is more likely than not that Devin Kelley would
4 have committed this attack on the 5th of November with or
5 without the alleged request for divorce on the 4th; isn't that
6 correct?

7 A. I think that's correct.

8 Q. The next one you indicate, the next motive, is his going
9 after Michelle Shields as a way of -- correct me if I'm
10 wrong -- is a way to abuse Danielle?

11 A. Correct.

12 Q. Okay. But he had other reasons to go after Michelle
13 Shields; correct?

14 A. I'm not -- I don't think he had other reasons to go after
15 Michelle Shields that were independent of Michelle's
16 relationship with Danielle or his relationship with Danielle.
17 I think they -- I don't think you can separate that.

18 Q. Well, as I understand it, you are not saying that the mere
19 fact that she was related to Danielle is the reason she was a
20 target, it's because he was trying to punish or further abuse
21 Danielle by killing her mother?

22 A. That's correct.

23 Q. Okay. But aside from any kind of motive to abuse
24 Danielle, he had other reasons to go after Michelle Shields;
25 isn't that correct?

1 A. I don't think that's correct.

2 Q. Didn't he blame Michelle for the long-standing abuse that
3 occurred at Donald Brassfield's hands?

4 A. I don't think that that's clear.

5 Q. You don't think that?

6 A. I said I don't think that that's a clear motive.

7 Q. Let's look at Joint Exhibit 477, page 98.

8 So if we look at that, this is the Texas Ranger's
9 interview of Danielle the same day of the shooting.

10 Do you understand that?

11 A. Yes.

12 Q. Okay. And then Texas Ranger Barina asks, "Did he have any
13 blame on your mom for what happened to you as -- as was there
14 any -- any" -- and Danielle says, "Yeah." The ranger
15 responds, "Okay. So he -- so he somewhat blames your mom for
16 the things that happened to you as a child"?

17 "Yeah. He blamed a lot of people for it."

18 Correct?

19 A. Correct.

20 Q. So it's clear that he did blame, according to Danielle, he
21 blamed Ms. Shields for the abuse that Danielle suffered as a
22 child?

23 A. According to this, but that wasn't questioned of me
24 previously.

25 Q. All right. And, in fact, at some point whether it was

1 previous or that day, Devin did find pictures and videos of
2 Donald Brassfield's abuse of Danielle in Michelle Shields'
3 home; correct?

4 A. Correct.

5 Q. And that was long after Donald Brassfield had left the
6 house?

7 A. Correct. And it was long before the shooting occurred.

8 Q. And, in fact, one of the instigating factors was Danielle
9 was going to have to go testify at Donald Brassfield's trial;
10 correct?

11 A. One of the instigating factors of what?

12 Q. Of his -- his motivation to go after Michelle Shields.

13 A. In my opinion, that wasn't one of the instigating factors
14 no.

15 Q. Was it in and of itself a potential factor?

16 A. You know, "potential," is like saying was it a possible
17 factor. Yes, it's a possible factor.

18 Was it a likely factor? In my opinion, it's not.

19 Q. Even though Danielle testified he was very upset about the
20 possibility of her having to go relive everything again in a
21 trial?

22 A. Well, there was -- yes. Even though. Yes. Correct.

23 Q. Okay. So he wasn't so upset that that might have been a
24 motivating factor; is that your testimony?

25 A. That's my testimony, because there's other evidence of

1 testimony that he was mixed about her testifying, that at
2 times he thought it was good, and at times he didn't want her
3 to testify.

4 Q. Okay. But Danielle said he was very upset about that.

5 A. I think that's correct.

6 Q. And they -- neither Danielle nor Devin had had any contact
7 with Michelle for the six months preceding the shooting;
8 correct?

9 A. That's correct.

10 Q. Zero contact?

11 A. Correct.

12 Q. Okay. So he had won in the relationship war; correct?

13 A. He had won in the relationship --

14 Q. Do you recall Danielle's statement that Michelle told
15 Devin that she would win in the end because Danielle would
16 come back to her?

17 A. I don't recall that, but I'll accept that as being
18 accurate.

19 Q. Okay. I want to talk about the other potential motivation
20 that you -- that you listed, which was, I guess, say it was
21 also, in part, related to issues concerning the impending
22 trial of Donald Brassfield and the history of Danielle and the
23 Sutherland Springs Church; is that correct?

24 A. Well, just to clarify --

25 Q. Okay.

1 A. What you are referring to -- and I think you are referring
2 to my deposition right now or my testimony. What I was asked
3 is: What were the possible motivation, which is different
4 than saying, what was the motivation.

5 Q. No, I understand.

6 A. And --

7 Q. But that's one of the possible --

8 A. And --

9 Q. I'm sorry. Go ahead.

10 A. And that was one of the possible motivations.

11 Q. Okay. And do you maintain that as a possible motivation?

12 A. This is the one, getting back at members of the
13 congregation?

14 Q. Yes.

15 A. Yes, that's a possible motivation. I think it's bottom of
16 my list of likely.

17 Q. Well, we know it wasn't the divorce that motivated it
18 because he didn't know about that when he had everything
19 planned already.

20 A. No. We don't know that it wasn't the divorce that
21 motivated. As I said before, you can plan something and then
22 at the last minute decide not to do it. So the fact that -- I
23 think it's clear that he was planning to do it, and I think it
24 was clear that the plan was for November 5th for the reasons
25 we've already gone over. That doesn't mean -- that doesn't

1 mean that he couldn't have changed mind.

2 And I think that the divorce statement cemented the plan.
3 So to say that it couldn't have been a motivation is
4 inaccurate.

5 Q. Okay. So, again, after all the planning he had done, all
6 the money he had spent, all the effort he had gone to, the
7 list that he provided, all the statements he made, the fact
8 that he had already packed the vehicle and was ready to go, he
9 was going to change his mind, potentially?

10 A. Yes. Look, in 2016, he bought the AR-15. In June of
11 2016, he bought protective armor. And that's a lot of
12 evidence of planning. I mean, why are you going to buy
13 protective armor if you're not going to do something
14 relatively soon? Something happened that he decided not to do
15 it. So I'm in agreement with you.

16 I think there's much stronger evidence that he had
17 concrete plans in place at least a week before, if not,
18 earlier of doing this. But just because you have plans
19 doesn't mean you don't change plans or you can't change plans.

20 Q. So after all this planning, he would just wake up and say,
21 "Not going to do it"?

22 A. That's not at all what I said. I said that something
23 could have happened -- you know, the worst thing happened, as
24 far as reinforcing the plan on the night before if his then
25 wife says, "I'm leaving you." I mean, that -- he's not going

1 to back off after that. If something else had happened,
2 maybe -- maybe that wouldn't have happened that time, but I
3 don't know.

4 Q. You think it's more likely than not that he would not have
5 taken -- followed through with his plan if Danielle had said
6 nothing about a divorce?

7 A. No. That's not what I said.

8 I think that if she had not said anything about divorce
9 and everything was status quo, it probably still would have
10 happened. But what if it wasn't status quo, and they had a
11 loving moment, maybe it wouldn't have happened, but I don't
12 know.

13 Q. Is there any testimony from Danielle that they had had any
14 loving moments over the past year?

15 A. No, there wasn't testimony. That wasn't asked.

16 Q. Okay. On the 5th of November, just after this occurred,
17 Danielle told the Rangers she was sure the reason was, for him
18 doing this, that it was due to her childhood history; is that
19 correct?

20 A. I'm not sure that she said she was sure that was the
21 reason, but I think she says something to that effect.

22 Q. Well, let's go to the Joint Exhibit 477, page 92. Five
23 through nine.

24 "So do you think that's why Devin might have went down
25 there was due to the -- due to your childhood history?"

1 And what does she respond, sir?

2 A. She says, "I'm sure."

3 Q. All right. She also told the Texas Rangers that the spark
4 that set him off may have been that he was -- she was going to
5 have to testify at Brassfield's trial November 27, 2017;
6 correct?

7 A. Correct.

8 Q. She told the Rangers that Devin was very upset that she
9 would have to testify and relive the whole ordeal; correct?

10 A. Yes.

11 Q. And she told the DODIG -- she gave them basically details
12 about what had occurred to her, how she was treated by the
13 church; correct?

14 A. Correct.

15 Q. And that included mocking, telling her she deserved to die
16 when she tried to commit suicide, they made fun of her scars,
17 and she says from the church and the youth; correct?

18 A. Correct.

19 Q. Some of the adults said she was a plague; correct?

20 A. Correct.

21 Q. And that how she deserved what she got; correct?

22 A. Yes.

23 Q. And she said that went on for years?

24 A. I believe that's correct.

25 Q. She further said, "Michelle didn't do anything about the

1 way she was treated?

2 A. Say that again.

3 Q. "Michelle didn't do anything about the way she was
4 treated."

5 Didn't intercede in the treatment; is that correct?

6 A. I think that's correct.

7 Q. Danielle said she let it happen for years?

8 A. Yes.

9 Q. And Devin knew all of this; correct?

10 A. Knew all of what?

11 Q. Knew all of the treatment she got at the church; all of
12 what was going on with Donald Brassfield; correct?

13 A. He knew about the sexual abuse, that's correct. And --

14 Q. And -- I'm sorry. Go ahead, sir.

15 A. And I think he knew aspects of what happened at the
16 church; correct.

17 Q. And he knew it at the time it was happening; correct?

18 Danielle testified that they were friends and they would
19 discuss the events; do you recall that testimony?

20 A. I vaguely recall that. I don't know the specifics.

21 Q. Okay. And, Doctor, you are not giving an opinion on the
22 question of whether a -- whether to a reasonable degree of
23 psychiatric certainty that if the Air Force submitted
24 Devin Kelley's criminal history information to the FBI NICS
25 system that he would not have committed the mass shooting?

JEFFREY METZNER - REDIRECT

1 A. I'm not giving an expert opinion on that question.

2 MR. DIEDRICHS: I'll pass the witness, Your Honor.

3 THE COURT: Any redirect?

4 MR. JACOB: Yes, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. JACOB:

7 Q. Dr. Metzner, can you hear me?

8 A. Yes.

9 Q. I'd like to start with this discussion about Danielle
10 Smith not telling the Rangers or DOD about the divorce either
11 on the day of the shooting and -- or shortly thereafter. Does
12 it surprise you that Danielle Smith did not tell the Rangers
13 or DOD about the divorce?

14 A. No, it does not.

15 Q. And why does it not surprise you?

16 A. Well, for a number of reasons. One, it's not unreasonable
17 to think that she felt guilty about causing the shooting
18 related to the divorce. So, you know, one, particularly right
19 after the shooting, to say that, I think it doesn't surprise
20 me.

21 It also doesn't surprise me when you look at the nature,
22 the conditions of that interview. And I know the Court has
23 seen the video with the father-in-law sitting right next to
24 her, you know, with some physical contact. Because if you
25 also look at that interview, you would not know that she was

1 physically abused and not just physically abused but
2 emotionally abused by Devin Kelley.

3 So I think there's a -- no, it doesn't surprise me is the
4 answer.

5 Q. And the father-in-law, Michael Kelley, was present in both
6 interviews; is that your understanding as well?

7 A. Correct. And -- and the father-in-law also has testified
8 that he had no idea that she was being physically or
9 emotionally abused by Devin Kelley.

10 Q. Okay. Is it your understanding -- what evidence are you
11 aware of that Danielle told Devin Kelley multiple times
12 throughout their relationship about wanting a divorce,
13 including as early as 2015?

14 A. Well, probably the clearest besides Danielle Smith's
15 testimony is Erin Higgins' testimony in -- in which she states
16 that Danielle has told her that and that's also confirmed in
17 part by the text messages between Erin Higgins and Danielle.
18 And I think, if I recall, those text messages, which I think
19 have been admitted in evidence, occurred in 2015.

20 Q. I also want to talk to you about this Brassfield trial
21 being a potential motivation for Mr. Kelley's conduct.

22 Is it possible that another reason that Devin Kelley did
23 not want Danielle to testify was that he did not want Danielle
24 in contact with police or prosecutors?

25 MR. DIEDRICHS: Objection. Speculation.

JEFFREY METZNER - REDIRECT

1 THE COURT: Can you answer that, Doctor? I mean, is
2 there anything in the records for you to opine on that or not?

3 THE WITNESS: Well, yes, I can answer that, Judge.

4 THE COURT: Go ahead.

5 THE WITNESS: If you look at the November 1, 2017
6 videotape of the sheriff's office and Devin Kelley and Michael
7 Kelley's interaction, during that interaction Devin Kelley
8 clearly states that he doesn't like police and doesn't like
9 talking with police.

10 But my -- so that would be the basis. But I would
11 say in response to your question, "potential," that's just
12 like the question the U.S. Attorney just asked me. Yes,
13 potential, possible.

14 I don't -- I can't say anything more than that.

15 BY MR. JACOB:

16 Q. Okay. I also want to talk about Erin Higgins. Could you
17 tell the court -- remind us what the Erin Higgins relationship
18 to Danielle was.

19 A. Yes. Erin Higgins was married for a time to -- and I'm
20 forgetting -- Donald, I think was his first name, Brassfield,
21 who was the sexual abuser of Danielle. So Erin Higgins was
22 technically the stepmother of Danielle. But both by testimony
23 from Danielle and Erin, they had a very close relationship.

24 Q. And I believe you told us that Devin Kelley lied about --
25 about having possession of the photographs; do you remember

1 that conversation?

2 A. I do.

3 Q. If Devin Kelley lied about having possession of the
4 photographs, do you know what reason he would have of wanting
5 to meet Erin Higgins the day of the shooting?

6 MR. DIEDRICHS: Objection, Your Honor. This is
7 speculation.

8 THE COURT: Can you answer, Doctor?

9 THE WITNESS: I can't answer to say why.

10 THE COURT: Okay, one second, Doctor.

11 So that's sustained.

12 Next question.

13 BY MR. JACOB:

14 Q. Dr. Metzner, you talked about, sort of, the four possible
15 motivations that Mr. Kelley had, including this avenger
16 protection theory that Mr. Diedrichs discussed with you at
17 length.

18 Regardless of which of those motivations that Devin Kelley
19 had, are they all related to domestic violence?

20 A. In my opinion, yes.

21 Q. And why is that your opinion?

22 A. Because Danielle was involved in any one of those
23 motivations and they -- the -- and it's clearly abusive, the
24 actions, towards Danielle. There was nothing nonabusive about
25 it.

1 MR. JACOB: Pass the witness, Your Honor.

2 THE COURT: Anything based on those questions?

3 MR. DIEDRICHS: Yes, Your Honor.

4 RECROSS-EXAMINATION

5 BY MR. DIEDRICHS:

6 Q. So in his mind, he goes to the church to avenge the -- the
7 terrible treatment she received at the hands of the church,
8 that's abusive?

9 A. That's clearly abusive. He's going -- he's telling
10 relatives who are very important to Danielle, not to mention
11 he's killing people who -- has been testimony or considered
12 important to Danielle. Danielle knew many of those people,
13 babysat many of those people. Yes. That's clearly abusive.
14 There is no way you can imagine that Danielle is going to
15 thank him for doing that. So yes, it's abusive.

16 Q. When was the last time she was at the church?

17 A. The last time she was at the church was probably the week
18 before at the fall festival.

19 Q. What about prior to that?

20 A. I don't know.

21 Q. And these are the same people that mocked her as a child
22 for the abuse that she suffered, according to her testimony?

23 A. Well, you said "people," and according to her testimony,
24 it was one family and one child, so in that sense, it's people
25 but it's not many people.

1 Q. Well, and she gave that testimony for the first time here
2 in the court?

3 A. Correct.

4 Q. Just after testifying that she was here testifying to help
5 the plaintiffs in this case; correct?

6 A. Correct.

7 MR. DIEDRICHS: That's all I have, Your Honor.

8 THE COURT: Anything?

9 MR. JACOB: No, Your Honor.

10 THE COURT: Any further need for the doctor?

11 MR. JACOB: Not from us, Your Honor.

12 MR. DIEDRICHS: Not from the U.S.

13 THE COURT: Thank you, sir. You are excused.

14 THE WITNESS: Thank you.

15 THE COURT: Any further witnesses from the
16 plaintiffs?

17 MR. JACOB: No, Your Honor.

18 THE COURT: Plaintiffs' rest and close?

19 MR. JACOB: Yes, Your Honor.

20 THE COURT: Plaintiffs rest and close for this
21 liability phase.

22 So at this point, we've heard the evidence that we
23 are going to hear. I guess, let's do any last-minute
24 housekeeping. Have we entered all the exhibits that the
25 plaintiffs want entered into evidence?

1 MR. JACOB: Yes, Your Honor.

2 THE COURT: Have we entered all the exhibits that the
3 government wants to enter into evidence?

4 MR. STERN: Yes, Your Honor.

5 THE COURT: So any of the other exhibits that have
6 not been moved into admission I'll consider withdrawn.

7 So at this point, then, it's close to the noon hour.
8 As I told you earlier, I'll give you-all this afternoon to
9 prepare for closing arguments tomorrow.

10 We'll have closing arguments beginning at 10:00. One
11 hour each was what was requested and what is given. That will
12 be inclusive of any questioning the Court might have of
13 you-all during your closing arguments. So one hour per side.
14 We begin at 10:00.

15 While we are here, though, let's finish up any
16 additional housekeeping matters.

17 It's my understanding you've been requesting daily
18 copy from the court reporters of the trial testimony. So
19 normally what delays proposed findings of facts and conclusion
20 of law from getting tendered is everybody is waiting on a
21 court reporter to provide all of that, but that's not the case
22 this time around; correct?

23 MR. ALSAFFAR: That's right, Your Honor.

24 THE COURT: So then what do you-all believe is a
25 reasonable deadline for you-all to submit proposed findings of

1 fact and conclusions of law?

2 MR. ALSAFFAR: Two weeks.

3 MR. STERN: Your Honor, I believe we already agreed
4 to 30 days. We would like to stand by that.

5 THE COURT: Well, I'm sorry. I forgot about that.

6 Well, so in light of -- I guess I was thinking 30
7 days, thinking it was going to take a while for the court
8 reporters to come in. Do you still need 30 days, and if you
9 do, I'll give it to you, but I'm just asking.

10 MR. STERN: We do, Your Honor.

11 THE COURT: So then findings of fact and conclusions
12 of law will be due from both sides 30 days from tomorrow. Let
13 me pull up a calendar here. That falls on a Thursday. Let's
14 just make it Friday. So findings of fact and conclusions of
15 law proposals are due from both sides no later than close of
16 business May 21st.

17 And so just thinking out loud for both your closing
18 arguments tomorrow and findings of fact and conclusions of
19 law, I guess I'm curious about where do we stand on this
20 proportionate responsibility phase and the liability, if any,
21 of Academy?

22 So, I mean, I've got questions for both sides. I
23 mean, but for the government first, I guess is where I'm
24 thinking about, so either tomorrow or during the findings of
25 fact and conclusions of law, or both, I guess I need to

1 understand better from the government how you think Academy
2 should be held proportionately responsible for this, because
3 if it's your argument that the United States Air Force could
4 not have foreseen any of these events, I mean, how then, could
5 Academy? I'm sort of perplexed by the, "Not us but Academy
6 should have."

7 MR. STERN: I could briefly address that and simply
8 say, Your Honor, if the United States is found not liable, the
9 first thing I'll do is drop the third-party action against
10 Academy.

11 THE COURT: Well --

12 MR. STERN: The point is to the extent --

13 THE COURT: Well, let me step back, then.

14 MR. STERN: Sure.

15 THE COURT: At what point in this trial are we -- and
16 phase one, which we are calling the liability phase, I mean,
17 aren't we concluding at this point in time the proportionate
18 liability is for all three, Mr. Devin Kelley, Academy, and the
19 United States Air Force?

20 MR. STERN: Absolutely, Your Honor.

21 THE COURT: So then, I mean, how do you -- I'm not
22 sure about, when you "drop Academy." I'm --

23 MR. STERN: Forgive me, Your Honor. I think that was
24 a little facetious.

25 I guess the United States' argument is obviously that

1 not only could the Air Force not foresee Devin Kelley
2 committing this heinous act, but that his ability to obtain a
3 firearm at any FFL was not a substantial factor in bringing
4 about this shooting. As a result, the United States and
5 Academy should not be held liable.

6 However, if the Court finds that Devin Kelley's
7 ability to obtain that particular AR-556 on April 7th, 2016,
8 then Academy should be held liable, because not only did they
9 violate federal law by selling that firearm to Devin Kelley,
10 but they -- if they complied with federal law, namely 18
11 U.S.C. 922(b) (3), then they should have denied the sale even
12 before they got to a NICS background check.

13 So as a result, if plaintiffs' theory is correct,
14 and, obviously, we disagree with it, that all of this
15 counterfactual didn't matter, all the Court should have looked
16 to is Devin Kelley purchasing this firearm to commit this
17 shooting, then Academy is liable, not the United States
18 because it never would have gotten to a background check in
19 the first place.

20 THE COURT: So just, I mean, we are speaking in
21 hypotheticals because, of course, I haven't made any rulings,
22 but just hypothetically, if we go that direction -- I mean, I
23 guess I'm asking the question: How do I develop proportions?
24 Do I just pick them out of air?

25 I mean, you seem to suggest it's -- it's all or

1 nothing. I mean, don't we have to somehow, and I don't know,
2 I'm welcome to hear both of your suggestions, I mean, at some
3 point, Kelley, of course, has got to bear some responsibility
4 for his actions.

5 If the government is found liable, and under your
6 argument then Academy ought to share some amount of liability,
7 well, I mean, under that theory, speaking just hypothetically,
8 shouldn't, if the government had placed the name properly into
9 the registry, I mean, Academy could have relied on that first
10 and then there would not have been any further sales
11 mechanisms to follow. But that's not what happened.

12 So Academy did sell, and so, I mean, how is the Court
13 to pick numbers? I mean, other than some kind of random
14 basis? How does the law guide me in that -- in that
15 determination?

16 MR. STERN: Because the statute is clear. It's
17 proportionate responsibility based on the causal link. So
18 plaintiffs, for example, have argued this theory of you get to
19 tally all of the Air Force's missed opportunities to increase
20 proportionate. That is wrong, as a matter of law. And we
21 briefed this extensively in a motion in limine specifically to
22 address this pretrial. But here we are.

23 So let me just say, to the extent that the Court
24 needs to apportion fault if, and only if, obviously, it finds
25 the United States liable, then the question of the causal

1 link, and, obviously, Devin Kelley being the intentional
2 tortfeasor, being premeditated, being so depraved in his
3 actions, bears -- we still think 100 percent liability,
4 obviously, the vast, vast majority of which.

5 Otherwise, to the extent of Kelley's ability to
6 obtain a firearm at an FFL was the causal link that the
7 plaintiffs have alleged, then that and that alone is all that
8 can be assessed. But that's also why we argue Academy should
9 bear the lion's portion of whatever would remain after
10 Devin Kelley, who obviously bears 99 percent.

11 The point is, that's exactly why we introduced into
12 evidence Academy's firearm checklist, because that shows they
13 have six steps that they go through. And step five is the
14 NICS background check. Step two is making sure that they get
15 the requisite governmental issued ID, and that that ID
16 identifies, for purposes of 18 U.S.C. 922(b)(3), where the
17 buyer resides, because Academy has to comply not only with the
18 state substantive law where the sale occurs, but also the law
19 from which the buyer resides, which is Colorado.

20 And here, there's a Colorado statute enacted after
21 the Aurora mass shooting to ban large-capacity magazines to
22 prevent mass shootings. The federal law was enacted by
23 Congress to ensure those types of laws could not be
24 circumvented by going from Colorado to Texas and obtaining
25 those type of large-capacity magazines.

1 If the checklist, which was undertaken by Academy,
2 was adequate and was followed, step 2 should have ended the
3 sale, and they never get to step 5 for the NICS background
4 check.

5 So that's, again, from a causation standpoint, the
6 NICS background check could not have been the proximate cause
7 of that sale, could not have been the proximate cause of
8 plaintiffs' injuries. That's why Academy bears the large
9 burden, large percentage of whatever is left after
10 Devin Kelley's obviously enormous percentage.

11 THE COURT: Yeah. So I just wanted to give you-all
12 the benefit of just my thoughts right now to help you prepare
13 your arguments.

14 MR. STERN: I'm ready to go, Your Honor.

15 THE COURT: Yeah. No, that's fine.

16 MR. ALSAFFAR: Can I take that 20 minutes back?

17 THE COURT: So the other part about this though is,
18 you know, I'm recalling evidence that the Air Force had a
19 checklist to.

20 So now, for you-all, I mean, what of, and what is the
21 Court to make of the alternative means to procure weapons
22 argument that the government has repeatedly relied upon? And
23 so you-all might want to consider addressing that during your
24 closing arguments, and certainly in the findings of fact and
25 conclusions of law.

1 As to the findings of fact and conclusions of law,
2 you know, I'm not going to limit -- you know, this is an
3 important case to many people, and so -- you know, of course,
4 I want you-all to submit proposed findings of fact and
5 conclusion of law, but to the extent that you also want to
6 submit sort of like a brief in support for specific portions,
7 you know, you have leave to do that. There's no pagination
8 limits, so, you know, you-all address to the depth you think
9 necessary.

10 Now, I would suggest to you-all that, you know, I
11 guess, and here's my problem with the government is -- you
12 know, the "no duty" argument, I have a hard time with. And
13 so -- but I am very curious about your proximate cause
14 argument. That, to me, is your strongest argument, so you
15 ought to focus on that.

16 And, likewise, the plaintiffs ought to be giving
17 particular attention to the proximate cause and foreseeability
18 elements here, because I think that's where the real fight is.

19 Anything else we need to take up before we adjourn
20 for the day?

21 MR. ALSAFFAR: Your Honor, I had a housekeeping
22 question. Would it be okay if we both use the podium, just
23 for the closing arguments?

24 THE COURT: If you both feel comfortable with that.
25 I'm not sure what your vaccination statuses are.

1 MR. ALSAFFAR: Fully vaccinated.

2 MR. STERN: Fully vaccinated.

3 THE COURT: So, yeah, if you feel comfortable doing
4 that, that's fine with me.

5 MR. STERN: Thank you, Your Honor.

6 MR. ALSAFFAR: Thank you, Your Honor.

7 THE COURT: Anything else we need to discuss?

8 MR. ALSAFFAR: Not for the plaintiffs, Your Honor.

9 THE COURT: So for everyone else here, we are in
10 adjournment until 10:00 tomorrow morning, central time.

11 (Proceedings continued in progress.)

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2 I certify that the foregoing is a correct transcript from
3 the record of proceedings in the above-entitled matter. I
4 further certify that the transcript fees and format comply
5 with those prescribed by the Court and the Judicial Conference
6 of the United States.

7
8 Date: 04/19/2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 20, 2021

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GIGI SIMCOX, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 *(San Antonio, Texas; April 20, 2021, at 10:00 a.m., in*
2 *open court.)*

3 THE COURT: Did y'all want to reserve any time for
4 rebuttal?

5 MR. ALSAFFAR: Ten minutes, Your Honor.

6 THE COURT: Ten minutes for rebuttal, and then a
7 ten-minute warning for both sides?

8 MR. STERN: Please, Your Honor.

9 MR. ALSAFFAR: Your Honor, is it okay if I have a
10 15-minute warning?

11 THE COURT: Yeah.

12 MR. ALSAFFAR: Thank you, Your Honor.

13 MR. STERN: I'll take the same, just to make it easy.

14 THE COURT: Good morning. We'll resume with 18 Civil
15 555.

16 All counsel, parties, witnesses, participants, and
17 members of the public are reminded that this is a formal
18 proceeding, and that they should behave at all times as if
19 they were present in the courtroom.

20 The standing order of the San Antonio Division of the
21 Western District of Texas on remote access to court
22 proceedings remains in effect. Photography, recording, or
23 streaming of this proceeding by any means is strictly
24 prohibited.

25 Though this proceeding is open to the public,

1 technological restraints requires that members of the general
2 public request access from the courtroom deputy to participate
3 remotely. Those granted approval to participate remotely must
4 not forward the electronic link to nonparticipating colleagues
5 or persons, and must not post a link on any public forum.

6 As with all proceedings, violations of these
7 instructions are subject to contempt proceedings.
8 Accordingly, please exercise proper courtroom decorum at all
9 times.

10 And with that, we'll turn to the plaintiffs for
11 closing arguments.

12 MR. ALSAFFAR: Your Honor, may I proceed?

13 THE COURT: Yes.

14 MR. ALSAFFAR: Thank you, Your Honor.

15 No one knew more about Devin Kelley's potent and
16 extreme danger to the community than the Air Force. No one
17 had the most time, no one had the most opportunity to protect
18 our community from Devin Kelley more than the Air Force.

19 We're here today because for over 30 years now, the
20 government has refused to take responsibility for protecting
21 the public as a result of its actions. We find ourselves as
22 the plaintiffs in an unusual position in arguing that the
23 federal law that was specifically designed to protect us from
24 gun violence matters, while the federal government has come
25 into court to argue that it doesn't.

1 And, Your Honor, you asked us to address two key
2 issues in closing arguments, and I'd like to -- I'd like turn
3 to that. The first one that you asked me to address was the
4 proximate cause issue, which has two elements to it, the cause
5 in fact and the foreseeability. And I'd like to turn first to
6 the cause in fact.

7 And I always like to, in these instances, Your Honor,
8 just turn to what the law is on that issue, and if I could
9 show you just the pattern jury charge, which is page 39 of the
10 pattern jury charge, proximate cause in Texas is very
11 straightforward. The question of proximate cause that you
12 have to answer, and it's straight out of the pattern jury
13 charge, is just a cause that it was a substantial factor in
14 bringing about the injury. And, Your Honor, you correctly
15 noted in your order what substantial factor means, and it is
16 not a complicated test in Texas law.

17 Substantial factor is would a reasonable person
18 believe that the cause was connected to the conduct in the
19 popular sense of the word. This is a common sense test. This
20 is not the kind of test that the government is asking you to
21 apply it. It is not a complicated, convoluted, alternate
22 reality test. It is simply would a reasonable person believe
23 that what the defendants did in this case contributed or
24 caused to the shooting.

25 So did the defendant's negligence cause Devin Kelley

1 to obtain weapons he used in the shooting? That's the
2 substantial factor test. That is virtually undisputed in this
3 case, Your Honor. And I wanted to -- and the reason I say
4 "undisputed" is because it's easy to forget that a very long
5 time ago in this case, though, after a very long year-plus
6 battle in discovery, we got the government to agree to some
7 very basic stipulations in this case after we got the
8 evidence. And I want to show you those stipulations, because
9 they actually bear directly on the question that you're asking
10 of us on substantial factor.

11 And if you look at Stipulations Number 8 and 9, Your
12 Honor, and we'll start with 8., 8 and 9 are exactly the same.
13 Eight applies to the OSI. Nine applies to the security forces
14 at Holloman Air Force Base. And if you look at the last
15 paragraph, "Consequently, Devin Kelley's fingerprints and
16 conviction were not in the FBI's National Instant Criminal
17 Background Check System at any time before November 5, 2017."
18 Now, this is not a new fact. We obviously have been dealing
19 with this fact for a very long time.

20 But when it comes to the first question you're asking
21 us to answer on substantial factor, this stipulation, along
22 with stipulation -- I won't show you Number 9. It's the exact
23 same thing, but it applies to Security Forces. This
24 stipulation already gets you very far down the road of
25 substantial factor test.

1 And the government in this trial in argument has
2 suggested that the stipulations don't really matter that much.
3 Suggesting that, "Well, because we stipulated to it, Your
4 Honor, it's really not that important." That could not be
5 farther from the truth. The fact that they stipulated to this
6 is because they had no choice. The evidence is overwhelming.
7 The fact that they stipulated to this, "Consequently, his
8 convictions were not in the FBI database." That is a causal
9 stipulation. The fact that they did, makes it more important,
10 Your Honor, not less important.

11 But you did ask us to go down the road and — and
12 talk about this alternative cause theory that the government
13 has asked you to entertain on the substantial factor test.
14 And I want to — I do want to go into that because we made a
15 great effort despite the fact, Your Honor, that what — what
16 the government is actually suggesting here in this alternate
17 cause situation, it really isn't alternate cause, Your Honor.
18 It's an alternate reality.

19 It's not based on the facts of this case. And it's
20 also not based on what the law requires. One thing that has
21 jumped out from their motion practice, their motions in
22 limine, and their arguments, their pre-closing arguments in
23 this case, is that they are not asking you to apply Texas law
24 correctly. They are using a substantial proximate cause test
25 that requires you to find that there is only one proximate

1 cause, and if that there is another proximate cause, or if we
2 can think of or imagine another cause, then there is no
3 substantial factor. And I think you know very clearly in your
4 orders, that is not the law in Texas. It's not the law in
5 most states either. That you can have more than one
6 substantial factor. You can have more than one proximate
7 cause. It's in the jury charge.

8 A proximate cause is all that's required. And if you
9 can establish that there is a proximate cause, even if there's
10 another proximate cause that's actually based in evidence and
11 reality, it doesn't overcome the fact that we've proven a
12 proximate cause, which has happened here. The reason that's
13 important, Your Honor, is because when you go through the
14 evidence and you have to write the opinion and you have to
15 base it on the actual evidence presented, this isn't like
16 other cases where you have a causation battle, you have -- you
17 have competing battles on what caused an injury.

18 Take a products liability case, standard crash
19 worthiness case where a car rolls over, and the plaintiff
20 says, "Well, the roof -- the roof crushed and it shouldn't
21 have because it wasn't designed properly." And the defendant
22 car manufacturer says, "No, that's not the cause. The cause
23 is, this was just a really bad accident," or, alternatively,
24 "We made the car fine. There's no evidence that it wasn't
25 made fine." And those battles are had on the battlefield of

1 the facts, the actual evidence and facts that happened, not on
2 some alternative theory on what may or may not have happened
3 or what another car manufacturer would have done or what
4 another accident would have happened.

5 In this case, the defendant is asking you, we want
6 you to engage in speculation and guesswork on what
7 Devin Kelley might have done if we assume away the reality of
8 what actually happened. That reality being that our
9 negligence substantially caused what happened here. If it
10 wasn't for what we did, the weapon that was used to murder
11 these families and to severely injure these women, children,
12 fathers, grandfathers would never have been in his hand.

13 And it's useful to remind you, Your Honor, that while
14 we did have direct evidence of that in the actual trial
15 itself, that we submitted over 20 depositions that are part of
16 the trial record, most of which are from Air Force employees.
17 Most of those employees admitted under oath that if it wasn't
18 for their failures to report, that gun never would have been
19 in his hand.

20 That is not only a substantial factor, Your Honor,
21 that is a direct straight-line proximate cause to how this
22 event happened, but I promised you I would get to this
23 alternative reality theory that the government has offered in
24 this case. So we addressed that. The first thing we did,
25 Your Honor, is we sort of made a list of what the government

1 was telling you was these alternate causes: So illegal guns,
2 the straw man purchase theory, stolen guns, ghost guns,
3 alternative gun markets, gun shows, and I think the last one
4 was internet -- internet sales as a possibility.

5 And the first thing we did was we looked at the
6 extensive Texas Rangers investigation, and you will remember
7 that we really took you through that evidence, and the main
8 reason that we called the Texas Ranger who led the
9 investigation, Terry Snyder, is because we wanted to ask him
10 and give you the evidence that you needed about this
11 alternative reality, alternative causation theory that the
12 government has offered.

13 We said, okay. Looking at this record and looking at
14 this investigation that the Texas Rangers did, Your Honor, the
15 FBI, it's the Department of Justice, the Homeland Security,
16 local law enforcement did, over 70,000 documents. They, as
17 you recall us saying, they turned over every single stone in
18 Devin Kelley's life. They didn't just look at his internet
19 profiles, which they did.

20 They didn't just interview everybody in his life,
21 which they did. They flew out to California to interview
22 potential witnesses related to this shooting. They didn't
23 just do that. They went on to his property. They unearthed
24 every single thing they could find about Devin Kelley, and
25 they put together quite a thorough file.

1 And when we asked Terry Snyder this question, we went
2 through each one of these, and what did he say about the
3 illegal guns question? That was the first one we asked him,
4 "Based on all this evidence, do you have any evidence that
5 Devin Kelley ever purchased any illegal guns," and that's his
6 trial -- trial testimony, any criminals, any illegitimate
7 place, any evidence whatsoever. "No."

8 We then went to the next theory, Your Honor, and that
9 was, well, Devin Kelley could have made a straw man purchase.
10 Devin Kelley could have gone, had a friend, had a family
11 member, have someone that he trusted go and get a purchase
12 through a straw man.

13 One of the factors that I think we proved
14 conclusively, Your Honor, on this one is that Devin Kelley
15 didn't really have a large social network. Devin Kelley was a
16 deeply disturbed and deeply paranoid person. Not a lot of --
17 he didn't like a lot of people, and not a lot of people liked
18 him.

19 He had a very small network of people that he
20 quote-unquote "could trust," and that was pretty much limited
21 to Danielle Kelley -- Danielle Smith -- sorry -- and his
22 parents. He had some -- some friends, some loose friends who
23 worked with him on and off, and that was about it.

24 And so the Texas Rangers looked into that. They
25 looked into every avenue and every relationship he had. And

1 we asked Terry Snyder, "What about the evidence, any evidence
2 in the record that Devin Kelley either had, asked, or pursued,
3 or even considered a straw purchase." None. No evidence.

4 But we didn't just ask Terry Snyder that. You'll
5 remember that the government attorney said, we are putting our
6 alternate theory, alternate causation case on the shoulders of
7 two key witnesses.

8 Do you remember Mr. Barborini? And you remember
9 Mr. Donahue, the Stanford law professor? The government said,
10 Your Honor, this is why we are bringing these two witnesses.
11 We are bringing these two witnesses for the sole purpose of
12 addressing this alternate reality, alternate causation theory,
13 and that's what they are here to talk to you about.

14 So I asked Mr. Barborini, "All right. Well, what
15 evidence do you have about a straw man purchase? Let's knock
16 that one out. Tell me all the evidence you can provide the
17 Court that there was ever a consideration or an attempt or a
18 thought about a straw man purchase," and Mr. Barborini
19 testified, "None, I don't have any evidence."

20 We asked Mr. Donahue that. "What evidence do you
21 have? You've talked about it in your papers and articles
22 you've written in USA Today, interviews you've given on TV,
23 but what evidence do you actually have this about case; about
24 whether he went to his family; whether he went to his friends?
25 Any evidence that he" -- "that a straw man purchase was even a

1 possibility in this case?" And his answer was the same, "No
2 evidence."

3 And I want to remind you, Your Honor, too, that these
4 are the two witnesses the government promised would prove this
5 part of their case. Not only did they promise it would prove
6 their part of -- this part of their case, but you remember
7 when we asked them, "Well" -- in terms of the reliability of
8 their opinions -- said, "Well, what did you review? How much
9 time and effort did you put into actually reviewing
10 Devin Kelley specifically and his life, because we have a
11 comprehensive 70,000-document file and a 30,000-document file
12 based on his Air Force -- or 30,000-pages file based on his
13 Air Force career. How much did you review?"

14 Mr. Barborini and Mr. Fox reviewed combined,
15 combined, no more than 40 documents. Combined. Almost
16 nothing from the Ranger investigation in Devin Kelley's life,
17 and virtually nothing from the actual Air Force file that had,
18 as you know, extensive information about what he preferred,
19 what he liked, what his choices were.

20 They put their entire alternative causation theory on
21 the shoulders of two witnesses that almost looked at nothing,
22 and I think -- and I think it's reasonable to assume that
23 there's a reason why they didn't show them those records,
24 because don't you know if they thought it was a reasonable
25 theory, don't you know if they thought that it was convincing

1 evidence, that these -- that there was evidence for these
2 alternative theories that they would have provided their two
3 main witnesses on this cause-in-fact claim all of the evidence
4 to look at? All of it. And they didn't. And that's why we
5 got these answers.

6 When we asked Mr. Barborini about, "Well, you talked
7 a lot about ghost guns. Tell us about the evidence you have
8 on ghost guns relating to Devin Kelley," and you'll remember
9 what he said on that. He said, "Well, I have no evidence that
10 he actually looked for a kit, purchased an 80 percent kit, or
11 was even looking into building an actual ghost gun."

12 We talked to Mr. Donahue about the ghost gun theory.
13 Same questions were asked of Mr. Donahue. "Devin Kelley
14 didn't have any ghost gun kits or ghost guns anywhere; right?
15 That's right."

16 And, Your Honor, let me make another point about the
17 ghost gun theory, if I could. We provided you extensive
18 evidence on Devin Kelley's life. It's admitted into evidence.
19 His history, educational history, his job history. And I'm
20 not being -- I'm not trying to be cruel, but Devin Kelley
21 wasn't a bright person. Devin Kelley wasn't a successful
22 person. Devin Kelley was a lazy person. That's who he was.

23 And I know the government says, "Well, anybody can
24 build it." In fact, that's what Mr. Donahue said. He said,
25 "Because anybody can build a ghost gun, I, therefore, know

1 Devin Kelley could have. That's all I can say because I
2 didn't look at any of his records. I didn't actually look at
3 what he did, but I can just tell you it's easy."

4 He didn't tell you what type of gun is easy to build;
5 did he? He didn't tell you how easy it is to build a
6 semiautomatic AR-15 that can fire off specialized bullets that
7 will kill you on impact and destroy your body and allow you to
8 kill, murder, and maim over 56 people in a matter of a few
9 minutes. He didn't talk about that. Neither did
10 Mr. Barborini.

11 We have no idea based on the government's evidence
12 what kind of guns they are talking about. They didn't talk
13 about what a receiver for an AR-15 looks like and how you get
14 a receiver, which is a firearm, to build a ghost gun. They
15 didn't talk about that. They didn't talk about what kind of
16 equipment you need to actually manufacture a semiautomatic
17 rifle that can do that damage, and not only manufacture and
18 build one that can do that damage, Your Honor, but one that's
19 reliable. One that is good as new.

20 Because what we know from Devin Kelley -- and I hate
21 to keep going back to the evidence. But what we know from
22 Devin Kelley is he -- he loved new guns. He wanted new guns.
23 He needed reliable guns. That's what his preference was.

24 But what we also know about Devin Kelley was not only
25 that he liked reliable, new guns. He was extremely paranoid.

1 He had an extreme paranoid disorder. You saw that in the
2 mental health records. You saw that from Air Force mental
3 health records. You saw that in the mental health testing.

4 You saw all of their experts on this issue -- well,
5 Dr. Bursztajn agreed on this as well. This man had a
6 personality disorder and severe paranoia. How does that
7 relate to this gun issue? He didn't trust people.

8 He didn't trust anybody. He didn't trust his wife.
9 He didn't trust anyone he worked with. And he certainly
10 didn't trust strangers or people he didn't know selling him
11 guns. And the only time he did do that once in his life years
12 before this shooting, well before all these brand new
13 purchases of guns, he traded it for a dog. That's the
14 evidence in this case. Not speculative. Not the craftsman
15 that the government wants you to believe Devin Kelley is, but
16 the evidence.

17 The alternative gun market theory. We also asked
18 Mr. Barborini about that. You know, there are these online
19 markets. There's these alternative markets. This is
20 different than the gun show markets. Well, let me -- this was
21 bantered a lot about the government, Your Honor, because it
22 seems easy; right? It seems easy and they want you to believe
23 that this is what he wanted to do. So let's just put aside
24 the fact that Devin Kelley demonstrated he didn't really trust
25 anybody, and he wanted to see the gun and have the gun and

1 have it be new because it was at a store. Remember Danielle
2 Smith testified to that. That's not controverted. That's
3 uncontroverted.

4 We asked Mr. Barborini, "What evidence do you have?
5 Just tell us anything that Devin Kelley had any interest or
6 availability of alternative gun markets. Don't recall seeing
7 that. None. No evidence."

8 Finally, we asked Mr. Barborini about this gun show
9 idea. We also asked Mr. Donahue that. Mr. Donahue liked to
10 talk about gun shows a bunch, and, Your Honor, we have a lot
11 of gun shows in Texas. I know that. Nobody is denying that.
12 We have a lot of gun shows all over this country, and whatever
13 you think of them, they are here and we're not disputing that.
14 We're not disputing that at all.

15 In fact, it's actually one of the worst pieces of
16 evidence for the government because it's the only alternative
17 theory that actually has something in the actual factual
18 record to at least talk about it. And what I mean, Your
19 Honor, is that we know that Devin Kelley went to gun shows.
20 We know that. That's undisputed. No problem admitting that.
21 That's true. Danielle Smith confirmed that, and they
22 certainly relied on her for that part of her testimony, so we
23 don't dispute that.

24 But what's very, very interesting is what the
25 evidence shows as a result of that, is that despite going to

1 gun shows, Devin Kelley never once bought any gun at a gun
2 show, not once, much less a high-powered semiautomatic weapon
3 that can commit mass murder reliably.

4 And we asked their expert Mr. Donahue, Professor
5 Donahue, about that. "Can you tell us any evidence in this
6 case, any, that any of his guns were purchased at gun shows."
7 Again, no evidence. That's the evidence. That's from their
8 own expert's mouth. We have no evidence. You cannot rely for
9 substantial factor on no evidence. That's certainly not
10 enough. Even if you accept the incorrect version of proximate
11 cause law that the government is offering, no evidence doesn't
12 get you there.

13 I want to -- I want to make another point about the
14 gun show as well. Before I do, there's one more thing. On
15 the substantial factor question, we actually put that question
16 directly to Mr. Barborini. We asked him directly, "What was
17 the government's negligence here of substantial factor in
18 bringing about his purchase of this weapon?"

19 You might not recall that. It was one of the last
20 questions we asked Mr. Barborini. "Do you agree that their
21 failure to put his conviction in the database was a
22 substantial factor in Devin Kelley being able to acquire the
23 gun that he shot everyone at Sutherland Springs Church with?"
24 "That's correct. That's correct."

25 That is from their star witness on alternative cause

1 and alternative sources.

2 I want to now turn to another interesting development
3 in this case, Your Honor, and that is the Dick's Sporting
4 Goods denial. You might recall, Your Honor, just for the
5 record, that purchase -- I'm sorry. Not purchase. That
6 denial. The denial at Dick's Sporting Goods, that occurred
7 almost two years before this shooting. And this is really an
8 important factor when it comes to the defendant's argument.

9 Now, what -- the interesting turn of events that I'm
10 referencing in this case, Your Honor, is that now the federal
11 government has come into court and said, "We think the denial
12 at Dick's is good for us. We think it shows that
13 Devin Kelley, you know, just wanted to break the law and keep
14 doing it."

15 I'll tell you this, Your Honor, the plaintiffs are
16 not disputing that Devin Kelley is a law breaker and a
17 criminal, and that he liked to break laws. And no one knew
18 that more than the Air Force. We are not disputing that.
19 That's what criminals do. And that's why laws like the Brady
20 Act are in place, for the sole purpose of preventing dangerous
21 people like him from getting guns. That's why it's there. So
22 I don't dispute that, that he liked breaking laws.

23 But what's interesting, Your Honor, is that this is
24 the worst fact for the defendant, not the best fact. It's not
25 even a remotely good fact for them, because Dick's, Your

1 Honor, is your test case. Dick's is your test case for every
2 single one of these alternative causation theories that the
3 government has proffered in this case. Every single one.

4 What do I mean about that?

5 Here's their theory. Their entire theory is we want
6 you to assume away what happened. We want you to assume away
7 the truth. We want you to do counterfactuals contrary to the
8 facts.

9 And contrary to the fact, they want you to assume
10 what would happen if Devin Kelley was denied in an FFL.
11 That's what they want you to assume away, because he wasn't
12 denied at an FFL. What would happen if he was? Our theory is
13 if he was denied at an FFL, all of these plethora of
14 alternative causation theories would come sprinkling down, and
15 he would have just had his rainbow choice of whatever he
16 wanted.

17 That's their theory. It happened. It happened at
18 Dick's Sporting Goods. Two years before this shooting, an FFL
19 turned him down. And what happened? Did he go to a gun show?
20 Yeah, he might have gone to a gun show. And did he buy a gun
21 there after being denied by an FFL? No, he didn't. That's
22 now undisputed, now that we have had this trial.

23 Did he ask somebody in his family? Do you remember
24 the government's argument was Devin Kelley exhibited so much
25 control over Danielle that she was like a robot, that she

1 would just do whatever he wanted, criminal or otherwise. I
2 find it interesting that they have presented no evidence that
3 Danielle has ever done anything like that for him. But let's
4 just assume -- let's just assume just for them.

5 That was their opportunity to prove. They had two
6 years to prove it. Did he go to Danielle and ask her to do a
7 straw purchase? Did he go to the father? Did he go to his
8 mother? Did he go to one of his somewhat acquaintances at
9 work, or anyone in the ex-military? Anybody? No.

10 Did he go online and buy an AR-15 or any other gun?
11 No. When he went to those gun shows, did he go, "You know
12 what, I've been denied at an FFL, so the jig is up, they know
13 I'm" -- "they've got me now, so I need to find another
14 source."

15 Did he do that? No. Why? Who knows. Who knows.
16 He's paranoid. He's mentally disturbed. He loves new guns,
17 and he only likes new reliable guns. Remember Danielle said
18 he just loves those big stores. That's where he wants to get
19 his guns.

20 Did he build a ghost gun, Your Honor? Did he build a
21 ghost AR-15 in those two years when he was supposedly very
22 interested in manufacturing his own weapons? He didn't.

23 Dick's is your test case. It's based in reality.
24 It's not speculative. It's not, let's guess what he might
25 have or could have done. The universe presented the

1 government with their very counterfactual, and it came back no
2 on each one of their theories.

3 What did he do instead? He went to an FFL and he
4 bought that weapon of mass destruction, that reliable new
5 killing machine at an FFL. And why? How did he get it?
6 Because the Air Force didn't report his conviction and he was
7 able to walk in and walk out with that gun that was used on my
8 clients and on all the plaintiffs.

9 Your Honor, there was another test case for their
10 theory. There was another one. Do you remember the Holloman
11 Air Force Base exchange purchase? Well, attempted purchase.
12 I'm sorry.

13 When Devin Kelley was hospitalized in a mental
14 hospital the second time, when he was planning a mass shooting
15 after he had been institutionalized, you will recall that he
16 tried to get a gun while he was in the mental hospital.

17 THE COURT: So the evidence in this case was -- at
18 least in the courtroom -- was kind of scant about why he was
19 denied. Is there some other evidence buried somewhere else
20 that I can --

21 MR. ALSAFFAR: No. There -- no. It's a very -- it's
22 an open question on why he was denied. Here's what the
23 evidence was at trial, though, on that issue, though, Your
24 Honor, because that's actually what I was about to say because
25 that's a very important point.

1 You'll remember we showed you the document from the
2 AFOSI file, that the Holloman Air Force Base exchange retailer
3 contacted OSI. We don't -- we don't know. The record -- I
4 mean, believe me, we've tried, and I'm not saying it was kept
5 from us. I'm just saying we've got a lot of records in this
6 case, and we've looked at every one of them.

7 It's not clear what triggered it. I don't know if
8 it's because the phone call came from the mental hospital. We
9 don't know if it was something that he said on the phone call
10 that made them a little -- little worried, but the bottom line
11 is we do know that the Holloman Air Force Base exchange
12 contacted the law enforcement about it.

13 So we know two things. We know that when he was in a
14 mental hospital and when he was making mass shooting threats
15 and when he was making homicidal threats and when he was --
16 you saw the testing. You know what happened in that mental
17 hospital -- when he was planning warfare tactics and offensive
18 attack strategies, he called an FFL. He tried to arrange a
19 purchase at an FFL while he was institutionalized.

20 And the FFL contacted the law enforcement agency, and
21 the reason why that's important, Your Honor, is that after
22 that, he didn't spend -- he didn't go dark. He didn't go gun
23 show shopping in the many, many years after that. He didn't
24 go have people straw man purchase for him. He didn't do any
25 of the things the government is insistent that he absolutely

1 more likely than not would have done, even though we now have
2 two test cases, two test cases now showing that.

3 And what's very, very important, Your Honor, about
4 the evidence in this case on that particular instance on June
5 of 2012, is that reporting works. Not only does it work, it
6 works against Devin Kelley. They stopped him from getting
7 that gun.

8 They even took away one of his weapons, you'll
9 remember that. The Air Force Special Forces took away and
10 seized his gun, and even though he had had a weapon actually
11 taken away from him, and even though he was put into a mental
12 hospital, he still went to an FFL. And even after that FFL
13 denied him, he didn't do anything illegal, purchasewise. He
14 didn't do any of that. He didn't do straw -- he didn't do any
15 of it. He just eventually did what he always did. He went to
16 an FFL.

17 But the second thing that's so important about that,
18 Your Honor, is that the Air Force reporting once again, when
19 they do it, it works.

20 The third -- the third item on this and, now, the
21 last one I'll address on cause in fact, Your Honor, and I
22 apologize if I'm spending too much I'm on it, but you told me
23 to address it and I want to address it. If the government is
24 allowed to indulge in speculation and ask you to engage in
25 speculation on what would have, could have done, if the thing

1 that actually caused the shooting and caused him to have the
2 weapon in his hands didn't happen, then the plaintiffs ought
3 to be able to also offer some ideas on that matter.

4 But these aren't ideas that are based in guesswork or
5 based in, you know, articles or thoughts about other shooters
6 or anything like that. These are ideas that are based in the
7 actual, factual record that has been entered into evidence.
8 What I'm talking about is the law enforcement encounters.

9 You will remember that we asked every one of their
10 experts that NICS serves two purposes. NICS doesn't just
11 serve the purpose of denying criminals and dangerous people
12 weapons. That's certainly a very important part of it, but
13 that's only one of its purposes.

14 You will recall at the beginning, we had the big
15 rules board where everyone agreed on the Air Force side. All
16 of those pictures were Air Force people that have been
17 submitted as trial testimony who agreed that there's another
18 important factor of the FBI NICS system, and that is that it
19 helps law enforcement keep our community safe, and that when
20 those records aren't submitted to the FBI, it's not just that
21 it helps deny guns to dangerous felons like Devin Kelley, it
22 also ensures that the law enforcement personnel know who are
23 the dangerous people out there, so when they encounter them,
24 they know who they are dealing with.

25 And when they encounter them and they do something

1 wrong, like abusing a child, abusing animals, being reported
2 for domestic abuse, they know they are dealing with a felon.
3 And if they know they are dealing with a felon, and they are
4 dealing with a felon like Devin Kelley who likes to walk
5 around all the time with a gun on his hip, and likes to tell
6 even the cops that he's wearing a gun on his hip, and likes to
7 tell everybody in his life that I like to carry a gun with me
8 at all times, that is also why NICS matters. The government
9 may not agree, but it matters, and it matters for that reason
10 as well.

11 And I'll just use one example. And I believe it's
12 JEX 522 is the record that we referenced in trial, and it's
13 been admitted, and that was the time, Your Honor, you remember
14 when just for a couple of weeks Devin Kelley and Danielle
15 Smith in Colorado were rooming with Emily Willis. And it was
16 only a few weeks that they roomed with her, and it only took a
17 few weeks rooming with her that she noticed he was abusing her
18 and that he was abusing his child. Exactly like he did with
19 Tessa Kelley. Exactly like what the Air Force knew about for
20 all those years. And you will remember, Your Honor, this is
21 that report 522.

22 Emily Willis reported child abuse on a convicted
23 child abuse and domestic abuse felon who liked to have guns
24 and who had guns with him in Colorado. She reported it and
25 the police -- and she reported it, she testified, and this was

1 also part of her testimony that's been entered into evidence,
2 Your Honor, so you can rely on it, is that she told the police
3 that this person, Devin Kelley, not only was abusing a child,
4 but that she knew he had been convicted of it before, that he
5 had been convicted -- he's a convicted child abuser.

6 And the police looked up his record. Said, he's
7 clean. There's nothing there. What did Devin Kelley do the
8 next day? Do you remember that, Your Honor? Danielle Smith
9 said he fled; he fled the state. And that was the end of that
10 case, because there's no record and it's just another report
11 of domestic abuse.

12 Now, what do you think would have happened if a case
13 of child abuse was reported, the police, which that record
14 proves actually did the background check, so we know they did
15 the background check, and so we know they would have pulled
16 up, this guy's a convicted domestic abuser and child abuser,
17 and then they find out he fled the.

18 State. We got a felon fleeing the state who's been
19 accused of child abuse. You don't think at the very least a
20 BOLO -- a BOLO would have been entered, just like they did at
21 the Air Force?

22 The idea that this not very bright person who liked
23 to tell everyone in his life he had guns and carried guns and
24 had all these law enforcement encounters, including four days
25 before the shooting, would not have been intercepted at some

1 point with his background? Because it's not only that he was
2 prevented from getting the weapons he'd used to kill all these
3 innocent people and injure them, he needed two things to
4 happen. He needed a gun that could do the job reliably that
5 he wanted and he needed his freedom.

6 He needed his freedom. Any one of those encounters
7 would have resulted in not only the underlying offense being
8 reported, domestic abuse was reported also in addition to
9 child abuse, but then they would have found out this guy's got
10 guns. That's an automatic ten year, easy. We can find any
11 U.S. Attorney to prosecute that. That's a layup conviction.
12 A layup.

13 THE COURT: You have 25 minutes remaining.

14 MR. ALSAFFAR: I want to transition, Your Honor.

15 THE COURT: Yeah. If you want to transition.

16 MR. ALSAFFAR: I do, Your Honor. Thank you, Your
17 Honor.

18 Next is foreseeability. I think you've laid it out
19 very well in the order, and it really is just a question of:
20 Could the defendant realize that failing to report
21 Devin Kelley for his felonies to the gun system would create a
22 situation where Devin Kelley could avail himself of the
23 opportunity to get a gun to commit gun violence? That's
24 foreseeability, the question.

25 And I think in your order, you also stated it

1 correctly, Your Honor, that the question of foreseeability
2 simply is, was it foreseeable to the Air Force that
3 Devin Kelley can commit gun violence? I mean, that's the
4 question of foreseeability in this case.

5 That has overwhelmingly been proved. What's happened
6 is the government is moving the goal post again, so they're
7 wrong on the proximate cause definition, but they are really,
8 really wrong on the foreseeability definition.

9 I want you -- I encourage you to go back and look at
10 Bursztajn, Dr. Bursztajn and Dr. -- Dr. Fox's testimony. I
11 encourage you to look at it through the eyes of what the Texas
12 law requires definitionally of "foreseeability." And it is as
13 clear as day that they are applying the wrong standard. Their
14 standard is predictability. They even use those words a lot.

15 Their standard is, "Unless you can predict this mass
16 shooting, it's not foreseeable." That is not the law.
17 Foreseeability has never been a crystal ball. And the
18 defendant's, the government's request that you -- we have to
19 prove crystal ball foreseeability is simply wrong.

20 But, boy, did we come close. Even under that
21 ridiculous standard did we come close. And I want to go
22 through that evidence very quickly, if I can, Your Honor.

23 First, I don't want to show you all the commander
24 memos from the Air Force. I'm confident that we probably did
25 that enough, but I want to just paraphrase those memos because

1 what the Air Force knew at the time, and the -- the sort of --
2 well, frankly, the disturbing mental health records, and the
3 disturbing mental health history that the Air Force was well
4 aware, I think we've proven beyond any doubt, much less a
5 preponderance of the evidence, that the Air Force knew this
6 man was severely mentally deteriorated, and that leopard
7 didn't change his spots.

8 We have the same leopard from the time he was in the
9 Air Force until the time this thing happened. That hurdle the
10 government can't clear. But what they knew more than his
11 extreme and disturbing mental health decline -- and that's
12 what they termed it in the record, Your Honor, "severe mental
13 health decline in the Air Force," they also knew about his
14 extreme physical violence, his gun violence, use of guns to
15 commit violence, his disturbing sexual violence, but also his
16 specific planning, his very, very specific planning of a mass
17 shooting.

18 That was -- that was something the government's
19 experts could not grapple with. The government has been
20 shifting its position on this from day one. Their first
21 position was, this was just domestic violence. He was just a
22 domestic violence person. And so, therefore, we can't be held
23 foreseeable liable because it's not foreseeable; what he did
24 wasn't domestic violence. Of course, I think we know that
25 this shooting was related to domestic violence. But putting

1 that aside, that was their argument first.

2 Their second argument was, "Okay. Well, we got some
3 trouble here. We got a lot of evidence that this was possibly
4 domestic violence, so really what the standard is now is that
5 you cannot prove that he was -- he was -- it was foreseeable
6 to us that he was planning a mass shooting."

7 Then they got into trouble with that one because we
8 proved actually he was planning a mass shooting, a mass attack
9 while he was in the Air Force. And so then the goal post
10 shifted to the Bursztajn standard and the Fox standard, which
11 is, no, you've got to prove this foreseeable -- this kind of
12 mass shooting was foreseeable.

13 What do I mean by, "They moved the goal post away and
14 back"? You will remember, Your Honor, that when we presented
15 their experts with the actual evidence of what he was planning
16 while he was in a mental health hospital and what he was
17 saying and threatening before and after was very clearly a
18 mass violence, mass shooting event.

19 You'll even remember that when the active shooting
20 expert, Supervisor Randall Taylor said the same, "Yeah, it was
21 foreseeable to us that he was possible going to commit a mass
22 shooting." They criticized him by saying, "Well, he's an
23 active shooter expert, not a mass shooter expert." I'm not
24 sure what the difference is.

25 But we asked Dr. Fox about this. We showed him the

1 record where the Air Force said, "No, no, no, he's actually
2 planning warfare and offensive attack strategies. He's
3 researching guerilla tactics in the mental hospital. He's
4 researching body armor. He's conditioning his cardiovascular
5 system. All the time, he's planning a way to escape and
6 create a diversion, which he then successfully does, while
7 he's arranging for a weapon."

8 The government's answer to that, "He was going home.
9 He wasn't going to do it. He was just going home." Well,
10 what kind of home is he going to where he needs to research
11 guerilla tactics, where he needs to plan offensive attack
12 strategies, where he needs to use body armor and a gun?

13 We asked this of Dr. Fox. We could put up Dr. Fox's
14 trial testimony. He finally conceded that it was foreseeable
15 to the government, that Devin Kelley was planning offensive
16 attack strategies. He also conceded that it was foreseeable
17 that Devin Kelley would kill his leadership. We can show
18 that.

19 So the Air Force was aware he had a severe disturbing
20 mental history. He was using guns in a violent manner and was
21 threatening to kill leadership, not family members; correct.

22 He also agreed that Devin Kelley made four separate
23 specific threats of mass killings while he was in the
24 Air Force; while he was in the Air Force. Threatened to kill
25 his leadership. He threatened to kill -- to blow everybody's

1 head off at his workplace. That's not leadership. He
2 threatened to kill the police as well, and he threatened
3 organizations within the Air Force. That was the fourth one.

4 Multi-variant attacks on both strangers and people he
5 knew, but not family members all qualifies as mass violence.
6 Dr. Bursztajn, however, probably said it best when he finally
7 admitted on cross-examination, relating to Devin Kelley's
8 planning, he conceded on cross-examination that the Air Force
9 was aware that Devin Kelley was planning a mass attack while
10 he was in the Air Force.

11 If we can show that, please.

12 All three, including Mr. Donahue — Mr. Donahue
13 termed it, "Well, the Air Force was aware that there was an
14 array of manifestations of intent to commit, quote 'mass
15 violence.'" Whole array of manifestations of violent intent
16 exhibited by Devin Kelley before they released him to the
17 public. That's correct.

18 Whichever way you skin that cat, that is all the
19 government's expert witnesses admitting that the Air Force
20 knew that Devin Kelley was planning a mass shooting event.

21 THE COURT: You have 16 minutes left.

22 MR. ALSAFFAR: Thank you, Your Honor.

23 I want to skip forward to something else the
24 Air Force did which I think bears on the foreseeability
25 question, and that's the barment issue.

1 You might remember, we -- we put this -- we put this
2 to Dr. Fox. We showed him a document -- I'm not sure if he
3 had seen before, but this was the document -- it was Joint
4 Exhibit 422. This, Your Honor, was a document that the
5 Air Force was protecting themselves, but not the rest of us.
6 This was the document that showed Devin Kelley trying to
7 access the Air Force Base after he was convicted and after he
8 was released from the Air Force.

9 You will remember, Your Honor, that Dr. Fox agreed
10 that three separate times, twice at the Holloman Air Force
11 Base, Devin Kelley tried to get on that base. We can be sure
12 there wasn't any good intent for that. But Devin Kelley,
13 after being barred, tried to get back on the base.

14 The first time he tried to get on the Air Force Base,
15 you will remember, April 26, 2013, the Air Force upgraded his
16 threat level. They said, "Hey, we're going to upgrade this
17 threat level," and then they not only protected the Holloman
18 Air Force Base -- rightly so, by the way, Your Honor. I have
19 no quarrel with that. That was the right thing to do.

20 They knew they had a deranged mass murderer on their
21 hands and that was the right thing to do to protect those
22 Air Force men and Air Force women, but then they upgraded his
23 threat level and protected everyone else at the Holloman Air
24 Force Base.

25 And, thankfully, when he came here to this town, to

1 San Antonio, and tried to get on to that base -- it's very
2 much -- a lot closer to his home, Your Honor, as you know, he
3 lived in New Braunfels -- they denied him as well. August
4 2015.

5 As late as February 2016, the Air Force was aware
6 that Devin Kelley was still trying to get on these Air Force
7 bases. February 2016, he goes back. That's not long, too
8 long before the shooting. Goes back to the Air Force Base at
9 Holloman to try to get on again. And he was denied. And why
10 was he denied? He was denied because the Air Force internally
11 reported this threat. And it worked.

12 Did Devin Kelley try to do anything illegal or try
13 any creative other ways to get on the base? He didn't.
14 Again, why? You don't need to answer that question. He just
15 didn't. That's the evidence. That's who he is. What we know
16 is that when someone reports him, including the Air Force and
17 they stop him from doing what he wants to do, they deny him,
18 he stops.

19 Remember Dr. Fox was asked that question on redirect
20 by the U.S. Attorney. And she said, "Are you saying that he
21 was stopped?" And he said, "Yeah. He was stopped." She was
22 like, "Are you sure he was stopped?" "He was stopped." Three
23 times he admitted to it.

24 The reporting system works. Not only does it work,
25 Your Honor, I think it works, but it also works on

1 Devin Kelley. It works on Devin Kelley. And I want to
2 just -- the last -- the last issue here, Your Honor, is the
3 only theory they have of why this happened, the motivation
4 theory, the protection theory, the avenger theory.

5 I don't want to spend too much time on that, because,
6 first of all, as Dr. Metzner explained -- and I think pretty
7 clearly -- even if we accept this as true, that somehow this
8 depraved person who cared nothing about anybody in his life,
9 and especially Danielle Smith and his kids, somehow was her
10 protector, was defending her honor by killing and massacring a
11 church, let's assume that's true, in what world is that not
12 domestic violence?

13 What world is a man, a serial rapist, that the
14 Air Force knew about, a serial abuser that the Air Force knew
15 about, what world is a man who thinks, I'm protecting my wife
16 by hog-tying her, putting a gun to her head in front of my
17 screaming children, locking her into a barn, then trying to
18 murder her entire family and church that she loves is
19 protecting her?

20 Well, let's assume that's true. That is not only
21 domestic violence. As Dr. Metzner told you, that is an
22 extreme form of domestic violence.

23 And if there's one thing Devin Kelley -- the
24 Air Force knew about Devin Kelley, is that he liked extreme
25 forms of violence, on underage girls, on of-age women, and

1 certainly of his spouses.

2 But I want to show you something, Your Honor, because
3 this entire protection theory is based on something that
4 didn't happen. You will remember in Dr. Bursztajn's cross --
5 recross-examination -- first of all, on his direct, he said --
6 well, the government showed him the records.

7 Remember the summary, the summary of Danielle Smith's
8 interview with the DOD with the federal agents? Do you
9 remember that? They had a summary that was unsigned and
10 unverified and the government also produced the actual
11 transcript of that summary. Dr. Bursztajn, for some reason,
12 only relied on the summary. I want to show you that document.
13 That's 156, JEX 156.

14 This is important, Your Honor, because this pretty
15 much puts this to bed, this protection theory. It's page 4 of
16 Joint Exhibit 156. This is actually what the government
17 showed him on his direct examination. And you remember this,
18 Your Honor, Dr. Bursztajn based his protection theory on this
19 quote, "Kelley then said to Danielle 'I'm sorry I have to do
20 this. I'm just trying to protect you. I have to tie you
21 up.'"

22 Well, Your Honor, we obviously combed through
23 everything and we combed through all of her testimony, and
24 that one just jumped out. We couldn't find that anywhere. So
25 there actually -- there is a transcript of this actual

1 summary. That is the transcript, JEX 452. I'm not going to
2 go through it, because this is by omission, but I encourage
3 you to read it. This is what Dr. Bursztajn is basing his
4 entire protection theory on.

5 You remember we asked him on recross-examination one
6 question, maybe two questions. We said, "Can you show us
7 anywhere in this transcript, of the actual transcript,
8 anywhere where she actually said that happened, because you
9 are basing it on her actual interview and we have the
10 interview transcript. Where did she say that? I can't find
11 it anywhere." And he said, "Well, not specifically." Then he
12 said, "Okay, not generally either."

13 It's not in there. It's not in there. It didn't
14 happen. And yet their entire protection theory, Your Honor,
15 is based on that. It's based on that.

16 Your Honor, I see I have ten minutes, and I would
17 like to address the apportionment question, if I could,
18 because you asked us to address that as well.

19 I think this dovetails -- you asked us in your order,
20 and I'll be brief because I would like to reserve some time.
21 You asked us in our order, you know, two things: You said
22 supervisory negligence. Well, I think we proved pretty
23 extensively through Colonel Youngner that 75 percent of the
24 contacts in the file, Devin Kelley file, were via supervisory
25 agents at Detachment 225.

1 But you also asked to look at that. And that was JEX
2 349 and JEX 348, those were the two audit trails that shows
3 you how many times supervisory agents and case agents touched
4 this file, and it was well over 130-plus. And
5 Colonel Youngner also said that the agents conceded in
6 deposition, you have that before you, too, that at the very
7 least, there were 79 supervisory reviews that should have been
8 done through the case file.

9 The reason that relates to proportionate
10 responsibility, Your Honor, you asked us to carve out the
11 percentage of supervisory negligence for apportionment
12 reasons, not only on the negligence finding, but also for
13 apportionment of responsibility.

14 THE COURT: That's also relevant to whether or not
15 the immunity defense is going to be raised on appeal.

16 MR. ALSAFFAR: It touches that as well.

17 And so we just wanted to provide you with the actual
18 documentation of that separation. So we now know that 70 to
19 75 percent of the actual overview and oversight of the file of
20 Devin Kelley was supervisor agents. But that's also important
21 for proportionate responsibility.

22 We literally know all the way up to 2017, Your Honor,
23 that Detachment 225 agents were contacting that file. And
24 they weren't just checking in. If you look at JEX 349, you'll
25 see, and we can pop a section up, they are actually going

1 through the folders and tabs, summary of investigation, by the
2 way, which tells you everything that's happened.

3 Incident disposition, subject disposition,
4 investigative disposition. That in this particular time is
5 2016 and 2017. That's how late Devin Kelley's file is being
6 looked at for possible reporting issues, if they know what
7 they are doing. And they didn't.

8 But that also bears on proportionate responsibility,
9 Your Honor. And what I'd like to do, if it's okay with Your
10 Honor, is I'd like to reserve the rest of my time to focus on
11 that specifically, if that's okay.

12 THE COURT: Yes, thank you.

13 MR. ALSAFFAR: Thank you.

14 THE COURT: Would you like a break, or would you like
15 to go forward now?

16 MR. STERN: Whichever Your Honor prefers. We can
17 take ten minutes.

18 THE COURT: Let's go ahead and take a ten-minute
19 break.

20 (Recess.)

21 THE COURT: Mr. Stern?

22 MR. STERN: Thank you, Your Honor.

23 Your Honor, plaintiffs just completely misconstrued
24 the cause-in-fact analysis. The question is whether there was
25 a substantial factor in bringing about this injury, and absent

1 that factor, the injury would not have occurred. Looking at
2 substantial factor, we ask not whether merely the Air Force's
3 failure furnished a condition, but whether it brought it
4 about. And it's a "but-for" analysis.

5 So the question is simple: Had the Air Force
6 submitted this information and had Devin Kelley been denied at
7 all FFLs, would he still have committed this mass shooting?
8 And given what we know about this individual, Devin Kelley,
9 given his access to firearms through non-FFL means, given his
10 knowledge about those alternative avenues, given his planning,
11 the determination, and obsession, the answer is clearly yes,
12 he still would have committed this horrific act.

13 Your Honor, Devin Kelley was obsessed with firearms.
14 He did nonstop research on guns. He went to gun shows. He
15 modified his firearms with aftermarket accessories. He
16 actually bought guns through non-FFL means twice. He posted
17 numerous pictures of his firearms and he had pictures of
18 himself on his iCloud account in menacing poses with his
19 firearms. He weighed his firearms. He weighed his
20 ammunition. He was obsessed with mass shootings.

21 Plaintiffs' argument is that he was planning a mass
22 shooting years earlier, even when he was in the Air Force. He
23 posted on Facebook about mass shootings. When he -- when he
24 contacted Jessika Edwards following the 2016 Charleston church
25 shooting, he said, quote, "I wish I had the nerve to do it."

1 When talking about the October 1st, 2017 Las Vegas
2 mass shooting, what did he tell his colleagues? "If you're
3 going to do it, do it big."

4 Erin Higgins testified that in the weeks leading up
5 to the mass shooting, Devin continuously talked about cults
6 and mass shootings.

7 Your Honor, the parties disagree about a lot of
8 things, but we generally agree on the vast majority of the
9 facts in this case. In fact, plaintiffs' own expert,
10 Dr. Metzner, talked about how it was clear that Devin Kelley
11 was planning this mass shooting well before Danielle's
12 supposed request for a divorce the night before. It was clear
13 he was planning this months in advance. His iCloud notes
14 suggest as much. Again, he was clearly planning this even
15 well before the fall festival.

16 He buys body armor online, despite it being illegal
17 for him to own or possess body armor. He goes to Hill Country
18 Truck Store to buy two hundred-round ammunition magazines.
19 And when they don't fit his firearm, he goes back to the
20 store, gives them his phone number, calls the store multiple
21 times a day, every day. And then the day before the shooting,
22 goes back to the store to see if it's available. Days before
23 the shooting, he writes, "Remember, remember the 5th of
24 November."

25 Dr. Metzner, again, plaintiffs' own expert, said that

1 it was not pure happenstance that that was the day he
2 committed this atrocity. And Devin Kelley had a black box
3 that contained his deepest darkest secrets. He concealed his
4 box to the universe, and he prevented anyone from going inside
5 and knowing his true intent.

6 With respect to Kelley's mental health, the parties
7 also largely agree. Dr. Metzner and Dr. Bursztajn both said
8 that Devin Kelley had delusional and self-aggrandizing
9 thinking. There's omnipotent thinking. Dr. Metzner even
10 stated that Devin thought he had quote, "A special mission in
11 life."

12 With regards to access to firearms and the NICS
13 system, the parties also largely agree, the NICS system is
14 effective at preventing certain people from obtaining firearms
15 at FFLs. But by an act of Congress, it is limited to only
16 sales by FFLs.

17 Private sellers, otherwise known as non-FFLs can sell
18 firearms without conducting background checks. In fact, it is
19 done regularly. There's many avenues that Devin Kelley could
20 have, and, in fact, knew about to obtain firearms without ever
21 being subjected to a background check.

22 In fact, plaintiffs' counsel, when crossing our
23 expert, Professor Donahue, joked, "There's a lot of guns in
24 Texas. There's a lot of gun shows in Texas." Your Honor,
25 plaintiffs' counsel can be as glib as it wants, but the

1 reality is that access is a huge factor when we're looking at
2 cause in fact, whether Devin Kelley would have used these
3 alternative avenues.

4 This isn't an alternate world. We are not talking
5 about alternate universes. We are talking about what the
6 Court asked to have a trial on. In your order, in response to
7 our motion for summary judgment, counterfactuals abound.
8 Laying out all the evidence, as we've done in this trial,
9 knowing who Devin Kelley was, and his means, his
10 determination, and his planning, it is very clear that he
11 would have carried out this mass shooting regardless of
12 whether his information was submitted to NICS.

13 In fact, Your Honor — again, perhaps most notably
14 plaintiffs' own expert, a forensic psychiatrist, Dr. Metzner,
15 refused to give an opinion as to whether or not Devin Kelley
16 would have been deterred had he been denied access at all
17 FFLs.

18 Your Honor, that silence speaks volumes. It should
19 be dispositive of this case. Plaintiffs' own expert refused
20 to even give an opinion as to whether this mass shooting would
21 have occurred regardless.

22 Our experts opined as much. Dr. Bursztajn and Fox
23 both stated that this was not preventable, and that is because
24 the evidence is clear. Devin Kelley was too determined. He
25 was too premeditated and too deliberate that he would have

1 done this regardless.

2 In fact, in his own iCloud notes on July 2017, the
3 same month that the Texas Rangers determined that he had
4 started planning, he writes, "I am the angel of death. No one
5 can stop me." Your Honor, if no one can stop him, certainly
6 not the NICS system would have stopped him. And as a result,
7 the United States cannot be held liable in this action.
8 Plaintiffs have failed to meet their burden.

9 Of course, for the plaintiffs to meet their burden,
10 they have to prove obviously not only causation, but duty
11 breach and causation. I know Your Honor has heard the United
12 States' duty argument, so I certainly won't dwell on it. I
13 will simply note that Your Honor has stated within the course
14 of this trial, that this is not a good samaritan law case.
15 This is a case about a statutory obligation imposed by
16 Congress on the federal agencies to report.

17 The government could not agree more, and that's why
18 this case is barred by *Johnson v. Sawyer*. I will simply state
19 also that when it comes to finding a private person analogue,
20 the parties have already extensively briefed the most
21 analogous case to the one at bar, and that's *Perry versus*
22 *S.N.*, and the Court found that there was no common law duty to
23 report or no common law duty to prevent the criminal conduct
24 of a third party. And that's what we have here.

25 So to answer Your Honor's question about whether the

1 government is essentially saying that it does not or never
2 ever can provide a duty or have a duty of care to plaintiffs,
3 the answer is when it comes to this type of intragovernmental
4 obligation, the answer is no, that there is no duty to report
5 and certainly no duty of care that's borne thereafter as it
6 pertains to any particular plaintiffs.

7 Even when we turn to the Restatement of Torts, it's
8 the second restatement, 323, the service -- which is, by the
9 way, borne from Good Samaritan Law, 323, that requires a
10 service rendered quote-unquote "to another." And here again,
11 "An intragovernmental reporting obligation is not a service
12 rendered to these plaintiffs, or any particular plaintiffs.
13 It is a general reporting obligation to enhance the general
14 welfare of the American citizenry, and a duty to all is a duty
15 to none."

16 Your Honor, also with regards to the Restatement of
17 Torts 323, it requires an increased risk of harm, that by
18 conducting an undertaking or performing an undertaking, it
19 must worsen the situation. Here, there was no worsening of
20 the situation. If Your Honor found the undertaking to be the
21 operation of NICS, then the comparison point is whether the
22 situation was worse compared to if the undertaking was never
23 performed at all.

24 And Professor Donahue testified that prior to NICS,
25 prior to November 1998, the net effect would have been the

1 same. Devin Kelley could walk into in an FFL and obtain a
2 firearm because there was no mechanism to enforce the Gun
3 Control Act of 1968. So, again, if we're even looking at the
4 increased risk of harm factor under Restatement of Torts 323,
5 plaintiffs cannot prove an increased risk of harm.

6 Now, plaintiffs have tried to sort of broaden the
7 scope of -- of the duty during this trial through basically
8 two means. The first is they asked Devin Kelley's family
9 members, "Well, if you had known that he was prohibited, would
10 you have acted differently? If you had known about
11 Devin Kelley's mental health issues, would you have acted
12 differently?" But they point to no laws, no federal laws, no
13 duties, no statutes that the Air Force had an obligation to
14 notify Devin Kelley's family members about his being
15 prohibited under the Gun Control Act.

16 They had no obligation to notify his family members
17 about his mental health conditions. In fact, HIPAA laws would
18 prevent such a reporting.

19 And so the idea about whether or not his family
20 members would have acted differently is sort of beside the
21 point in this case. In fact, the government hasn't identified
22 them as responsible third parties. Our whole argument is his
23 family members didn't know that he was prohibited, and,
24 therefore, had no concerns about him having this arsenal.

25 In fact, Devin Kelley's father stated on the day of

1 the shooting that his son had access to his firearms. This
2 was long before he got sued, before any lawyers got involved,
3 the Texas Rangers asked Michael Kelley, "Did your son have
4 access to your firearms?" And he said, "Yes."

5 So to the extent that plaintiffs are trying to argue
6 there's some separate duty to report to Kelley's family
7 members, that's simply a nonstarter in this case.

8 They also talk about the idea that other law
9 enforcement entities would have -- would have interacted with
10 Devin Kelley differently had his information been in NICS
11 system. And I want to deal with this sort of in two ways.
12 Certainly, when it comes to the causation, it's wild
13 speculation, but also with regards to broadening of duty.

14 Let me start with causation.

15 Plaintiffs have put on no evidence in this
16 counterfactual about how any law enforcement entity would have
17 engaged with Devin Kelley had his information been in the NICS
18 system. They provided some half-hearted testimony about
19 Devin Kelley stating that he had a firearm on his hip when the
20 Cibolo police detectives went to his property on November 1st.

21 But Ranger Snyder noted that at that time,
22 Devin Kelley was not a suspect. In fact, he was a family
23 member of a victim who had evidence that would be helpful to
24 the prosecutors. And so there would be no need to perform a
25 background check on Devin Kelley when the Cibolo police

1 detectives went to the property. They would have no knowledge
2 of him even being a felon, much less talking about this
3 counterfactual, them going on to his property and seizing the
4 firearm as a result.

5 It is pure speculation.

6 The same with regards to this allegation by Emily
7 Willis. If you recall, this happened back in 2014. The day
8 after she contacts or finds out about the abuse, Devin Kelley
9 takes his family and flees to Texas. As a result, it is
10 completely speculative as to whether anything would have
11 occurred differently.

12 They have provided no testimony from any law
13 enforcement entity in Colorado, or from DHS, because,
14 remember, the Colorado law enforcement entity did put
15 information into the system, but, yet, there's no testimony
16 about whether this would have been handled differently as a
17 result.

18 But, Your Honor, not only does it fail, this issue
19 about interactions with other law enforcement entities fail as
20 a matter of causation, it also broadens the scope of the duty.
21 What plaintiffs are arguing is that the Air Force had an
22 obligation, not just to put this information into NICS, but
23 into the III, the Interstate Identification Index, one of the
24 three databases that are searched during a NICS background
25 check.

1 But that obligation to put the information into III
2 is not from the Brady Act. It's not even from the NICS
3 Improvement Amendments Act from 2007. It's from the Uniformed
4 Crime Reporting Act, 18 U.S.C. 534. That's why I went through
5 that on cross-examination of plaintiffs' expert, the former
6 IG, Mr. Ryan.

7 Because what they are basically arguing is that there
8 was yet another negligent undertaking in this case, that the
9 Air Force had an obligation to submit information to III, such
10 that any law enforcement entity, I guess, anytime thereafter
11 that could use that in order to interact with Devin Kelley
12 would, therefore, create yet another duty in this case.

13 And that's the problem with finding duties based on
14 these intergovernmental reporting obligations. They know no
15 bounds. Plaintiffs' argument essentially is that anytime a
16 law enforcement entity would have the benefit of some
17 information in III and any law enforcement entity fails to
18 submit that information, we have a breach.

19 That cannot be the standard when it comes to these
20 type of federal systems. It can't be the standard when we
21 talk about federal statutory duties, which is exactly why
22 *Johnson v. Sawyer* bars this type of action and says it has to
23 be based on a private-person analogue, that the FTCA is not
24 created as a tort remedial measure anytime the government
25 fails in an operation based on a statute, a regulation, an

1 instruction, a manual. It is for similar circumstances of
2 private parties, and that's not what we have here, Your Honor.

3 Now, when it comes to breach, the United States has
4 acknowledged that the Air Force failed to submit
5 Devin Kelley's disqualifying information into the NICS system.
6 So I'd like to take this opportunity to discuss breach, as it
7 pertains to the issue of apportionment, if the Court gets
8 there.

9 And, again, the United States strenuously contests
10 liability, so we should never get to the issue of
11 apportionment. But plaintiffs have simply argued that the
12 Court should just sort of tally up the number of missed
13 opportunities, or the number of touches a supervisor had on
14 Devin Kelley's case file. But that's not the standard in
15 Texas.

16 The standard, as it is identified in the Texas
17 proportionate responsibility statute, makes it an issue of
18 causation, not of fault, not of culpability. And, here,
19 plaintiffs' causal link is that -- at least their theory -- is
20 that Devin Kelley was allowed to obtain a firearm at an FFL,
21 and that is the cause between the Air Force's supposed failure
22 and the mass shooting.

23 That failure and that ability of Devin Kelley to
24 obtain firearms through FFLs exists regardless of whether the
25 Air Force failed to submit 100 or one time. It exists no

1 matter how many times a supervisor at Detachment 225 touched
2 Devin Kelley's investigative case file. That's the only point
3 of comparison between the Air Force and Devin Kelley and
4 Academy.

5 Even if -- even if the Court was sort of to look at
6 all these supposed missed opportunities, we'd have to show
7 that there's significantly less missed opportunities than
8 plaintiffs would suggest. For example, plaintiffs just talked
9 about the idea of these monthly supervisory reviews of the
10 case file.

11 Now, the United States doesn't dispute that these
12 monthly reviews are mandatory, but the manner in which they
13 were conducted was discretionary. Plaintiffs have looked at
14 AFOSI manual 71-121 to find this mandatory obligation to
15 conduct these monthly reviews, and, again, that is a
16 requirement. But that same manual states that the unit
17 leadership has the discretion to create a program to allow the
18 supervisors to determine what to focus on, on any given month.

19 When they talk about "investigative sufficiency,"
20 there is a lot of factors that go into sufficiency, whether or
21 not they are properly getting enough evidence, whether or not
22 they are talking to enough witnesses, effectuating search
23 warrants, so on and so forth. That's the type of discretion
24 that supervisors need when looking at these monthly -- when
25 performing these monthly reviews.

1 In fact, Colonel Youngner talks about Attachment 7 to
2 that manual, and he even acknowledged that that is used merely
3 as a guide and that is discretionary of whether or not the
4 supervisor is going to look for fingerprints. As a result, if
5 it's discretionary, it is barred by the discretionary function
6 exceptions of the Federal Tort Claims Act.

7 Similarly, when we talk about the weekly reviews,
8 plaintiffs have cited no mandatory directive that a supervisor
9 at Detachment 225 has to look for fingerprints or file
10 dispositions during these weekly reviews. In fact,
11 Colonel Youngner made it clear that any such weekly review was
12 at the discretion of the supervisor.

13 Similarly --

14 THE COURT: Refresh me what the evidence is from the
15 final report. I mean, if the supervisor looked at a final
16 report and sees that there's not a reporting done to NICS, how
17 is that discretionary?

18 MR. STERN: Your Honor, the case closure, the one
19 instance that you would have to use a sufficiency checklist,
20 would have to require that the fingerprints and file
21 disposition be submitted.

22 So, again, we're not disputing the one instance when
23 there was a case closure that Detachment 225 had an obligation
24 to ensure the fingerprints had been -- were submitted. But to
25 the extent that plaintiffs are sort of asking the Court to do

1 this tallying of all the circumstances, that is wrong as a
2 matter of law. That is also wrong as a matter of fact because
3 we're really looking at one instance a supervisor had to look
4 for a final disposition.

5 Similarly, with regards to --

6 THE COURT: And just to be clear, that's not a
7 discretionary function?

8 MR. STERN: Your Honor, I don't believe it is. We
9 can put more -- we can put more evidence -- I'm sorry, we can,
10 obviously, brief this during post-trial findings of fact and
11 conclusions of law, but, again, the United States is not
12 disputing that when it comes to the submission of fingerprints
13 and final disposition, there was a mandatory obligation, at
14 least under the regulations. Obviously, we're not saying that
15 that imputes to or creates a duty under Texas tort law.

16 But, again, the reason why I'm going over all of
17 these things is because not only are plaintiffs wrong as a
18 matter of law in terms of to go about looking at
19 apportionment, but they are even wrong about the number of
20 supposed missed opportunities.

21 Mr. Alsaffar is going to come back and talk about the
22 number of touches of the investigative case file. That simply
23 is irrelevant to the apportionment because there's no
24 mandatory directive that during those touches, so to speak,
25 there was an obligation to ensure the fingerprints and final

1 disposition was submitted. The agents and the supervisors
2 have discretion when looking at investigative sufficiency and
3 moving a case file along. So, again, that can't be a basis
4 for apportionment in this case.

5 Similarly, when we talk about Security Forces
6 Squadron, Security Forces Squadron's investigation could not
7 be a proximate cause of plaintiffs' injuries because that
8 investigation ended in a letter of reprimand. So even if the
9 Security Forces Squadron investigators had an obligation to
10 submit Devin Kelley's fingerprint cards, in order to close
11 that loop, they would have had a similar obligation to submit
12 the final disposition, and that disposition, again, was a
13 non-judicial proceeding that could not have prohibited Kelley
14 under the Gun Control Act.

15 So as a result, that entire investigation has no
16 bearing on the ultimate issue of whether or not Devin Kelley
17 would have been able to obtain a firearm to commit this mass
18 shooting.

19 Your Honor, if any apportionment is to occur and if
20 you are going to look at the underlying predicate based on
21 what the OSI officers, and what the Air Force did in this
22 case, which again, it is not based on fault, it is based on
23 causation. But looking at the OSI agents did in this case,
24 how thoroughly they investigated Kelley. In fact, they
25 investigated him so thoroughly, that they uncovered all of

1 these bad acts and threatening acts that the plaintiffs now
2 rely on to make their case for foreseeability.

3 They worked hard to ensure Devin Kelley was
4 prosecuted, that they got a conviction, that they made sure
5 Tessa and her stepson were taken away from Devin Kelley. They
6 made sure that he was barred from the base to protect those
7 that he directly threatened. They worked hard in making sure
8 Devin Kelley got the punishment he deserved.

9 You'll have to compare their fault -- I'm sorry, not
10 their fault -- their actions to that of Devin Kelley himself.
11 Devin Kelley, the intentional tortfeasor, the individual who
12 planned well in advance, who drove nearly an hour to a church
13 and who perpetrated the indiscriminate slaughter of an entire
14 congregation.

15 Your Honor, Devin Kelley was not deterred by any
16 illegal consequences. He went to jail for abusing his first
17 wife. Got out, remarried, and abused his second wife. He
18 was -- he wanted to be a member of the Bandidos, a violent
19 motorcycle club. He was convicted of animal cruelty in
20 Colorado. He took Spice when he was in the Air Force, and
21 then continued to use and abuse drugs all the way up to the
22 day of his death.

23 He was barred from the Air Force bases, yet continued
24 multiple times to try to get on them. Both at Holloman and
25 even here in San Antonio. Laws did not stop Devin Kelley.

1 Certainly, the NICS system would not have stopped him. He was
2 the Angel of Death. No one was going to stop him, and as a
3 result, plaintiffs cannot prove causation as a matter of law
4 in this case.

5 Your Honor, causation has two factors, foreseeability
6 and cause in fact. Foreseeability requires that the
7 anticipated or the reasonably anticipated act be of the same
8 general conduct as that which occurred. So we're looking at
9 character and severity.

10 So when we are looking at whether or not the breach
11 of a duty proximately caused plaintiffs' injuries, we first
12 need to be very careful about what the Court can even factor
13 when assessing foreseeability. Foreseeability is limited to
14 that which gave rise to the duty. It has to, because we're
15 looking at whether the breach of that duty caused plaintiffs'
16 injuries.

17 And what gave rise to the duty in this case? I
18 should say the supposed duty, Your Honor, because obviously I
19 want to preserve that issue. What was the conduct that gave
20 rise to Devin Kelley being prohibited under 18 U.S.C.
21 922(g) (1) and (g) (9), because that's the only conduct that can
22 be considered.

23 ATF Counsel William Ryan testified that there's no
24 heightened obligation when someone is otherwise threatening
25 people, just as there's no lower obligation to report when the

1 individual is otherwise a good person. The only things that
2 can be considered by the Air Force or by any reporting entity
3 is only the conduct for which the prohibition exists. And
4 that's why the only conduct that can be assessed is the
5 conduct that gave rise to the two specifications for which
6 Kelley was prosecuted.

7 So can we pull those up.

8 Let's blow up Specification 1 and 2.

9 Your Honor, Specification 1 talks about Devin Kelley
10 striking Tessa, choking her, pulling her hair, and kicking
11 her. Specification 2 talks about Devin Kelley assaulting his
12 stepson by striking him on the head and body with force likely
13 to produce death or serious -- I'm sorry -- grievous bodily
14 harm with his hands.

15 Your Honor, these are serious offenses. The United
16 States is not making light of them. They are horrific acts.
17 But they are of different general character than that which
18 occurred on November 5th, 2017.

19 In fact, Devin Kelley pled not guilty to a
20 specifications regarding his use of a firearm. It's only
21 these two specifications that gave rise to a duty, and it's
22 only these two specifications that can be examined when we
23 look at whether the breach of that duty proximately caused
24 plaintiffs' injuries.

25 That should be dispositive of the foreseeability

1 analysis. Yet, even if we look at all of Devin Kelley's other
2 bad acts, other violent tendencies, other threats that he made
3 during his time in the Air Force, we still note that what
4 happened on November 5th, 2017, was of different character.
5 It was of different severity than anything he had done during
6 his time at the Air Force, or even what the Air Force knew at
7 the time of his conviction.

8 Drs. Fox and Bursztajn both testified that while it
9 might have been foreseeable that Devin Kelley would commit
10 domestic violence, sexual assault, perhaps even workplace
11 violence, what happened on November 5th, the premeditated,
12 coldblooded, calculated, well-planned, methodical slaughter of
13 virtual strangers was different than the type of spontaneous
14 threats he made in the Air Force.

15 Sexual violence is horrific, but it doesn't make a
16 mass shooting of this kind foreseeable. Domestic violence —

17 THE COURT: So is workplace violence not mass
18 shooting violence?

19 MR. STERN: Your Honor, Dr. Fox testified about the
20 difference between workplace violence and the idea of going up
21 and shooting up a location — I'm sorry — a place of
22 employment simply because they were threatened or because
23 their boss sort of yelled at them, as opposed to what happened
24 here.

25 The months in advance of planning a church shooting

1 because you're obsessed with mass shootings, because you are
2 obsessed with firearms, and because you want to become the
3 Punisher to avenge your wife. That is something of different
4 kind.

5 So as a result I want to talk more about the idea of
6 Devin Kelley's motivation and how that motivation was
7 unforeseeable to the Air Force, because I think that is the
8 standard Your Honor provided to the parties in its order in
9 response to the cross-motions for summary judgment.

10 Your Honor wrote, "To the extent that the government
11 can establish that Kelley's conduct was motivated by some
12 unforeseeable external event, or that in the years between
13 Kelley's conviction and the Sutherland Springs shooting
14 Kelley's mental health deteriorated so significantly as to
15 render his actions unforeseeable a reasonable trier of fact
16 could find that the shooting was unforeseeable."

17 Your Honor, I believe the government has met this
18 standard, but before we talk about Devin Kelley's motivation,
19 I do want to remind Your Honor that when we talked about
20 Devin Kelley's planning, premeditation, determination in the
21 motion for summary judgment, we did it to show that
22 Devin Kelley would not be stopped, he would not be prevented.
23 That goes to cause in fact.

24 So all of the facts that plaintiffs use to show the
25 Air Force could have foreseen this event, much of it is the

1 same evidence that the government now uses to show the same
2 event was not preventable, which goes to cause in fact.

3 Yet, nonetheless, the motivation was unforeseeable to
4 the Air Force because this was not an act of domestic
5 violence. Plaintiffs have never really articulated what their
6 theory is of domestic violence, other than to say at times
7 that it was Danielle's "church family."

8 The idea of the church family expands the definition
9 of domestic violence past its breaking point. Dr. Metzner
10 basically said it could be anything, any pattern of abusive
11 behavior in a relationship to gain or maintain control of an
12 intimate partner.

13 But, Your Honor, that goes too far afield in even
14 what the Lautenberg Amendment was intended to protect. If we
15 look, this is the NICS overview, "The Lautenberg Amendment 18
16 U.S.C. 922(g) (9) protects victims" -- and it defines victims
17 as -- "a current or former spouse, parent, or guardian, parent
18 of a child in common, current or former co-habitant as spouse,
19 parent, or guardian, or similarly situated thereto."

20 Your Honor, an entire church is simply not a victim
21 of domestic violence. It would cheapen the definition of
22 domestic violence if anytime someone commits a heinous act it
23 can be chalked back up to trying to control another
24 individual. So it fails as a matter of law, but it also fails
25 as a matter of fact in this case.

1 Devin Kelley committed this horrific act because he
2 was obsessed with mass shootings, because his mental health
3 was deteriorating, because he had deep anti-religious
4 sentiment. And when the upcoming trial of his wife's abusive
5 father gave him the rationalization to do this, he took that
6 opportunity. And what I mean by rationalization is his belief
7 that Danielle made outcries to the church years earlier, and
8 those cries were not heard, and as a result two additional
9 girls were injured.

10 Devin Kelley believed that Danielle was mocked and
11 ridiculed by the church when she came forward, and as a
12 result, based on his warped, delusional self-aggrandizing
13 thinking, thinking that he had a special mission in life, he
14 took that opportunity to rationalize his behavior because he
15 wanted to become a mass murderer. And that's what he did,
16 Your Honor.

17 This isn't some grandiose or counterfactual
18 counter-universe theory by the government. This is borne out
19 by the facts, by the objective facts before any of the lawyers
20 got involved, before anyone's wavering allegiance, before
21 Danielle testified that she was trying to help the plaintiffs.
22 These were the facts at the time.

23 If we take a look at the Texas Rangers Situation
24 Report Number 1. Your Honor, they themselves write, "It is
25 suspected that Devin was resentful of Danielle's mother,

1 Michelle Shields, for her husband's sexual assault of
2 Danielle." This wasn't because of Devin's sexual assault,
3 because of his domestic violence. It was because of Donald
4 Curt Brassfield's sexual assault of Danielle. And Devin knew
5 about it and it enraged him.

6 Let's pull up Joint Exhibit 543.

7 Again, this is from the FBI. They say that this post
8 is particularly concerning. Devin Kelley writes, "I'm an
9 atheist and they are ignorant self-righteous Christians, or so
10 they claim in public. But behind closed doors, it's drug
11 addiction and domestic violence." Again, it's not his
12 domestic violence he's talking about. It's Donald Curt
13 Brassfield's domestic violence.

14 And what do the people closest to Devin Kelley tell
15 the Texas Rangers on the day of the shooting about what they
16 believe his motivation was? Again, well before all the
17 lawyers got involved, what was their gut reaction? What did
18 they believe was his reasoning?

19 Let's watch the first video.

20 (Clip was played.)

21 Your Honor, this is what Danielle told the Rangers as
22 to what the motivation was, that what she went through as a
23 kid. But then she continues and talks about the relation --

24 (Clip was played.)

25 Devin knew Danielle was going to have to testify on

1 November 27th, weeks after the shooting. She knew he was very
2 upset by it. She's asked, "Do you think that that's why Devin
3 went down to the church?" She says quote, "I'm sure."

4 Let's watch the next video.

5 (Clip was played.)

6 Again, Danielle says that, "Devin knew and that he
7 was upset about all of it, that it was a fucked-up situation,
8 that people don't care, that people are heartless, and that he
9 had a justification to be angry at that situation."

10 One last video.

11 (Clip was played.)

12 Again, Devin wasn't just targeting Michelle Shields.
13 He blamed a lot of people for it. And what does Danielle mean
14 by "blaming a lot of people," and that people were heartless,
15 that they didn't care?

16 Well, she tells the Department of Defense Office of
17 the Inspector General investigators a few months later and she
18 clarifies what she meant by this. She stated Devin knew,
19 Devin knew that "during the process of the abuse I went
20 through, that the church and her and they made fun of me for
21 it. They mocked me and said I deserved it, and that I should
22 have died when I tried committing suicide. Before I got
23 adopted I was burned. I have scars on my body. I got made
24 fun of that from the church and the youth, some of the adults
25 saying I was a plague and they didn't want their children

1 hanging out with me because I would rub off on them, and how I
2 deserved to be raped and molested." And most importantly,
3 "Devin knew everything and Devin saved me from having to keep
4 living through the hell that I had to keep living through."

5 Now, plaintiffs have suggested that Danielle wasn't
6 feeling free to be truthful during this testimony because
7 Michael Kelley was in the room both times, that she couldn't
8 talk about the divorce, and that being the reason why Devin
9 would have committed this atrocity.

10 But, according to her own testimony, Michael Kelley
11 and Rebecca Kelley already knew about this supposed request
12 for a divorce. She also testified about a lot of other
13 illegal and embarrassing acts by Devin Kelley during these
14 interviews. Why wouldn't she tell the agents what they needed
15 to know to actually go forward in their investigation?

16 Moreover, the government understands why she wouldn't
17 want to provide this testimony now. Not only has she
18 testified that she's tried to help these plaintiffs, but it
19 portrays the church in a terrible light. It puts them in a
20 terrible position.

21 And to be clear, the government is not -- the
22 government doesn't know what to believe about this. The
23 government doesn't necessarily believe that Danielle actually
24 was mocked and said that she should have been successful when
25 she tried to commit suicide.

1 As Pastor Pomeroy stated, "Danielle has a great
2 propensity to tell stories." In this realm, it doesn't really
3 matter what was true. It matters what Devin believed. It
4 matters what stories he was told and what rationalization he
5 used to commit this heinous act.

6 Because one thing is clear, when we look at the facts
7 of this case Devin Kelley was planning this mass shooting
8 months in advance. And that much preparation, that much
9 deliberation, that much premeditation, makes it clear he would
10 have carried this out, regardless of whether his information
11 was in the NICS system.

12 Let's take a look at the time line of all the facts
13 leading up to this mass shooting, and it is clear that nothing
14 also going to stop him.

15 THE COURT: You have 16 minutes.

16 MR. STERN: Sixteen minutes?

17 Again, by May 2017 he's not only threatening Michelle
18 Shields, he's threatening a whole host of people. He
19 threatened Valerie Rowe, clear out of the blue, despite the
20 fact they had stopped being colleagues years earlier. Yes, he
21 threatened Michelle Shields, but around the same time Jessika
22 Edwards severs their relationship after she believes
23 Devin Kelley is completely obsessed with mass shootings.

24 Fast-forward to the next month. And this is when he
25 writes, "I am the angel of death. No one can stop me."

1 He writes multiple iCloud notes. He goes and buys
2 body armor on eBay online, despite the fact that it's illegal
3 for him to own it or possess it.

4 He continues to put more iCloud notes in
5 preparation -- write more iCloud notes in preparation to
6 commit this mass shooting.

7 He goes to visit Candace Marlowe on September 1st,
8 2017. He hadn't visited her since 2016. Why then? Because
9 his mental health is deteriorating. He knows -- everyone
10 knows that he needs help.

11 Erin Higgins testified that his mental health started
12 deteriorating, that he was talking about cult and mass
13 shootings leading up to the church shooting.

14 Rebecca Kelley, Devin's own mother, talks about how
15 she took Devin to Dr. Batenburg's physician assistant because
16 he was having such great anxiety that he was losing control of
17 his bowels. He hadn't had such anxiety for the months or
18 years leading up to the shooting.

19 Again, going forward, we see after the October 1st,
20 2017 Las Vegas shooting he tells his colleagues, "If you're
21 going to do it, do it big."

22 Yet more iCloud notes showing preparation.

23 Here, eight days before the shooting is when he goes
24 to Hill Country Truck store, tries to get two 100-round
25 magazines, contacts the store multiple times a day, every day,

1 to try to obtain them.

2 Yet more iCloud notes in preparation for the mass
3 killing.

4 Then we see the comment, eight days before the
5 shooting, "Remember, remember, the fifth of November."
6 Dr. Metzner doesn't think this is near happenstance. This is
7 preparation.

8 Seven days. He places yet another picture on
9 Facebook of a firearm showing, "She's a bad bitch."

10 More preparation. More notes.

11 Five days before the shooting. He allows Danielle to
12 go to the fall festival. In fact, Danielle previously
13 testified it was Devin's idea to go to the fall festival. Why
14 does he go? Michelle Shields tells us why. It was to case
15 the place.

16 In fact, if it was about domestic violence, then why
17 would he allow -- why would he allow Danielle to go to the
18 fall festival at all? Danielle hadn't spoken with her mother
19 in over six months. Michelle Shields hadn't even met her
20 granddaughter.

21 Devin was winning in the war of control over
22 Danielle. Why allow her to have this one-on-one interaction
23 with her mother? It was because he was casing the place, and
24 because on the forefront of his mind was the abuse by Donald
25 Curt Brassfield. And we know that because on the very same

1 day he contacts Erin Brassfield and says he found videos and
2 photographs depicting the abuse.

3 Now, Your Honor, we don't know what happened to those
4 videos and photographs. We don't know when they were
5 destroyed, but all we know is this is what Devin is fixated on
6 days before the shooting. When the Cibolo police detectives
7 go to the property to obtain the evidence, everyone testified
8 that even made Devin more enraged. This is what was on his
9 mind.

10 And on the day before the shooting Devin takes three
11 times the amount of medication that's prescribed to him. And
12 again, even the most objective people, Devin's own colleagues,
13 when they are interviewed after the shooting state, yes, Devin
14 had issues with Danielle's side of the family. But why? As
15 it related to the pending criminal court case with her father
16 in Guadalupe County. Again, it is about Devin avenging the
17 abuse by Donald Curt Brassfield.

18 And what does Devin write to his sister the night
19 before the shooting? It's not about a divorce. It's not
20 about marital problems. He writes, "My unusual and irrational
21 thinking I'm afraid has plagued my mind constantly. I just
22 don't know if a fake life is worth living. If I was truly
23 free to be myself, they would hunt me down and chain me. So
24 the only way is to hide among the sheeple, but it only
25 propitiates the problem." He writes, "Doing well, LOL. I

1 fake everything because I'm far from doing well. The more I
2 fake, the more isolated I become. It's become my way to
3 survive. I've learned the more I blend in by pretending I
4 have emotions or even a personality that people don't catch on
5 that I'm simply not there. A shell of a person. I think some
6 people are catching on though which isn't good. I'm more
7 comfortable around people with my mask on."

8 The next day Devin Kelley puts on his Punisher mask,
9 drives to a church and commits one of the worst mass shootings
10 in U.S. history. That could not be foreseeable to the
11 Air Force years earlier.

12 Your Honor, I want to turn to the second factor of
13 causation, which is cause in fact. Your Honor, again, it
14 requires a substantial factor without which the events would
15 not have occurred.

16 As Your Honor noted, this case has counterfactuals
17 abound, and as Your Honor wrote in its order in response to
18 the cross-motions for summary judgment, quote, "Kelley's
19 ability to obtain firearms from sources outside of the FFLs is
20 at the heart of this factual dispute and in many ways at the
21 heart of this litigation."

22 The United States has proven that there's multiple
23 avenues through which Devin Kelley could obtain firearms
24 without being subjected to a NICS background check. Now,
25 plaintiffs' counsel have brought up this conspiracy theory

1 that we didn't provide all the requisite information to
2 Professor Donahue or to Stephen Barborini, but their job in
3 this case was merely to set the stage to make it clear that
4 while NICS is effective, it is limited by law.

5 NonFFLs, private sales, do not require background
6 checks. So there's a multitude of ways Devin Kelley could
7 have obtained firearms. Private sales occur online at gun
8 shows, at flea markets, between friends and family. There are
9 numerous ways he could obtain firearms, and that's not even to
10 mention the illegal ways, such as black markets and using a
11 straw purchaser.

12 Moreover, he knew about these alternative avenues.
13 These were not underground. Plaintiffs' expert, Professor
14 Webster talks about the south side of Chicago and Baltimore
15 that have significant gun restrictions that require prohibited
16 individuals to go to underground markets to obtain these
17 firearms.

18 But that's not the case in Texas. Texas is what's
19 known as an open state. There are no additional state gun
20 regulations that limit these non-FFL avenues. There's no
21 universal background checks. There's no permit to purchase.
22 There's no restrictions on these type of firearms that he
23 used.

24 In fact, Stephen Barborini testified that these two
25 firearms that Devin Kelley used, the AR-556, which just simply

1 Ruger's -- Ruger's standard or type of AR-15 is one of the
2 most common ARs and most popular ARs in the world. They are
3 sold at almost every gun show. Plus, you can still buy them
4 new.

5 Stephen Barborini testified you can buy them, quote,
6 "Still in the box." This was known. These sources are not
7 underground. They are secondary markets that are open and
8 notorious. Again, plaintiffs own counsel stated, "there's a
9 lot of guns in Texas. And there's a lot of gun shows in
10 Texas." You could easily buy new guns online as well. But
11 these avenues are not just hypotheticals. They were known to
12 Devin Kelley. Devin Kelley lives -- not only lives in Texas,
13 which is an open state, but he researched online nonstop about
14 firearms.

15 THE COURT: So you have six minutes left. I'm not
16 sure if you want to continue with this argument --

17 MR. STERN: I do.

18 THE COURT: -- or if you want to move to numbers on
19 proportionate responsibility.

20 MR. STERN: Your Honor, I believe I already made the
21 argument with regards to Academy yesterday, so I believe that
22 the argument needs to be that not only were these non-FFL
23 avenues available, but that Devin Kelley knew them, and that a
24 reasonable finder of fact would say that he would have used
25 them if necessary. Because again --

1 THE COURT: But what do I make the fact that he never
2 did?

3 MR. STERN: Your Honor, that's not sufficient.

4 See, plaintiffs are trying to use the NICS [verbatim]
5 gun store as a test case because it only proves that he went
6 to another FFL. But Devin Kelley's preference isn't the
7 critical issue in this case. In order for plaintiffs to make
8 their but-for causation analysis, the question is: If
9 Devin Kelley was denied at all FFLs, what then? Because
10 that's what happens when his information is in the NICS
11 system.

12 The government doesn't deny that Devin Kelley only
13 had guns he obtained from FFLs at the time of the shooting,
14 but if he was denied all of those firearms, if he's denied
15 each stage of a background check, does he simply take his ball
16 and go home? Of course not. He gets any firearm he needs to
17 commit this mass shooting.

18 He had been planning it for too long. He was too
19 obsessed with firearms. He was too obsessed with mass
20 shootings. He knew about these alternate avenues. In fact,
21 again, he did nonstop research of guns online.

22 He also bought parts for guns online. He bought body
23 armor on eBay, even though it was illegal for him to do so.
24 These are all avenues online that do not require background
25 checks.

1 When it comes to gun shows, Danielle testified he
2 went to gun shows. He liked to go to gun shows.

3 When it comes to purchasing by friends and family,
4 again, this is not hypothetical. He urged his father to buy
5 an AR-15. He bartered for a shotgun. That's not through an
6 FFL. He bought a handgun from a friend in Texas. Again, not
7 through an FFL.

8 So he obviously knew these alternative avenues. And
9 the question is: If he knew about them, would he have taken
10 them, if he needed to?

11 This is the individual who, again, was preoccupied
12 with weapons even dating back to his time at Holloman Air
13 Force Base, who threatened the lives of Air Force leadership,
14 and openly carried a firearm on Holloman Air Force Base, who
15 pointed a firearm at Tessa in a threatening manner, and then
16 pointed the firearm at himself.

17 Your Honor, he had his guns confiscated at Holloman,
18 yet still sought more firearms. During his hospitalization at
19 Peak he was found to have researched the internet for body
20 armor and the purchase of weapons. Does that sound like
21 someone who is going to be denied by a background check
22 system?

23 It was documented that he was training his
24 cardiovascular system by extending his workouts from 20
25 minutes to 60 minutes. Your Honor, plaintiffs use this to try

1 to show foreseeability. The government uses this to show a
2 lack of preventability. He went to gun stores to look at them
3 frequently. He posted pictures of firearms and said things
4 like, "She's a bad bitch." He kept pictures of himself posing
5 with firearms on his iCloud notes.

6 Your Honor, he forced his wife to watch him shoot and
7 pick up the shells. He sold the CPX-2 pistol that was not
8 obtained from an FFL. He wanted to open a gun school to teach
9 people. He taught his own mother how to shoot. He gave her
10 pointers.

11 Your Honor, his own parents claimed that they weren't
12 interested in firearms, yet they had carry permits and had
13 firearms themselves. His own father claimed that his son
14 could access his firearms.

15 Your Honor, perhaps the most objective person in this
16 case is their former roommate Emily Willis. She gave
17 deposition testimony. And she stated that given that Danielle
18 was under such control of Devin, had she been asked to obtain
19 a firearm for him, Miss Willis testified that, yes, she
20 believed that Danielle would have purchased a firearm for
21 Devin.

22 Devin weighed his firearms. He weighed his
23 ammunition. He modified them with aftermarket accessories to
24 maximize the lethality and then posted pictures online. He
25 commented on a YouTube video about how to build a silencer,

1 and then went ahead and built a silencer out of an oil can.

2 He sent Jessika Edwards pictures of multiple guns he
3 was building, specifically an AR-15 style rifle.

4 He was completely obsessed with mass shootings.
5 After the Las Vegas mass shooting he stated, "If you're going
6 to do it, do it big."

7 He researched other mass shooters, including the
8 Columbine shooters. He researched the characteristics of mass
9 shooters. Again, a week before the shooting he went to buy
10 two 100-round magazines. He then contacts them every day.

11 He posted, "You learn to shoot by doing it. Mass
12 shooters are impossible to detect. They pass psych evals."

13 He wrote, "Mass murderers don't do it because of
14 videos games. They do it because they are tired of the
15 fucking bullshit in the rigged system and the hate that breeds
16 in all 90 percent of humans. And it's time for pay back."

17 He wrote, "Remember, remember the fifth of November."

18 And he went to a church with his Punisher mask and
19 shot 450 times into a church and inside of a church.

20 Your Honor, again, plaintiffs own expert refused to
21 answer the ultimate question in this case. If Devin Kelley
22 was denied at all FFLs, if the NICS system worked and he
23 couldn't purchase guns at gun stores, what then? That's what
24 the plaintiffs have to prove, to prove cause in fact. And
25 their own expert refused to give testimony on it.

1 That, again, is dispositive of what we all know. And
2 that is, nothing and no one was going to stop Devin Kelley.
3 He was the angel of death. No one would stop him.

4 THE COURT: Thank you.

5 MR. ALSAFFAR: May I proceed, Your Honor?

6 THE COURT: Yes.

7 MR. ALSAFFAR: I want to talk about the last point,
8 that the government -- we're done with the government's
9 arguments, and now we know we have not heard one explanation
10 whatsoever, why on earth did Devin Kelley ask Erin Higgins to
11 meet with him privately by herself in the truck that he had
12 all of his weapons in the morning he was going to go kill all
13 those people?

14 Why have they not answered that question?

15 The reason why they haven't answered that question
16 and the reason why they can't answer that question is Erin
17 Higgins has nothing to do with the church. She has nothing to
18 do with this protection/avenger theory. Remember when Erin
19 Higgins testified on the stand and she took us through that
20 day and, she said, "yeah, I see that."

21 Devin Kelley was going to kill her. She was the
22 other victim. Why? Erin Higgins testified she was the
23 closest person to Danielle Smith in her life. Remember,
24 Danielle Smith, we have showed you the text messages, she was
25 texting and letting Erin know that she was being abused and

1 that she wanted to get a divorce, and that she just a few
2 months before had caught him on camera cheating on her.

3 Devin Kelley knew that Erin was a threat. Why can't
4 the government answer that question? When I asked Dr. Fox on
5 cross-examination, recross, I asked him one question, I said,
6 "I don't get it. Tell me, if this whole thing is about
7 protection and avenge, was he trying to protect Danielle from
8 Erin Higgins? Was that protection?" And he said -- he
9 struggled, he's like, "No, it's not. I don't know why. I
10 don't know why."

11 They can't answer that question.

12 It's very simple. Just like he targeted Michelle
13 Shields, the mother he perceived as interfering in his
14 domestic life, just as he targeted Erin Higgins, the other
15 mother that was a threat to interfering in his domestic life,
16 he was taking care of family business, all of it, that day.

17 Why else would he meet with her that morning in the
18 truck with all his guns? She narrowly escaped death. And the
19 reason, this video picture story the government keeps
20 pressing, was a ruse. He was lying to her so that she would
21 come meet him. That was the very reason he gave to her to
22 come meet. She was smart enough to go to the cops and not do
23 it. She barely escaped death, being the 27th murder victim.

24 If the government can't answer that question, their
25 whole thing falls apart. Just like when Dr. Bursztajn made up

1 his protection theory based on what turned out to be not true
2 because he didn't read the transcript. It's all made up.

3 And again, Your Honor, if this was to avenge, my God,
4 that's an act of domestic violence. That's an act of domestic
5 violence.

6 I want to go skip to the proportionate responsibility
7 because Mr. Stern misstated something about the record and
8 about the mandatory instructions. Now, the reason why the
9 government, all new in this trial, it's never happened before,
10 is now arguing that the mandatory instruction didn't require
11 these supervisory reviews, and that now the checklist is some
12 kind of a discretionary function, don't worry about the
13 checklist, it doesn't matter, the instruction itself required
14 the fingerprint submission, the instruction itself required
15 the criminal history data reporting.

16 Colonel Youngner told you that. All of their
17 witnesses that you'll read told -- said the same thing. The
18 checklist is just to help them, not -- it was just a dumb-down
19 list to help them not make the obvious mistake, and they still
20 made it, even with the checklist.

21 Don't worry about that argument. That is a red
22 herring by the government. And the reason why it's a red
23 herring, Your Honor, is because they touched that file. They
24 contacted that file over 130 times. And they know it. And
25 they know that 75 percent of that was by supervisors. And

1 they know, we showed you, that what they were looking at was
2 the very files and folders where they are supposed to be
3 required to report the fingerprints in the criminal history
4 data.

5 That's why they are so afraid of those numbers,
6 because it affects the proportionate responsibility. It
7 absolutely does. How can the government come here and say
8 with a straight face that our mandatory obligation under the
9 law really is just one, one opportunity? One opportunity,
10 despite their own record showing that they have already
11 admitted it's at least 15?

12 And then when we actually looked at the records and
13 the dates and how many supervisory agents, we know that
14 79-number of monthly required supervising reviews, that wasn't
15 something we made up. That was what their own case agents
16 admitted to in their depositions. And you'll see that when
17 you review it, that they had that mandatory obligation.

18 Section 4.24, 1.3, that was JEX 450. We don't have
19 to show it, but that's the section that says those mandatory
20 reviews have to happen by the supervisors. That's the section
21 that actually says R-84s, the disposition reports, have to be
22 looked at. The government is still, 30 years later, saying we
23 don't have to do it. Thirty years later.

24 The last point on apportionment, Your Honor, is
25 Mr. Stern talked about it yesterday and brushed by it today,

1 but I want to be very clear on this, and that has do with
2 Academy.

3 They brought Mr. Ryan, really, for the only purpose
4 of saying Academy should be held somehow more liable than the
5 government. I don't know how they get there. I think you
6 pointed out the right analysis is, wait a second, if it's
7 foreseeable to Academy, y'all knew 100 times more about this
8 person's dangerousness, about his willingness to plan and try
9 to commit mass murder. How could they would be more liable?

10 Putting that aside, I think that's obvious a specious
11 argument by the government. I think the bigger point here is
12 just about a causation argument. Remember I showed Mr. Ryan
13 that Devin Kelley actually had a Texas driver's license? And
14 remember I showed Mr. Ryan that the ATF's own form showed, the
15 tracing, showed that he actually used that license to purchase
16 a gun at Academy about a month before the shooting.

17 Now, remember when Mr. Ryan said, "At the day of the
18 day, you're right." That's the trace sheet, Your Honor.
19 You'll remember that, JEX 554. He said, "You're right. Him
20 having a Texas driver's license means he could have gotten a
21 gun at Academy. It would have passed the FBI background
22 check, and the only thing that would have prevented that sale
23 would have been an FBI denial."

24 And the only way that FBI denial comes back is if the
25 Air Force had done its job. So that, at the end of the day,

1 that pretty much eliminates in terms of substantial
2 consideration Academy as a proportionate responsibility.

3 Now, we believe the government has more liability in
4 this case. And the reason for that is not only for the
5 hundreds of opportunities they had to actually figure out
6 their mistake. Not only, Your Honor, for the -- it's a
7 30-year problem. Not only for the fact that they let loose
8 7300, 7,300 criminals on the streets who could get guns
9 because of their -- not only their negligence, but their lack
10 of concern and indifference to fix it.

11 Their argument that when the IG told them over and
12 over again -- and IG Rymer was here to tell you that's not
13 true. Their argument that, oh, we only have to fix the sample
14 size. That shows you their indifference. That proves it
15 beyond.

16 The Texas pattern jury charge, Your Honor, asks you
17 to look at all the factors. All the factors. And, as you
18 know, and as I know you're struggling with, it gives you broad
19 and wide discretion, and it cannot be overturned if it's
20 supported by the evidence. And I encourage you, Your Honor --

21 THE COURT: Then what do I do with Devin Kelley?

22 MR. ALSAFFAR: Well, I think Devin Kelley bears some
23 responsibility, Your Honor. And we would put the
24 responsibility on -- the majority on the government.

25 I think that the government bears anywhere between

1 65, 70, and Devin around 30. But that's what we -- and
2 that's, Your Honor, that's supported by the evidence.

3 And what I would do, Your Honor, is I would encourage
4 you to look at the cases. If you look at the *Nixon* case, Your
5 Honor, that's cited in our report. If you look at *Del Lago*,
6 Justice Willet issued that opinion from the Supreme Court in
7 2010.

8 In those cases, in *Nixon*, for example, that was the
9 rape of a ten-year-old girl. That rape occurred when the
10 rapist took -- it was a stranger. They didn't know any
11 history about this rapist. It was just a stranger in another
12 apartment complex, who abducted the girl, ten-year-old, in one
13 complex, took her to the defendant complex, and there was an
14 unlocked door. So he took her in there. Committed this
15 horrible crime. And then locked her in the room and left.

16 The Supreme Court found that the *Nixon* could be held
17 liable and it was foreseeable and it was a substantial factor.
18 In that case, Your Honor, a broken latch on a door of a
19 stranger criminal was enough to be a substantial factor.

20 In *Del Lago* it was a fraternity fight at a resort bar
21 and the person who -- the plaintiff who sued for brain damage
22 was one of the instigators of the fight. The negligence in
23 that case -- and that went all the way to verdict.
24 Justice Willet upheld it in the Supreme Court, the majority
25 percentage on the bar.

1 In that case, the evidence was simply that the
2 security guards who were there didn't get there within three
3 to four minutes in time to stop this massive brawl from
4 happening that they didn't start. And in that case the
5 majority was placed on the resort.

6 The purpose of those cases —

7 THE COURT: Your time is up.

8 MR. ALSAFFAR: Oh, I'm sorry, Your Honor. I'm sorry,
9 Your Honor.

10 THE COURT: I'll give you one minute to wrap up.

11 MR. ALSAFFAR: Your Honor, I'll just say very quickly
12 that the purpose of those — the purpose of those cases is to
13 show you that, *Nixon* especially, is that when you have
14 substantial evidence and foreseeability, and in this case,
15 this is not a criminal case, we're not putting Devin Kelley
16 behind bars, it's a civil case, and when you show the extent
17 that they knew, the amount that they knew, and the amount of
18 time and opportunity to correct, that weighs heavily on
19 proportionate responsibility.

20 And I'll close, Your Honor, by saying that I know
21 that the plaintiffs are listening to this trial and I know
22 that they are watching right now. And I just want to make
23 sure it's very clear to them that they have had to endure and
24 listen to the government say that this law doesn't matter.
25 They have had to endure and listen to the government just now

1 and throughout this trial say that they are partly to blame
2 for being attacked because of this warped person's mind that
3 they were the bullies that caused him to want to come.

4 But, at the end of the day, I believe that the law
5 and the facts of this case are on their side, and the
6 Air Force's 30-year retreat from accepting responsibility can
7 and must end now.

8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 I appreciate the cooperation from all of you, the
11 entirety of the plaintiffs' team in coordinating this to a
12 lead counsel arrangement, and for the government's cooperation
13 with the plaintiffs on various matters.

14 I'll wait for both of you-all to submit your proposed
15 findings of fact and conclusions of law, and thereafter I'll
16 try to return a verdict and my final findings of fact and
17 conclusions of law as quickly as I can.

18 We're in adjournment.

19 (Concludes proceedings.)
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2 I certify that the foregoing is a correct transcript from
3 the record of proceedings in the above-entitled matter. I
4 further certify that the transcript fees and format comply
5 with those prescribed by the Court and the Judicial Conference
6 of the United States.

7
8 Date: 04/20/2021

/s/ Gigi Simcox
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