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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CALEB BARNETT, et al.,)	
)	
Plaintiffs,)	
vs.)	
	)	No.
KWAME RAOUL, et al.,	)	3:23-cv-209-SPM
)	
Defendants,)	
-----)	
DIANE HARREL, et. al,)	
)	
Plaintiffs,)	
vs.	)	No.
	)	3:23-cv-141-SPM
KWAME RAOUL, et. al,)	
)	
Defendants.)	
-----)	
JEREMY W. LANGLEY, et al.,)	
)	
Plaintiffs,)	
vs.	)	No.
	)	3:23-cv-192-SPM
BRENDAN KELLY, et al.,)	
)	
Defendants.)	
-----)	
FEDERAL FIREARMS LICENSEES OF)	
ILLINOIS, et al.)	
Plaintiffs,)	
vs.	)	No.
	)	3:23-cv-192-SPM
JAY ROBERT "JB" PRITZKER, et)	
al.)	
Defendants.)	

1 The deposition of JEFFREY EBY, was
2 taken by Deborah A. Duffy, CSR, RPR, pursuant to
3 the applicable provisions of the Federal Code of
4 Civil Procedure and the rules of the Supreme Court
5 of the United States of America, pertaining to the
6 taking of depositions for the purpose of discovery,
7 via Zoom videoconferencing, commencing at
8 approximately 9:30 o'clock a.m. on the 18th day of
9 July, of the year 2024.

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Reported by: Deborah A. Duffy CSR, RPR

License No.: 084-002516

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1 (Witness sworn.)

2 JEFFREY EBY,
3 called as a witness herein, having been first
4 duly sworn, was examined and testified as follows:

5 EXAMINATION

6 BY MR. WELLS:

7 Q. Good morning, Mr. Eby. My name is Chris
8 Wells. I'm an attorney with the Illinois Attorney
9 General's Office. I represent some of the
10 defendants in this case; the Governor of Illinois,
11 J.B. Pritzker, Attorney General and the director of
12 the Illinois State Police, Brendan Kelly.

13 It is nice to meet you this
14 morning. Thank you for joining us. And just for
15 the record, your name is Jeffrey Eby, and that is
16 E-B-Y. Is that correct?

17 A. Yes, sir. That is correct.

18 Q. Mr. Eby, have you ever given a
19 deposition before?

20 A. No, sir.

21 Q. So you understand that the court
22 reporter just had you take an oath, and you are
23 testifying here today under oath, and it is the
24 same as if we were in court.

1 Do you understand that?

2 A. Yes, sir, I understand.

3 Q. You've met the court reporter Debbie,
4 who is going to be helping us today.

5 She is going to be taking down
6 everything we say. So in order to help her do her
7 job and to make sure what you say is fairly
8 recorded in the transcript, I'd ask a couple things
9 from you:

10 First, if you would just wait
11 for me to finish my question before you start
12 answering, that would be much appreciated. Just so
13 she can get down the question and the answer.

14 Since you've never had a
15 deposition before, I will go ahead and tell you --
16 you will inevitably break this rule.

17 Every witness breaks this rule.
18 I will probably interrupt you at various times. We
19 will try to remind each other to slow down and
20 pause and give each other a chance to finish.

21 It is just the nature of the
22 depositions and sometimes Zoom doesn't help in that
23 respect.

24 As I'm asking you questions, you

1 may hear an objection from Mr. Brady. Mr. Brady,
2 you understand, is representing you in today's
3 deposition. Is that fair to say?

4 A. That is fair to say.

5 Q. So Mr. Brady may object, but you will
6 generally still need to answer the question that I
7 asked, if you understand the question. If you
8 don't -- if you don't understand the question, I
9 would ask you to state that and ask you to clarify.

10 If you answer the question I'm
11 going to assume -- and everyone reading the
12 transcript will assume that you understood the
13 question as asked. Is that fair?

14 A. Yes, sir.

15 Q. The one exception that we may encounter
16 is if Mr. Brady specifically instructs you not to
17 answer because of the attorney/client privilege.

18 In that case, that is the
19 exception to the rule that you generally have to
20 answer.

21 Are you on any -- and I
22 apologize for the intrusiveness of this question,
23 but it is a standard question in this type of
24 circumstance.

1 Are you on any medication today
2 that would prevent you from giving truthful
3 testimony?

4 A. No, sir.

5 Q. So as you know, we are doing this
6 deposition virtually today through Zoom. I'm in my
7 office in Chicago. Where are you located today?

8 A. I'm in my home office in southern
9 Missouri. In Chadwick, Missouri.

10 Q. Okay. And is there anyone in the room
11 with you today?

12 A. No, sir.

13 Q. Are there any other applications --
14 software applications open on your computer aside
15 from Zoom?

16 A. I will check real fast. I'm afraid I'll
17 close the wrong one and shut us down.

18 Q. I understand.

19 A. I've closed everything else.

20 Q. Thank you very much.

21 I would ask you to keep the
22 other applications closed other than Zoom. Do you
23 have a smart phone on you?

24 A. I put it away, out of my reach.

1 Q. Okay. Great.

2 If you could just keep the smart
3 phone away from you. The reason I'm asking these
4 questions is I would ask you, while we are on the
5 record, the only way we should communicate is
6 verbally through Zoom. And your attorney should
7 only communicate with you on the record verbally
8 through Zoom while we are on the record.

9 So if that changes, let me know
10 and we will address it. Despite being on Zoom,
11 simulate as if we are in a room together if that
12 makes sense.

13 A. Yes, sir.

14 Q. Do you have any documents in front of
15 you?

16 A. No, sir.

17 Q. And if you have any problem with the
18 technology we are using today, please let me know.
19 Please speak up and let the court reporter know.

20 Mr. Eby, the name of the lawsuit
21 you are being deposed is Barnett v. Raoul, Case
22 Number 23 CV 209. It is pending in the U.S.
23 District Court. There are three other cases that
24 have been consolidated with the Barnett Case.

1 Harrel vs. Raoul 23141 Langley v. Kelly, 23 CV 192;
2 and Federal Firearms v. Pritzker 23 CV 215. Do you
3 know that the deposition you are giving today may
4 be used in all four of those cases?

5 A. I do know.

6 Q. And do you understand that the
7 plaintiffs in all four of those cases have
8 identified you as an expert witness?

9 A. I do know.

10 Q. When you say you do know, what do you
11 mean?

12 A. I mean, I didn't realize I was in all
13 four cases, but I do understand that now. That is
14 fine.

15 Q. Do you know if you've been specifically
16 retained by the other plaintiffs in all four cases?

17 A. I have one point of contact and that is
18 Mr. Sean Brady. I don't know if I've been
19 retained. I wasn't aware of that.

20 Q. So is it fair to say the one point of
21 contact you've had about this litigation is Sean
22 Brady?

23 A. Yes, sir.

24 Q. Where are you currently employed?

1 A. I'm a technical consultant. I currently
2 have a primary role with Trijicon, Incorporated out
3 of Michigan. I work with their business
4 development office in Virginia.

5 Q. What does Trijicon, Incorporated, do?

6 A. They make optics; hunting scopes and
7 for the military, they make machine gun optics,
8 rifle optics, pistol optics, iron sights. They are
9 in the business for about 40 years now.

10 Q. You said it is pronounced Trijicon?

11 A. Yes, they made up the name. So it is
12 not a logical form of English.

13 Q. Can you spell it for us?

14 A. T-R-I-J-I-C-O-N.

15 Q. You said Trijicon makes optics. Is that
16 optics for firearms?

17 A. Yes, sir. And iron sights for pistols.

18 Q. You mentioned that some of the optics
19 that Trijicon makes are for hunting. So is that
20 for firearms used in the civilian market or sold in
21 the civilian market?

22 A. Yes, sir.

23 Q. Would that include AR platform rifles?

24 A. Yes, sir.

1 Q. What other types of firearms for the
2 civilian market does Trijicon make optics for?

3 A. They make thermal optics for both
4 civilian and military use. Machine gun optics.
5 Missile so -- I'll say missile. They sell boosters
6 called "Gustav" -- is a rocket, but they have
7 submunitions that can be guided which make them
8 missiles --

9 Q. I'm sorry. Go ahead.

10 A. Did I answer the question or did I miss?

11 Q. No. You did. Thank you.

12 You also mentioned that there is
13 a military component of Trijicon's business. How
14 is the military component of Trijicon's business
15 different than the civilian component?

16 A. They are business developers; both
17 international and domestic. They interact with
18 each military branch with a program manager to find
19 out what capability gaps those branches have and if
20 we can build or supply a solution to those gaps.

21 Q. And just roughly, what is the proportion
22 of Trijicon's business that is military side versus
23 civilian side?

24 A. I'm throwing an opinion out there, but I

1 think it is roughly 70 percent civilian and 30
2 percent military. And with zero basis to make that
3 number.

4 Q. That is just your best estimate?

5 A. Based on money, primarily. I understand
6 how much revenue comes in from each side, and that
7 would probably put it in the 70/30, but that may
8 not be true on products. It may be more products
9 towards one versus whether they are more expensive
10 than the civilian market than the military that
11 buys under contract with Highbolt.

12 Q. So your assessment of the 70 percent/30
13 percent split is based upon your understanding of
14 where the revenue comes from?

15 A. Yes, sir. Yes, sir.

16 Q. Do you know if Trijicon is a member of
17 the National Shooting Sports Foundation?

18 A. I do not know.

19 Q. What assignment were you given in this
20 case?

21 A. Expert witness on the law itself as I
22 understand it. So I was presented the areas of the
23 law that Governor Pritzker signed. "What do you
24 think?"

1 Q. Which law?

2 A. Assault weapons banned law. I don't
3 know the name. I did know it, but I can't recall
4 it.

5 Q. And did you look at the terms of the
6 statute itself in preparing your expert reports?

7 A. I read through the list of the weapons
8 primarily -- and no guarantee that I even knew what
9 those were.

10 There were quite a few weapons
11 on there.

12 Q. When you say there was no guarantee that
13 you knew what those were, what do you mean?

14 A. Meaning, my expertise relies upon
15 weapons I had used in the military. And then a few
16 civilian of the myriad of civilian options.

17 So I would also have to look
18 some of those weapons up using the internet for me
19 to totally understand that.

20 So I'm not an expert in all
21 weapons. I'm an expert in which I had to train
22 within the military.

23 Q. So is it fair to say your expertise is
24 specific to the weapons that you were trained on in

1 the military?

2 A. Limited because I also teach as a
3 National Rifle Association instructor for pistols.
4 Graduated tactical training course, but even those
5 are limited in nature to the amount of weapons
6 there are in the world.

7 Q. You mentioned two civilian training
8 courses. What were those again?

9 A. Law enforcement tactical instructor.

10 Q. And who provided that training?

11 A. The National Rifle Association provided
12 that.

13 Q. What weapons were utilized in that
14 training?

15 A. We brought our own weapons, your
16 preferred pistol. I took a GLOCK 19, and your
17 preferred rifle. I had one of the AR-15 variants
18 that I own.

19 Q. Do you remember what variant
20 specifically?

21 A. I do not.

22 Q. And what -- generally speaking, what
23 AR-15 variants do you own?

24 A. I have Larue tactical Daniel Defense. I

1 call them -- I bought several of these where I
2 bought independent components and assembled them.
3 They don't really have a clear identity.

4 Q. In addition to law enforcement -- I'm
5 sorry. Did I cut you off with others?

6 A. There are, but I can't recall the names
7 of them.

8 Q. Just approximately how many AR-15
9 variants do you own?

10 A. Approximately 22. And they are
11 comprised in different configurations. As an
12 AR-15, with the 16-inch barrel, as an AR pistol
13 with a pistol base. As a pistol caliber carbine --
14 unless my wife asks, at which point I have three.

15 Q. And are you familiar with the National
16 Firearms Act?

17 A. Yes, sir.

18 Q. Is it fair to say that some of those
19 weapons that you mentioned would be NFA, or
20 National Firearms Act --

21 MR. BRADY: Objection. Calls for a legal
22 conclusion to the extent there is an NFA issue,
23 which the witness understands may not be -- have
24 the proper tax stamp. I would instruct the witness

1 not to answer and assert his Fifth Amendment.

2 MR. WELLS: So let's keep it to form, if we
3 could, Sean.

4 BY MR. WELLS:

5 Q. I'm really just asking your
6 understanding. I'm not asking whether you are
7 complying with any law or not complying.

8 I just want to know if you have
9 an understanding as to whether some of the firearms
10 you have possessed would be classified as NFRA
11 firearms?

12 MR. BRADY: I will renew my objection. The
13 witness has a right to be instructed on his rights
14 to answer that if there is an issue, so...

15 BY MR. WELLS:

16 Q. Do you understand?

17 A. Do I understand?

18 Q. Yes. Do you understand? Are you able
19 to answer?

20 A. I have deliberately not signed up to the
21 NFA because I have no weapons that meet that
22 description. I have no short-barreled weapons. I
23 have no any other weapons where you can stick a
24 pistol on and reclassify a weapon simply by that

1 small little hand grip in the front.

2 I have deliberately avoided
3 having any NFA items outside of suppressors, which
4 I have six. And those were all registered.

5 Q. Understood. Thank you, Mr. Eby.

6 And what I'm trying to
7 understand -- because you make different
8 recommendations later in the report and
9 considerations about what rules might apply to
10 different weapons.

11 So I'm really trying to
12 understand your knowledge with the applicable
13 regulations.

14 So I don't mean to be intrusive.
15 That is really the purpose. Okay. How would you
16 describe your field of expertise?

17 A. Small arms/weapons expert. We have a
18 very deliberate training program from the Marine
19 Corps, and some side training programs from the
20 National Rifle Association on both pistols and
21 tactics. I was the officer in charge of the small
22 arms instructors instructor course, which is the
23 premiere instructor development course for all
24 small arms.

1 During my tenure, I oversaw the
2 development of the combat marksmanship program,
3 which included combat marksmanship instructor
4 training and combat marksmanship coach training.

5 In addition, I oversaw the
6 development of the foreign weapons instructor
7 course and the foreign weapons coaches course.
8 That lasted for a period of three years.

9 I've been an instructor for
10 small arms, for machine guns, missiles, rockets,
11 motors, rifles, grenade launchers and explosives.

12 Q. And I believe we were talking about two
13 specific civilian training courses. You mentioned
14 military experience. You talked about one of them.
15 What was the second civilian training course you
16 received?

17 A. Basic pistol course.

18 Q. And was that a course from the National
19 Rifle Association?

20 A. Yes, sir.

21 Q. Are there any other civilian trainings
22 that you've received that you think are relevant to
23 your testimony?

24 A. Not with certifications, no.

1 Q. What materials did you review in
2 preparing your initial expert report in this case?

3 A. I reviewed field manuals and operational
4 manuals, primarily written by the Army as they are
5 well funded for the development of those.

6 I read historical reports and
7 experiments, a secretary defense report following
8 Vietnam. My initial days of Vietnam primarily --
9 that is quite a large sum of publications just in
10 that statement.

11 Q. And are all of those publications, the
12 ones you cited -- the ones you cited in your expert
13 report?

14 A. Yes, sir.

15 Q. Beyond what is cited in either your
16 initial expert report or your rebuttal expert
17 report, are there other materials you reviewed that
18 are not cited in those documents?

19 A. Nothing distinguishable.

20 Q. So everything you reviewed and relied
21 upon is reflected and cited in the expert report
22 and rebuttal report?

23 MR. BRADY: Objection. Vague.

24 THE WITNESS: That is correct. Yes.

1 BY MR. WELLS:

2 Q. Did you review the expert reports of any
3 other experts in this case?

4 MR. BRADY: Objection. Vague as to when.

5 MR. WELLS: If you understand, you can answer.

6 THE WITNESS: Yes, sir, I did.

7 BY MR. WELLS:

8 Q. Which expert reports did you review that
9 are related to this case?

10 A. Segments of Andrews Tucker and Lucier --
11 or something very similar to that. Butchering the
12 name.

13 Q. Were there any other expert reports or
14 segments of expert reports that you reviewed in
15 your work on this case?

16 A. I don't recall.

17 Q. You mentioned expert report from
18 Mr. Tucker. Do you know Mr. Tucker?

19 A. Oh, yes, sir.

20 Q. Who is Craig Tucker?

21 A. Craig Tucker was my commanding officer
22 in 1999 to late 2000. He was the lieutenant
23 colonel then. I was recently a marine gunner,
24 which is a commissioned officer. Served with him

1 in 29 Palms at 2nd Marines, 2004 and 2005. Then
2 Colonel Tucker was my commanding officer as we
3 served together in Iraq in Al Anbar Province.

4 Q. What is your opinion of Mr. Tucker?

5 MR. BRADY: Objection. Vague. Calls for
6 narrative. You may answer.

7 THE WITNESS: I served with Craig Tucker. He
8 is an honorable outstanding combat commander. I
9 have a very high regard for him.

10 BY MR. WELLS:

11 Q. What is your opinion of Colonel Tucker's
12 knowledge of military small arms?

13 A. That is not so high. He used me to
14 answer those questions on all occasions.

15 I don't believe he has had any
16 deliberate training and certifications on small
17 arms other than holding it and using it. And even
18 that is limited.

19 It is very common for an officer
20 to not hold the rifle past the rank of lieutenant.
21 And, for instance, 30 years of service maybe you
22 hold the rifle for three years of that, and use a
23 pistol. So his knowledge and expertise on that
24 rifle, the employment, the instruction are very

1 limited as they should be. That is not his role.

2 Q. What is the role of an officer, then?

3 A. He is to manage the forces that provide
4 the fight against the opponent. And he does that
5 very well.

6 Those forces are air, sea, land,
7 space, cyber. He manages that very well to apply
8 pressure on the opponent. His role is not to
9 identify characteristics of employment of
10 individual weapons.

11 Q. How does a commander make decisions
12 about what particular forces to deploy if they
13 don't understand the underlying weapon systems?

14 MR. BRADY: Objection. Calls for speculation.

15 THE WITNESS: I would be speculating on his
16 training and education that got him prepared to do
17 so. Because I didn't undergo that level of
18 training.

19 BY MR. WELLS:

20 Q. How is your role as a Marine gunner
21 distinct from the role of your commanding officer?

22 A. I was an advisor with no authority.

23 Q. Can you explain more of what that means,
24 that you were an advisor?

1 A. I can explain what he tasked me to do,
2 if that would help. He would inform me to create
3 training programs for each of our individual
4 weapons. Not only on the loading unloading
5 characteristics nomenclature but on the employment
6 of them individually.

7 And then he would task me
8 to create training events that would group weapons
9 and systems and people together in ever-escalating
10 sizes. From fire team to rifle squad, to platoon,
11 to company, battalion and regiment.

12 And I would create these
13 training events to employ the best practices for
14 weapon system and grouping, so we could evaluate
15 our readiness with his participation. We would
16 identify weakness through those training events and
17 have follow-along training to correct those
18 shortfalls.

19 Q. So I want to come back to some of that
20 here in a few minutes. But before I do that, I
21 just want to be clear. The initial report that you
22 prepared in this case was prepared with
23 Mr. Musselman. Am I saying that correctly?

24 A. You are.

1 Q. How do you know Mr. Musselman?

2 A. He was also a Marine gunner close
3 friends and still are.

4 Q. Can you tell me how it came to be that
5 the two of you prepared an initial report together?

6 MR. BRADY: Objection to the extent it calls
7 for communication with counsel. You may answer.

8 THE WITNESS: I think Mr. Brady is the one
9 that brought Mr. Musselman in. Mr. Musselman and I
10 met at a retirement ceremony in Washington, D.C.,
11 for a friend of ours.

12 We had spoken that we had both
13 been requested by Mr. Brady to write statements.
14 We each had a divergent path on what that statement
15 would look like. And I was not a fan of the
16 direction Mr. Musselman wanted to go into.

17 So we agreed to write individual
18 separate statements and we would communicate with
19 Mr. Brady as we wrote these individual statements,
20 but at the end of the day, I believe Mr. Brady
21 preferred my statement better, and Mr. Brady handed
22 it to Mr. Mussleman to corroborate and look for any
23 errors.

24 So to be fair, it was my

1 statement that Mr. Mussleman witnessed, approved
2 and corroborated. I think he added one line into
3 it on the addition of a 149 and hand rifle. I
4 forgot to mention. And the rest of that was my
5 statement.

6 BY MR. WELLS:

7 Q. When you say you were not a fan of the
8 direction that Mr. Mussleman wanted to go, what
9 direction did Mr. Mussleman want to go?

10 A. I think he was leaning more towards
11 articles from civilian world and use of guns and
12 mass murders, and I disagreed that that was my
13 strength and my training. And I didn't want to
14 start quoting what was happening outside of the
15 military as that would just be pure opinion.

16 Q. What types of articles from the civilian
17 world describe mass shootings?

18 MR. BRADY: Objection. Vague.

19 THE WITNESS: The Miami-Dade shooting in 1986.

20 For instance, initially eight
21 FBI agents engaging two hostiles, hundreds of
22 rounds were fired at a distance of 20 feet.

23 Speaking towards -- I think he was going after the
24 lack of lethality in some engagements for shotguns.

1 .357 Magnum. Pistols. Ruger 14 was employed in
2 that engagement.

3 I think he was leaning more
4 towards how hard it is to put an opponent down.
5 How resilient the human body is.

6 My comment to him was neither
7 one of us are ballisticians or forensic experts,
8 and it is really out of our lane to speak so
9 heavily in the lethality role when there are so
10 many variables involved.

11 BY MR. WELLS:

12 Q. In formulating your opinions as
13 reflected in your expert report and your rebuttal
14 report, did you rely on any evidence from the
15 civilian world?

16 MR. BRADY: Objection. Vague.

17 THE WITNESS: Most likely I did. Only because
18 I read a lot. I study both civilian and military
19 engagements. From not only weapons employed, the
20 bullets that are used. The human performance of
21 the body. The body alarm response, and how that
22 alters your memory of an event if you were close.

23 So it would be impossible for me
24 to tell you the levels of influence of all writings

1 from all natures as I certainly didn't shelter
2 myself only to the military world, when there is
3 tons of evidence or opinions in the civilian world.

4 Yes, I did, but if I had to list
5 those out I wouldn't be able to do so.

6 BY MR. WELLS:

7 Q. Did you review any publications
8 discussing the lethality of firearms used in mass
9 shootings?

10 A. Not for this event, no. That would have
11 been previous to over the last 40 years.

12 Q. Why did you not review those types of
13 materials?

14 A. Just time. I had plenty to research to
15 find those historical studies that I knew existed,
16 read them again, understand what they conveyed and
17 what their out-brief was -- what their final facts
18 were, and whether or not those fit with my own
19 thoughts. And there was just no time to do the
20 research and external -- there are a lot of words
21 involved.

22 Q. So you looked for sources that fit with
23 your own thoughts? Did I hear that correctly?

24 MR. BRADY: Objection. Misstates testimony.

1 Vague.

2 THE WITNESS: I looked for sources that I knew
3 I had read before in order to quote them and
4 reference them.

5 BY MR. WELLS:

6 Q. Would reports of lethality of firearms
7 and civilian mass shootings be relevant to an
8 expert in your field?

9 MR. BRADY: Objection. Vague. Calls for
10 speculation.

11 THE WITNESS: It is my opinion that most
12 reports I see outside of FBI are not scientifically
13 studied, evaluated, controlled for variables.

14 When the military does a report,
15 it is very much a fifth-grade science project where
16 they control for variables, evaluate the outcomes
17 and provide me something that I can have confidence
18 in instead of a very wordy opinion piece.

19 So other than FBI documents,
20 which are very few that I've had access to,
21 majority of my opinion has been shaped by military
22 studies.

23 BY MR. WELLS:

24 Q. Did you review any FBI reports

1 discussing civilian mass shootings in preparing
2 either your expert report or your rebuttal report
3 in this case?

4 A. No, sir.

5 Q. In discussing the statement that you
6 prepared that Mr. Musselman also signed onto, do
7 you stand by everything that is written in that
8 statement?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: I have no reason to change my
11 opinion on anything that I wrote.

12 BY MR. WELLS:

13 Q. And that statement reflects your words
14 in its entirety. Is that fair to say?

15 MR. BRADY: Objection. Vague.

16 THE WITNESS: Yes.

17 BY MR. WELLS:

18 Q. And same thing goes for the rebuttal
19 report. The rebuttal report you prepared in this
20 case is your words. Is that fair to say?

21 MR. BRADY: Objection. Vague.

22 THE WITNESS: Yes, sir.

23 BY MR. WELLS:

24 Q. Okay. I'm going to talk a little bit

1 about -- more about your Marine Corps experience.

2 When did you join the Marine
3 Corps?

4 A. I went on active duty in June of 1982.

5 Q. And I believe you mentioned earlier that
6 you became a Marine gunner in 1999. Is that right?

7 A. That is correct.

8 Q. If you could just describe for me
9 generally your roles in the Marine Corps from 1982
10 to 1999?

11 A. I joined the Marine Corps, and I was
12 assigned as an assaultman, which is a demolitions
13 man with a rocket capable of reducing bunkers.

14 I served in that role no more
15 than nine months before being accepted into an
16 anti-tank missile course that was on-the-job
17 training. There was no school for it. We were
18 trained by the people that already knew. I stayed
19 in anti-tank missile until 1987. In 1987 I was
20 sent out on embassy duty for Brussels Belgium and
21 Dehli, India. Eighteen months in each one of
22 those. Returning back to the fleet Marine Corps in
23 1990 where I joined, second Battalian, 8th Marine.

24 I was assigned as a machine gun

1 section leader initially and then moved over to
2 scout sniper platoon. It is the scout sniper,
3 staff NCO, staff non-commission officer in charge.

4 And then I was assigned in 1993
5 to fleet anti-terrorism security team company out
6 of Norfolk, Virginia, where we were the world
7 response force for the chief of naval operations.

8 I had a 50-man platoon with our
9 own mortars, rockets. Every man had a rifle and a
10 pistol. I had sniper systems. I had light machine
11 guns as part of that 50-man platoon. I did that
12 for three years.

13 And in 1996 I was reassigned to
14 be the chief mortar instructor at school of
15 infantry, Camp Lejeune. Eighteen months later, I
16 was reassigned to be the infantry platoon course
17 instructor where we were to teach a 13-week course
18 across all of the small arms -- a rifle battalion;
19 motors, rockets, missiles, mortars, rockets,
20 missiles, machine guns, grenade launchers,
21 explosives, rifles and no pistols. We honestly
22 didn't have pistols in the infantry.

23 By 1999 -- late '98 I was
24 selected to be the Marine gunner. The performance

1 for that selection, we had to be an enlisted E-7
2 Gunnery sergeant with 16 years' experience to be
3 eligible.

4 I had the sixteen years in the
5 Gunnery service. I was selected and transferred,
6 and I had seven months of school in Quantico,
7 Virginia, before I went to second Battalian 7th
8 Marines Twentynine Palms in late September of 1999.
9 I was then in marines until January 2003 where I
10 just came off of deployment with the 2nd battalion
11 7th Marines. Joined 7th Marines regiment, 17 days
12 before leaving again for the Operation Iraqi
13 Freedom.

14 I was with 7th Marines until
15 returning from Iraq in 2005 where I was transferred
16 to be the instructor. The officer in charge of the
17 small Arms Weapons instructor's course of the
18 battalion in Quantico, Virginia. Three years in
19 that billet, before General Dunford created a
20 billet for Marine gunner at the Pentagon, and
21 brought me up as the first Marine gunner to serve
22 at the Pentagon to serve as an advisor, as
23 confidant, for plans policies and operations.

24 I served in that for three years

1 before retiring in November of 2010.

2 Q. Can you describe just generally your
3 combat experience in the marines?

4 A. Yes, sir. In 1991 I was on Operation to
5 Provide Comfort in Northern Iraq. Separating the
6 Iraqis who were killing the Kurdish people.
7 Created a safe zone for those Kurdish people.

8 Spent four months patrolling the
9 separation of the Iraqis from the Kurds in Northern
10 Iraq with 2nd Battalion 8th Marines as part of the
11 24th Marine Expeditionary Unit.

12 Later I deployed on Operation
13 Iraqi Freedom from Kuwait to Baghdad in a 4 month
14 -- slightly 57 days of straight combat before
15 settling down for another two months of just
16 pacifying the area and retrograding.

17 Working our way back down to
18 Kuwait and leaving for the United States. So from
19 January 2003 until late May of 2003, I was sitting
20 in that Kuwait and Iraq and back to Kuwait time
21 frame on Operation Iraqi Freedom.

22 I returned in January of 2004
23 with Colonel Tucker and stayed until May of 2005,
24 approximately 15 months, overall, of combat in

1 Western Iraq from Al-Asad to the border of Turkey
2 -- in Syria rather.

3 With a slight deviation for
4 November 2004, our regiment was brought in to
5 assist on the Second Battle of Fallujah in 2004.

6 Q. And have you discharged a weapon in
7 combat?

8 A. Yes, sir.

9 Q. Did you do that in 1991?

10 A. No, sir. Not 1991.

11 I ordered the discharge of
12 weapons, machine guns and mortars and riflemen. I
13 did not personally position myself to do so.

14 Q. And when you did discharge your weapon
15 in combat, when did that occur?

16 A. That occurred in the 2003 push to
17 Baghdad. And also in the 2004 to '05 time,
18 specifically in and around Fallujah, but also
19 around Al-Qa'im, and then bounced in between.

20 Some of those were just trying
21 to defeat an IED. Some of those were obstacles in
22 the road, and I would shoot them to see if they
23 would detonate or move or show up some wires.

24 Others were joining in somebody

1 else's fight at Al-Qa'im when they were closing in
2 on the objective and all throughout Fallujah.

3 Q. When you say some of those discharges
4 were trying just to defeat an IED, what do you
5 mean?

6 A. An obstacle in the road that could be
7 filled with explosives that can detonate on a
8 passing vehicle. There was seldom a way around
9 that.

10 So a means of identifying it to
11 see if it was just a random obstacle that fell off
12 of the vehicle or if they delivered an improvised
13 explosive device, would try to change the way it
14 laid in the ground.

15 Rifles won't detonate
16 explosives, but I could move it. I could see if
17 any wires or signals were tied to it or disrupt it.
18 Or it being able to be detonated by wireless
19 remote.

20 So these were just means before
21 walking over and detonating it.

22 Q. When you say "shooting at them," what
23 type of weapon would you use to shoot at the IED?

24 A. I had an M4, which is all I had

1 available to use so I used it.

2 Q. What kind of M4?

3 A. There is one type of M4, and it is a
4 slight -- adjustable buttstock, 14.5-inch rifle
5 barrel with a flash hider on it. A non-free
6 floating rail, a slip lever with a safe semi-auto.

7 Q. You mentioned another combat experience
8 in which you joined other people's fight. What
9 type of weapon would you be using in that combat?

10 A. -- I also had an M4 at that time with a
11 Trijicon optic on it.

12 In these engagements, someone
13 from a position of defense had shot at marines.
14 And marines immediately cordoned the area and
15 surrounded it to prevent that individual or
16 individuals from leaving.

17 On these occasions we did not
18 try to enter. We isolated the objective when we
19 brought something heavy to destroy the building or
20 destroy the bunker or destroy hideaway as a safer
21 means for us to eliminate that threat without
22 having to get into the room and get shot in the
23 face.

24 Q. Other than the M4 rifle, are there any

1 other weapons that you discharged in combat?

2 A. M240 machine gun in position. Only to
3 relieve the marine that burned himself with hot
4 brass. That machine gun was on a military Humvee.
5 He was suppressing the whole side of the building
6 with traversing fire just to keep somebody from
7 stepping up into a window or shoot out of it.

8 For about one minute, I relieved
9 him and continued suppressing while he got the
10 brass out of his flak jacket. And he was ready to
11 get back in position, and I gave him the position
12 back.

13 Q. So that was one minute of suppression
14 fire? Is that right?

15 A. Yes. Many times, not engaged in combat,
16 where I fired weapons, and I did a lot of training
17 to teach the marines how to work as a group because
18 you are always doing pick-up teams.

19 People are changing out
20 regularly and you are always having to reinstill
21 that level of knowledge of how they all need to
22 work around each other.

23 So heavy machine guns. M2 heavy
24 machine guns. M240 medium machine guns. M249

1 light machine guns. The Barrett sniper rifle. The
2 M110 semi-automatic sniper rifle. The M16A4, were
3 all -- I had shotguns many times, but most of those
4 were in training scenarios I created outside of
5 Al-Asad to train the force that was going to use
6 them.

7 Q. So I understand that a lot of the
8 discharges took place in training, but in terms of
9 combat, the two weapons you fired in combat were
10 the M4 rifle and M240 machine gun. Is that fair to
11 say?

12 A. Yes, sir.

13 Q. And when you fired the M4 rifle in
14 combat, what setting was the rifle in?

15 A. Always in semi-auto.

16 Q. So in your report, you mentioned a
17 variety of different weapon systems that you became
18 familiar with and became an expert in as a Marine
19 gunner. And you described some of them as
20 individual and some of them as a crew served.

21 What is the difference between
22 an individual and a crew-served weapon?

23 A. Every Marine is assigned an individual
24 weapon whether that is an M4, M16 A4 or M9 pistol,

1 now replaced with an M17 pistol.

2 Crew-server weapons are those
3 medium machine guns -- it starts with a medium
4 machine gun. It is a three-man group. Those three
5 men be assigned to that medium machine gun, yet all
6 of them have individual weapons as well.

7 So they will all have either
8 pistol -- the gunner will usually get the pistol.
9 The assistant gunner and the team leader will get
10 an M4 or M16A4. That transitions over time.
11 Meaning what we assign them changes by the year as
12 it progresses.

13 If you were to ask me what their
14 weapon was in 1999, it was an M16A4, but by 2003 it
15 was an M4A1, and by 2010 it was M27.

16 So that weapon progressed as
17 technology progressed, and as acquisitions changed.
18 So crew serves are more than one individual
19 assigned to a weapon that requires a crew to
20 operate. Three different machine guns. Two
21 different mortars. One -- two missiles, are all
22 crew weapons.

23 Q. In your report, you specifically list or
24 you identify two rifles, three sniper rifles, two

1 grenade launchers, four different machine guns, two
2 mortar systems, four rocket systems, two anti-tank
3 missile systems, and a 25 Bushmaster canon.

4 Do you recall that part of your
5 report?

6 A. I do.

7 MR. BRADY: Objection. Vague.

8 BY MR. WELLS:

9 Q. When you mentioned the two rifles, what
10 model of rifles were you referring to?

11 A. M4A1, M16A4.

12 Q. What were the fire settings on the
13 M4-A1?

14 A. Safe, semi-automatic and burst.

15 Q. What were the fire settings on the
16 M16-A4?

17 A. The same. Safe, semi-auto and burst.

18 Q. What does "burst" mean?

19 A. It fires a three-round burst every time
20 you pull the trigger.

21 Q. You mentioned three sniper rifles in
22 your report. What models of sniper rifles?

23 A. Initially the M40A5, at the time I
24 think. It could have been an A4, but it was a bolt

1 action rifle. The M110 semi-auto special
2 application rifle. And then the Barrett M107
3 special application scoped, which was a 50 caliber.

4 We honestly don't call that a
5 sniper rifle. It is in the sniper platoon, but it
6 is special application scoped rifle. It is not
7 very accurate. It is designed to shoot equipment
8 primarily -- vehicles.

9 Q. Do you know if any of those three sniper
10 rifles are available in the civilian market?

11 A. All three of them are available on
12 civilian market. All three are semi-auto only.

13 Q. And I believe you said that -- what was
14 the Barrett model again?

15 A. At the time it was M107.

16 Q. And what type of application was the
17 Barrett M107 used for in the Marine Corps?

18 A. Shoot at engine blocks. Shoot at
19 radiators. Try to stop mobility for opposing
20 vehicles. It is actually very limited if you are
21 against a peer threat because peer threats will
22 come with armor that we can't penetrate with that
23 rifle.

24 It is fine against third-world

1 countries that are going to show up in a Toyota
2 Highlander. So it is limited in nature where we
3 can use it.

4 Q. Can you imagine a scenario in a civilian
5 setting where a civilian would use a Barrett M107
6 for self-defense?

7 MR. BRADY: Objection. Vague. Calls for
8 speculation. Incomplete hypothetical.

9 THE WITNESS: Yes, I could. And it wouldn't
10 be the best solution, but if that was the only
11 solution, that would be the only thing he could
12 use. And there are those who are long-range
13 precision shooters. That may be his only weapon.

14 So I will tell you now, my
15 favorite weapon is the one I grab first.

16 BY MR. WELLS:

17 Q. You said it wouldn't be the best
18 solution. Why wouldn't it be the best solution?

19 A. It is extremely cumbersome, heavy,
20 awkward. Low in portability. Heavyweight. Really
21 requires a prone shooting position, which may not
22 be applicable at the time of the engagement
23 depending where you are at.

24 So it is not what I would

1 recommend, but if it is the only one you have.

2 Q. If you were in a home setting, would you
3 recommend using an M107 for -- a Barrett M107 for
4 self-defense?

5

6 MR. BRADY: Objection. Vague incomplete
7 hypothetical.

8 THE WITNESS: No, sir. I would not.

9 BY MR. WELLS:

10 Q. Why not?

11 A. It is heavy. It is cumbersome. It
12 requires prone shooting position. It is very
13 low-volume ammunition. Not very portable. Not
14 maneuverable. Not made for small-stature people.
15 Not only for its weight and length, and limited
16 ammunition, and being limited ammunition, it has a
17 harsh recoil.

18 THE COURT REPORTER: Did you say horse.

19 THE WITNESS: Say that again, please.

20 THE COURT REPORTER: You said it has a
21 harsh --

22 BY MR. WELLS:

23 Q. Harsh recoil, H-A-R-S-H.

24 A. Harsh recoil.

1 Q. Would use of a Barrett M107 rifle in a
2 home setting for self-defense create the risk of
3 overpenetration?

4 MR. BRADY: Objection. Vague. Calls for
5 speculation. Incomplete hypothetical.

6 THE WITNESS: I would presume a significant
7 amount of overpenetration, yes.

8 BY MR. WELLS:

9 Q. Why would you presume a significant
10 amount of overpenetration?

11 A. That bullet can travel 7,200 meters
12 without obstruction when launched at a 40-degree
13 angle with sea level, 72 degrees, no humidity.
14 That has a lot of distance behind it.

15 So because it has such a long
16 distance behind it, it has the potential to
17 penetrate easier than a lower-velocity smaller
18 bullet.

19 Q. How does the velocity of a bullet affect
20 the distance it can travel?

21 MR. BRADY: Objection. Vague. It calls for
22 speculation.

23 THE WITNESS: The velocity of being able to
24 fire, temperature, altitude. All of those affect

1 how far the bullet can travel.

2 BY MR. WELLS:

3 Q. And how does velocity affect the
4 wounding capacity of a bullet?

5 MR. BRADY: Objection. Vague. Incomplete
6 hypothetical.

7 THE WITNESS: That would be best answered by a
8 ballisticsian other than myself. I would be stating
9 an opinion that is ever influenced by changing
10 thoughts on what metric we use for lethality.

11 BY MR. WELLS:

12 Q. You mentioned two grenade launchers in
13 your expert report in conjunction with, you know,
14 your training and familiarity as a Marine gunner.
15 What models of grenade launchers were you referring
16 to?

17 A. An under barrel M203, which is now
18 getting ready to be M320, individual grenade
19 launcher tied to a billet in the rifle squad, and
20 then we have a belt-fed automatic M19, which is
21 usually vehicle mounted.

22 Q. Are either of those weapons available in
23 the civilian market, as far as you understand?

24 MR. BRADY: Objection. Vague. Calls for

1 speculation.

2 THE WITNESS: They are available only through
3 NFA effort. You would have to locate them and have
4 a special buy.

5 BY MR. WELLS:

6 Q. Is one person able to carry an M203
7 attachment grenade launcher?

8 A. Yes, sir.

9 Q. And is one person able to carry a
10 beltmark 19 grenade launcher?

11 A. No, sir. That is a three-man crew
12 requirement.

13 Q. You mentioned four different machine
14 guns, that as a marine gunner, you had to be an
15 expert in. What were those four different machine
16 guns?

17 A. M249 light machine gun. M240 Bravo
18 medium machine gun. The M2 heavy machine gun. And
19 the Mark 19, heavy grenade launcher.

20 Q. M249 light machine gun, can one person
21 carry that?

22 A. Yes, sir.

23 Q. The M240 Bravo medium machine gun, can
24 one person carry that?

1 yes, he could employ it by himself.

2 Q. You mentioned four rocket systems. What
3 rocket systems, as a Marine gunner did you have to
4 be an expert in?

5 A. The M72 light weapon is a rocket. The
6 AT4 rocket. The SAAB Bofors Carl Gustav had two
7 different variants. So the M3 and the M4 variants
8 are Carl Gustav rockets.

9 They are Carl Gustav depending
10 on what we decide to buy 7 of the 10 different
11 ammunitions that are available to load into it,
12 whereas the M72 and AT4 come with an anti-tank
13 rocket, only.

14 Q. Is the M72 light anti-tank weapon one
15 that could be carried by one individual and fired
16 by one individual?

17 A. Yes, sir.

18 Q. Is the AT4 rocket system one that could
19 be fired by one individual and carried by one
20 individual?

21 A. Yes, sir.

22 Q. Is the Gustav M3 a weapon that can be
23 carried and fired by a single individual?

24 A. It is a crew weapon of two, but, yes, it

1 is can be carried and fired by one individual.

2 Q. Can the Gustav M4 also be carried and
3 operated by a single individual?

4 A. Yes.

5 Q. You mentioned two anti-tank missile
6 systems. What are those missile systems?

7 A. Initially there were three. The dragon
8 missile, but they are obsolete and replaced by the
9 Javelin anti-tank missile. Again, another exchange
10 happened. The -- again, another exchange happens,
11 the tube launched optically tracked wire command
12 link ATM, the was replaced by the Saber anti-tank
13 missile.

14 So at the end of the day we
15 still had two. Either the dragon and a tow or it
16 went from Javeline to Saber.

17 Q. And can those missile systems that you
18 just described be carried and operated by a single
19 individual?

20 A. No, sir. Those are extremely heavy and
21 cumbersome and, again, a three-man crew.

22 Q. If two members of the three-men crew are
23 incapacitated, can that remaining member operate
24 that weapon system?

1 A. Yes. Move it, not likely.

2 Q. I'm going to cover -- I should mention
3 to you, Mr. Eby, at the outset. If you need to
4 take a break at any point, you should let me know.

5 The only thing I would ask if
6 there is a question pending, you just answer the
7 question pending before we take a break.

8 So we've been going a little
9 under an hour. Would you like to continue or would
10 you like to take a break?

11 A. I'm okay to continue.

12 Q. Just let me know if that changes. I'm
13 going to cover just some basic concepts with you.
14 What is a rifleman?

15 A. Rifleman is an individual that is armed
16 with a rifle who has a duty and responsibility to
17 shoot a point targets under the command of a fire
18 team leader or the commander of the squad leader.

19 Q. Let me just show you something here.
20 Okay. Mr. Eby, I've put up on the screen a
21 document with the heading "Joint reported experts,
22 witness, Jeff Eby and Michael Musselman." Do you
23 see that?

24 A. I do.

1 Q. Have you seen that document before?

2 A. I have.

3 Q. What is it?

4 A. My report.

5 Q. Okay. It is a 305-page document, which
6 includes both the report and the exhibits as
7 submitted from your counsel.

8 So I'm just going to scroll
9 through it. I'm not going to go through the whole
10 thing, but just the report section. Does this look
11 like it is the report that you prepared and drafted
12 in this case?

13 A. It does.

14 MR. WELLS: So for the sake of the record, I'd
15 ask the court reporter just to note that this is
16 Exhibit 1.

17 (Deposition Exhibit 1 was marked
18 for identification.)

19 BY MR. WELLS:

20 Q. It is the expert report of Jeffrey Eby
21 and Michael Musselman. And as I'm scrolling
22 through here on page 14 of the PDF, are you
23 familiar with this document?

24 A. I am.

1 Q. And what is it?

2 A. It is the FM350 Operations.

3 Q. And these are the exhibits to your
4 report. Is that fair to say?

5 A. Yes, sir.

6 Q. I'm just going to scroll to the end
7 here.

8 Does this look like the last
9 exhibit in your report, PDF 45, which has been
10 marked as Exhibit 5 -- I'm sorry -- Exhibit 1?

11 A. Yes.

12 Q. So I've just marked here your report as
13 Exhibit 1. I would just like to now show you a
14 different document. Okay? Do you see a document
15 labeled "Expert Witness Rebuttal Report of Jeffrey
16 Eby" on the screen now?

17 A. I see that.

18 Q. Are you familiar with this document?

19 A. Not that I can recall.

20 Q. I'm scrolling through the second page
21 here of this report. Does this page look familiar
22 to you?

23 A. No. Let me read it.

24 In part, it looks like I'm being

1 quoted. Maybe it is mine. Yes. This does look
2 familiar.

3 Q. I'm scrolling to page 4. Does page 4
4 look familiar to you?

5 A. Yes.

6 Q. Does page 4 look familiar to you?

7 A. Yes, sir.

8 Q. Okay. And Page 6. Do you see at the
9 bottom of Page 6, it says "S, slash Jeffrey Eby."
10 Do you see that?

11 A. Yes, I do.

12 Q. Did you input your signature in that
13 document?

14 A. I don't recall.

15 Q. Do you --

16 A. I do not recall whether I signed that
17 digitally or not, or just authorized a signature.
18 I don't recall.

19 Q. Do you know if you reviewed this
20 document before your digital signature was applied
21 to it?

22 A. Yes, sir. I do know that I reviewed
23 that document.

24 Q. And when did you review that?

1 A. I don't recall the date.

2 Q. Did you personally draft the contents of
3 this document?

4 A. Yes, sir, I did.

5 Q. And when we looked at the first page of
6 this document titled "Expert Witness Rebuttal
7 Report of Jeffrey Eby," you didn't initially recall
8 it. Do you recall that document now?

9 A. I recall pieces of it. What confused me
10 was the expert witness rebuttal. That part speaks
11 to somebody else. Altered pieces of this. I would
12 have to read the entire document to see what was
13 altered. Because these look like my words on the
14 front of it, but that doesn't look like -- maybe it
15 does.

16 I guess that isn't somebody
17 rebutting me. That is my rebuttal statement. I
18 just didn't recall the title of it.

19 Q. So the title indicated to you that there
20 may have been some altercations of the document
21 after you reviewed it last?

22 MR. BRADY: Objection. Misstates testimony.

23 THE WITNESS: I believe this is my statement.
24 I initially read that incorrectly thinking that was

1 somebody else's rebuttal to me, and they were
2 listing quotes from me.

3 This appears not to be the case.
4 This is my statement in entirety.

5 MR. WELLS: Okay. I'd like to mark this
6 Exhibit 2. It is expert witness rebuttal report of
7 Jeffrey Eby.

8 (Exhibit 2 was marked for
9 identification.)

10 BY MR. WELLS:

11 Q. Mr. Eby, this is both your expert report
12 and an underlying exhibit, which is 803-page PDF.
13 Do you see that?

14 A. I do.

15 Q. And in keeping with this case, can you
16 tell me how this -- besides the part that you
17 drafted, what comprises the rest of the 803 pages?

18 MR. BRADY: Objection. Vague.

19 THE WITNESS: I believe it is the references
20 that you see at the bottom. These are lengthy
21 publications where you see the army studies or
22 operation manuals.

23 They comprise the majority where
24 I took my statements from, what I base them upon.

1 BY MR. WELLS:

2 Q. So I'm moving to Page 111 of the PDF,
3 which it has been marked as Deposition Exhibit 2
4 and within the PDF is labeled as Exhibit 4 to
5 Mr. Eby's rebuttal expert report.

6 Looking at page 111 of the PDF,
7 do you recognize this document?

8 A. I do.

9 Q. What is it?

10 A. It is a marksmanship publication titled
11 "Rifle Carbine" written by the Department of the
12 Army.

13 Q. Does it have a number at the top there
14 that says TC322.9?

15 A. Yes, sir. Training circular is what TC
16 means. Training circular 22.9.

17 Q. And are you familiar with this document?

18 A. I have read this document, yes.

19 Q. What is it?

20 A. It is a marksmanship publication
21 designed to teach the best practices on an
22 individual training program for a rifle and a
23 carbine.

24 Q. What function does this document serve

1 in the Army?

2 A. It is the beginning stages of
3 instruction for a weapon program usually in
4 isolation and in sterile controlled environments
5 that will initially start off with no time limits,
6 and then grow to small easily achieved time limits
7 that teach loading, unloading, sighting, aiming,
8 methods of marksmanship for shots.

9 It is our beginning stages of
10 when we introduce weapon platform or conduct annual
11 training to re-establish a baseline of knowledge.

12 Q. Does the U.S. Marine Corps also use this
13 document?

14 A. We will refer to it, but we have our own
15 document that we would use.

16 Q. What is the name of that document?

17 A. I don't recall the current name as it's
18 been updated. It would be a training publication,
19 and the naming convention that changed after I
20 retired. I may not recall the variety, like
21 Marine Corps Warfighting Publication, Marine Corps
22 Doctrinal Publication, Marine Corps Training
23 Publication.

24 All of those naming conventions

1 changed after my service. I don't recall what they
2 are right now.

3 Q. In preparing your rebuttal expert report
4 why did you choose to rely on this document as
5 opposed to Marine Corps publication?

6 MR. BRADY: Objection. Misstates testimony.

7 THE WITNESS: I had seen a reference of the
8 same number.

9 I believe it was FM-22.9
10 referred to with a statement that I disagreed with.
11 At the most -- I disagreed with it for two reasons.
12 The most common and best method of engagement was
13 rapid semi-automatic fire on engagements. And I
14 realize how dangerous that statement was if we were
15 to fight Russia, China, Iran or North Korea.

16 In the last 70 years we have
17 been fortunate to fight only third-world countries
18 that cannot match us with manpower.

19 In all engagements since then,
20 we had a five-to-one minimum ratio of our forces
21 against theirs. And we even increased that at
22 point of contact by matching forces together.

23 So the reason we've been able to
24 use semi-auto only for so long is because the

1 opponents we have faced since the Korean War, have
2 been non-peer. They didn't equal us in manpower.
3 They didn't equal us in armor. They had no air
4 superiority. They had no naval forces to project
5 power. They had no low-training military force
6 equal to ours, and it gave us this capability to
7 overrun them with semi-auto carbs -- would be five
8 of us shooting for every one of them.

9 But the reality is we prepared
10 the workforce for a peer opponent that we haven't
11 faced maybe since Korea, maybe even World War II.
12 World War II certainly is pretty amazing. I don't
13 know if they have equal superiority to the Naval
14 force.

15 So by limiting automatic fire,
16 it takes away the critical requirements for react
17 to ambush. We had two different ambush reactions,
18 have been room clearings, not ambush. Those are
19 all critical times where automatic fire has to be
20 available. And in the previous document to this
21 one, it had made that statement that semi-automatic
22 fire was the preferred method of engagement without
23 putting it into context. Without understanding the
24 significant danger a statement like that could lead

1 to if automatic fire was eliminated from future
2 military weapons.

3 Q. Is it fair to say that during your time
4 in the military you were a vocal proponent of
5 automatic fire?

6 A. Yes, sir.

7 Q. Did others in the military disagree with
8 that view?

9 MR. BRADY: Objection. Calls for speculation.

10 THE WITNESS: It is calling for speculation,
11 but I will say there is a time phase.

12 Prior to 2001, there was no
13 disagreement. After -- I'm sorry. 2003. When we
14 went into Iraq, and we did automatic fires
15 throughout Iraq through 2003, '04 and '05. The
16 automatic fire tended to go away after 2005. We
17 went into more a guard force, police-style
18 behavior.

19 We were literally reading
20 Miranda rights to people we captured. It became --
21 we were an extension of a large police force.

22 So the nature of the war changed
23 after 2005 to low-intensity police style
24 engagement. We would have been better off sending

1 police forces, as a matter of fact, instead of
2 military as our overreaction led to more harm and
3 problems.

4 So probably from 2005 on, the
5 experience of the force led to poor conclusions of
6 what we needed. They would have taken away the
7 body armor, taken away the automatic fire. They
8 would have moved the machine guns off the table for
9 use and probably very much limited the use of
10 machine guns, because they created more harm.

11 I mean you shoot at one guy and
12 kill 10 civilians in the process, and then you
13 have 10 people trying to kill you tomorrow. Likely
14 so.

15 So the nature of the war
16 changed. So I would say today, after 20 years of
17 war, you probably had a force that would be
18 perfectly fine eliminating the automatic fire
19 foolishly and hindering our ability to fire.

20 Q. When you say "They would take away
21 automatic fire," who is "they"?

22 A. Anybody with time in the service, whose
23 limited experience was that 2006 and on, in either
24 Afghanistan or Iraq, would come to completely

1 different conclusions than somebody before 2005.

2 Q. And when you were in the military in
3 that time frame, so in the first decade of the 21st
4 century, were there some in the military that you
5 encountered that were advocating taking away
6 automatic fire capability on M4/M16 rifles?

7 A. I recall nobody trying to take it away
8 during my time of service.

9 Q. So I'm just trying to understand the
10 comments you were making previously that there was
11 based on the -- the way the war in Iraq changed,
12 there was a shift in viewing semi-automatic versus
13 automatic fire. Is that what you were saying?

14 A. Yes, sir. And it was about every six
15 months. The nature of the war changed from more
16 control -- literally with lawyers. Rules of
17 engagement changed significantly.

18 So to the point where if
19 somebody jumped out of a building to shoot at me
20 and then dropped his weapon, I was no longer
21 allowed to engage him.

22 Prior -- during my time frame we
23 would have killed him on the spot. And be careful
24 what type of path I lead you on here too, because

1 predominantly, 99 percent of the time, we never saw
2 an individual to shoot at.

3 We received fire from a
4 position, and we suppressed that position. So the
5 stupid people all got killed very quickly in the
6 war, and they learned to take cover and hide and
7 they didn't shoot at us from a position where they
8 could get shot back very easily.

9 So that is why automatic fire
10 was critical. That is why machine guns were
11 critical, but there was a point in that 2006, '07,
12 '08, we were limiting the use of machine guns. You
13 were not allowed to fire. You had to get direct
14 approval from a commander to engage somebody that
15 was shooting at you, if your only tool to shoot
16 with was a machine gun.

17 As we were restrained, and
18 restraining the force, so as to do no harm, and
19 kind of create a police-style behavior of trying to
20 capture that individual -- we call it a targeting
21 board. We would write out a whole list and spend a
22 week with the lawyers and the prosecuting
23 attorneys, trying to show the evidence as to why
24 they should be apprehended and held. That is the

1 nature of the war as it was changing.

2 By the time you get to 2010,
3 there was no combat by us. We were guarding our
4 security positions while the Iraqis were doing the
5 killing.

6 Our mission had evolved to
7 training the Iraqis or Afghans and let them go
8 fight.

9 Q. I believe I heard you say earlier that
10 automatic fire created more harm than it solved in
11 the latter stages of the Iraq conflict. What did
12 you mean by that?

13 MR. BRADY: Objection. Misstates testimony.

14 THE WITNESS: I meant just that.

15 Meaning that those automatic
16 fires went beyond a target of being aimed at,
17 whether it was a building or position and hit
18 goats, sheep, camels, people, And it created
19 animosity, likely so. That is why it would be
20 better at that time not to use the U.S. military
21 that had been trained at high intensity and try to
22 perform a police action.

23 It was not our training program.
24 We were being drug down this path of low intensity

1 and behaving other than our training programs were,
2 and we should have just switched the force and sent
3 in LAPD and NYPD.

4 Q. So is it fair to say that at times in
5 the latter stages of the Iraq war, automatic fire
6 sometimes resulted in unintended casualties?

7 MR. BRADY: Objection. Incomplete
8 hypothetical. Misstates the testimony.

9 THE WITNESS: I only got half of the question.
10 Please restate it.

11 BY MR. WELLS:

12 Q. Sure. Is it fair to say, as you were
13 just describing that in the later stages of the
14 Iraq war, at least post-2005, I think is the time
15 frame that you used, use of automatic fire at times
16 resulted in unintended civilian casualties?

17 MR. BRADY: Objection. Vague. Misstates the
18 testimony. Incomplete hypothetical.

19 THE WITNESS: It is potential -- but I think
20 automatic fire had been done by the end of the
21 time.

22 High-intensity fighting, but
23 over the last fights were Fallujah and Ramadi in
24 the 2005 time frame. After that we had sufficient

1 manpower and force to overwhelm them with slow
2 fire, sustained fire. We would have anywhere from
3 10 to 50 upon one opponent, and still have trouble
4 capturing them because of the rules of engagement
5 that prevented us from shooting while we are
6 wearing heavy body armor, and weapons and ammo.
7 General Mattis coined quite a phrase, "Do no harm."
8 And what he meant by that "Do no harm" is don't
9 hurt one civilian in your effort to attack ten
10 opponents. Because one civilian will have a family
11 that will fight you again later.

12 So General Mattis understood
13 that low-intensity conflict more than anybody else.
14 It was really hard to ramp down the marines to that
15 low level of engagement when all of our training
16 was at the high-end, high-intensity combat.

17 Q. Is it fair to say that your opinion is
18 that automatic fire is most necessary in
19 high-intensity combat?

20 A. Yes, sir. I think -- the 13-man patrol
21 moving across a rural area, urban street, and I
22 receive fire from one individual. I can't see that
23 individual. He is hidden back into a room. I'm
24 not even sure which window or building he came

1 from.

2 Our immediate response to that
3 right then is all weapons go to full auto. And we
4 have altered our weapons since 2010. The M27 has
5 now replaced with the M4 and the M160A4 in the
6 Marine Corps infantry. That is a full auto. There
7 is no more burst. We got rid of -- because it was
8 inhibiting our ability for high-intensity combat as
9 we prepared to face China, Russia, Iran and North
10 Korea.

11 The Army did an improvement on
12 their M481 to eliminate the burst trigger and went
13 back to full auto. And for the same reason. So
14 even in that low-intensity conflict, if one person
15 shoots at me, we all immediately fire full auto
16 with everything we have to suppress that location
17 while we bound ourself to cover. Something that
18 stops bullets is how we define cover.

19 Then that usually takes up one
20 magazine. Then we immediately uncover, switch back
21 over to semi-auto, which we will probably stay for
22 duration of this. Try and do it as -- assume where
23 are they. How do we pin them in. Can we really
24 locate the fire position they are from. And then

1 make decisions on what we do about it.

2 Q. Is it fair to say that use of full
3 automatic fire from an M4 or M16, the way in which
4 it is used is suppression in combat?

5 MR. BRADY: Objection. Incomplete
6 hypothetical. Vague. Calls for speculation.

7 THE WITNESS: Yes, sir. I would say that.
8 And I will tell you, historically, and I wrote in
9 one of these reports, the rifle has created less
10 and less overall casualties over time.

11 For instance, in Civil War, 70
12 percent of all casualties were produced by a
13 rifleman. And then degraded over time, to the
14 point where in World War II, 25 percent of all
15 casualties were produced by a rifleman, and the
16 majority of the casualties were produced by
17 artillery.

18 If you look at Ukraine and
19 Russia today, it is closer to 99 percent of all
20 casualties are produced by artillery. High
21 explosives delivered by air or artillery. Less and
22 less by the rifle. The rifle is used as a tool to
23 pin forces down while you bring other deadly forces
24 to bear. That is that orchestration of force that

1 Colonel Tucker was so well at -- was use the
2 rifleman, not to inflict casualty, just to hold him
3 in place. Keep them from running away to fight
4 another day, and then bring other forces to bear to
5 destroy them.

6 Q. That 70 percent figure and that 99
7 percent figure, what sources are you relying upon
8 for that?

9 A. I would not be able to answer that off
10 the top of my head. And I quoted them in this
11 document wherever they came from. That is the
12 other nature -- is I don't have all these readily
13 available to reference.

14 Q. Why don't you have them available?

15 A. I don't have any documents directly in
16 front of me and you have control of the mouse.

17 Q. I see. I see. I thought you were
18 saying you didn't have access to them at all.

19 But you believe 70 percent and
20 99 percent are quoted in your expert report?

21 A. Yes, sir, they are. Or they were. They
22 may have been pulled out. I don't recall.

23 If I take control of that
24 document, not the 803 pages, but the references,

1 we will see if it jumps in my mind, but to see --
2 I have read this over and over. I looked for
3 specifically, when preparing this, because in
4 conversations with my peer group, we have often
5 talked about the value of a rifle in combat and how
6 high of a value was it. And we agreed that the
7 rifleman has not been the cause of a win. It has
8 been a supporting factor in winning these heavy
9 intensity fights. The cause of the win has been
10 air-delivered ammunition and artillery, the tanks.

11 Q. And as I understand those figure
12 breakdowns, so you said 70 percent of casualties in
13 the Civil War were caused by rifles, but now in the
14 Russia/Ukraine war, 99 percent of casualties are
15 caused by something other than a rifle. Did I
16 state that correctly?

17 A. You are correct. And I just read that
18 recently in another document that came out. I
19 believe it was a senator from Mississippi who wrote
20 it. It started from with a W. Whiten, perhaps?
21 He was quoting the forces that we may potentially
22 face. And in that, he is quoting the stalemate
23 that is happening in Ukraine and Russia right now,
24 where if you can be seen, you can be killed.

1 So now they have gone back into
2 a quasi-trench warfare of stalemate because of the
3 heavy sensors in the air, the thousands upon
4 thousands of drones all keyed into artillery
5 systems ready to fire on a seconds, notice.

6 So that is why if you can be
7 seen you can be killed. Artillery is winning this
8 fight in common-day war.

9 Q. How does the lethal capability of a
10 Civil War rifle compare to the lethality of an M4
11 like you carried in the Marine Corps?

12 MR. BRADY: Objection. Vague.

13 THE WITNESS: Probably better answered by a
14 ballisticsian. What -- the advantage of the
15 rifleman had there is they had this sense of honor
16 to face each other from 50 yards apart and take
17 turns firing. With a 50 caliber bullet that would
18 do massive tissue damage and very low competency on
19 medical availability.

20 So you have two factors, right?
21 Short range. Horrible medical treatment capability
22 during Civil War. Compared to today to small
23 bullet, which creates a significant wound, with
24 very good medical. And we developed these things

1 called the "golden alley" where we will take a
2 casualty. We will get you to treatment within one
3 hour.

4 We will find a way and we work
5 on it very diligently. Every casualty will get to
6 a shock trauma unit within one hour that can save
7 their life.

8 In the Civil War, they would
9 probably have died or had their leg cut off. Today
10 we kept them alive. So you have a false
11 measurement between the Civil War and today because
12 of the medical factor.

13 Q. So is it your testimony the Civil War
14 rifleman is more effective in combat than the
15 American soldier carrying an M4 -- rifleman?

16 MR. BRADY: Objection. Vague.

17 THE WITNESS: I would not say it is more
18 effective. It is more lethal because we are
19 standing there facing each other. We can see each
20 other. They are 50 yards apart.

21 Every single engagement for the
22 Marine Corps, it is very rare to see who you are
23 shooting at. They certainly aren't at 50 yards
24 waiting your turn to fire.

1 So no, I would not say the
2 rifleman was more effective. He had better
3 opportunity against a stationary force which was
4 following a Napoleonic formation facing each other,
5 taking turns to fire.

6 Q. I'm just asking about the weapon now.
7 So a Civil War rifle compared to an M4, which is
8 more lethal?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: I'm going to have to speculate.
11 I would take today's weapon over Civil War any day
12 of the week, but the method to fighting then led to
13 more individual casualties by rifle.

14 BY MR. WELLS:

15 Q. Are you a military historian?

16 A. No, sir.

17 Q. Are you a firearms historian?

18 A. I'm not.

19 Q. What training do you -- did you receive
20 any training from the military on historical
21 tactics as they relate to Civil War battles?

22 A. Yes, sir, I did. We call them
23 generations of warfare. Generation 1 was
24 Napoleonic tactics; square against square.

1 The value of that square when
2 presented by calvary and artillery and how you
3 would strengthen the square; and then Generation 2,
4 where we are adding armor and aviation elements.

5 So you would have more than one
6 dimension of the fight. Instead of just ground,
7 you have ground air and ground, air, Navy, and then
8 you have armored systems.

9 So this progressed over time to
10 hybrid warfare that we are in today. Sometimes
11 referred to as Generation 5.

12 A type of war meaning non-state
13 actors can stand up against state militaries,
14 equally. Non-state actors of whether it is squeaky
15 rebels or the S-bullet who had his own aviation
16 elements, artillery elements, missile forces.
17 These are non-state -- that was not typical before
18 World War II, but now it is more typical.

19 There may not be a state where
20 you can have a reasonable conversation with. Does
21 that answer your question?

22 Q. It is helpful, yes.

23 So can you tell me. You said
24 you would prefer an M4 over a Civil War rifle. Why

1 would you prefer the M4 over a Civil War rifle?

2 A. Civil War rifle is heavy, long,
3 cumbersome, slow to reload, and very harsh recoil
4 to manage.

5 Recoil management is critical to
6 follow on shots. So if I don't get kicked
7 backwards by the recoil of that heavy musket where
8 my muzzle rises up to the air, and there is a time
9 loss of getting that muzzle back down to the
10 target. So the shot, if I missed, I'm about able
11 to watch the effect of the shot and make a quick
12 adjustment from that shot, because I have to reload
13 and reacquire the target.

14 The AR platform has a buffer
15 system in it. Has an adjustable stop to fit my
16 body stature and whatever clothing that I'm
17 wearing.

18 Has a shorter barrel to bring
19 the weight closer to me. Has a free-floated
20 forehand so I don't deviate the barrel. And it has
21 a lethal enough projectile to hit the target more
22 accurately than -- at further distances.

23 The AR platform is portable,
24 lightweight, maneuverable, to allow me to get into

1 and out of different positions of protection. The
2 musket does none of those.

3 Q. When you say that the AR cartridge is
4 lethal enough, what do you mean?

5 A. I just want to make him stop shooting.
6 I don't need to blow his arm off or his head. I
7 just put a hole in him to make him react. That is
8 our entire premise of combat is present a
9 life-threatening challenge to opponent to make him
10 stop firing or stay hidden.

11 Riflemen, more often than not,
12 just keep him hidden. And while he is hidden and
13 unable to shoot at us, we bring other forces to
14 destroy him.

15 Q. When you said that "that AR cartridge
16 was lethal enough," what AR cartridge were you
17 referring to?

18 A. Mentally. I was thinking of the M855
19 green tip 62 grain bullet that was the primary
20 bullet we used. We had plenty of other options.
21 They weren't always readily available.

22 We had to plan ahead to get
23 them. Tracer bullets they made, 56 was available.
24 Today they've replaced the M55 with enhanced

1 performance called M855-A1.

2 Predominantly all my engagements
3 around my career were with the MA-55 and MA56, the
4 green tip bullet and a tracer compatible to that
5 green tip bullet.

6 There were occasions where I had
7 frangible bullets when I was on an anti-terrorist
8 unit we used frangible bullets when doing shipboard
9 takedowns so we wouldn't poke a hole in a nuclear
10 reactor or ricochet around and hit ourselves.
11 Those bullets disintegrated on impact. And then we
12 used them in Fallujah to kill the cats and dogs
13 dragging the bodies around so we could collect up
14 those bodies before disease was rampant.

15 Q. When you were talking about the virtues
16 of AR-15 rifle -- and you mentioned the lethal
17 enough round, you were specifically referring to --
18 or you had your M855 round that you used in the
19 military; is that right?

20 MR. BRADY: Objection. Misstates testimony.

21 BY MR. WELLS:

22 Q. Can you say that again, Mr. Eby?

23 A. Yes, sir, at that time, M855.

24 Q. And is that M855 round available in the

1 civilian market?

2 A. Yes, sir, it is.

3 Q. And is that M855 round, as you
4 understand, one that folks who own AR-15 rifles
5 frequently used?

6 MR. BRADY: Objection. Vague. Calls for
7 speculation.

8 THE WITNESS: I would say no, sir, it is not.
9 We really do not like that round. It is a full
10 metal jacket with an armor penetrator. It doesn't
11 expand well. It will seriously just poke a hole in
12 most targets without expansion.

13 So as a civilian, I would want
14 something that would create a larger wound cavity,
15 that did not over penetrate, that stayed inside the
16 body as much as possible.

17 So the last bullet I would
18 choose would be the M855 bullet.

19 Q. But the M855 is available in the
20 civilian market for folks to purchase and civilian
21 semi-automatic MA-15. Is that correct?

22 A. Yes, sir, it is.

23 Q. You mentioned that you wouldn't want a
24 bullet that did not overpenetrate. Does the M855

1 round pose a risk in a home setting?

2 MR. BRADY: Objection. Incomplete
3 hypothetical. Calls for speculation.

4 THE WITNESS: Yes, sir. It has a penetrator
5 in it that could get through barriers easier.

6 There are some negatives to it
7 under 27 meters -- I don't know why that number
8 came up. It was converted to yards.

9 It is under such high stress
10 that if it hits a barrier, a door frame or a
11 doorknob, it can disintegrate itself. So there are
12 limitations to it. It is also velocity dependent.
13 It needs to have 2500 feet per second or more to
14 enter the body, rotate and break apart.

15 Under that 2500 feet per second
16 it doesn't break apart. It just flips over and
17 exits. So you have basically a ice pick hole that
18 doesn't have that decompression of blood loss, loss
19 of a limb, major muscle damage. And, again, for
20 self-defense, it is a horrible bullet design.

21 Q. You mentioned flipping over and exiting.
22 Is that commonly referred to as "yaw"?

23 A. Yaw leads to flipover. So yaw is the
24 angle of entry, and we call that bullet "yaw"

1 dependent." It has to be off axis. On axis would
2 be a zero of liquidity of entry. Off axis would be
3 anything plus or negative from zero.

4 If it has yaw -- any bullet
5 entry, and still has 2500 feet per second, as it
6 rotates, it will break apart at the cannellure,
7 which is a little crimp where you see at the top of
8 the brass casing right where it meets the
9 projectile. It will break apart at that point and
10 give multiple trauma wounds with the goal of
11 stopping the aggression faster.

12 On the M4-A1, and M4 and A1,
13 that bullet reaches speeds under 2500 meters at 75
14 meters victorious.

15 The M16A4 with a 20-inch barrel,
16 that distance happens at 175 meters. That makes it
17 a very limited projectile. It is difficult to
18 shoot it in a short range, because it is under such
19 high stress. It hasn't stabilized and it is
20 difficult to shoot at the further ranges because it
21 loses velocity and no longer brakes apart and gives
22 multiple target points.

23 Q. So in the civilian market, are there
24 other types of ammunition available for an AR-15

1 platform rifle to correct for those concerns you
2 just identified?

3 A. Yes, sir. There is plenty. There is
4 more than I am an expert on. Probably 20 different
5 variations. And a lot of them are sold as hunting
6 rifles -- hunting bullets.

7 Q. And the bullets in those categories,
8 that -- is it fair to say you would recommend those
9 more for self-defense than an AR-15 platform for
10 rifle?

11 A. Yes, sir, I would. I would have to
12 review them individually to do so.

13 Q. And is that because the bullets in that
14 category, the 20 to 25 examples that you just
15 mentioned or that category, those bullets are more
16 likely to break apart upon hitting a body. Is that
17 fair to say?

18 MR. BRADY: Objection. Misstates testimony.
19 Vague.

20 THE WITNESS: I would say yes. That is fair
21 to say. They don't have the same level of stress.
22 I say "they," right? But when I say "they," I'm
23 talking about 20 or 30 different bullet designs.
24 So it is really hard to say one answer to answer

1 your question without picking a bullet, starting a
2 bullet, which I don't do. I never get to pick my
3 bullets. I get to shoot what I was issued.

4 BY MR. WELLS:

5 Q. So you do make a recommendation about
6 use of AR platform rifle for self-defense in this
7 case. Is that right?

8 A. Yes, sir.

9 Q. And what bullet would you recommend to
10 use in that rifle in a home defense setting?

11 A. I would search a line of a small
12 deer-type of bullet. 55 to 62 grains or -- as a
13 matter of fact, when I shoot deer right now, I use
14 a Federal 77 grained Open Tip Match bullet, which
15 would be a very good bullet for humans.

16 Q. Why is it a good bullet for humans?

17 A. Because it expands into the target and
18 it breaks. It comes apart into multiple track
19 wounds. So there is a chunk of it that will
20 mushroom out and give me a larger hole diameter to
21 give me more blood loss. A lot of casualties stop
22 fighting due to decompression. They just lose
23 blood. But that can last two minutes before that
24 individual stops shooting at me.

1 So we tend to put more bullets
2 in, try to get more trauma wounds until that
3 aggressor stops.

4 Q. Is it fair to say that you would
5 recommend, for instance, a 77 grain bullet along
6 the lines of what you just described because the
7 trauma wounds will be greater from that bullet? Is
8 that fair to say?

9 MR. BRADY: Objection. Vague. Misstates the
10 testimony. Incomplete hypothetical.

11 THE WITNESS: Yes. Those strong of wounds
12 would be significantly better than the M855 bullet.

13 BY MR. WELLS:

14 Q. Okay. I'm going to pop back to Exhibit
15 4 of your reply -- or your rebuttal.

16 I showed it to you. It is the
17 TC322.9. It is a publication called "Rifle and
18 Carbine, May 2016." And I believe you testified
19 earlier that you wanted to include this exhibit in
20 your rebuttal because a prior version of this
21 document was referenced by other experts in this
22 case.

23 And you disagreed with the
24 statements in the prior version. Is that fair to

1 say?

2 A. Yes, sir. That is fair to say.

3 Q. I just want to show you that other
4 document and make sure we are talking about the
5 same one.

6 Okay. Mr. Eby, do you see a
7 document labeled "Rifle Marksmanship, M16-M4 Series
8 Weapons"?

9 A. Yes, sir.

10 Q. And it has an FM3-22-9?

11 A. Yes, sir.

12 Q. Have you seen this document before?

13 A. Briefly. I have not read it totally. I
14 just went to a reference.

15 Q. And what is the date on this document?

16 A. August 2008.

17 Q. So flip to Page 7.89 in this document,
18 which for the record, I think I'd like to mark as
19 Deposition Exhibit 3.

20 (Deposition Exhibit 3 was marked
21 for identification.)

22 BY MR. WELLS:

23 Q. And directing your attention to the
24 bottom of the page Bates-labeled 0AG3359, do you

1 see that statement that says "rapid semi-automatic
2 fire"?

3 A. Yes, sir. I see that.

4 Q. And do you see that it states the most
5 important firing techniques during fast-moving
6 modern combat is rapid semi-automatic fire?

7 Did I read that correctly?

8 A. You did read that correctly.

9 Q. And is that the statement that you were
10 describing earlier that you disagreed with?

11 A. Yes, sir, that is.

12 Q. And I believe you stated in your
13 rebuttal report that this was just the author of
14 this document's opinion. Is that fair to say?

15 A. It is. There is no reference alluded
16 to. As a matter of fact, every report I've ever
17 read says the exact opposite of that.

18 Q. And this type of document, how -- what
19 level of approval would be required for this
20 document to be used in the Army for training?

21 MR. BRADY: Objection. Calls for speculation.
22 Vague.

23 THE WITNESS: I don't know how the Army would
24 approve this. They have a process, but I'm not

1 aware of what it is for final approval. They have
2 a doctrine command. I doubt it is at the 3-star
3 level. The subordinates, they offered the
4 opportunity to approve these. I wrote doctrine for
5 awhile for the Marine Corps. And our methods are
6 completely different than the Army. So I can't
7 even speculate on what their approval process is.

8 BY MR. WELLS:

9 Q. Do you know whether this document would
10 have been authored by a single person?

11 A. Army is probably a 20-man crew with an
12 individual per chapter.

13 Marine Corps would be at a
14 single person on the entire bulletin.

15 Q. And do you have any sense at what level
16 in the chain of command this document would have to
17 receive final approval before it could be used to
18 train soldiers?

19 A. Yes, sir. Probably a colonel level, an
20 O6 after approval from editors and grammar
21 specialists.

22 Q. And in your experience in the military
23 where a colonel signing off on a document like
24 this, would they know what is in it?

1 MR. BRADY: Objection. Calls for speculation,
2 incomplete hypothetical. Vague.

3 THE WITNESS: I would say no. The colonel
4 would take advice of the people who wrote it, the
5 grammar specialist who edited it and then the
6 photographers or graphic artists. He would more
7 than likely just take those advisors input and then
8 sign it once they told him it was ready.

9 BY MR. WELLS:

10 Q. And this document was in effect, when
11 you were serving alongside U.S. Army soldiers in
12 the military, correct?

13 A. Yes, sir.

14 Q. And those soldiers would have been
15 governed by this document. Is that fair to say?

16 MR. BRADY: Objection. Vague, calls for
17 speculation.

18 BY MR. WELLS:

19 Q. You can answer.

20 A. Eventually, yes.

21 Q. And just trying to understand what the
22 author was communicating here. What is your
23 understanding as to why the author would make this
24 statement?

1 MR. BRADY: Objection. Vague. Calls for
2 speculation.

3 THE WITNESS: I would speculate that with 70
4 years of fighting low-intensity conflict or police
5 actions from Vietnam, Afghanistan to Iraq, the
6 experiences perceived by the authors, the actions
7 in contact with enemies, led him to believe that
8 only semi-automatic fire was necessary.

9 At no time since World War II
10 or maybe Korea have we fought somebody equal to us
11 in strength training and capabilities to counter
12 that statement. And my concern was they are
13 learning the wrong lessons from the wrong fights.

14 By setting the force up to
15 continually fight in a third-world country, we fail
16 to prepare the force for a first-world peer threat.

17 Q. So your read of this document in this
18 particular statement is that the statement about
19 the most important firing technique during
20 fast-moving modern combat being rapid
21 semi-automatic fire is the product of the nature of
22 the wars that the United States has fought during
23 the last 60 years being low intensity. Is that
24 right?

1 A. Yes, sir --

2 MR. BRADY: Objection. Misstates the
3 testimony.

4 BY MR. WELLS:

5 Q. Is that a "yes"?

6 A. Yes, sir.

7 Q. Let me show you one more document, and
8 then we will take a break since we've been going
9 here for awhile.

10 Okay. Mr. Eby, I've put up on
11 the screen a document labeled "ATM321.8 Infantry
12 Rifle Platoon Squad," dated January 2024.

13 Have you seen this document?

14 A. No, but I've seen previous versions of
15 this.

16 Q. When you say "previous versions," what
17 do you mean?

18 A. These documents are regularly updated on
19 a time span. When they can afford to do so and
20 have the time to get to them.

21 Some are called for review every
22 three years, and that review may decide no changes
23 recommended, or it may go back into a full edit and
24 restructure.

1 Q. So when you say "every three years," is
2 it fair to say that this January 2024 date
3 indicates to you that this is the most recent
4 iteration of this document?

5 A. Yes. Now, I can see it was an
6 eight-year delay from the previous one.

7 It supersedes the April 2016
8 document of the same number.

9 Q. And you're basing that on the text that
10 says, "Distribution restriction approved for public
11 release. Distribution is unlimited. This
12 publication supersedes ATP321.8 dated 12 April
13 2016." Is that right?

14 A. Yes, sir. Whenever we need to pull the
15 date and search for a super session to see if it
16 has been replaced.

17 Mostly we wouldn't do that. We
18 will take the document we had originally and just
19 work with it.

20 Q. And do you see at the bottom there, this
21 has been labeled OAG 006571? Do you see that page
22 number?

23 A. I do.

24 Q. All right. And do you see that it is

1 596-page PDF that I'm not going to make you read
2 all of it, but I will scroll to the end here and
3 just show you final page numbers, OAG 007166. Do
4 you see that?

5 A. I do.

6 Q. And is that consistent with the
7 understanding of this publication, that it is close
8 to a 600-page manual?

9 A. Correct.

10 Q. And what is the function of this
11 document in the military?

12 MR. BRADY: Objection. Vague.

13 THE WITNESS: These documents are designed to
14 give a squad leader, commander a best practice
15 overview of how to think about using their force.
16 Using their weapon systems.

17 So when I say "best practice,"
18 it means a generalization of any engagement you may
19 or may not get into with an unknown enemy force.
20 We call this a "baseline." Give me a start point
21 to make my considerations on when forming my plan.

22 At least I have -- I don't know
23 if you've ever heard phrases such as "get out of
24 the box." You have to mentally get out of the box.

1 Well, this is the box. This is our start point on
2 what should I be considering on manning, training
3 and equipment before I adjust that plan based on
4 enemy situations. Troops and fire support who are
5 available, weather, and then my own available
6 personnel, and my own available personnel, and then
7 enemy situation.

8 So these are not cookie-cutter
9 actions. You just use this as you start your
10 argument for your plan. Does that help?

11 Q. That is helpful. And is it -- how does
12 the function of this document differ from the one
13 that we've previously looked at, TC322.9 Rifle and
14 Carbine?

15 A. Without reading this document, the rifle
16 and carbine would be individual skills. This would
17 be more collective. This would probably take you
18 to the tactical operations of the squad and the
19 platoon with various weapons. The grenade
20 launchers, the rifles, the automatic rifles. The
21 Army still uses the light machine gun within their
22 squads.

23 They could have assets and
24 support, such as mortars and machine guns, and

1 aerial support, gun fire support. Drones for
2 sensors.

3 This is a collective effort to
4 try to bring it all together.

5 Q. Okay. I'm scrolling to Page 3 of the
6 PDF, which has Bates Label OAG 006573 to show you
7 the table of contents.

8 Do you see that?

9 A. I do see that.

10 Q. Okay. And just to give you a second to
11 look at the table of contents, with small Roman
12 numeral one, OAG6573, and you move to the second
13 page.

14 And do you see on the second
15 page, which is Bates-labeled OAG 006574, Chapter 4
16 is labeled "Offense," and Chapter 5 is labeled
17 "Defense."

18 Do you see that?

19 A. I do.

20 Q. And based on this table of contents and
21 your understanding of what this document is, what
22 is -- why would Chapter 4 be labeled "Offense"?
23 What is that about?

24 MR. BRADY: Objection. Calls for speculation.

1 THE WITNESS: We have different behaviors in
2 an organization. We use different weapon systems
3 when we go into the offense than we do when we go
4 into the defense.

5 We have different expectations
6 of behavior, different tools that we will need.
7 These give me that start point of the conversation
8 and understanding what an average might be that I
9 can deviate from building my plan.

10 The more of these you read, the
11 faster you develop your plan.

12 Q. And when you were in the military would
13 you have been the one developing the plan or would
14 you have been a commanding officer?

15 A. The commanding officer would have been
16 developing the plan. I would have been the advisor
17 on whether we were offense or defense or in between
18 the two. We may have just been patrolling a prior
19 developing situation and we need to go into
20 defense, depending on enemy size, capabilities.

21 Q. And what is the nature of the advising
22 that you would provide in that relationship?

23 MR. BRADY: Objection. Incomplete
24 hypothetical. Vague. Go ahead.

1 THE WITNESS: The majority of the time, I
2 would be asked a specific question, "which of our
3 elements is the best applied in this situation."
4 Will the weapons that we had available benefit or
5 hinder in whatever hypothetical situation?

6 In the defense, are we organized
7 properly? Are there some best practices we have
8 forgotten? I usually would get tasked. Go down to
9 the companies. Overview their defensive parimeters
10 and behaviors and identify any friction points that
11 needed resolving.

12 Q. And how is an offensive operation at a
13 higher level different than a defensive operation?

14 A. We task organize for the mission. For
15 instance, in the offense -- we have standard
16 administrative organizations. A rifle squad. A
17 rifle platoon. A rifle company. They have
18 adjustable war organization and adjustable
19 equipment. Those are administrative in nature
20 only.

21 We only use them to manage the
22 force in the peacetime -- we call it "Garrison,"
23 but it is the area around the barracks that we stay
24 in the majority of the time.

1 Once we go into combat, we task
2 organize for the mission. So depending on the
3 mission, what is the enemy situation? What are
4 troops? Is fire support available? What does the
5 terrain look like? What is the weather? We will
6 task organize completely away from a standard
7 organization.

8 We will break down to assault
9 support, security and headquarter elements. We
10 will identify the needed external assets; tanks,
11 artillery, amphibious tractors, aviation, naval
12 gunfire, and we will add that altogether.

13 Q. I think that is helpful.

14 Let me just ask to try to
15 situate this publication and how it is used. In
16 your rebuttal report on Page 5, you said "The
17 military does not teach automatic fire skills in
18 marksmanship facilities. Automatic or burst firing
19 skills are taught during tactical scenarios and
20 field training environments using different
21 publications than the marksmanship ones to guide
22 these best practices."

23 Is this publication we are
24 looking at right now, the infantry squad, ATP3

1 21.8? Is this one of the publications that would
2 be used to train riflemen on tactical scenarios?

3 A. Potentially, yes. It is a start point,
4 but it is also modified by student handouts and
5 instruction classes from the basic school, the
6 infantry squad leader school and the infantry
7 platoon training course. And those areas will use
8 training handouts to help refine this start point.

9 So in conjunction with several
10 documents, we start building behaviors and
11 practicing those.

12 Q. So just kind of using a school analogy,
13 is it fair to say this document we are looking at
14 right now. This ATP328.1 is sort of like a
15 coursebook, and then in training, the instructor
16 will add on and build from that course book. Is
17 that a fair analogy?

18 MR. BRADY: Objection. Vague.

19 THE WITNESS: Yes, sir. In that training
20 outline they have to paint a picture of a scenario.
21 This manual probably won't do that well. It will
22 probably be a World War II scenario with some
23 historical action. In that actual classroom where
24 we break it down into the squad leader training or

1 basic response training, it will create the
2 hypothetical scenario that forces decisions on task
3 organization and equipment to go over, and that may
4 change in the very next class. They will refine it
5 because they didn't like the outcome of an event.
6 So, those are -- I call them "live." Those are
7 living documents that are worked on each and every
8 occasion of use. But it starts with something like
9 this. It is grounded in some kind of best practice
10 recommendation of behavior that you can consider.
11 You are not bound by it. Nobody is going to grade
12 you and hold you to it.

13 So this is a good start point to
14 read through to formulate in a young officer's --
15 or young officer's mind, the right words, the right
16 organizations, the right expected behaviors
17 depending on the mission and enemy. It is a good
18 baseline and very good documents for that, but we
19 don't run around with them with this checklist to
20 make sure that is how we are behaving, because it
21 depends upon the hypothetical situation that you
22 are faced with to execute.

23 MR. WELLS: Okay. Mr. Eby, we've been going
24 about two hours. Why don't we take a break. It is

1 11:02. Why don't we reconvene on 11:15. And
2 you're on central time, right?

3 THE WITNESS: Yes, sir.

4 MR. WELLS: Let's reconvene at 11:15.

5 (Recess.)

6 BY MR. WELLS:

7 Q. Let's go back on the record. It is
8 11:16 AM. Did you speak to anyone during --

9 A. I spoke to my counsel.

10 Q. Let's jump in here to a document that
11 was previously marked as an Exhibit, ATP321.8.

12 We are specifically looking at
13 OAG 65943. I'm directing your attention, Mr. Eby,
14 to paragraph marked 111. Do you see that?

15 A. Sir, I have a screen in front of the
16 screen.

17 I don't know if that is mine or
18 yours. Oh, I got it.

19 Q. Okay. Can you see it now?

20 A. I do. Yes, sir.

21 Q. Do you see where it says "111. Fire
22 teams are designed as self-contained team?" Do you
23 see that?

24 A. Yes, sir.

1 Q. And it goes on to say, "The automatic
2 rifleman provides an internal base of fire with the
3 ability to deliver sustained suppressive small arms
4 fire on area targets. The rifleman provides
5 accurate, lethal direct fire for point targets."

6 Do you see that?

7 A. I do.

8 Q. Do you agree with those statements?

9 A. They are in the initial development of
10 skills, yes.

11 Q. What is a fire team?

12 A. An administrative organization designed
13 to train and develop skills in a peacetime area.
14 We don't fight like that. We fight in
15 task-organized elements, assault support security
16 and headquarters. We can use these in defensive
17 situations, if it is beneficial to us, to simplify
18 command and control. But these are for developing
19 understanding the roles, duties and
20 responsibilities during training.

21 Q. When it says here, "The rifleman
22 provides accurate lethal direct fire for point
23 targets." What are "point targets"?

24 A. It is a misnomer. Point target is

1 designed for machine guns where a full burst of
2 fire can hit that same cone of fire where all
3 bullets impact.

4 Point and area targets should
5 never have been incorporated into a rifle because a
6 rifle is an uncontrolled aim. It doesn't have a
7 tripod. I can't control the direction of fire.
8 And the point would be the size of a bullet being
9 fired. So that point would be a .223 caliber from
10 a rifle or .308 from a larger rifle to -- this was
11 a mistake in publication that derive from 1960s
12 that should never be incorporated. We just can't
13 get rid of it.

14 It is one of these things that
15 stuck there, but it would be a single point, single
16 aim, point and shoot, and hit that one spot would
17 be the intent to this statement.

18 Q. So is it fair to say that point target,
19 when it is used, regardless of whether you agree
20 with its usage or not, refers to shooting and
21 hitting one spot? Is that right?

22 A. Yes, sir. Yes, sir. Whether that is a
23 door, window, person, if you ever see one.

24 Q. And the term "area target," regardless

1 of whether you agree or disagree with the term, how
2 is that different from the term "point target"?

3 A. Area target is controlled by techniques
4 of employment. Searching is an elevation change.
5 I aim higher. I aim lower. Traversing. I aim
6 further left. I aim further right.

7 On the machine guns -- the heavy
8 machine guns and medium machine guns, they have a
9 tripod where they traverse an elevation mechanism
10 that controls the size per the impact of an area.

11 So a squad leader can give a
12 command. They fire on a 10-foot wide area of that
13 bunker on Gun 1, and then overlay that with a fire
14 command to Gun 2 to ensure that this entire width
15 and height can be impacted with machine gunfire.

16 We can do the same thing with
17 mortars. We can do the same thing with artillery.
18 It doesn't apply to the rifle because, A, we can't
19 control the overall aim, and they are not designed
20 to shoot area targets without a tripod.

21 Q. When you say "A rifle is not designed to
22 shoot area targets without tripod," what rifle are
23 you referring to?

24 A. Any handheld rifle should not be

1 receiving these artillery point targets. But they
2 got imbedded so early and have been stuck in our
3 doctrinal publications for 60, 70 years -- as a
4 matter of fact, I received meritorious promotions
5 that I now know to be incorrectly applied.

6 Q. Are you including machine guns within
7 your usage of the term "rifle"?

8 A. No, sir. Machine guns point and area
9 applies. They have control features where I can
10 control the beaten zone. The beaten zone is that
11 area where all bullets impact.

12 That same area is called "cone
13 of fire" when the bullets are in the air. So a
14 machine gun shoots 5 to 8 rounds of burst. As
15 those bullets go up in the air, they are forming
16 this cone of fire. So as bullets lay onto the
17 ground, that terms changes to "beaten zone" where
18 the bullets made impact.

19 So because they have a search
20 and traverse mechanism, we can control the size of
21 that location of the beaten zone. It can be a
22 point area or an area -- impact area.

23 So the fire command from the
24 leader, whoever that is, can designate point

1 targets for medium and heavy machine guns, light
2 and heavy mortars. We mistakenly use it often in
3 rifles, where a logic flow would take it out of the
4 conversation.

5 Q. Just explain to me one more time -- I
6 may have missed this -- why it shouldn't be applied
7 to a rifle. Because I think you said something
8 like a rifle can't be controlled in the same way.
9 Why can't these terms be applied to a rifle?

10 A. Even when I'm rifle shooting fully
11 automatic and it is out on my tripod, he is
12 subjected to the recoil of the weapon. And then he
13 is subjected to his own training capability to
14 manage that recoil to keep the whatever burst of
15 rounds into a certain area. We can't do that
16 deliberately. We don't control the recoil between
17 rifle systems, between shooters.

18 There are too many variables.
19 We can control the area of the impact with medium
20 and heavy machine guns with mortars because those
21 are all controlled with traversing elevation
22 mechanisms.

23 So that is how I define this --
24 is because the rifle is too subjected to the recoil

1 management of the shooter, too subjected to the
2 different position. I don't know if they can
3 manage that recoil in an area to guarantee -- point
4 an area of coverage. Therefore, it doesn't apply.

5 Q. I see. So your description of an
6 infantryman with an M4/M16 rifle, there is too much
7 variation across an individual infantryman's
8 ability to stay in a particular area when using
9 automatic fire to apply the point target and the
10 area target. Is that fair to say?

11 MR. BRADY: Objection. Misstates testimony.
12 Vague.

13 BY MR. WELLS:

14 Q. Is that fair to say?

15 A. Yes, sir.

16 Q. And when you say M4/M16 rifle is too
17 subjective to recoil, what do you mean?

18 A. I mean that the muzzle rises, dependent
19 upon the shooter's ability to manage it.

20 And I don't know the individual
21 shooter. I can put him through training programs
22 to help get the body mass behind the weapon. I can
23 show him stance position and grip to enhance the
24 tightness of that first fire or full auto. But I'm

1 not the guy shooting it.

2 And every shooter is different.
3 So it is not repeatable the way it is with a
4 machine gun.

5 Q. So is it fair to say, then, that some
6 infantrymen may be able to effectively use fully
7 automatic fire and stay on target, but others may
8 not be able to be -- stay on target?

9 MR. BRADY: Objection. Incomplete
10 hypothetical. Calls for speculation. Vague.

11 THE WITNESS: Yes. Fair statement.

12 Without the proper training,
13 repetition, there is no two shooters that will
14 perform the same way.

15 BY MR. WELLS:

16 Q. Okay. Just looking back at the screen
17 here, this Section 1.11 that we previously
18 mentioned is on OAG-006594, the statement -- the
19 second sentence in 111, "The automatic rifleman
20 provides an internal base of fire with the ability
21 to deliver sustained suppressive small arms fire on
22 the area of targets."

23 What weapon does an automatic
24 rifleman carry?

1 A. The Army uses an M249 light machine gun.
2 The U.S. Marine Corps uses an M27 select fire
3 rifle.

4 At the end of the day, that is a
5 role to play that is less dependent upon the weapon
6 system, and about the duty assigned by the
7 commander -- the fire team, the squad, whatever the
8 element leader is.

9 If my automatic rifleman that
10 had the designated automatic rifle gets shot, the
11 guy with the rifle gets told, "You are now the
12 automatic rifleman. You will perform the duties to
13 suppress at a high volume against this location for
14 this duration."

15 So it is an assigned role.
16 Weapon -- the Army uses it differently than the
17 Marine Corps because they use a light machine gun.
18 We do not.

19 Q. What is "sustained suppressive small
20 arms fire"?

21 A. Dependent upon the timing of the enemy
22 that comes up, the element leader will tell you at
23 a rate of fire. He may choose 10 rounds a minute
24 or 45 rounds a minute.

1 He may tell you to empty a
2 magazine in 10 second. He gets to choose because
3 the enemy has a vote. Whatever the volume of the
4 enemy, the behavior of the enemy, that behavior
5 determines our response.

6 Q. Have you ever seen a commander give an
7 instruction to empty a magazine in 10 seconds?

8 A. Not in that nature. I've heard an
9 instruction to suppress --- well, it is a response
10 behavior.

11 We have to have an immediate
12 response action. And we rehearse these before we
13 go out. So in that time frame -- I will give you
14 an example.

15 If we are on movement to
16 contact, and we take chance contact, the immediate
17 action drill is empty your magazine as fast as
18 possible in auto fire while moving to cover.

19 Once in cover, slow down, shoot
20 sustainably as we assess the situation. So we run
21 these prior to -- I know where I'm going to go. I
22 get a mission. I'm getting ready to execute it. I
23 have a full laundry list of how do I react to
24 incoming air? How do I react to naval gunfire.

1 How do I react to artillery? What do I do with an
2 IED? So every potential scenario
3 is rehearsed with an immediate action drill so that
4 no commands be given. You have an expected drilled
5 response to perform until you get into cover and
6 out of that immediate danger area.

7 Then you receive different
8 commands. Does that make sense?

9 Q. It does. And you mentioned earlier that
10 a team leader or a commander may give an
11 instruction of a rate of fire, 10 rounds a minute,
12 sometimes 45 rounds per minute. In what scenario
13 would you expect 10 rounds a minute to be given?

14 MR. BRADY: Objection. Incomplete
15 hypothetical. Vague.

16 THE WITNESS: I'm picturing something in my
17 mind. I know the answer to that. Meaning I have
18 to now formulate what is the size of the enemy.
19 How many people do I have? What weapons do I have
20 available? How much ammunition do I have? Will I
21 finish this engagement so I have ammunition to
22 continue on my primary mission?

23 Those are hypotheticals I have
24 to make something up in order to answer.

1 Q. But just walk me through this -- go
2 ahead.

3 A. So in a hypothetical. If I am evenly
4 matched, I won't give a round count. I would just
5 suppress until we get into cover. That would be a
6 full automatic suppression until we get into cover.
7 This is the most dangerous time for me. The enemy
8 picked the location of this fight. I'm standing
9 and moving wide open to their gun fire, and I can't
10 figure out where they are at.

11 I don't see them. They are
12 shooting, trying to make as many casualties out of
13 us as possible before we get undercover. It is our
14 high volume of fires that become our protection for
15 the next twenty seconds, trying to get undercover.

16 Q. And is that the typical time period in
17 which you would expect automatic suppression fire
18 to take place, twenty seconds?

19 MR. BRADY: Objection. Vague. Misstates
20 testimony. Incomplete hypothetical.

21 THE WITNESS: Unfortunately, you would have to
22 set the scenario of how far is it for me to get
23 into cover? How many of my people are there? How
24 many of them are there? What weapons do they have?

1 You would have to paint a really
2 deep picture to get a single answer, and it would
3 only apply to that one scenario that you painted.

4 BY MR. WELLS:

5 Q. And when you are talking about giving
6 commands in that circumstance as Marine gunner,
7 would you be giving commands, or would another
8 officer give commands in those types of scenarios?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: It would not be me. It would be
11 whoever the element leader was at the point of
12 contact. And he wouldn't issue a command at all,
13 initially. They would follow the immediate action
14 they rehearsed.

15 His first command opportunity is
16 when he finally gets in a safe position to assess
17 and decide.

18 BY MR. WELLS:

19 Q. A commander that gives a fire command,
20 you said, 10 rounds per minute. Is that a common
21 way of giving a fire command to instruct a team at
22 what rate they should fire based on the number of
23 rounds per minute?

24 A. It is. We have a little. Acronym we

1 call it ADDRAC. "Alert, direct, description,
2 range, assignment and control." Who is going to
3 shoot. And then the control piece of it -- you are
4 going to get ready to fire.

5 That is not an immediate -- that
6 order to the force is not the first thing that
7 happens. The first thing that happens is survival.
8 Get out of this -- what we call a "kill zone" of
9 the enemy's choice.

10 That reaction is rehearsed and
11 delivered, and once you get in to wherever the
12 cover is -- now, unfortunately we don't get to
13 patrol only where there is nearby safety areas.
14 You could be standing in the middle of an empty
15 parking lot -- that doesn't happen immediately.
16 Nobody can hear. The gun fire is too loud.

17 We are all suppressing and
18 moving undercover.

19 Q. Is what you're describing characterized
20 as a movement to contact?

21 MR. BRADY: Objection. Vague.

22 THE WITNESS: No. It is any time I'm moving.
23 I could have an immediate action while I'm in the
24 stationery defense of a building. Artillery is

1 coming in, and I have a planned behavior to
2 execute. Run down in the basement and get
3 undercover.

4 No. It is not just one mission
5 movement to contact. I could be on the street. I
6 could be out just trying to hand out water to the
7 local kids and take chance contact.

8 I had an immediate planned
9 response at that point to execute. Whatever that
10 element leader made up, he may use this document as
11 a baseline, but it doesn't fit the scenario, the
12 location, the personnel he has available, the enemy
13 capability. And he has to make the baseline
14 modification, maybe from this, maybe from the class
15 that he had, or maybe he makes something up to be
16 unpredictable.

17 BY MR. WELLS:

18 Q. So as I understand what you are saying
19 there is a couple of phases to what you are
20 describing. There is contact which triggers
21 immediate action or immediate response. Is that
22 fair to say?

23 A. Yes, sir.

24 Q. And that immediate action or immediate

1 response involves both firing and moving to cover.

2 Is that right?

3 A. Yes, sir.

4 Q. And then once that initial round of fire
5 and moving to cover has been accomplished, then the
6 commander will set a rate of fire; is that right?

7 A. In part. At the time he gets
8 undercover, he has to make an assessment -- am I
9 strong enough to overwhelm this enemy? If I'm not,
10 can I get more assets to do so.

11 If I can get more assets to do
12 so, how am I going to do it? If I can't get more
13 assets to do so, I can't overwhelm that enemy, I
14 need to disengage. So he has to assess all this
15 action and situation and make a decision in issuing
16 an order.

17 In that issuing an order when he
18 finally gets around to it, he might give a rate of
19 fire command if it's necessary, and he may just
20 say, "Look around the area, and let's leave."

21 So it is not a fixed answer
22 without a scenario.

23 Q. Understood. And I'm just trying to
24 understand so -- your testimony that it is in that

1 initial time period between the contact and
2 obtaining cover, that in your view, full-on
3 automatic fire from an M4 or M16 is critical. Is
4 that your testimony?

5 MR. BRADY: Objection. Misstates the
6 testimony.

7 THE WITNESS: Yes, sir. I would probably be
8 able to identify five areas where automatic fire is
9 absolutely critical, and that would be a night
10 ambush when the enemy is standing, and I am trying
11 to ambush him. I want a high volume of fire in the
12 area immediately.

13 Room clearing. Where I don't
14 know where he is at, but I'm the one who has to run
15 into the room, and he is hidden behind a -- you
16 know, a barrier somewhere, and I can't find him.
17 We use our automatic fire then.

18 Trench warfare, we use that as
19 well because we don't know -- we don't know where
20 they are at. So we are using bullets to search and
21 make them psychologically suppressed. And then
22 near and far ambush.

23 So urban warfare, trench
24 warfare, near and far ambushing, and that is

1 another oxymoron. When I'm there, everything is
2 near ambush. Take cover.

3 Q. Understood. And I'm just trying to
4 understand. So in your report you specifically
5 discuss suppression, use of automatic fire and
6 suppression, but you didn't mention those other
7 scenarios. Why not?

8 A. Very lengthy responses with
9 uncontrollable variables.

10 Q. And are there publications from either
11 the Army or Marine Corps that you would point to
12 that identify those scenarios as ones where you
13 would use full automatic fire come in M4 or M16?

14 MR. BRADY: Objection. Vague. Incomplete
15 hypothetical.

16 THE WITNESS: I don't know if the publications
17 get into those weeds. We have a post-war battle
18 school that we will talk about urban room clearing.

19 We have shipboard takedown
20 tactics course. We talk about the use of automatic
21 fire. Using frangible bullets on ships.

22 We have squad leader schools
23 that talk about trench warfare. We have a combined
24 arms exercise out in Twentynine Palms that forces

1 into trench warfare.

2 So not necessary the
3 publications, but the schoolhouses would find
4 behaviors -- we call them "tools in a toolbox."
5 They are not a cookie cutter. Do this. Do that.
6 It is things to think about in order to survive
7 this problem, and then you decide.

8 BY MR. WELLS:

9 Q. In the time period from 2005 after, in
10 Iraq, which you described earlier, which I think
11 you indicated that the nature of the war changed,
12 were room-clearing operations still happening in
13 Iraq post-2005?

14 A. I don't know. I would think
15 room-looking operations were happening. In our
16 tactical documents, we teach room clearing. We
17 teach a couple things, like enter from the top of
18 the building and work your way down.

19 The Marines refused to do that
20 because we have so much armor on that we would cut
21 a hole in the ceiling when they would come in, if
22 they took casualty, they couldn't get the casualty
23 back up.

24 So then when they had to flood

1 the building with a hand grenade, these are my
2 propriety to get out. So the Marines stopped doing
3 that. So that was the case where the tactical
4 publication was absolutely incorrect, and the
5 Marines, by de facto behavior, changed what they
6 were doing. They started going from the bottom up.

7 In were probably clearing rooms
8 like we were some police force getting ready to
9 issue an arrest warrant for about 10 days. And we
10 recognized we were taking too many casualties. So
11 then we became the room looking force where if we
12 thought there was a hostile in that building, we
13 didn't go in. We isolated it. Cordoned it. We
14 brought in an air-delivered JDAM, joint direct
15 attack munition, or we brought a tank to shoot it,
16 or we brought a bulldozer and leveled the building.

17 So our doctrine, we thought, was
18 invalidated with our behavior and Fallujah. It was
19 the first time we were able to use that doctrine
20 since it had been written probably in the '60s.

21 Q. So prior to 2008, which was the date
22 when we looked at an earlier publication, did
23 Marines in Iraq encounter night ambushes?

24 MR. BRADY: Objection. Vague.

1 THE WITNESS: Yes. They did. IED-initiated
2 attacks with one or two support systems. Did the
3 Marines conduct night ambush? I'm sure --

4 Q. No. Did they --

5 A. Did they react -- probably not very
6 often. It would probably be an IED strike and not
7 ambush.

8 They just didn't form enough
9 manpower to act that cohesively against us.

10 Q. Is it fair to say what you just
11 described would also apply to soldiers in the army,
12 Iraq --

13 MR. BRADY: Objection. Vague. Calls for
14 speculation.

15 THE WITNESS: It does call for speculation.
16 Unfortunately, the Army was tied
17 to their vehicles. Their actions didn't mirror
18 ours. And I would totally speculate on what their
19 immediate action goals would be. But they tended
20 to suppress with their Bradley 25-millimeter
21 Bushmasters, and not disload the infantry.

22 Q. So the Army would use 25-millimeter
23 bushmasters to provide suppressive fires. Is that
24 right?

1 A. Yes, sir.

2 Q. What is the 25-millimeter bushmaster?

3 A. It is a chain gun -- it is -- 25
4 millimeter equals one inch. So it is a one-inch
5 bullet. It is about a foot long with a lot of
6 power behind it. Seven or eight different munition
7 options from training practice -- from armor
8 incendiary to high explosive.

9 It is a very heavy machine gun
10 that is -- that a million-dollar ballistic
11 calculated laser range -- enabled range finder to
12 help aim.

13 Q. Based on your experience in Iraq, that
14 is the weapon that the Army would use for
15 suppression?

16 MR. BRADY: Objection. Vague. Objection.
17 Vague and incomplete hypothetical.

18 THE WITNESS: If while moving, that would be
19 their first response.

20 Once they got to deliberate
21 objective, they would dismount the force, and you
22 have got the full litany of small arms available
23 from medium, heavy machine guns, grenade launchers,
24 rifles.

1 BY MR. WELLS:

2 Q. Prior to 2008, did soldiers and Marines
3 engage in the room-clearing operations in Iraq?

4 MR. BRADY: Objection. Vague.

5 THE WITNESS: What do you mean by "room
6 clearing"? High-intensity assault? Shoot
7 everything? Throw a grenade and kill everyone or
8 just go in to look?

9 BY MR. WELLS:

10 Q. I mean room clearing as used earlier in
11 the deposition.

12 A. I have to have the situation of the
13 enemy to make that decision.

14 Q. You mentioned earlier that, you know,
15 past a certain time period, the way in which
16 Marines and soldiers would operate -- you said like
17 some police force. What did you mean by that?

18 A. The behaviors in the military were
19 constantly, continually constrained and restrained
20 over time. And I have randomly picked 2005 and
21 2008. The comments internally were that every six
22 months the nature of the war was changing.

23 So units -- for the infantry, we
24 didn't have -- we would go over for six months,

1 come back for three, and go back over for six or
2 seven.

3 In my case, I went over for five
4 and went back for fifteen straight. And the nature
5 of that war kept changing both on the enemy
6 behavior, on assets available to us -- as new
7 assets became available -- and then on our
8 responses. And as more lawyers got involved.

9 We had legal teams -- at some
10 point, we had them at rifle platoon level at 40-man
11 unit. It started with one judge advocate general
12 at the regiment level -- a regiment of 10,000
13 people.

14 And it ended with a judge
15 advocate general representative at every force,
16 trying to help shape our reaction to the enemy.

17 I say "ended." Overtime it got
18 progressively harder to justify engagement.

19 Q. Why do you think of that as resembling a
20 police force?

21 MR. BRADY: Objection. Misstates testimony.

22 THE WITNESS: Police force. Their job is to
23 not harm the civilians, right? Their job is to
24 read you your rights and apprehend.

1 Ours was to kill you. Our
2 training was to destroy you. So having to ramp
3 down this 19-year-old kid that we have spent a year
4 and a half to kill everything in front of him and
5 get him to slowly read your rights or arrest you,
6 we weren't prepared for that.

7 So in order to ramp that down,
8 that is when more and more restraints and
9 constraints and behavior controls were applied, and
10 we created rules. If you were on a machine gun,
11 somebody shot at you, you had to yell a warning.
12 Fire a pop-up at him. Shoot a warning shot and
13 then shoot them in the time span of them trying to
14 kill you.

15 At some point, like, 2008 and
16 beyond, it was no longer what we were good at was
17 destroying things. They should not have sent us if
18 they didn't want them destroyed.

19 BY MR. WELLS:

20 Q. I'm going to show you another document
21 here. Before I do that, let me ask you -- what is
22 "lethality"?

23 A. Vague, unmeasurable term.

24 Q. Have you ever used the term "lethality"?

1 MR. BRADY: Objection. Vague.

2 THE WITNESS: I've used it in an instruction
3 to explain why that term has changed five times
4 during my career.

5 BY MR. WELLS:

6 Q. Have you ever written the lethality of
7 weapons has increased?

8 A. Possibly.

9 Q. Do you recall writing that the
10 relationship between the lethality of weapons and
11 the dispersement of troops found on the same battle
12 field has been a consideration for commander since
13 man first engaged in combat?

14 A. Absolutely.

15 Q. When did you write that?

16 A. Probably in the late '90s. I was -- we
17 were struggling to replace the M249. It was not
18 working for us. The light machine gun was not
19 working for us. It was an automatic rifle. It was
20 too cumbersome. Too heavy. Got hot too fast.
21 Failed to function when you were moving.

22 So I was writing this -- for
23 instance, in Agincourt, the year -- I don't know,
24 1,000. We put 10,000 people on a square, as in a

1 Napoleonic square.

2 Today we would put four Marines,
3 because as lethality of systems increased; air,
4 naval, armor, weaponry, machine guns, mortars. As
5 those increased, we could spread the force out and
6 had to increase survivability.

7 Q. Did I hear you say the word "Agincourt"?

8 A. You did.

9 Q. And so by Agincourt, you are referring
10 to A-G-I-N-C-O-U-R-T, the famous battle?

11 A. Yes, sir.

12 Q. And when did that battle happen?

13 A. I don't remember the year. I want to
14 say the 1400s, maybe. Before we had the very
15 strong mortars, artillery, tanks, aviation.

16 Q. What was the missile weapon that was
17 predominantly used at the battle of Agincourt?

18 A. Trebuchet.

19 Q. Trebuchet?

20 A. Yes, sir. All-artillery weapons.

21 Q. What about non-artillery? What was --
22 at the battle of Agincourt, what weapon was used
23 that wasn't artillery?

24 MR. BRADY: Objection. Vague.

1 THE WITNESS: I don't remember any missile.

2 Missile implies control. I
3 launch it, and I can control it to the target.

4 BY MR. WELLS:

5 Q. Do you know which missile weapon is
6 considered by military historians to have been
7 decisive at the battle of Agincourt?

8 MR. BRADY: Objection. Vague. Calls for
9 speculation.

10 THE WITNESS: No, sir.

11 BY MR. WELLS:

12 Q. Do you know what missile weapon English
13 troops, the battle of Agincourt, would have been
14 equipped with?

15 MR. BRADY: Objection. Vague.

16 THE WITNESS: I do not.

17 BY MR. WELLS:

18 Q. I'm going to direct your attention
19 -- Mr. Eby, I'm showing you a document labeled
20 "Automatic rifle concept Part One. History and
21 empirical testing."

22 Do you see that?

23 A. I do.

24 MR. WELLS: And for the court reporter, I'd

1 like to mark this as an exhibit. I think we are up
2 to Exhibit 5. Is that right?

3 THE COURT REPORTER: Yes.

4 BY MR. WELLS:

5 Q. So I'm showing you what we are marking
6 for identification purposes, Deposition Exhibit 5.
7 What is this document?

8 (Deposition Exhibit 5 was marked for
9 identification.)

10 BY MR. WELLS:

11 Q. What is this document?

12 A. Three-part document trying to convince
13 the Marine Corps to shift away from the M-249 light
14 machine gun to a true automatic rifle. Written
15 approximately -- probably 2002, '03. Somewhere in
16 that time frame.

17 Q. So this is a document you wrote?

18 A. I participated in and wrote. This got a
19 lot of editorial effort from the officers of the
20 2nd Battalion, 7th Marines.

21 Q. And just reading the first paragraph, it
22 says, "The relationship between lethality of
23 weapons and dispersion of the troops found on the
24 same battle field has been a consideration for

1 commanders since man first engaged in combat."

2 Do you see that?

3 A. I do.

4 Q. And that is the quote we read earlier,
5 and that is your word, "lethality." Is that right?

6 A. Yes.

7 Q. And in that last same paragraph, it says
8 "As lethality of weapons has increased, so has the
9 dispersion necessary to preserve combat power."

10 When you said "The lethality of
11 weapons has increased," what were you referring to?

12 A. The range and capability of artillery
13 weapons. The range and capabilities of tanks,
14 which didn't come out until World War II.

15 The enhancement of aviation that
16 really started in World War I but became supreme by
17 World War II. Those systems changed the nature of
18 wars.

19 Forced dispersion as they were
20 -- so explosive and dangerous covered more distance
21 and range and more explosive distance on the
22 ground.

23 Q. Do you believe that the lethality of
24 rifles has increased over time?

1 MR. BRADY: Objection. Vague.

2 THE WITNESS: I don't think so.

3 I think -- if anything, their
4 range has increased. Their performance on the
5 human body has decreased compared to that musket we
6 talked about earlier.

7 And part of that could be the
8 ability of medical.

9 Their accuracy certainly has
10 increased which has enabled further hits, but in
11 the last 30 years we degraded to the lowest single
12 fire bullet we can use for other reasons.

13 We wanted to manage the recoil.
14 We wanted affordability. Less weight. So I can
15 certainly get more hazardous to the human body,
16 projectiles, at the individual level.

17 Q. Why would weight be a relevant
18 consideration in deciding what ammunition to use?

19 A. I think about my assault. I left Kuwait
20 and I didn't get to Baghdad for 57 days. I didn't
21 take my uniform off in those 57 days. I didn't
22 take my boots off more than five minutes to wipe my
23 feet with wipes, and the level of exhaustion, the
24 degradation of nutrition. Weight -- every ounce

1 matters more tomorrow than it does today, as my
2 physical ability gets weaker over time.

3 So weight always matters.
4 Especially as that increases in time, duration and
5 distance.

6 Q. When you say "weight always matters,"
7 you are referring to the aggregate weight of the
8 different materials that an infantryman is carrying
9 into combat. Is that what you are referring to?

10 A. Yes, in sum. All weight that I'm
11 carrying on my body matter.

12 Q. Have you ever heard lethality being
13 discussed in conjunction with weight?

14 MR. BRADY: Objection. Vague.

15 THE WITNESS: Not that I recall. Well, yes I
16 have.

17 BY MR. WELLS:

18 Q. Explain.

19 A. The ease of getting the weapon -- except
20 a big rifle. I have to paint a picture in my
21 brain again.

22 The ease of getting a rifle into
23 a firing position while in cover, weight matters.
24 That variant you talked about earlier would be a

1 horrible weapon to jump into a leaning position
2 behind the couch. It is heavy. It is long. It is
3 difficult to move away from.

4 If I have to move positions, I
5 have this 50-inch long musket to move with, and
6 weight adds up as I present the rifle into my
7 shoulder to make a standing shot. That weight gets
8 hole very quickly as I'm aiming, trying to assess
9 where the enemy is at and point it.

10 So now, weight and length factor
11 together, so if it is heavy and closer and shorter
12 and closer to my body, it is easier to manage than
13 it is heavy and it is four feet out away from me.

14 Q. Okay. I'm sharing with you a document.
15 It is previously marked as Deposition Exhibit 1.
16 It is your expert report with attachments. I'm
17 looking at PDF 299.

18 Directing your attention to the
19 numbered paragraph 23. Reading this paragraph, do
20 you recognize what this document is?

21 A. I do. I don't see the name, but this is
22 the special infantry weapons studies or the SAWS
23 studies. There were those Army studies from the
24 late '50s, early '60s.

1 Q. But you recognize this as a document
2 that you attached to your expert report?

3 A. I do. I do.

4 Q. So looking at paragraph 23, it says,
5 "Considerations of the relative lethality of 5.56
6 millimeter and 7.62 millimeter ammunition with the
7 possible exception to duplex, support all of the
8 CDCEC SAWS conclusions. It is concluded that there
9 are no tactically significant differences between
10 5.56-millimeter and 7.62-millimeter ammunition per
11 round of ammunition; however, 5.56-millimeter
12 ammunition is significantly superior to
13 7.62-millimeter ammunition in lethality per pound
14 of ammunition, or per basic load carried by the
15 soldier."

16 Do you see that?

17 A. I do.

18 Q. And this is one of the documents that
19 you relied upon in formulating your opinion in this
20 case.

21 Is that right?

22 A. That is.

23 Q. And do you have an understanding as to
24 what lethality per pound of ammunition means?

1 A. It is too vague for me to determine. As
2 I told you earlier, I've undergone five definitions
3 of lethality during my time of service.

4 What we thought was a big old
5 theory, hydrostatic shot, which was a mistake to
6 now shock placement theory. Theories. All
7 theories.

8 We just were not ballisticians
9 and not forensic experts. I understand whoever
10 wrote that believed that to be true. Maybe in some
11 -- whatever his thoughts were at the time -- but he
12 certainly has more bullets per pound. Maybe that
13 is how he is measuring it.

14 Because a pound of 556 might
15 give you 100 bullets, and a pound of 762 might give
16 you 30. He has more opportunity, but lethality,
17 I've been measuring it too many different ways to
18 plant a flag on that definition.

19 Q. Do you agree with the statement that
20 there are no tactically significant differences
21 between 5.56-millimeter and 7.62-millimeter
22 ammunition per round of ammunition?

23 A. I do not.

24 MR. BRADY: Objection. Vague.

1 THE WITNESS: I do not.

2 BY MR. WELLS:

3 Q. Why not?

4 A. Weight, balance, load is far easier with
5 that 556 than it is that 762. 762 may penetrate,
6 but all I want to do is to duck, stay in position
7 while I bring something heavy to kill him.

8 I can do that with a small
9 projectile.

10 Q. In your expert reports, you cite the
11 U.S. Army Weapons Systems handbook. Do you recall
12 citing that document?

13 A. I do.

14 Q. And what generally is that document?

15 A. Probably a snapshot for Congress
16 primarily to show what we are currently using, kind
17 of an update of changes. So if you haven't been
18 paying attention, the systems change regularly.
19 You can get kind of a quick look of what is
20 currently there.

21 Q. I've shared on the screen a document
22 with Bates Label OAG-8050 that says, "Weapon
23 systems handbook 2020 to 2021." Do you see that?

24 A. I do.

1 Q. Is this the document that you were just
2 referring to?

3 A. Yes.

4 Q. This is the document that you cited in
5 your report?

6 A. Correct.

7 Q. Okay. So in your understanding that
8 this is a -- the document itself is hundreds of
9 pages. Is that right?

10 A. Normally it is. I only see three here.

11 Q. I've created an excerpt to make it a
12 little smoother for you, but you understand the
13 document as a whole, which has been produced in
14 this litigation several hundred pages long, and
15 this is just an excerpt.

16 A. I understand.

17 MR. WELLS: And just for the record, I'd like
18 to mark this as Deposition Exhibit 6.

19 (Deposition Exhibit 6 was marked
20 for identification.)

21 BY MR. WELLS:

22 Q. It is OAG-8050, and then OAG-008351 to
23 8352. Do you see that, Mr. Eby?

24 A. I do.

1 Q. So I've excerpted a particular section
2 of the weapon systems handbook, which you cited in
3 your expert report related to the next generation
4 squad weapons.

5 Do you see that?

6 A. I do.

7 Q. What are "next generation squad
8 weapons"?

9 A. The Army's replacement to close combat
10 force for primary general purpose rifles and light
11 machine guns.

12 So they replaced the M249 with
13 an automatic rifle version of the next gun. And
14 they created a whole new caliber in doing so.

15 Q. Why did they do that as far as you
16 understand?

17 MR. BRADY: Objection. Calls for speculation.

18 THE WITNESS: After WANAT Valley in 2008, when
19 the Army was nearly overrun on outpost, there was a
20 lot of anecdotal complaints that the 556 bullet was
21 inadequate to putting the opponent down. And that
22 started an effort to -- that is their first real
23 evaluation of 556 of these Army's research and
24 development. Finally went back and evaluated the

1 bullets we were using to determine if they would
2 penetrate far enough and create enough trauma to
3 put a combatant down, and they determined that it
4 does not.

5 It needed to be bigger. So they
6 created their own 6.8 millimeter as a result of
7 that effort.

8 Q. You mentioned "anecdotal complaints."
9 Who are those anecdotal complaints from?

10 A. The war fighters on the scene.

11 Primarily they would do things called "lessons
12 learned." "What do you think" type questions.

13 "I think I shot that guy 47
14 times, and he failed to die. My bullet doesn't
15 work." Those are anecdotal because we had no
16 ballisticians on site or doctors to evaluate, nor
17 should they have.

18 In my mind, they still remained
19 anecdotal, and there is no evidence training.
20 There is no scientific measure being used. And it
21 may have been just poor shots.

22 Q. Is it your understanding that those
23 anecdotal complaints prompted the Army to initiate
24 the Next Generation Squad Weapons Program?

1 A. Not initially. Initially they tried to
2 enhance the bullet and they created MA55-A1
3 enhanced performance bracket. The Marine Corps
4 worked simultaneously with its own SOST, special
5 operations science technology bullet, and then we
6 had a huge fight at the Army/Marine Corps levels,
7 and Congress had to order the Marine Corps to
8 follow suit with the Army, and take the M855A-1.
9 That was Stage 1. Get a bullet in existing
10 weapons.

11 Then they went after what is a
12 better solution. And ended up with a 6.8 x 51 mm.

13 Q. When you say "get a better bullet,"
14 better how?

15 A. I think -- I don't know. I wasn't
16 present for the evaluation, and they close hold all
17 that information. I can make some assumption, but
18 it would just be that.

19 Q. Let's look at this document. Just
20 zooming in on Internal Pagination 300. It is
21 OAG-008531. This is deposition Exhibit 6. Top of
22 the page says "Next generation squad weapons. I'm
23 looking at the section that specifically says
24 "Benefit to the soldier." Do you see that?

1 A. (No response.)

2 Q. Mr. Eby, can you see that?

3 A. I'm not finding it -- oh, yes, I do.
4 I'm sorry.

5 Q. No. It's okay. Sometimes it's hard to
6 see on screen. Okay.

7 Under "Benefits of the soldier,"
8 it says, "NGSW," which is Next Generation Squad
9 Weapons program "significantly increases lethality
10 and probability at the squad level.

11 Due to the nature of the
12 general purpose ammunition, the 6.8-millimeter
13 projectile will outperform even the most modern
14 5.56-millimeter and 7.62-millimeter ammunition.

15 These weapon systems will give
16 soldiers significant capability improvements and
17 accuracy range, signature and lethality."

18 Do you see that?

19 A. I do.

20 Q. Is this the transition you were
21 describing? The transition from the
22 5.56-millimeter round to the 6.8-millimeter
23 projectile?

24 A. It is.

1 Q. Would you agree with me the way this
2 program is described in this document is that
3 transition would significantly increase lethality;
4 is that right?

5 MR. BRADY: Objection. Vague. Misstates the
6 document.

7 THE WITNESS: I would be limited to say that
8 it improved accuracy, improve range, improve
9 signature management. I can't define lethality.

10 BY MR. WELLS:

11 Q. Can you define probability of hit?

12 A. Yes, I can.

13 Q. What is that?

14 A. Out of 10 out of 10 rounds, I will hit
15 more often than a previous competitor.

16 So I will increase my hit
17 potential under the same exact circumstances, and
18 in this platform, because it has a fire control
19 system, it can give you range correct, it tells you
20 what portion of the rifle to aim with, will
21 logically increase hit potential.

22 Q. Why is the probability of hit an
23 important metric?

24 A. In the marksmanship world that is how we

1 measured you. You fire 100 rounds. You hit 80 of
2 them. That is how we keep score. In a combat
3 scenario. We are not actually expecting hits. We
4 just want to keep you suppressed so we can kill you
5 with other means. If we get hits out of that, by
6 all means we are happy with that, but that is not
7 the rule.

8 Q. It notes here that the 6.8-millimeter
9 projectile that the Army is moving to is going to
10 out perform even the most modern 5.56 millimeter,
11 and 7.62 millimeter. Do you see that?

12 A. I do.

13 Q. Do you have an understanding why the
14 Army would have chosen a 6.8-millimeter projectile
15 as opposed to a 7.62-millimeter projectile?

16 A. I do not.

17 Q. Do you have an opinion about whether a
18 6.8-millimeter projectile can outperform even the
19 most modern 7.62-millimeter projectile?

20 MR. BRADY: Objection. Vague.

21 THE WITNESS: I do not. I don't have any
22 experience with the 6.8.

23 BY MR. WELLS:

24 Q. What is slow semi-automatic fire?

1 A. Usually referred to as sustained rate of
2 fire, 12, 15 rounds per minute.

3 If it is going to use that term,
4 then you can create your own answer.

5 Q. Where did that fifteen rounds per minute
6 figure come from?

7 A. I think it was tied to the heat of the
8 barrel. We can find no evidence of any test ever
9 performed that tells us X number of rounds, when
10 does the barrel get hot? We had general rules, but
11 when a barrel gets hot, we need fifteen minutes to
12 cool it down.

13 So we were very careful not to
14 get it hot. A weapon starts degrading as soon as
15 it gets to 550 degrees. When rounds could cook off
16 in the chamber.

17 These are all just general
18 guidelines, kind of help shape your logistics. I
19 think, based on an enemy situation, it is going to
20 take me 5 minutes to get across from the last spot
21 to the enemy, I need 5 minutes' worth of ammo.

22 Can I add more ammo or do I need
23 to divide that five minutes into the ammo I am
24 carrying? So we will build our combat prep based

1 on these considerations.

2 And then we will pre-issue
3 commands to -- at certain points, I have more
4 exposed force, so I want you to increase your rate
5 of fire. When that exposed force goes undercover,
6 decrease your fire. And we manage that so we have
7 enough ammo to get through the fire.

8 Q. Is management and preservation of
9 ammunition an important consideration in combat?

10 A. Yes, sir because I don't know where it
11 is going to come from if I run out.

12 Q. How does the use of automatic fire
13 impact preservation of ammunition?

14 MR. BRADY: Objection. Vague.

15 THE WITNESS: Clearly it does not, and we
16 probably -- if it is a deliberate attack, and I
17 conducted the planning, I would never use automatic
18 fire until I get into the building or into the
19 trench.

20 There are different applications
21 where I need to use it to survive. Best-case
22 scenario, I don't use it at all. I pin him down
23 with sufficient overwhelming fires, and I drop the
24 artillery until they are pounded.

1 Q. So is it fair to say then, one of the
2 reasons why soldiers and Marines use automatic fire
3 sparingly, and only out of necessity, is to
4 preserve ammunition?

5 MR. BRADY: Objection. Vague. Incomplete
6 hypothetical. Argumentative.

7 THE WITNESS: I would say no. It is more of a
8 survival tool. I need it when my plan fell apart
9 or the enemy got a vote, I need to get out of a bad
10 situation.

11 Clearing rooms, again, is
12 extremely dangerous. We don't know how many are in
13 there, what weapons they are armed with, and we
14 overwhelm that with hand grenades and fire for our
15 self-preservation.

16 When they attack me, I'm out in
17 the open. I survive with high volume of fire at
18 the expense of my weapon. I may melt that gun. As
19 long as I can get undercover and survive, and then
20 evaluate what is left of weapons.

21 BY MR. WELLS:

22 Q. When you said "melt that gun," what do
23 you mean?

24 A. When the Army went to WANAT Valley in

1 2008, they melted their guns. The gas tube that
2 allows air to come out of the barrel and cycle the
3 bolt, and that gas impingement system, those melted
4 in half. The gun was useless.

5 The rifle got so hot that they
6 -- the bullets -- took it out. So now you have a
7 smooth musket, perhaps. The barrels got so hot
8 they bent.

9 Q. What caused that melting?

10 A. Being overwhelmed. Not being prepared
11 for 200 people to attack 48. And then -- they
12 fired full auto. It is that or die. That will get
13 overrun.

14 So in that full auto with every
15 magazine they had, they ruined their guns, but they
16 defeated the enemies' attack in doing so.

17 So in that case, that was a good
18 choice either that or they would all be dead.

19 Q. Are you familiar with rapid
20 semi-automatic fire?

21 A. I am. It's an Army term. I don't know
22 that the Marine Corps picked it up yet.

23 Q. What is rapid semi-automatic fire?

24 A. Generally referred to as three times the

1 sustained rate, so approximating about 45 rounds
2 per minute.

3 Q. Where -- you said generally defined.
4 Where would that be defined?

5 A. That is usually a marksmanship
6 publication. That is a very valid technique if the
7 shooter has been trained well to manage recoil.

8 Q. What if the shooter has not been
9 adequately trained to manage recoil, would you
10 recommend rapid semi-automatic fire?

11 MR. BRADY: Objection. Incomplete
12 hypothetical.

13 THE WITNESS: I would not.

14 BY MR. WELLS:

15 Q. Why not?

16 A. Deplete his combat load. Increase
17 danger on the reload process. Overheat his rifle
18 with no effect.

19 Q. You said that sometimes, though, rapid
20 fire could be a valid technique. In what
21 circumstances would rapid semi-automatic fire be a
22 valid technique?

23 MR. BRADY: Objection. Incomplete
24 hypothetical.

1 THE WITNESS: Hypothetical situation where the
2 range is probably too far for automatic fire to
3 control the burst on the target. So rapid fire
4 would allow -- there is a phrase we use called
5 "controlled pairs" and "hammer pairs".

6 Hammer pairs, I see the sight
7 one time and I fire two bullets. I pull the
8 trigger twice to get hammered, but I only saw the
9 site one time for accurate alignment. That is a
10 very close proximity and target.

11 And if I were measuring me, that
12 might be -- at 50 meters, I would have to stop and
13 start finding the shot in order to control the
14 beaten zone into the target area.

15 Rapid fire would be superior to
16 automatic fire at a certain distance, depending on
17 that shooter, and that shooter's capabilities to
18 manage recoil over automatic fire.

19 Q. And you said rapid semi-automatic fires
20 three times the sustained rate, and that
21 approximates to 45 rounds per minute.

22 At 45 rounds per minute in an
23 M4/M16, that would require a magazine change in
24 that minute; is that correct?

1 A. Yes.

2 Q. How does that impact -- how does the
3 magazine change impact the rate of fire?

4 MR. BRADY: Objection. Vague. Incomplete
5 hypothetical.

6 THE WITNESS: Every one of us changes the
7 magazine at different speeds. It is a rehearsed
8 behavior. It is a gear and location requirement.
9 Individual training requirement. I could give you
10 assumptions of trained shooter versus untrained
11 shooter.

12 Novice versus expert on speed to
13 do so. You know, it is not uncommon for a trained
14 shooter to change magazines in one and a half
15 seconds.

16 It is not uncommon for people
17 I've spent time with on NRA training, that had to
18 be 10 seconds to change their magazine. So that
19 would affect overall their fire if those are
20 fictional numbers that we can't scientifically
21 prove true.

22 Q. I'm going to show you a document, PDF
23 page 254 of your expert report and attachments. Do
24 you recognize this document?

1 A. Can you scroll up and show me the name
2 training circular or ATP? I recognize it from one
3 of those.

4 Q. It is Exhibit 4 to your rebuttal report,
5 TC3229, "rifle and carbine." Are you familiar with
6 that?

7 A. I am.

8 Q. Do you see that? So it is Exhibit 4 to
9 your rebuttal report, and it says "Rifle and
10 carbine"?

11 A. I do see it.

12 (Exhibit 4 was marked for
13 identification.)

14 BY MR. WELLS:

15 Q. So this is a document that you chose to
16 attach to your rebuttal report. Is that right?

17 A. That is correct.

18 Q. Okay. So going back to the page I was
19 at previously, which is, again, 254, and a PDF, and
20 it is 86 -- page 86 "internal pagination." It is
21 Chapter 8 at the top, and it says "Rate of fire."
22 Do you see that?

23 A. I do.

24 Q. And would you agree with me that this

1 page describes slow semi-automatic fire or rapid
2 semi-automatic burst fire?

3 A. I do.

4 Q. And those figures you gave before, were,
5 I think, 12 to 15 rounds of what you called
6 sustained fire. Do you see that underneath "slow
7 semi-automatic fire"? Do you see that?

8 A. I do.

9 Q. And so you said the Army uses the term
10 "slow semi-automatic fire." You would characterize
11 this as "sustained fire"; is that correct?

12 A. That is right. People may have changed
13 their mind because we tend to steal these
14 publications and throw a camouflage cover on it and
15 claim we wrote it.

16 Q. And under "rapid semi-automatic fire,"
17 that 45 rounds per minute figure that you quoted
18 earlier, you see that reflected here. Is that
19 right?

20 A. I do.

21 Q. Under automatic or burst fire, there is
22 no numerical value for rounds per minute. Do you
23 have an understanding as to why that might be?

24 MR. BRADY: Objection. Calls for speculation.

1 THE WITNESS: In the fire engagement, I think
2 we train too specifically. We don't expect that to
3 happen beyond one magazine, so it is 20 or 30
4 rounds. Well, it is not even that. We don't load
5 30. We load 28 because the spring system gets too
6 tight, and the magazine won't lock on the weapon.

7 So with a 30 magazine holds 28
8 rounds. In those engagements where my life is at
9 risk, and I have ordered an immediate action drill
10 to use automatic fire, it is very limited in
11 duration.

12 BY MR. WELLS:

13 Q. Okay. And tell me again what burst fire
14 is?

15 A. Burst is a trigger limiter that only
16 allows three rounds be fired for every pull -- or
17 every trigger bullet.

18 Q. Why would there be a trigger limiter
19 installed that limits three rounds to one trigger
20 pull?

21 A. It is anecdotal. As I understand it, it
22 was logisticians wanting to apply how much bullets
23 to buy and they didn't burn through it all, so they
24 put a burst limiter on there. Number one, to limit

1 how much you shot that range, but, two, to limit
2 your ability to overheat the weapon.

3 Q. And you said it was whose decision? The
4 logisticians?

5 A. Logisticians. They have to pre-plan how
6 much ammunition we get each year in training. How
7 much we are using in war.

8 They pre-plan these logistical
9 load outs. For them, that benefited. For us, it
10 was a horrible idea. For the fighter this is one
11 of the worst designs ever built because the trigger
12 went through different trigger pulls as it went
13 through different sear positions, and it prevented
14 in a life critical moment from having access to
15 full auto.

16 And as I mentioned, we have
17 since moved away from this. We've gone back to
18 full auto, but it took us 40 years to do.

19 Q. When you logisticians, are those members
20 of the Marine Corps or who are these logisticians?

21 A. Logisticians are occupational, both Army
22 and Marine Corps, who have an influence on how much
23 ammunition we get to train, how much they have to
24 buy.

1 As a matter of fact, in the
2 training and readiness manual that depicts what
3 skills we need to perform for the Marine Corps,
4 they did not buy the ammunition, that is written in
5 those documents sufficient to develop a skill.

6 They gave us a flat rate of
7 ammo. So -- for instance, in my training manual,
8 it might call for ten thousand rounds of 556
9 bullets for every individual rifleman. Yet I only
10 get 500.

11 So they have an overall
12 influence about what they are willing to buy, and
13 they don't let the training and readiness manual
14 that we use to develop skills to change their mind.

15 Q. You would agree, though, that running
16 out of ammunition in combat is a major issue,
17 right?

18 A. Absolutely.

19 Q. And the role of the logisticians is to
20 plan to make sure that there is enough ammunition
21 for war fighters. Is that right?

22 MR. BRADY: Objection. Vague.

23 THE WITNESS: In part. He has to have enough
24 in theater to feed me, but the combat element

1 leader has to determine what he is going to take
2 forward based on his evaluation of the situation.

3 BY MR. WELLS:

4 Q. Are you familiar with the scenario that
5 Colonel Tucker has referenced at various points in
6 which the Marine Corps was running very low on
7 ammunition in the battle of Fallujah? Do you
8 recall -- are you aware of that situation?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: I'm not.

11 BY MR. WELLS:

12 Q. All right. I'm going to direct your
13 attention now of page 148 of this same PDF, which
14 is still within the same rebuttal Exhibit 4.

15 Rebuttal Exhibit 4 of your
16 rebuttal report, do you see in PDF 148, which is,
17 again, part of TC322.9, dated May 13, 2016, Table
18 21. Do you see that?

19 A. I see that.

20 Q. What is being shown in Table 21 here?

21 A. Switch levers, overall barrel length,
22 and 3 settings for select fire.

23 Q. And you see the left column? It says
24 "weapon, M16-A2, M16-A3, M16-A4." What is that

1 describing?

2 A. The M16 series of weapons.

3 The Marine Corps never bought
4 the A3. The U.S. Navy bought it. We went from the
5 M16 to the A1 to the A2 to the A4. And then we
6 switched from the M4 to the M4-A1.

7 Q. And so the left column then describes
8 the different rifles that were issued to soldiers
9 and Marines?

10 A. That is correct.

11 Q. And the next column -- set of columns,
12 where it says "selector switch positions." Do you
13 see that?

14 A. I do.

15 Q. What is being described in those three
16 columns?

17 A. The three different settings and type of
18 behavior of the weapon when you choose a semi. I
19 can shoot semi. One shot for one pull, or I can
20 have the option depending on the variant,
21 three-round burst or full auto.

22 Q. And for the M16-A2, you would agree with
23 me that the three selector switch position lists
24 are safe, semi and burst. Is that right?

1 A. That is correct.

2 Q. And there is no full auto?

3 A. There is no full auto --

4 MR. BRADY: Objection. Vague.

5 BY MR. WELLS:

6 Q. The M16-A3 are safe, semi and auto. Do
7 you see that?

8 A. I do. That is correct.

9 Q. And does auto there refer to full
10 automatic?

11 A. Yes, sir.

12 Q. And that full automatic would be -- as
13 long as you are squeezing the trigger rounds you
14 are going to be firing until the magazine is
15 exhausted. Is that right?

16 A. That is correct.

17 Q. And that is different than the burst of
18 fire you described earlier where as long as you are
19 squeezing the trigger, the most you are going to
20 get is three shots in one squeeze. Is that right?

21 A. That is correct.

22 Q. In M16-A4, the selector switch position,
23 it says "safe, semi and burst." Do you see that?

24 A. I do.

1 Q. And, again, that is -- burst is three
2 shots. There is no list for listing of full
3 automatic selector switch position for M16-A4; is
4 there?

5 A. There is not.

6 Q. All right. So just focusing on the M16
7 variants here. So for the M16-A2 and M16-A4, which
8 you said are the only ones that the Marine Corps
9 actually used. They didn't use M16-A3. Those
10 rifles, the M16-A2 and M16-A4, did not have full
11 automatic capability on them; is that right?

12 A. That is correct.

13 Q. And those are the rifles -- well, let's
14 go to the M4.

15 So the M4 you see it says "safe,
16 semi and burst." Is that right?

17 A. That is correct.

18 Q. And then the next line M4-A1, "safe,
19 semi and auto." "Auto" is referring to full
20 automatic?

21 A. Yes.

22 Q. So on this chart, which of these rifles
23 did you carry during your time in the Marine Corps?

24 A. The M4 and M16-A4 and M16-A2.

1 Q. So all of the rifles you carried in the
2 Marine Corps, only had burst fire, and no full
3 automatic capability. Is that right?

4 A. From that chart you are missing the
5 M16-A1 that did have full auto, which I did carry.
6 I did carry an M4-A1 in a limited duration for a
7 three-year period. Very short duration.

8 So I would carry everything, but
9 the M16-A3 from that, and in addition, I would have
10 had the M16-A1.

11 Q. And the M16-A1 was full automatic?

12 A. I believe so. There were two. M16,
13 M16-A1. They are original, and the original weapon
14 I carried was full auto.

15 Q. But subsequent to that, the weapons that
16 you carried only had burst fire; is that right?

17 MR. BRADY: Objection. Vague.

18 BY MR. WELLS:

19 Q. What was your answer?

20 A. Yes. Only had burst fire for the
21 majority.

22 Q. What was your understanding as to why
23 the military switched from an M16 with full
24 capability to an M16 with only burst fire

1 capability?

2 MR. BRADY: Objection. Calls for speculation.
3 Misstates testimony.

4 THE WITNESS: To preserve ammunition.

5 We did not have the marksmanship
6 training program to incorporate accurate automatic
7 fire.

8 All of our marksmanship training
9 was bulls-eye training designed by the NRA in 1908,
10 and that is the only way we measured success was to
11 shoot very slow and methodically from very stilled
12 firing positions of standing, kneeling, prone or
13 squatting for one shot, one hit measures.

14 We didn't measure anything
15 tactically.

16 Q. Was the military also concerned with
17 increasing hits on target?

18 A. In the marksmanship range, yes. And the
19 tactical scenarios, no. In the tactical scenarios,
20 you don't see your target. You see an area. You
21 have to suppress the area.

22 Q. How does burst fire save ammunition
23 compared to automatic fire?

24 A. It limits how many rounds you can get

1 out per trigger pull, forcing you to reset the
2 trigger, which made that extremely dangerous.
3 Because now, when I'm trying to get out of a near
4 ambush or run into a house, I can't shoot
5 everything in the house. I have to keep resetting
6 the trigger.

7 Q. When Marines are being trained on the
8 amount of rounds they should discharge in full
9 automatic fire per trigger pull, how many rounds
10 are they trained per trigger pull for full
11 automatic fire?

12 MR. BRADY: Objection. Vague.

13 THE WITNESS: We try to get them to control it
14 down to three to five, because that manages the
15 recoil to keep the shots. But if they had to vote,
16 if they are three feet off of the target as the are
17 entering the room, just pull the trigger until it
18 is out of ammo.

19 So that is where that full auto
20 helps if a condition requires it.

21 Q. So when the Marines are trained to use
22 full automatic fire, they are trained to use three
23 bursts of fire?

24 MR. BRADY: Objection. Misstates testimony.

1 Vague. Incomplete hypothetical?

2 THE WITNESS: During the initial training, we
3 try to get them to control the three to five --
4 three to five rounds we need to try to fix their
5 body position to manage the recoil.

6 During advanced training, we
7 don't give them a limit. They determine that based
8 on the situation they are in.

9 So during advanced training of
10 shipboard tactic or close-quarter battle, they
11 decide how many rounds they need to finish the
12 fight.

13 BY MR. WELLS:

14 Q. And you specifically mentioned
15 room-clearing scenarios. Is that a scenarios -- is
16 that a scenario in which you would expect
17 full-automatic fire to be used?

18 MR. BRADY: Objection. Misstates the
19 testimony. Vague. Incomplete hypothetical.

20 THE WITNESS: Yes. That is one of the
21 scenarios I would expect full auto to save their
22 life.

23 BY MR. WELLS:

24 Q. In a home defense scenario, would the

1 same calculus apply that you would want to use full
2 automatic fire in a home defense scenario?

3 MR. BRADY: Objection. Vague. Incomplete
4 hypothetical. Calls for speculation.

5 BY MR. WELLS:

6 A. If the cost of doing so wasn't so
7 exorbitant, I would expect that skill to save
8 lives.

9 Q. When you say the cost of doing so
10 weren't so exorbitant. What do you mean?

11 A. The NFA made fully automatic rifles
12 \$40,000 each. I can get an AR or a semi-automatic
13 for 500. That is a pretty high price to pay for a
14 middle-class person, even if they chose to get the
15 training and they understand how to use it
16 properly. The price of entry is too high.

17 Q. So just setting aside the cost
18 consideration. So if the price were the same
19 between a semi-automatic AR-15 and a full automatic
20 AR-15, if that were legal and able to be purchased,
21 would you recommend for self-defense scenarios in
22 the home a full automatic AR-15?

23 MR. BRADY: Objection. Vague. Incomplete
24 hypothetical.

1 THE WITNESS: I would recommend a full
2 automatic pistol caliber carbine to reduce weight,
3 length, portability, maneuverability to increase
4 the volume of fire so I win this fight. Yes.

5 BY MR. WELLS:

6 Q. In untrained civilian hands, you would
7 recommend a full automatic pistol carbine for use
8 in self-defense in the home?

9 MR. BRADY: Objection. Misstates testimony.
10 Argumentative. Vague. Incomplete.

11 THE WITNESS: I would require a training
12 program for that.

13 MR. WELLS: It's 12:28. We've been going an
14 hour and 15 minutes since the last break.

15 Would you like to take a lunch
16 break? Is that okay to you?

17 THE WITNESS: It's up to you. I'm fine.

18 MR. WELLS: Okay. Why don't we take a lunch
19 break so I can see if I can try to cut some stuff
20 to make this process a little more streamline. Is
21 that okay?

22 THE WITNESS: Yes, sir.

23 MR. WELLS: Let's go off the record.

24 (Recess).

1 MR. WELLS: Back on the record at 1:15.

2 BY MR. WELLS:

3 Q. Mr. Eby, as a reminder, you are still
4 under oath.

5 Did you have a good lunch?

6 A. No. I just had a lunch.

7 Q. All right. Fair enough. Mine wasn't so
8 good either.

9 All right. I'd like to ask you
10 about the term "peer opponent. Your report uses
11 the term "peer opponent." What does that mean?

12 A. Equal in force across multiple
13 war-fighting functions is what that means.

14 They are equal to us in space
15 capabilities, cyberspace, air, sea, land. But it
16 also means they have a well-trained force. They
17 have leadership courses to teach their leaders
18 instead of restricted course where you tend to get
19 only the leaders that had any education.
20 Everybody else is just ordered to be that.

21 So a well-trained peer force can
22 match our capabilities across all of the war
23 fighting functions and spectrums, and they equal or
24 exceed us in mass.

1 Where we would no longer have
2 this five-to-one ratio we were accustomed to in the
3 last 60 years.

4 Q. I'm going to show you a section from
5 your expert report. It is a document that we
6 previously looked at. That is marked FM30, date
7 stamped October 1st, 2022. It is Exhibit 1 to your
8 initial expert report. What is this document?

9 A. It is FM30, 3-0 is operations. It is
10 that general baseline of how to consider organizing
11 your force and what assets have available.

12 These, again, are designed to
13 give you best practice thoughts to shape your mind.
14 This is not a higher level. This will be more of
15 an operational level of two-star generals need this
16 level of education.

17 Q. Is this is a concept that you as a
18 Marine gunner would have trained on?

19 A. In conversation only. It would not have
20 been my deliberate training as mine were more
21 individual and weapons, but having an understanding
22 of all this is just a byproduct of existence, and
23 the Marine Corps, especially at that final billet,
24 I had at three-star level. This is using like the

1 real words. It means something to them.

2 Q. So who specifically is using this
3 document that we are looking at if it means
4 something to them?

5 A. Probably your colonel and above.

6 Q. It says at the top there, "Peer threats
7 contest the joint force and all that remains
8 through several methods." Do you see that?

9 A. I do.

10 Q. And we said peer threat opponent,
11 earlier, but is peer threat the same thing as peer
12 opponent?

13 A. It is. These are, again, couple
14 relatively recent terms that come out.

15 We didn't really use these words
16 when focused on Afghanistan, Iraq or Vietnam. We
17 didn't consider them equal to our capabilities or
18 cross-war functions. This is coming out more
19 recent probably in the last 10, 15 years.

20 Q. You retired from the military when?

21 A. 2010.

22 Q. And were these terms being used in 2010
23 when you retired from the military?

24 A. They were just beginning. It was our

1 group mainly. They were trying to shape their
2 understanding of how the threat is changing. So
3 these are all -- and this is still what it is
4 doing. This will probably change a couple more
5 times because it is all relatively new.

6 Q. When was the first time you heard the
7 phrase peer threat in the military?

8 A. I don't recall. I actually -- we used
9 general terms like this, "forces of equal
10 capabilities" in the early '80s.

11 We were doing methodical warfare
12 at the time. Talking about the fights against
13 Russia really during the Cold War, where we
14 considered them a peer threat.

15 Then it kind of went away when
16 we started talking low intensity for 20 years, and
17 now it is coming back again. I don't remember if
18 we used the exact word "peer," but "equal force."
19 "Equal capabilities."

20 Q. All right. And you mentioned earlier
21 joint force -- well, we didn't discuss joint force.
22 What is joint force?

23 A. Multi-services and multi-nations
24 comprise of joint force.

1 Q. What are domains?

2 A. Air, sea, land, cyber and space.

3 Q. Do you see this illustration here that
4 has kind of a black square and a blue square and a
5 green and blue square?

6 A. I do. I do.

7 Q. And next to that are labels of space,
8 cyberspace, air, land and maritime. Are those the
9 domains?

10 A. Yes.

11 Q. And I think you said earlier what
12 defines a peer threat. The ability to contest the
13 joint force, so the combined U.S. forces and
14 potentially allies in all domains. Is that right?

15 MR. BRADY: Objection. Misstates the
16 testimony.

17 THE WITNESS: It is, and there is an entire
18 definition to that, meaning that if they can
19 contest us in air, it is for limited amount of
20 time. And limited space, if they can create a
21 moment of superiority, then they have contested or
22 overwhelmed us in that asset.

23 BY MR. WELLS:

24 Q. Has the number of domains increased over

1 time?

2 A. Cyber increases what I remember the
3 most. Recently added. And then space is
4 relatively new. As we consider navigational
5 capabilities and satellites and centers. The space
6 part came first, and now cyber is now we consider
7 weaponized capability and an area that we need to
8 sustain and contest.

9 Q. How does an adversary's ability to
10 contest U.S. forces in cyberspace impact whether a
11 rifleman uses semi-automatic or automatic fire in
12 combat?

13 MR. BRADY: Objection. Incomplete
14 hypothetical.

15 THE WITNESS: Yes. I'm trying to place that
16 myself. I suppose you could hack a command if it
17 came through digital means, or hack the location of
18 targeting that comes out of these digital awareness
19 kits. It is called ATAK. The commanders can send
20 down targeting information to those digital kits
21 through cyber. They could give me the feeling of
22 being overwhelmed, which would trigger my behavior
23 to use automatic fire.

24 So that is a completely made-up

1 sentence, but that would be an example.

2 Q. How does an adversary's ability to
3 contest U.S. forces in space impact whether a
4 rifleman uses semi-automatic or automatic fire in
5 combat?

6 MR. BRADY: Objection. Incomplete
7 hypothetical. Vague.

8 THE WITNESS: I would have to struggle and
9 figure out a way that is used for satellites, or
10 sensors may need to decide which greater fire to
11 use. I can't think of one.

12 BY MR. WELLS:

13 Q. You wrote in your report that the only
14 reason U.S. forces have employed semi-automatic
15 rifle fire during the last 60 years of combat is
16 due to our fighting non-peer enemies over this
17 duration. Low-intensity combat in Iraq,
18 Afghanistan, criminal behavior in Panama or police
19 action in Vietnam. Was that your opinion?

20 A. Yes, sir.

21 Q. What was the basis for this opinion?

22 A. Numerically outnumbering all of our
23 opponents on all of those engagements. Not meeting
24 all of the other assets of cyber and space. And

1 very little maritime since World War II.

2 So we had not fought anybody
3 that equaled us in mass. We had in 60 or 70 years
4 now, benefited from having overwhelming mass at the
5 point of contact against untrained -- as a matter
6 of fact, they didn't even throw on uniforms.

7 We haven't fought anybody in
8 uniforms or formations since the Korea War.

9 Q. So is it your testimony that the last
10 time the United States faced a non-peer enemy in
11 combat was in the Korean War?

12 MR. BRADY: Objection. Misstates testimony.

13 BY MR. WELLS:

14 Q. I'm sorry. Peer enemies?

15 A. Yes. I would -- Korean would be
16 questionable. Certainly World War II. Japan and
17 Germany equalled power capabilities across all
18 domains and with mass. And exceeded us in several
19 locations with boats and tanks, but in World War II
20 for certain. Korea, maybe. That would take some
21 research.

22 Q. Did you do any research on that Korean
23 War to determine whether that was a conflict with a
24 peer enemy?

1 A. I know they equaled us on ground and
2 surpassed us. I did not continue to research to
3 see if they had capable space, cyber or air.

4 Q. And you say "equal," you are referring
5 to numerical equality. Is that right?

6 A. In some occasions, no. We really had
7 the ability to match at the point of attack to
8 equal or outnumber us in capability. I say
9 outnumber, but to exceed our capability. Meaning
10 they would localize air superiority by suppressing
11 our air. Localize Naval superiority by suppressing
12 our naval.

13 In that case in Korea, they did
14 have multi-machine gunners, tanks, to overwhelm our
15 forces. That made them appear in a localized
16 individual parts.

17 Q. Are you able to identify any publication
18 that specifically states that the only reason that
19 U.S. forces have employed semi-automatic rifle fire
20 during the last 60 years of combat is due to our
21 fighting non-peer enemies over this duration?

22 A. No. I've never searched for it, and I
23 certainly won't find it in the next thirty seconds.

24 Q. So there are no U.S. Army publications

1 that make this assertion?

2 A. Not to that deliberate nature, no.

3 Q. And you are not aware of any U.S. Marine
4 publications that make this assertion?

5 A. I am aware that the 2nd Marine Division
6 Gunner is conducting educational peer instruction
7 to revitalize the idea of automatic fires as
8 mentally the lessons people have taken away from
9 these engagements or that we haven't used them,
10 therefore, more likely not need them.

11 These remind me of the potential
12 for Iran, Russia and China, and the value of those
13 powers. So that education is ongoing right now at
14 the 2nd division by Gunner Ron Hathaway.

15 I don't know that he has
16 publications at this point, and he's got -- again,
17 what we are concerned with is 70 years of a
18 low-intensity enemy, leading us to the wrong
19 conclusions.

20 Q. So is it fair to say that this
21 statement -- that the only reason U.S. forces have
22 employed semi-automatic rifles fired during the
23 last 60 years of combat is due to our fighting
24 non-peer enemies over this duration? Is that your

1 personal opinion?

2 A. Yes, sir, it is.

3 Q. Are there other experts that you can
4 point to who share that opinion and have stated so
5 in writing?

6 A. Ron Hathaway has stated so in his
7 educational terms of instruction out of 2nd Marine
8 Division, but I haven't screened everything that
9 the active force has been talking about in the last
10 15 years.

11 Q. And is that writing from Mr. Hathaway
12 something you consider in formulating your opinion
13 in this case?

14 A. Not at all. It was corroboration. My
15 opinion has already been formed based on the
16 experience I had in the corps, and understanding we
17 could be fighting Russia. That is really what
18 drove my behaviors and understanding of our
19 capabilities and preparations in my early years of
20 service. And it was a hard switch for me to switch
21 over to this low-intensity combat.

22 Q. And is that publication that you
23 reference from Mr. Hathaway, is that publication
24 you have access to?

1 A. I could have. I don't have access to it
2 right now. He explained this to me in a
3 conversation that he has been doing these
4 educational points.

5 That would be accessible if you
6 want to look through it.

7 Q. Did you review that publication in any
8 way in conjunction with your work in this case?

9 A. No. I just had a conversation with
10 Gunner Hathaway.

11 Q. When did that conversation happen?

12 A. Maybe the first week of May.

13 Q. What prompted you to have that
14 conversation?

15 A. We were talking, already, about Marine
16 Gunner Association and asked him what had he been
17 doing.

18 He told me that a high
19 preponderance of Marine gunners had been selected
20 from the scout sniper background. Single-rifle,
21 single-shot mentality. And he was having a hard
22 time with the upcoming gunners recognizing the
23 value of fires; therefore, he had created this
24 period of instruction to talk about it again, and

1 start a resurgence of understanding why that is
2 valuable and why not.

3 Q. Why did he want to create a resurgence
4 of that understanding?

5 MR. BRADY: Objection. Calls for speculation.
6 Vague.

7 THE WITNESS: Specifically because the snipers
8 were trying to go away from -- the former snipers
9 who are now Marine gunners were so focused on
10 well-aimed shots -- and his educational discussion
11 was recognizing that we seldom see who we shoot at.
12 Recognizing that we seldom see who we shoot at.
13 And we shoot at areas. We shoot at specifically
14 that bunker, that door, this window. We would do
15 that to pin somebody down.

16 He is concerned that we would
17 lose our volume because we know that what creates
18 suppression is sufficient, accurate rounds.

19 So sufficient is dependent upon
20 the situation. We can't tell you how many rounds
21 are sufficient. We don't know if they are accurate
22 until after the fight when we destroy the enemy
23 because we don't see the enemy. We see the bodies
24 afterwards.

1 BY MR. WELLS:

2 Q. In the conversation with Mr. Hathaway --
3 he is currently in the Marine Corps. Is that
4 correct?

5 A. Yes, sir.

6 Q. And his concern is that the folks being
7 selected as gunners now are -- there is an over
8 representation of snipers?

9 A. No. The over-representation of snipers
10 desiring slower, more accurate shots. And his
11 concern was they misunderstand the enemy behavior
12 of not standing out there waiting to get shot.

13 Q. Who makes the selection of Marine
14 gunners?

15 A. Commissioned officers that are onboard,
16 and they select from applicants that are submitted
17 to them.

18 Q. And those same commissioned officers,
19 they are focused on concepts like combatting peer
20 threats?

21 A. They are.

22 Q. What is low-intensity combat?

23 A. It was what we experienced in
24 Afghanistan and Iraq, a non-peer threat that has no

1 equal capabilities across all domains of war.
2 They could very easily be coined as criminal
3 behavior. They don't often mass forces. They are
4 not often state supported. We don't bring all
5 weapons to bear.

6 Q. -- do you -- you were in combat in
7 Fallujah. Is that right?

8 A. Yes.

9 Q. Was that low-intensity combat?

10 A. It actually was even though it is
11 dangerous to the person entering the room. It is
12 still low intensity combat.

13 They did not have tanks. They
14 did not have air capability. They did not have
15 space capabilities. They might have had cyber.
16 They did not have space capabilities.

17 So all of those categories, it
18 breaks down to low-intensity of no mass formations,
19 no overly trained force. No react forces or
20 reinforcements.

21 Q. Did you ever communicate to your fellow
22 in Marines in Fallujah what they were experiencing
23 was low-intensity combat?

24 A. No. I never needed to.

1 Q. Were the enemy forces that the U.S.
2 military facing in Vietnam well trained?

3 MR. BRADY: Objection. Calls for speculation.

4 THE WITNESS: Not to my knowledge. No.

5 BY MR. WELLS:

6 Q. Were they well armed?

7 MR. BRADY: Objection. Calls for speculation.
8 Vague.

9 THE WITNESS: Not equal to us.

10 BY MR. WELLS:

11 Q. Are you familiar with the Tet offensive?

12 A. I am.

13 Q. What is the Tet offensive?

14 A. 1968, offensive Israeli masked personnel
15 for the last ditch effort to push United forces
16 out. They caught us off guard that we were not
17 prepared for.

18 That was a localized massing of
19 capabilities for a very short duration that was
20 finally beat back.

21 Q. Was that low-intensity combat?

22 A. Not to the person on front line, but,
23 yes, to the service as a whole. To the nation,
24 yes.

1 Q. So the Tet offensive was low-intensity
2 combat for the United States as a whole?

3 MR. BRADY: Objection. Misstates testimony.
4 Vague.

5 BY MR. WELLS:

6 A. History would perceive that to be
7 low-intensity conflict.

8 Q. The fall of Saigon, did the U.S.
9 military in Vietnam outnumber our opponents at the
10 point of contact during the fall of Saigon in 1975?

11 A. Not to my knowledge. We were in a full
12 retrograde at that point. And I think we were
13 diminishing in size and capability by the hour.

14 Q. Was that the fall of Saigon
15 low-intensity combat?

16 A. It was.

17 Q. All right. You state in your expert
18 report that against a peer threat, which all U.S.
19 forces prepare for every day, fully automatic fire
20 is critical. It is rehearsed repeatedly.

21 That is your opinion?

22 A. It is my opinion.

23 Q. And I think you discussed the word --
24 the phrase "peer threat," is something that is a

1 more recent term.

2 When you joined the Marine Corps
3 during the 1980s from -- so 1982 to 1989, did the
4 United States face a peer threat at any point
5 during that time period?

6 MR. BRADY: Objection. Misstates testimony.
7 Argumentative. Vague.

8 THE WITNESS: I don't recall any. Grenada,
9 Panama, no. No peer threat.

10 BY MR. WELLS:

11 Q. Well, not just combat against a peer
12 threat. Was there peer threat with The United
13 States military between 1982 and 1989 was preparing
14 to face?

15 A. Absolutely. Russia, Soviet Union,
16 U.S.S.R.

17 Q. And your training at that time as a
18 Marine was focused on contesting that potential
19 peer threat. Is that right?

20 A. That is correct.

21 Q. And I believe you said that when you
22 first joined the Marines, you had an M16-A1 and
23 that was replaced by an M16-A2; is that correct?

24 A. Yes.

1 Q. And when did that replacement take
2 place?

3 A. I would be guessing a year,
4 approximately within a year or two. So 1983 or
5 '84. Even if they would authorize a replacement,
6 it could take up to two to five years depending how
7 fast they could field them for a full change to
8 happen.

9 So when you read some history
10 studies of M14 authorized in 1957, it may not have
11 been finished fielding until 1963. And it got
12 cancelled in the fielding in the process.

13 So it takes time to issue the
14 weapons, train to those weapons, train the armors,
15 the maintainers, and then the individual shooters,
16 how to use them before we relinquished the old one.

17 Q. You received your M16-A2 as a
18 replacement for the M16-A1 at some point prior to
19 1989, correct?

20 A. Right.

21 Q. And that M16-A2 had burst fire
22 capability, but not full automatic fire capability;
23 is that correct?

24 A. Correct.

1 Q. And you were trained on that M16-A2 to
2 potentially contest Russia at that time, in the
3 U.S.S.R?

4 A. About five years.

5 Q. And your training during the 1980s, did
6 you rehearse repeatedly to prepare for the
7 potential of conflict with the U.S.S.R?

8 MR. BRADY: Objection. Vague.

9 THE WITNESS: We did.

10 BY MR. WELLS:

11 Q. You state elsewhere in your expert
12 report that the U.S. forces do not prepare for
13 future fights against non-peer threats. Therefore,
14 will always be ready to use fully automatic fire
15 against determined peer-level threats in all
16 environments. Is that your opinion?

17 A. Well, we -- it is my opinion. But the
18 fact is we had to redo low-intensity conflict
19 training courses in stride fighting.

20 So we went into Iraq ready to
21 fight a high-intensity fight. There was all this
22 concern we would lose 40 percent of the force, and
23 that is not what we found. We realized we needed
24 to scale down. So we built training programs in

1 Twentynine Palms to help adjust ourselves from high
2 intensity to low intensity. Try and not create
3 more damage than we were doing.

4 So we did switch behaviors. We
5 had trained on one level of warfare, and that
6 didn't manifest, and then we had to train the force
7 while fighting for a different level of warfare.

8 And I helped create those
9 training programs at Twentynine Palms.

10 Q. And what were those training programs,
11 specifically, again?

12 A. We called them lane training. Each lane
13 had a specific capability, but one lane would be
14 how to identify IDs and defeat them. Another lane
15 would be how to render safe foreign weapons in
16 order to get them out of the battlefield.

17 We would have a lane on -- you
18 know, response to contact, both near and far
19 ambushes. That changed and emerged into one
20 response. Just ambushed. So our ambushes, we used
21 to train people to assault towards the objective
22 and we ended up getting too many casualties using
23 lasers.

24 So we eliminated that behavior

1 that was in our manuals, and we just wanted to take
2 cover, and figure out a way out of kill zones with
3 high-intensity fires. Sensitive site exploitation.
4 How to gather evidence was developed in those time
5 frames.

6 Q. So is it fair to say that based on the
7 differences in the type of combat that the U.S.
8 military was facing in Iraq and Afghanistan,
9 changes to tactics and doctrine were instituted?

10 MR. BRADY: Objection. Vague.

11 THE WITNESS: Yes, sir.

12 BY MR. WELLS:

13 Q. And changes in training to how riflemen
14 were trained to use their rifles were all sent. Is
15 that right?

16 A. Limited occasion --

17 MR. BRADY: Objection.

18 THE WITNESS: It was really more about adding
19 thermal sights. Adding intensified sights for
20 sensors. Using the IED jammers. So there is other
21 equipment that was causing a lot of the change.
22 Our tactical behavior at the point of the fight
23 didn't change very much.

24 It was just the equipment that

1 we used changed.

2 BY MR. WELLS:

3 Q. Okay. You mentioned that the Marine
4 Corps transitioned to M27. What is an M27?

5 A. It is a rifle with select fire
6 capability. It looks very much like the M16. It
7 has an adjustable buttstock with free-floating
8 handrail. That free-floating handrail, it
9 increases accuracy.

10 It has a metallurgy that lasts
11 30 thousand rounds instead of the 5,000 rounds of
12 the M4. At the time it had enhanced accuracy, but
13 it has been shot out now. They had them too long.

14 It had fire of semi -- safe,
15 semi and auto. It is a billet role that -- that
16 rifle, initially, would replace the M249 light
17 machine gun. Now it is in the hands of every
18 rifleman in the Marine Corps.

19 Q. What does an automatic rifleman carry in
20 the Marine Corps at this point?

21 A. The M24.

22 Q. So --

23 A. So does the rifleman, the team leader,
24 grenadier.

1 Q. What caliber is an M27?

2 A. 5.56.

3 Q. Is that the same caliber as the M4 and
4 the M16 before it?

5 A. Yes, sir.

6 Q. Is it the same caliber that you can get
7 in a semi-automatic only AR-15 in civilian setting?

8 MR. BRADY: Objection. Incomplete
9 hypothetical. Vague.

10 THE WITNESS: There are two different layers
11 of AR-15 for civilians and it is kind of a time
12 stamp. Let's say 1990, and I don't know the date.
13 Civilian rifle used to be built towards a SAAMI
14 pressure, S-A-M-M-I. I have no idea what that
15 means. 65,000-pounds-per-square-inch capability.

16 NATO was built towards NATO
17 pressures of 75,000 pounds per square inch.
18 Civilians finally caught on that military-grade
19 ammunition was available on the resale market and
20 changed their designs to meet NATO's specs, not
21 SAAMI, but it is possible to run into older SAAMI
22 rifles that may not handle the pressure of NATO
23 bullets that you can buy on the resale market.

24 Q. Is it fair to say that nowadays civilian

1 AR-15's are manufactured frequently to be able to
2 handle the pressure of NATO caliber bullets?

3 MR. BRADY: Objection. Incomplete
4 hypothetical. Calls for speculation.

5 THE WITNESS: Although I haven't pulled every
6 rifle ever being made, I would say, yes, the
7 predominance of them would handle NATO specs.

8 BY MR. WELLS:

9 Q. I know you don't know what the acronym
10 "SAAMI" means, but generally speaking, what is
11 SAAMI?

12 A. I think it is "Small Arms Ammunition" --
13 I don't know the M and the I. I don't know if that
14 is maintenance or manufacturer. But it kind of
15 guided them towards do this at least to make that
16 system safe.

17 Q. What is SAAMI, an organization? Is it a
18 company?

19 A. I don't recall if that is an
20 organization or just a title of a document to
21 control design.

22 Q. Do you know whether the U.S. Marine
23 Corps decided to adopt the M27 as the primary
24 weapon for Marine riflemen?

1 A. The effort started in 1999 and was
2 finally adopted in 2011.

3 Q. So the adoption took place in 2011 after
4 you left the Marine Corps. Is that correct?

5 A. That is correct. It was being tested by
6 1st Battalion, 3rd Marine Battalion from 2009
7 through 2011. I was in the Marine Corps when it
8 was sent out for Afghanistan deployment and end
9 user EVALS. That became a positive report which
10 led to the Commandant General James to order the
11 replacement as an automatic rifle only for the
12 first several years. And then General Robert
13 Neller ordered it against the entire infantry,
14 probably about 2015.

15 Q. I'm directing your attention to Page 9
16 of your expert report, which has been marked as
17 Deposition Exhibit Number 1. And in particular,
18 Footnote 9 -- and I will show you Footnote 9 is
19 referencing the U.S. Marine Corps M27. Do you see
20 that?

21 A. I do.

22 Q. And the M27's ability to mechanically
23 fire between 700 and 900 rounds, and the citation
24 for that is in Footnote 9; is that correct?

1 A. That is correct.

2 Q. And it says in "Footnote 9 see Exhibit 4
3 HKM27 IAR Product Sheet, September 2012, page 3."
4 Do you see that?

5 A. I do.

6 Q. What is that document?

7 A. That document is a theoretical number
8 about what could be achieved if you actually had a
9 magazine that would hold 700 to 900 rounds. It is
10 giving you precisely the timing of the cycle of
11 operation from firing one bullet to completion of
12 that cycle of operation where the bullet is fired.
13 The bolt is unlocked. The empty casing is
14 extracted and then ejected. The hammer is cocked.
15 The bolt goes forward and strips a new round off
16 the magazine and loads it, and the bolt locks
17 again.

18 That cycle of operation -- the
19 scientific timing of that cycle of operation is the
20 way they measure it. If you are able to load
21 enough magazines or actually load those magazines
22 extremely quickly, you could get between 700 and
23 900 rounds a minute.

24 Q. So my question is really just what is

1 the document, this HKM27 AR spreadsheet?

2 A. The HK produced that marketing statement
3 to the force when these were first being filled,
4 and this is what I happened to have in my folder to
5 pull from. Today they will have a manual on this.
6 I don't have that. So when I was referring to
7 this, this was the original release of the product
8 sheet that came out when the fielding was underway.

9 Q. And it is a specific citation to page 3.
10 So is this a multipage document?

11 A. Yes.

12 Q. So I'm going to direct your attention to
13 what has been marked as Exhibit 4 in your exhibit
14 -- in your expert report.

15 Is this the document that was
16 cited in Footnote 9 that we were just discussing?

17 A. Yes.

18 Q. And it is a one-page document. Is that
19 right?

20 A. I thought it was more. It must be one
21 page if there is no follow-up.

22 Q. So you see Exhibit 4, and then there is
23 just one page after?

24 A. I think in the original it had some

1 photos up front, and then it got into these
2 details. This looks like a partial of the handout.

3 Q. Who decided to just provide this single
4 page here?

5 A. Probably me. I don't know what I was
6 referencing and why.

7 Q. Let me show you something. I'd like to
8 mark this as Deposition Exhibit 7. Bates-labeled
9 OAG008507 through OAG008509?

10 (Deposition Exhibit 7 was marked
11 for identification.)

12 BY MR. EBY:

13 Q. Mr. Eby, it is labeled M27 infantry
14 automatic rifle 5.56 millimeter by 45, and it is a
15 three-page document. Do you recognize this
16 document?

17 A. That looks more like the flier I was
18 referring to when we were going to that one-page
19 reference.

20 Q. And so this is a three-page document,
21 correct?

22 A. Right.

23 Q. And just looking at page 1, shows a
24 soldier or Marine firing a weapon that is the cover

1 page. Page 2, you would agree has more information
2 about the M27 infantry automatic rifle; is that
3 right?

4 A. It does. It shows more than what we
5 purchased.

6 Q. You said "what we purchased." Who is
7 "we"?

8 A. The Marine Corps. When you see two
9 different barrels kind of the middle left. We
10 didn't buy all those. They have options. We
11 picked one. This is a flier. They offered us
12 options to choose from.

13 Q. Yes, but -- so this flier offered the
14 Marine Corps options to choose from?

15 A. Not this flier. This indicates what HK
16 had available. From within this, we made choices
17 on some of these things -- barrel lengths
18 specifically, because we picked an 18-inch barrel,
19 which I think has been moved to a 16-inch barrel
20 now.

21 So there were choices available
22 whether or not we wanted bi-pods and the front
23 handguard or that sling or some other sling.

24 So there was still choices to be

1 made here on the procurement decisions by the
2 Marine Corps.

3 Q. Is it fair to say that the large picture
4 of the M27, although it has some differences from
5 what was ultimately acquired, that is the M27 that
6 you were referring to that the Marine Corps
7 ultimately adopted?

8 A. That is correct.

9 Q. And you mentioned the images on the
10 bottom left?

11 A. Bottom -- to the near left -- I think
12 those are all different barrels. That is what they
13 appear to be. There is a short barrel, medium
14 barrel. 14-inch barrel. Another 14-inch barrel.

15 Q. Okay. So at the bottom left we are
16 looking at three images of three different rifles.
17 Is that fair to say?

18 A. Yes. You see three different barrel
19 lengths. We did not buy the top two.

20 Q. And we are at OAG 008508. The bottom
21 left, do you see where it says, "The MR556-A1 is a
22 semi-automatic variant of the HK416 well-suited as
23 a law enforcement patrol carbine. The highly
24 accurate 5.56-millimeter MR557-A1 is commercially

1 available in most U.S. states." Do you see that?

2 A. I do.

3 Q. So is it fair to say that this
4 particular rifle we are looking at the bottom left.
5 The HKMR556-A1 is a civilian version of the M27.

6 MR. BRADY: Objection. Vague. Speculation.

7 THE WITNESS: It is a replica because it is
8 not complete with auto. So it would not meet those
9 high-end capabilities that are critical for
10 survival.

11 BY MR. WELLS:

12 Q. So the difference between the rifle in
13 the bottom left corner, the HKMR556-A1 compared to
14 the M27 is the absence of an automatic setting?

15 MR. BRADY: Objection. Vague. Incomplete
16 hypothetical.

17 BY MR. WELLS:

18 Q. What was your answer?

19 A. Yes.

20 Q. Did the reference to this semi-automatic
21 rifle have anything to do with why page 2 was
22 excluded from this exhibit attached to your report?

23 A. You know, I think my report was only
24 referring to rate of fire. I needed that other

1 page for rate of fire. I didn't need all this to
2 refer to.

3 Q. And I think you mentioned -- is the Army
4 undergoing transition of infantry?

5 A. I was told by Gunner Hathaway that the
6 Army authorizes the product improvement program to
7 remove the three-round limiter and go back to a
8 full auto on all future M4s. Taking the existing
9 M4s and making them into M41s. That is my only
10 source. I didn't follow up with it.

11 Q. So do you have any familiarity with the
12 XM7 rifle?

13 A. I've never touched it. I've talked to
14 Marines and one general officer who has. They see
15 it as impressively accurate, just overly heavy.
16 They are going to be concerned with portability,
17 maneuverability, and they are running some end-user
18 trials right now to see if that is going to be a
19 hindrance in confined space, jungles where length
20 and weight matter.

21 Q. Are you familiar with the SIG SAUER MCX
22 Spear?

23 A. I've seen it. I'm not familiar with it.

24 Q. Let me direct your attention -- well,

1 let me ask you this. Did you assert in your expert
2 report that the Marine Corps's transition to the
3 M27, which has full automatic capability, is it a
4 recognition of the utility of the full automatic
5 fire capability? Do you recall that?

6 A. Um-hum. I agree.

7 Q. And I think at various points in your
8 report, you discuss different studies that have
9 been done about the effectiveness of full automatic
10 fire? Do you recall that?

11 MR. BRADY: Objection. Vague.

12 THE WITNESS: That is correct.

13 BY MR. WELLS:

14 Q. All right. I'm showing you what has
15 previously been marked as Deposition 2, which is a
16 portion of your rebuttal report. And I'm directing
17 your attention to the last few sentences before the
18 italic quotes where it says specifically, "Those
19 studies have indicated that physical -- the
20 physical and psychological importance of automatic
21 fires as they relate to the suppression of enemy
22 positions during high-intensity combat." The
23 following are quotes from several examples of these
24 historical studies. Do you see that?

1 A. I do.

2 Q. And how did you select the quotes that
3 follow after that?

4 A. Searching through there to find out the
5 outcomes of those studies and the psychological
6 studies and accuracy studies.

7 So I was just looking for
8 corroborating statements on the importance of
9 automatic fires, both in accuracy on the objective
10 area and psychological effects to the recipient of
11 those fires.

12 Q. And would you say these are the best
13 studies you've identified?

14 MR. BRADY: Objection. Vague.

15 THE WITNESS: These are really the only
16 studies that I know of. Studies in the military
17 are multi-million dollars. The only other
18 experiment that I know of was a Marine Corps
19 war-fighting laboratory study in 2009 that measured
20 the M27 against the M249 for -- I'll say the word
21 "effectiveness," and they had to explain what that
22 meant. What the rate of fire is. Number of hits.
23 Number of near misses. Time for engagements. Time
24 between the weapon running dry and getting back

1 into the fight. All these were metrics, day and
2 night. And the M27 surpassed M16-A4 and the M249.

3 I've seen no studies
4 because they cost multi-millions of dollars to
5 build to refute these, and they are still being
6 quoted, a Dr. Axe. He has a Ph.D. -- that was
7 working for the deputy commandant for capability
8 development and was quoting these studies in 2009
9 to ensure near misses were counted in that study.

10 So they are still valid and
11 being used across the services.

12 BY MR. WELLS:

13 Q. And to be clear, we are talking about
14 the studies in Footnotes 11 through 17 of your
15 rebuttal expert report. And I think as you
16 indicated, the most recent of those studies is from
17 1966. Is that right?

18 A. Correct. I think I listed in the Marine
19 Corps labs external report, or I intended to or
20 maybe it didn't make the final cut, but it used all
21 these documents anyway to refer the value of
22 psychological effects and near misses.

23 Q. So the studies I'm seeing here are from
24 1966, 1952, 1957. Those are the studies that you

1 cited actually in the report. Is that right?

2 A. That is correct, and nothing to date to
3 refute this.

4 Q. Obviously any report written before
5 1966, would not be able to account for conflicts
6 subsequent to 1966. Is that fair to say?

7 MR. BRADY: Objection. Argumentative.
8 Incomplete hypothetical. Calls for speculation.

9 MR. WELLS: Let's just keep it to form, Sean.
10 You can answer if you understand.

11 THE WITNESS: I understand. I'm processing
12 the question. These were limited to studies prior
13 to 1966, which, by the way, was the last time we
14 fought a high-intensity conflict.

15 BY MR. WELLS:

16 Q. In 1966?

17 A. Prior to 1966.

18 Q. Understood. All right.

19 I'm showing you, again, what I
20 can represent to you has been marked as Deposition
21 Exhibit 1. This is a portion of your initial
22 expert report, in particular, page 6.

23 Directing your attention to the
24 paragraph that begins "Against a peer threat."

1 Going to the last sentence -- or the last two
2 sentences, you wrote, "The U.S. Army will issue the
3 XM7 rifle with select fire settings of safe, semi-
4 and fully semi-automatic to those frontline units
5 that will not receive the M4 PIP product
6 improvement program. These changes are a
7 recognition of the value of fully and automatic
8 fire in preparation for future peer-level
9 conflicts." Do you see that?

10 A. I do.

11 Q. What is the basis for your statement
12 about what the Army is doing with respect to the
13 XM7 rifle?

14 A. General Nathan Lord, the general retired
15 this year and made a similar statement to me about
16 the recognition that our efforts at World War II
17 are much more similar to future potential fight
18 against China, Russia, Iran or North Korea.
19 Therefore, modifications to systems were being made
20 in lieu of that future enemy. Pacing Threat is
21 what joint chiefs call it. Most likely "threat" is
22 what Congress calls it.

23 Q. All right. And the next sentence in
24 your report says, "This has been confirmed by

1 testing." What does "this" refer to?

2 A. Good question. Let me look at this. I
3 think "this" is the automatic fire, because it
4 leads into this research office reports.

5 Q. And the testing that is referenced is
6 identified in Footnote 8. Would you agree with
7 that?

8 A. I would agree. One of several.

9 Q. Well, the footnote identifies the test
10 from 1952; is that right?

11 A. That is correct.

12 Q. Are there any other tests that you are
13 referring to when you said this has been confirmed
14 by testing?

15 A. Just this one there. It is corroborated
16 by the special-purpose individual weapon test.
17 That is SPIW. The Project SALVO reports on the
18 value of automatic fire.

19 Q. Where are those said?

20 A. They are after this. You alluded to
21 them in Section 11 through 17 earlier.

22 Q. What was the Project SALVO report?

23 A. I don't recall. 1960 or '63 maybe.

24 Q. Were any of those reports written after

1 1967?

2 A. No. Maybe by a year, if at all.

3 Q. All right. Directing your attention to
4 this paragraph here that is quoting from the 1952
5 operational requirements foreign and infantry
6 hand-weapon study, the italicized writing says,
7 "Recent ORO investigations in Korea have shed some
8 light on this subject by indicating,
9 quantitatively, the comparative importance of aimed
10 and unaimed fire as related to offensive and
11 defensive operations. Generally, aimed fire plays
12 a more important part in defense than unaimed or
13 volume fire, whereas, offensive, the reverse is
14 true."

15 Do you agree with that
16 statement?

17 A. I do agree with it.

18 Q. How is volume fire measured?

19 A. The behavior of the enemy determines if
20 your volume is sufficient.

21 If the enemy is still up
22 shooting, you are not shooting enough. Or you
23 don't have enough people shooting. So it is always
24 about the enemy's behavior that determines whether

1 you have a sufficient, accurate amount of
2 suppression.

3 Q. Do you agree that unaimed fire is
4 important in offensive operations?

5 A. Absolutely.

6 MR. BRADY: Objection. Vague.

7 BY MR. WELLS:

8 Q. Did you ever train Marines to use
9 unaimed fire?

10 A. I think -- let's clarify. Unaimed at a
11 human or unaimed at a position? So it is still
12 aimed fire. It is not just "stick my rifle over my
13 head and pull the trigger." It is still aimed at a
14 targeted area. There just isn't a visible movement
15 there to shoot at.

16 So, in a sense, that is unaimed,
17 and it is firing at an area specific to pin down
18 somebody to prevent them from shooting.

19 Q. And did you ever train Marines to use
20 unaimed fire at all?

21 A. Not unaimed. If I were to define
22 unaimed, it would be -- I'm not even looking at
23 sighting systems. I'm just pointing at a direction
24 and pulling the trigger. That is just a waste of

1 ammo -- ammunition.

2 Q. Do you recall when we previously looked
3 or discussed the statement that the rifleman
4 provides accurate lethal direct fire for point
5 targets. Do you recall that discussion?

6 A. I remember that, yes.

7 Q. How does this quote, which discusses
8 unaimed fire square with the rifleman providing
9 accurate lethal direct fire from point targets?

10 MR. BRADY: Objection. Vague. Compound.

11 THE WITNESS: In the report it will talk about
12 not being able to see the opponents. Therefore,
13 you are not aiming at an individual. You are
14 aiming at a specific stated position. Whether that
15 position is a window, door, bumper, wall. So the
16 definition of aimed to fire, would be I see my
17 target and I aim at it. That just doesn't happen
18 in high-intensity conflict because nobody wants to
19 get shot.

20 BY MR. WALLS:

21 Q. You write in your report, Page 6, that
22 none of the weapons banned by Illinois are remotely
23 sufficient to handle the military's requirements
24 for weapons it uses against peer-level countries.

1 Do you recall offering that opinion?

2 A. I do. Particularly explicitly applied
3 to semi-autos only.

4 Q. What do you mean?

5 A. I mean none of them had full auto
6 capability that would be used in a military force
7 around the world against peer threats; therefore,
8 they are not remotely qualified to be a military
9 service weapon.

10 Q. What sources were you relying upon that
11 were, quote, "banned by Illinois"?

12 A. State the question again, please.

13 Q. What sources did you look to to
14 determine what weapons are, quote, "banned by
15 Illinois"?

16 A. The law signed by Governor Pritzker,
17 with the list of weapons on it, I saw no weapons
18 employed by a military service around the world,
19 minus the M38 enhanced battle rifle, the 50-caliber
20 special operations rifles. There were a couple
21 sniper systems in there that would be employed.

22 Q. Okay. And you are specifically
23 referring to, like, for instance, Barrett M107-A1?

24 MR. BRADY: Objection. Misstates the

1 testimony.

2 BY MR. WELLS:

3 Q. Is that right?

4 A. Yes. That is exactly it.

5 Q. The Barrett M107, would that be
6 sufficient for military needs against a peer
7 threat?

8 MR. BRADY: Objection. Vague.

9 THE WITNESS: Potentially. Yes, it would be.
10 I think we moved beyond that to semi-automatic
11 box-fed rifles now instead of bolt actions. We
12 have no capacity, but if that was what I was left
13 with, then, yes. It would work.

14 BY MR. WELLS:

15 Q. You state at one point here in your
16 report, "Beyond certain semi-automatic only
17 50-caliber special application rifles and the M14,
18 which has been converted to an M39 enhanced
19 marksman rifle EMR, we are unaware of a single
20 military in the world, let alone any branch at the
21 U.S. Military that uses any semi-automatic rifles
22 for general combat purposes. Is that your opinion?"

23 A. It is, and that was brought up by Mike
24 Musselman. That was one of those areas he weighed

1 in on to help compare the list of banned weapons in
2 Illinois against what we know of around the world
3 militaries.

4 I'm not a 143-country expert on
5 it. Weapons being employed, but on the modern
6 battlefield, our peers in Europe and many Asian
7 countries, they have all gone and maintain the
8 ability of full auto.

9 Q. What sources did you consult in forming
10 that opinion?

11 A. Google.

12 Q. Google?

13 A. Yes, sir.

14 Q. Any other sources?

15 A. I didn't. That is an area that I ask
16 Mike Musselman to weigh in on. If he recognizes --
17 all of these are just years of experience and
18 spending time in bilateral training to see what
19 they are using. The fastest source to scan across
20 140 countries is Google.

21 Q. Do you know what sources Mr. Musselman
22 consulted in doing that research?

23 A. I do not.

24 Q. What documents from foreign militaries

1 did you personally review in forming this opinion?

2 A. None.

3 Q. Do you know what Mr. Musselman reviewed?

4 A. I do not.

5 Q. Do you speak any languages other than
6 English?

7 A. I barely speak English.

8 Q. So did you review any publications from
9 militaries around the world that were in other
10 languages?

11 MR. BRADY: Objection. Asked and answered.

12 THE WITNESS: The only publication I reviewed
13 was the Google search or semi-automatic weapons
14 being employed by, and the answer was no.

15 BY MR. WELLS:

16 Q. Do you know whether the Costa Rican
17 Military uses semi-automatic-only rifles?

18 MR. BRADY: Objection. Asked and answered.

19 THE WITNESS: For snipers, yes.

20 BY MR. WELLS:

21 Q. Do you know if Costa Rica has military?

22 A. I don't.

23 Q. Okay. I'd like to ask you a little bit
24 more about the M855 rounds. The M855 round was

1 replaced by the M855-A1. You discussed that in
2 your report. Is that right?

3 A. M855-A1 replaced the M855, yes. In both
4 services now. Initially it was only in the Army.
5 Now it is the Army and Marine Corps.

6 Q. Do you have an understanding as to why
7 that transition took place?

8 A. I do. Those anecdotal complaints, even
9 if they weren't valid, were emotionally, important
10 enough to look into it.

11 So Army research and development
12 command conducted evaluations on the bullets -- and
13 I think they were going to make the replacement.
14 Even they were going to change the color. They
15 were going to do something to make you feel better
16 about what you were taking into war.

17 But the fact is the reports that
18 came out on the bullet did show it to be inferior
19 to M855-A1 through barriers and into the human
20 body. It moved the -- remember I'd spoke earlier
21 about M16-A4, M855, failed to behave correctly
22 after 175 meters, when it got under 2500 feet per
23 second.

24 The M855-A1 does not have that

1 limitation. It works up to about 435 meters, where
2 the ability to find the target -- the accuracy of
3 the rifle, the accuracy of the ammunition, kind of
4 reached the limit on ability to hit the target.

5 Q. All right. So let me show you your
6 expert report again in here. So I'm showing you
7 what has been previously marked as Deposition
8 Exhibit 1, which is your initial expert report, and
9 the paragraph you now see on the screen. Is this
10 what you were describing just now?

11 A. No. This is what the Marine Corps
12 effort was doing in those early 2000s that we were
13 having the same complaints, but we couldn't find
14 evidence to support it. That the M855 was
15 insufficient.

16 The one I was just explaining
17 was an Army effort following this. They had the
18 same problems. People complained that I shot the
19 guy, he didn't fall down. I think my bullet is
20 bad.

21 So that forced the Army's hand
22 to search for a different bullet. The Marine Corps
23 did start working towards a different bullet that
24 science -- a special operations science and

1 technology bullet, but that was overruled by
2 Congress. We didn't want two services with two
3 different bullets.

4 Q. Okay. And so you state here in response
5 to constant complaints by infantrymen from 2003 to
6 2005, that the 556 millimeter ammunition, that the
7 M16 uses was inadequate in terms of penetration
8 lethality, in terms of performance. The U.S. Army
9 commenced studies to consider replacing the M855
10 green tip 62 grain projectile. The findings of
11 those studies conducted between 2005 to 2010 were
12 that the M855 bullet underperformed in
13 incapacitating enemy combatants and should be
14 replaced. And it was, in fact, replaced as the
15 U.S. Army explained in a report.

16 Is that the transition you were
17 describing earlier between the M855 and the
18 MS55-A1?

19 MR. BRADY: Objection. Vague. Compound.

20 THE WITNESS: But yes. That is a good
21 synopsis of what happened. There were a couple
22 interim bullets that came in, bought off the shelf,
23 sent over to get people to feel comfortable about
24 their ammunition.

1 BY MR. WELLS:

2 Q. And the complaints were apparently at
3 least in 2003 and 2005 that you wrote here, that
4 the M16, M855, 5.56-millimeter round was inadequate
5 in terms of penetration, lethality and terminal
6 performance. Did you write that?

7 A. I'm searching for it. Oh, I see it. I
8 clearly wrote it, yes. Those were, again,
9 accusations ongoing at the time, lack of confidence
10 in the bullet, and those are the accusations as to
11 the problem.

12 Q. What sources did you rely on in making
13 this assertion?

14 A. The Marine Corps war-fighting lab was
15 doing in conjunction with Army, research, and
16 development command was giving briefs in this 2005
17 time frame, explaining their initial results on
18 bullet testing and penetration -- separation.

19 When I say "separation," the
20 bullet comes apart and creates better terminal
21 performance inside the body. That is what that
22 means.

23 So we were being told that was
24 from 2005 to 2010 I was entering these meetings

1 between Marine Corps systems command and Army
2 development command as they discussed the problem,
3 identified a path forward, and there were two
4 different plans.

5 The Marine Corps had one bullet.
6 The Army had a different bullet, M855-A1, and they
7 sorted themselves out and made it M855-A1.

8 Q. What does penetration mean in the
9 sentence?

10 A. It usually means depth. And it can be
11 depth through equipment.

12 Most conversations are around
13 lethality -- is we need at least 12 inches of
14 penetration -- and this is not my lingo. These are
15 things we are told over and over again that are
16 around a general statement.

17 I need 12 inches of penetration,
18 meaning if it is coming through my shoulder and it
19 is coming through the equipment I'm wearing, it
20 needs to get into the center of the body.

21 Well, if it could penetrate 12
22 inches of ballistic gelatin, it is theoretical that
23 it gets through all those obstacles in the body.

24 Lethality is a wild animal

1 nobody can clearly define, and it has
2 multi-definitions. And then terminal performance
3 is the method of lethality, the body stops
4 functioning.

5 Q. Did you say the discussion of lethality
6 in particular was not your lane? Is that right?

7 A. It is not definable. It is clearly in
8 my lane because I wanted to kill everybody, but the
9 measures that was given for how you measure
10 lethality weren't holding up to the test of time.
11 So we kept changing how we measured it.

12 I still wanted lethality. And I
13 just did it through volume. I will give you a
14 bunch of this until you stop moving.

15 Q. So you've used the word "lethality" in
16 this report, right?

17 A. I have. And I hate that I keep doing
18 that because I can't even define the dang thing.

19 Q. Do you consider these three factors;
20 penetration, lethality and terminal performance
21 relevant to how effective a particular weapon is
22 for combat?

23 A. In part --

24 MR. BRADY: Objection. Compound.

1 BY MR. WELLS:

2 Q. Is that a "yes"?

3 A. It is in part, yes. I would include
4 portability. The ability to maneuver in and out of
5 firing position. Overall weight, balance, ease at
6 aim, ease at managing recoil.

7 Q. What other factors?

8 A. It is a portable weapon. It is
9 adjustable to fit me. It is easier to get into and
10 out-of-fighting positions where I'm trying to take
11 cover. It is lightweight and well-balanced.

12 Q. Any other factors?

13 A. Ease of managing the recoil.

14 Q. Any others?

15 A. Probably, but not off the top of my
16 head. Like, ease of reload. That is another
17 important factor we could get wrong.

18 Q. I direct your attention to what is
19 Exhibit 3 in your rebuttal expert report, which I
20 can show you.

21 Here is Exhibit 3, at PDF 97,
22 cover page starts at page, PDF 97. Scrolling down
23 to PDF 99. Do you recognize this document?

24 A. I do. This is one of those briefs the

1 Army was giving with the Marine Corps war-fighting
2 lab in conjunction, and I was invited into the
3 list.

4 Each of these conversations,
5 they are developing their information and they are
6 deciding how they are going to proceed replacing
7 the M855.

8 Q. And just looking at what is internally
9 paginated, Slide 3, labeled "Army requirements for
10 general purpose ammunition." On the right, do you
11 see the column that says "Performance measures"?

12 A. I do.

13 Q. Do you see the one category "Performance
14 measures" that says "Protected target/urban
15 structures"?

16 A. (No response.)

17 Q. Do you see that?

18 A. I'm searching for it. Oh, yes. I do.

19 Q. And under the "Protected targets urban
20 structures, next to the right of that, it says,
21 "Body armor fabrics, body armor array of
22 battlefield type barriers, trees, walls to items on
23 the uniform walls and doors."

24 What is that describing there?

1 A. The environment we are fighting in,
2 typically. So urban areas, forest areas. Things
3 that you might naturally take cover behind,
4 vehicles, and we wanted -- the Army was saying they
5 wanted to be able to penetrate those barriers and
6 still have a bullet that is performing when it hits
7 the target behind it.

8 Q. When you say "performing, after it
9 penetrates," what does that mean?

10 A. It means it doesn't deviate in
11 direction. It don't disintegrate itself getting
12 through the barrier, and it still has the ability
13 to get inside the lethal area of the human body,
14 disrupt enough organs to decompress or kill the
15 target area.

16 Q. And in that same row of urban structures
17 on the far right, in the column that is labeled
18 "Performance measures," do you see it says, "24
19 layers of Kevlar. 3/8 inch of mild steel and
20 concrete masonry unit."

21 Do you have an understanding as
22 to what that is referring to?

23 A. It is also the Kevlar that the
24 protection is worn for both us and China, and

1 Soviet Union -- a few other countries are wearing
2 them. Some Iranians are wearing them. The 3/8th
3 mild steel, I have no idea where they got that
4 determination, but I'm thinking car. Some car
5 structure, concrete masonry unit in typical
6 structures throughout Middle East that people would
7 take cover behind. We want to be able to penetrate
8 those.

9 Q. And when it says "Performance measures,"
10 what this slide is discussing is the ability of a
11 general purpose ammunition round fired from an M16
12 or M4 to penetrate 24 layers of Kevlar, 3/8th inch
13 of steel or concrete masonry unit and still be
14 lethal. Is that right?

15 MR. BRADY: Objection. Compound.

16 THE WITNESS: That is correct. That is
17 probably a masonry unit that is not full of cement,
18 but they had to pick some parameter that they were
19 going to target, and they picked these.

20 I'm sure there was research that
21 led them to why these and not a 15-inch tree, but
22 these are probably the harder objectives to defeat,
23 so they got listed.

24 BY MR. WELLS:

1 Q. "24 layers of Kevlar." What does that
2 refer to?

3 A. Probably my flight jacket -- my flight
4 jacket that I wore that holds my body armor is more
5 than likely what they had to test against. And so
6 they stuck it in there to defeat our armor. And
7 that is not the first time we've done that. M855
8 bullet that we picked up in 1983, it was tested
9 against the steel helmet that we wore in World War
10 II and Vietnam. It had an inner liner of the
11 materials and outside steel.

12 The only criteria for that
13 bullet measured against were the 600 yards, the
14 bullet, the M855, could penetrate through both
15 walls of fiberglass and steel of the steel part of
16 the helmet. That is what they had available, so
17 that is what they used.

18 Q. So why would 24 be able to penetrate 24
19 layers of Kevlar be relevant as a performance
20 measure in deciding what general purpose ammunition
21 to be used?

22 A. I have no idea.

23 Q. Do you think it might have to do with
24 penetrating body Army worn by enemy soldiers?

1 A. Could be. I was not present for that
2 decision-making.

3 Q. You cited this document as a basis for
4 your expert report; is that right?

5 A. That is true. But there are decisions
6 being made in this room for trade space. If I
7 wanted 34 layers of Kevlar, I probably needed a
8 bigger bullet, faster bullet.

9 They had to pick a standard, and
10 they did. I can quote them, but I wasn't present
11 in the room for the conversation for why they chose
12 what they did.

13 Q. Directing your attention to the
14 internally marked Slide 4 in the same document,
15 titled "Comparison of changes." What do you
16 understand this to be -- what is being described on
17 this slide as you understand it?

18 MR. BRADY: Objection. Vague.

19 THE WITNESS: Well, Territory 6 and
20 nomenclature of two different projectiles; the M855
21 and the M855-A1, and it looks to me that they cut
22 and pasted 3/8th inch model steel from M855 as a
23 performance metric for the M855-A1. So they just
24 used what was previously in existence, and that is

1 probably the steel part of the helmet.

2 There are a lot of factors that
3 go into making that decision, though, when they are
4 narrowing down the scope of what they are building.

5 Q. So the M855 has one column in the
6 middle, and there are different attributes listed;
7 cartridge length, bullet weight, tip ID, and it
8 goes down through soft target. Do you see that?

9 A. I do.

10 Q. Do you agree with the information listed
11 in the column under M855? Do you think that is
12 accurate?

13 MR. BRADY: Objection. Vague. Compound.

14 THE WITNESS: I do think that is accurate as
15 far as I can tell.

16 BY MR. WELLS:

17 Q. And this is the same M855 round that you
18 can purchase, right?

19 A. Correct.

20 Q. And the M855 round that would work in a
21 civilian semi-automatic AR-15, would it be able to
22 penetrate 3/8th inch of mild steel at 160 meters?

23 MR. BRADY: Objection. Calls for speculation.

24 THE WITNESS: I don't know. I have not tested

1 against 3/8ths inch steel at 160 meters.

2 So me when I see these, like,
3 rate of fire, like hot barrel procedures, I want to
4 go test it myself. And even then there are
5 variables. Am I at sea level? Is it 72 degrees?
6 Is there no humidity? Because that will affect
7 velocity.

8 You add temperature, the bullet
9 gets faster. You add humidity, the bullet gets
10 slower. You add altitude, the bullet gets faster.
11 I don't know the details that went into that, but I
12 have become very cynical about reading marketing
13 statements like this. And hesitate to believe that
14 it will do that.

15 BY MR. WELLS:

16 Q. You said marketing statement. This is
17 an Army publication that you attached to your
18 rebuttal statement. How is this a marketing
19 statement?

20 A. Well, it is advertising to the service
21 and to the user a -- maybe it is propaganda. A
22 non-measured, non-reported, no-evidence statement
23 which can either be identified as propaganda,
24 hearsay. I have seen no evidence of -- I've seen

1 the evidence of the velocity, but I have not shot
2 at 3/8ths inch at 160 meters, and they don't give
3 me the conditions, meaning temperature, altitude,
4 sea level, humidity. I don't know what conditions
5 those were in.

6 Q. So, are you saying the information in
7 this document is unreliable?

8 MR. BRADY: Objection. Argumentative.

9 THE WITNESS: I'm saying it is probably
10 reliable once at 160 meters in the conditions that
11 they were in -- if they actually tested it. And
12 historically, that has not been the case. And it
13 is expensive to do those tests, and they are not
14 always tested.

15 I'll give you an example. The
16 machine gun hot barrel procedures, 200 rounds per
17 minute. I have a hot barrel. I need to change
18 barrel.

19 Gunner Mike Brooks called it
20 "general dynamics." He had built the machine gun
21 we were using, and we asked him if we could have
22 the test for that, and the Marine Corps -- and the
23 general dynamics told Gunner Brooks that general
24 dynamics did not perform that test. The Marine

1 Corps made that number up.

2 We could never find evidence.
3 We called capability development and integration
4 asking for the test report, and it had never been
5 tested, ever. And it only simply got tied to --
6 our ammunition comes in a 200-round can. So
7 somebody writing a publication somewhere, wrote
8 their opinion that the barrel should be changed
9 every 200 rounds.

10 Q. Why did you cite this document?

11 A. I don't recall. I would have to go back
12 and see what I was trying to refer to.

13 Q. Did you rely upon information that you
14 are cynical about and skeptical of in forming your
15 opinions?

16 MR. BRADY: Objection. Argumentative. Vague.

17 THE WITNESS: Absolutely. I am telling you
18 this is a legitimate document that is made in
19 publications, and I remain cynical on who made the
20 test and where the valid information comes from.
21 So maybe it will penetrate 3/8 inches, but I don't
22 know. I don't intend to shoot. But I'm telling
23 you I haven't seen the test result, so I'm not
24 confident it is legitimate.

1 Q. The information that is listed in
2 velocity under the M885 3113 feet per second. Do
3 you think that is a valid number?

4 A. I do. I've gotten similar speeds to
5 that in my own evaluations using a chronograph.
6 Those speeds change, though, on barreling, and they
7 changed on temperature and humidity. I know what
8 my altitude will be, but I don't know what the
9 temperature and humidity will do to speeds. It
10 will vary. I think in a box at 20 rounds, those --
11 there is a standard deviation of 20-round shots.
12 That could be up to 50 feet per second across the
13 20-round fire.

14 Q. You mentioned that you had personally
15 replicated this velocity. Do you rely on numbers
16 that you can't personally replicate?

17 A. I question them, and I don't swear that
18 they are true because I was not present for them.

19 Q. How did you personally replicate the
20 3113 feet-per-second velocity?

21 A. Using a 16-inch barrel through a
22 chronograph, I've got similar numbers within 50
23 feet per second of that across 20 bullets.

24 As I figure out the velocity

1 equals trajectory, and that trajectory is important
2 as the range increases.

3 So in my own Kestral, those
4 M855-A1 fire rounds came into that area. We
5 usually round it out down to 3100 feet per second.
6 So 3075 to 3125 and, it will be in that ballpark.

7 Q. Where did you -- how did you develop
8 that methodology?

9 A. Of testing? That is a standard behavior
10 for developing trajectory profiles in a ballistics
11 applications in using a Kestral wind sensor and
12 using a -- what I use was a Labrador ballistic
13 chronograph to get the speed.

14 That behavior is typical for
15 snipers to understand their velocity average to
16 build out a target core.

17 Q. When did you perform this testing?

18 A. I've been performing this testing for
19 about three years. So the most recent one,
20 probably August of last year. Because I had the
21 M855-A1 and the M855 at my house as Trijicon was
22 concerned that the trajectory profiles were
23 different. So before we built and offered a new
24 reticle, Trijicon asked me to test the bullets. I

1 did so, and it turns out there is a difference
2 between the trajectories with M855-A1 as it gets
3 further away from the target.

4 So it gets more stable in
5 distance, therefore, it has a custom ballistic
6 curve, which would need a custom bullet --
7 ballistic drop compensated reticle design.

8 Q. When you personally conducted this
9 testing, did anyone else help you?

10 A. Gunner Chris Jones joined me. He is a
11 retired Marine gunner with time on his hands, and
12 he was interested -- because the Army posted M855
13 and the M855-A1 ballistically matched. And they
14 are correct to a certain point.

15 At 300 meters, they are within
16 inches of each other being ballistically matched.
17 Beyond that, the M855-A1 stays a little farther.
18 Doesn't fall as fast. You start getting a
19 deviation of trajectory hole and ballistic drop.

20 So we tested through all of that
21 using 300 rounds of ammunition that we bought
22 online that was available on the market and shot it
23 through our civilian guns to find out if these
24 trajectories matched. We identified the deviation

1 recognizing special radical design requirements
2 from Trijicon.

3 Q. I'm sorry. Were you also testing
4 M855-A1 rounds? Is that right?

5 A. Yes. Both of these.

6 Q. And those M855-A1 rounds, you are able
7 to purchase online?

8 A. Yes.

9 Q. And were you able to replicate the right
10 column, the data from the right column with respect
11 to the M855-A1 rounds?

12 MR. BRADY: Objection. Vague, compound.

13 THE WITNESS: I didn't try to replicate
14 column.

15 The only thing I was trying to
16 replicate was the speed and trajectory drop.

17 BY MR. WELLS:

18 Q. What speed were you able to measure for
19 the M855-A1 that you purchased online?

20 A. I don't recall. I'd have to look up the
21 data to see how far -- because it was -- M855-A1
22 was 25 to 40 feet per second faster, per bullet on
23 average. But it stayed in the same general
24 trajectory.

1 They are not very accurate
2 bullets. I mean we use terms like minutes of
3 angle. So a minute of angle is dumbed down to be
4 one inch of a hundred meters standard, constantly.
5 And that angle of deviation stays true out to
6 further distances.

7 We shot to 600 meters, and the
8 bullets were really closer to three minutes an
9 angle, staying at 3-inch group at 100 meters, and
10 18-inch groups at 600 meters, which that is not
11 sniper quality by any means. It is what we can
12 expect from a general purpose bullet.

13 Q. What civilian rifles did you use to
14 conduct this testing?

15 MR. BRADY: Objection. Vague.

16 THE WITNESS: I don't recall anyway. I mean I
17 -- as a matter of fact, Gunner Chris Jones brought
18 his own rifle made by Geissele, but I don't know
19 the model. Barrel length -- and barrel length
20 would have mattered. I think he brought in an
21 16-inch barrel rifle, which would have met the M27
22 capability of the Marine Corps, but not the M4 or
23 the M4-A1 because they are a shorter barrel.

24 Q. Did you write down the conditions under

1 which you conducted this testing anywhere?

2 A. I did.

3 Q. You did?

4 A. I did.

5 Q. And where is that written up?

6 A. I submitted a report to Trijicon and it
7 is probably on my hard drive somewhere. I
8 originally wrote them on the target sheets on
9 pencil and paper and had to transcribe them on an
10 Excel sheet to try to capture data.

11 Q. Did you have an understanding of whether
12 or not it is legal to purchase M855-A1 rounds in
13 the United States?

14 MR. BRADY: Objection. Calls for a legal
15 conclusion.

16 THE WITNESS: It was open-market buy.
17 Literally looked it up on Google. They were
18 selling them somewhere in Ohio, and we ordered 200
19 or 300.

20 MR. WELLS: All right. We've been going for
21 about an hour and 20 minutes. Do you need a break?

22 It is 2:36. Why don't we come back
23 at 2:45.

24 (Recess.)

1 MR. WELLS: We are back on the record at 2:46.

2 BY MR. WELLS:

3 Q. Mr. Eby, just remind you. You are still
4 under oath.

5 Did you speak to anyone during
6 the break?

7 A. I did not.

8 Q. Prior to the break, we were discussing
9 some testing that you performed on M855 rounds, and
10 M855-A1 rounds. Do you recall that discussion?

11 A. Yes, sir.

12 Q. When you were conducting that testing,
13 the rifles that you were using to conduct that
14 testing, were they AR-15-type rifles?

15 MR. BRADY: Objection. Vague.

16 THE WITNESS: Yes.

17 BY MR. WELLS:

18 Q. And were they civilian, meaning
19 semi-automatic only 15-type rifles?

20 A. Yes.

21 Q. But you don't specifically recall, as
22 you sit here today, which make and model AR-15-type
23 rifles they were. Is that correct?

24 A. That is correct, but I probably wrote it

1 down on my notes.

2 That would give me barrel
3 length, which would be important for comparison
4 contrasting with other barrel lengths.

5 Q. And based on that testing using those
6 particular rifles, you were able to replicate with
7 an M855 cartridge a velocity of 3113 feet per
8 second. Is that right?

9 A. Yes, roughly.

10 Q. And you were able to replicate a similar
11 velocity with the M855-A1 round?

12 A. Correct.

13 Q. All right. Mr. Eby, you wrote in your
14 report that pistols in the military are used for
15 same purpose they are in civilian life. You agree
16 with that statement?

17 A. Self-defense, yes.

18 Q. And the purpose that pistols -- for
19 which pistols are used in the military and civilian
20 life are self-defense. Is that right?

21 A. Yes.

22 Q. Do you agree that rifles serve a
23 different purpose in the military than pistols?

24 MR. BRADY: Objection. Vague.

1 THE WITNESS: Yes.

2 BY MR. WELLS:

3 Q. Do you agree that rifles perform
4 tactical tasks in the military that pistols do not
5 perform?

6 A. Yes.

7 MR. BRADY: Objection. Vague.

8 BY MR. WELLS:

9 Q. Do you agree that rifles perform tasks
10 that pistols cannot perform?

11 MR. BRADY: Objection. Vague.

12 THE WITNESS: Yes.

13 BY MR. WELLS:

14 Q. And the rifles we are discussing, when
15 we are talking about military rifles that a
16 rifleman would possess, we are talking about M4,
17 M16 and M27 that we previously discussed. Is that
18 right?

19 MR. BRADY: Objection. Vague. Compound.

20 THE WITNESS: Yes.

21 BY MR. WELLS:

22 Q. What is a tactical task?

23 A. Close, destroy, seize, block, deny. So
24 these come about as key phrases and mission

1 assignment directing a unit or element that belong
2 to this tactical -- it could be block this avenue
3 or seize that building or destroy that position.

4 So there is actually documents
5 that guide the development of those statements of
6 tasks, which type of words to use in that
7 development of the task assignment.

8 Q. And you wrote in your expert report that
9 no general purpose force in the U.S. Army or Marine
10 Corps has a tactical task against an enemy that
11 requires a pistol as a solution? Do you agree with
12 that?

13 A. I do.

14 Q. You described pistols as a personal
15 protection weapon. What does that mean?

16 A. The individuals assigned pistols will
17 have a different role to perform. It doesn't
18 necessarily involve attacking the enemy. A
19 colonel, for instance, his role is not to jump out
20 and start closing with the enemy. His role is to
21 coordinate all of the forces into the fight.

22 So he won't have necessarily --
23 he won't be assigned a rifle as his table of
24 equipment assigned. He will get assigned a pistol,

1 because his real tools are his radios and his M4s,
2 and machine gun. He has a machine gun.

3 So he would probably get a
4 pistol as a self-defense weapon of last resort --
5 somebody is about to overrun his position.

6 This deliberate fielding of
7 equipment kind of fell apart during -- well, you
8 have to know nobody felt comfortable only being
9 armed with a pistol.

10 So we had to source spare rifles
11 and issue them out, because the plan for the Marine
12 Corps did not include rifles for the machine gunner
13 or rifles for the colonel.

14 So I had to find 600 spare
15 rifles to issue out to personnel that needed them,
16 and then assure that they were zeroed, had optics
17 on them, slings, and that they were trained on
18 them. And that happened upon arrival into Iraq.

19 Q. Did you do that for Colonel Tucker?

20 A. I did.

21 Q. You mentioned that rifles were used to
22 close with the enemy in a way pistols are not used.
23 What does that mean, "close with the enemy"?

24 A. "Get close to the enemy."

1 So we have a phrase, we use
2 close with and destroy. The purpose of the
3 infantry is to locate, close with and destroy the
4 enemy by fire and by close combat.

5 So that is the definition. I am
6 going to locate him. Get close to him and destroy
7 him. Now that is doctrine. Doctrine's best
8 practice.

9 It may not be what we do, which
10 I know I'm coming across as cynical on some of the
11 stuff we read, but it doesn't stand the test of
12 time, like that urban entry from the top down.
13 That didn't work, but it has been in our doctrine
14 for 80 years.

15 So we have to measure these
16 things against real world behavior and modify and
17 historically, in my time in service, I would
18 stumble across too many things that were written as
19 "validated" that had never been tested.

20 Q. You wrote in your expert report that
21 pistols lack sufficient velocity to ensure bullet
22 penetration, and expansion are required to stop an
23 attacker in a military context. Do you agree with
24 that statement?

1 A. I do. Reliability. That stands to be
2 true.

3 Q. Why is sufficient velocity important for
4 military firearms?

5 A. Velocity can lead towards penetration of
6 barriers. Penetration of the equipment they are
7 wearing, and penetration of the human body with
8 sufficient depth to create incapacitation. Pistols
9 are low velocity already. A third of the speed,
10 which lead to penetration. And a low performing
11 and low expanding. So because they are so slow,
12 they don't necessarily expand well.

13 There are bullets that are
14 designed to do that. They are expensive like \$2.00
15 a bullet, but aren't the normally used bullet
16 because of the cost.

17 And in the military, we have a
18 dumb chunk of lead surrounded by a jacket that is
19 not designed -- it would be what we call "plinking
20 bullets." Something to shoot at a target, just to
21 get skills, but not for shooting humans.

22 Q. So you discussed velocity and
23 penetration. What does expansion mean in this
24 context?

1 A. Assuming a bullet will mushroom and
2 create more tissue damage as it is penetrating.
3 Will separate into large chunks. Not just
4 disintegrate into nothing to get multiple track
5 wounds and increase the amount of trauma to the
6 body.

7 Hopefully hit something large
8 and create a lot of tissue damage to incapacitate
9 the opponent.

10 Q. Do you agree that pistols lack velocity
11 to hit assailants that are "far away"?

12 MR. BRADY: Objection. Vague.

13 THE WITNESS: Define far away.

14 BY MR. WELLS:

15 Q. Greater than 25 meters.

16 A. I can hit targets at a 100, but when I
17 hit them at 100, with a pistol, low volume,
18 low-spend bullet, I don't expect incapacitation.

19

20 Q. What is the maximum range which you
21 would expect incapacitation from a 9-millimeter
22 pistol round, for instance?

23 MR. BRADY: Objection. Vague.

24 THE WITNESS: Which bullet?

1 BY MR. WELLS:

2 Q. Well, pick a bullet that you use in a
3 9-millimeter handgun.

4 A. I don't know. I've not shot anyone with
5 a pistol.

6 I have confidence that I can hit
7 them and expect individual incapacitation at 25
8 meters or less.

9 Q. So you would feel confident in a
10 9-millimeter round in terms of incapacitation, up
11 to 25 meters? Is that fair to say?

12 MR. BRADY: Objection. Vague.

13 THE WITNESS: It is fair to say. I usually
14 consider so -- I mean there is a good couple
15 studies out. I don't know where they came from,
16 but 12 rounds seems to be the minimum that leads to
17 incapacitation. And these -- when they are broken
18 down -- there is a very good article. It talks
19 about four rounds are likely to miss simply because
20 you are a nervous wreck, and your body alarm
21 response is going on. Or you're going to hit the
22 wrong part of the body, not to incapacitate, and
23 finally four might get into the right location and
24 perform well. So the argument would be minimum to

1 twelve, or argument presented. Now I don't have
2 evidence one way the or other.

3 Q. Now, speaking of an M4 or an M16 firing
4 an M855, at what range would you feel confident
5 that that round would have incapacitation ability?

6 MR. BRADY: Objection. Vague. Compound.

7 THE WITNESS: I've been presented by the Army
8 research and development command that an M4 series,
9 that distance is 75 meters or less.

10 We can hit them out to 300.
11 That is both with the Army test and 500 yards for
12 the Marine Corps, but the bullet performance is so
13 inadequate, we don't expect incapacitation.
14 However an M16 series, that distance slows to 175
15 meters. That is based on velocity over 2500 feet
16 per second, and then performance of the M855
17 bullet.

18 Q. Do you agree that pistols lack
19 sufficient velocity to stop an assailant wearing
20 body armor?

21 MR. BRADY: Objection. Vague.

22 THE WITNESS: I do believe that. There is
23 easily available lightweight classes of body armor
24 that would stop pistol projectile and that have no

1 means of stopping a rifle.

2 BY MR. WELLS:

3 Q. Do you have an understanding as to at
4 what range in the civilian setting self-defense
5 encounters take place within?

6 MR. BRADY: Objection. Vague. Calls for
7 speculation.

8 THE WITNESS: I would be speculating, but, you
9 know, really the information is in police reports.
10 The majority of those are within 7 yards. So they
11 are pretty close proximity, and the way the rules
12 are written for self-defense, you have to have
13 capability and intent and that usually gets them
14 very close before they commit. About three yards.

15 BY MR. WELLS:

16 Q. Within seven yards -- within seven
17 yards, would a 9 millimeter handgun have an
18 incapacitation ability?

19 MR. BRADY: Objection. Vague.

20 THE WITNESS: Provided the shot was accurate,
21 yes. Most likely. Again, they can pick a
22 full-known jacket bullet. And one designed for
23 shooting paper. So with appropriate expanding
24 bullets, then yes.

1 BY MR. WELLS:

2 Q. Appropriate expanding bullets, what type
3 of bullets are you referring to?

4 A. Well, the 147 grain Speer gold dot with
5 a polymer filling. The Hornady HTX bullet -- or
6 some of these, they have a polymer fill to them.
7 The research is done by the FBI that we are all
8 leaning on, about bullet comparisons, and they gave
9 a good list on those reports about bullet
10 performance, expansion, accuracy.

11 So anybody seriously interested
12 in it, can look up those reports and find out
13 recommendations on the civilian market crossover
14 bullet.

15 Q. What are the titles of those reports?

16 A. I don't recall.

17 Q. As best -- I mean generally, if you
18 could just describe --

19 A. So FBI -- this would be a Buford Boone
20 question because he did the studies, and I would
21 call Buford. I would call him and ask, "What
22 bullet, sir? The best bullet, sir."

23 Buford led the FBI going from 45
24 to 9 mil to 10 mil, and back to 9 mil. And all of

1 the drama that happens with all that.

2 I just read the reports, and I
3 don't remember the titles. It would be along the
4 handgun stopping power or bullet performance
5 reports.

6 Q. How do you know Buford Boone?

7 A. When I was at Quantico, he was the lead
8 ballistician at the FBI Academy, and my staff would
9 get briefs from him. He would come over and talk
10 and "Here is what we think we know." "Here is
11 testing we are going to do." And eventually the
12 feedback, he would let us know changes to common
13 thought on fact.

14 Q. When is the last time you spoke to
15 Mr. Boone?

16 A. Probably a year ago. He had to educate
17 me on how important the crown of a rifle barrel is
18 for accuracy. Apparently he did a study in 2013,
19 and I heard about it last December. I was mad.
20 Things I have been quoting for years, he proved to
21 be false.

22 Q. Would you agree that in combat, you
23 rarely see the enemies you are firing at?

24 MR. BRADY: Objection. Vague.

1 THE WITNESS: I do agree.

2 BY MR. WELLS:

3 Q. Is that a difference between combat and
4 a civilian self-defense environment?

5 MR. BRADY: Objection. Objection. Vague.
6 Calls for speculation.

7 THE WITNESS: I have not had a civilian
8 confrontation to know. I have suspicions that
9 would believe that the opponent would be more
10 visible, but it would be really up close.

11 BY MR. WELLS:

12 Q. You mentioned before certain rules that
13 govern -- or you just mentioned rules describing
14 proximity, capability and intent. What were you
15 referring to.

16 A. Justification for self-defense.
17 Justification for hostile action. There is more --
18 these are just conversations: How do you know
19 you're in danger? How do you know he is a danger
20 -- or she? How do you know they are capable of --
21 then you get into these layers. And this is just
22 conversations on -- disparity. Disparity of size,
23 disparity of skill, disparity of age. Disparity of
24 strength. So these are all

1 factors, weighing in on just how to use force.

2 Q. Where do those factors come from?

3 A. Conversations. Precedent that came up
4 in legal actions after an incident. That is why
5 they are not consistent because you can get
6 variations of that across legal precedent.

7 Q. You understand, though, that in the
8 civilian environment, any use of a firearm has to
9 be legally justified, right?

10 MR. BRADY: Objection. Calls for a legal
11 conclusion.

12 MR. WELLS: You can answer.

13 THE WITNESS: Yes, I understand that.

14 BY MR. WELLS:

15 Q. Right. And so when you are talking
16 about proximity, capability and intent and some of
17 the training that applies for self-defense
18 scenarios, those are proven concepts -- legal
19 concepts for someone who is thinking about using a
20 firearm for self-defense to understand, correct?

21 MR. BRADY: Objection. Vague. Compound.
22 Calls for a legal conclusion.

23 THE WITNESS: Yes. It is critical to be aware
24 of the consequences after the fact. That you may

1 win the fight and lose the -- your long-time access
2 to freedom.

3 So we have these conversations
4 philosophically, morally. We have these
5 conversations in basic training. And to be fair --
6 I teach a lot of women. The first thing I tell
7 them is their greatest self-defense tool is to wear
8 tennis shoes. Run away from the enemy.

9 Q. What is the U.S. Military pistol that is
10 issued to officers?

11 A. Currently the M17 built by SIG Sauer --
12 it has three different magazines in it. So the
13 service can order whichever they want. 21 is
14 standard. 17 or 15 rounds are available.

15 Q. Is the SIG Sauer M17 that is available
16 or that is provided to the members of the military,
17 the same as SIG Sauer that is available to the
18 general public?

19 A. It is retitled. It is called the M320,
20 but it is the same -- I don't know if there is any
21 design changes, optics or how the internal safety
22 works, but they are replicas of each other in
23 similar appearance.

24 Q. Do they have the same performance

1 capabilities?

2 A. Same velocity.

3 MR. BRADY: Objection.

4 THE WITNESS: I would think, yes.

5 BY MR. WELLS:

6 Q. So same bullet, same velocity. That is
7 the relevant consideration?

8 A. Well, I said that too fast. They can
9 fire the same bullet. They won't choose the
10 military bullet. They will take a better bullet
11 and then have a better performance on the target
12 than service pistol with a ball of ammo.

13 Q. You mentioned the military issues M17s
14 with either a 21 round magazine or 17 round
15 magazine. Is that right?

16 A. They have the option when they are
17 making the contract to pick one of those.

18 Q. Are you aware that the SIG Sauer and M17
19 has an extended 30-round magazine option?

20 A. I was not aware.

21 Q. And you mentioned that the M17 has a
22 15-round magazine option; is that right?

23 A. It does. Let me clarify.

24 The Army uses a larger slide in

1 18. I may have this backwards. One of the
2 services ordered a shorter compact pistol, M17, and
3 they are the one that bought the longer pistol. So
4 they had two; M17 and M18.

5 They both had replicas on the
6 civilian market. Looked the very same, and you can
7 put whatever ammo you feel necessary.

8 Q. You wrote in your report that virtually
9 all boxed magazines for M16 and M4 rifles in the
10 military use 30-round magazines. Why is the
11 standard rifle magazine in the military larger than
12 the standard pistol magazine?

13 A. The rifle is the standard combat arm.
14 Pistol is a self-defense tool, carried for
15 convenience and as a last-ditch effort. The
16 30-round magazine is only a 30-round magazine
17 because after 20 years of testing, you can't get
18 one that will hold more. Our
19 preference would be to eliminate that reload time,
20 which is very difficult and slow, especially with
21 the cumbersome gear you wear, and the bad positions
22 we get into.

23 So it is never a comfortable,
24 clear firing line where you have ease of access to

1 the firing magazine, but all testing on higher
2 capacity magazines are designed as underarm drums,
3 60-round magazine and none of those would work,
4 okay?

5 Q. So if reliability were not a concern
6 from your perspective, is there any limit for what
7 you would hope for in a magazine capacity for an
8 M16 or an M4?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: Yes. The limit would be based
11 on some form of experimental test such as how
12 quickly can I get into and out of these firing
13 positions across multiple target engagement and
14 multiple firing positions and the weight of the
15 ammo didn't cause a change on the engagement speed.

16 So I run a baseline. Here is my
17 30-round magazine. I run through that baseline
18 test. Here is my speed and accuracy, and then
19 start stepping up this ammo until I get a
20 degradation, then I would be able to determine the
21 answer to that.

22 BY MR. WELLS:

23 Q. You sometimes carry a GLOCK G42 as your
24 concealed carry weapon, correct?

1 A. 542, 43X, 19. I switch it up depending
2 on how I'm dressing.

3 Q. What do you mean?

4 A. Some weapons are smaller in design and
5 easier to carry. At all times you kind of have to
6 dress down, right? Tucking in your shirt doesn't
7 help conceal a weapon. And people get nervous when
8 they see weapons, so it is better to conceal it.
9 It is better not to telegraph it to people you are
10 carrying it. So you are trying to not show it as
11 a good civil action to those around me and as a
12 means not to draw attention to myself.

13 Q. So, the type of clothing that you are
14 selecting affects, in your mind, what type of
15 pistol you might carry when you are engaging in
16 concealed to carry. Is that right?

17 A. Yes, sir.

18 Q. And the GLOCK G42, what is the standard
19 magazine capacity on that?

20 A. The standard is six rounds, plus one in
21 the chamber. There is an after-market magazine
22 available that will put nine rounds in the magazine
23 made by Shield Arms, and then one in the chamber.
24 And it is still just inadequate to get to that

1 12-round, kind of, best guess, volume you need to
2 win these fights.

3 Q. When you engage in concealed carry with
4 a GLOCK G42, what magazine capacity does that GLOCK
5 G42 have?

6 A. I quit wearing it. I now carry GLOCK
7 43X with 15-round magazine, and one in the chamber.

8 Q. Was there a period of time when you
9 carried the GLOCK G42?

10 A. There was, and then GLOCK built a better
11 pistol, so I replaced it. The G42 sits in the
12 drawer somewhere.

13 Q. Mr. Eby, I'm going to show you a
14 document that I would like to mark as Deposition
15 Exhibit 8.

16 (Exhibit 8 was marked for
17 identification.)

18 BY MR. WELLS:

19 It is called "The GLOCK Slimline
20 Advantage." Do you see that?

21 A. I do.

22 Q. Who wrote this article?

23 A. I did.

24 Q. What is this article about?

1 A. GLOCK asked me to write something, and
2 then they directed me what to write on. So they
3 wanted to market these GLOCK Slimlines.

4 So to meet that requirement, I
5 wrote this article. So they kind of controlled the
6 message ahead of time. They had you select from --
7 do you want to talk about A or talk about B, and
8 then you build it out from there.

9 Q. Did you get paid by GLOCK?

10 A. I did get paid by GLOCK. They offered
11 to send anything I needed. I didn't need it.
12 Those are not my pistol photos. They put in their
13 stock photos.

14 Q. Do you agree with what you wrote here?

15 A. I do. I had to reread it again.

16 Q. Okay. Just directing your attention
17 here -- directing your attention to this paragraph
18 here that says "In previous years," do you see that
19 in the middle of the right column?

20 A. I do.

21 Q. And you wrote, "In previous years I
22 limited myself to the red dot adorned G19 and had
23 great difficulty wearing it without looking sloppy
24 wearing an untucked oversized shirt. When GLOCK

1 released the G42, I bought several, just as I did
2 with the G43. When carrying the G42 and G43, I
3 always carried two spare magazines to make up for
4 their reduced ammunition capacity but felt
5 comfortable knowing I had a gun on me with
6 sufficient ammunition to readily address an
7 attack." Did you write that?

8 A. I did.

9 Q. And you agree with that?

10 A. Not now. I kind of have come off the
11 two spare magazines because I found a
12 higher-capacity magazine that held nine plus one,
13 and then -- in a lot of these articles, there was
14 research that said the majority of civilian
15 gunfights never get to the second magazine. So it
16 kind of shook my stance a bit that I don't need all
17 of that ammunition. The majority of the test is a
18 little earlier. So I would probably change that
19 now if I had a limited capacity of 6 round, I would
20 carry a spare mag. If I had capacity of 15, that
21 is probably sufficient. And all of the evidence
22 indicates.

23 Q. Just looking here, at the next
24 paragraph, it says "When GLOCK released the G43X

1 MOS, I immediately bought two, and outfitted each
2 of them with a red dot sight. I carried mine in an
3 appendix holster where my G19 normally sits, and my
4 wife carries hers in a purse designed for quick
5 access. The new 10-round magazine capacity seems
6 sufficient to carry without spare magazines and is
7 much easier to conceal in warmer weather.

8 As soon as the weather permits,
9 I will move back to my G19, but I do not feel
10 shortchanged in the least, carrying the G43X."

11 Do you agree with that
12 statement?

13 A. I do.

14 Q. And the G43X MOS that you are
15 referencing in there, that was a 10-round magazine?

16 A. Stock is 10 rounds. I found a Shield
17 Arms magazine that holds 15.

18 Q. And is that what you carry now; 15-round
19 magazine?

20 A. It is.

21 Q. Let me direct you back to your expert
22 report. Okay? I'm directing you back to what has
23 been previously marked as Deposition Exhibit 1,
24 which is your initial expert report, page 9.

1 Directing your attention to the
2 top of the page underneath "rate of fire." It
3 says, "It is our understanding that the Seventh
4 Circuit Court Appeals indicated in its opinion for
5 this case that the, quote, "rate of fire" of the
6 semi-automatic rifles, handguns and shotguns, that
7 Illinois has deemed," quote "assault weapons,"
8 closed quote, "could be relevant to the legal
9 analysis whether they are different in kind from
10 the M16 fully automatic rifle." Do you see that?

11 A. I do.

12 Q. What is your understanding as to what
13 the Seventh Circuit has said about the relevance of
14 rate of fire to this lawsuit?

15 MR. BRADY: Objection. Calls for a legal
16 conclusion. Vague.

17 THE WITNESS: As opposed to what it says? It
18 is debatable about whether or not the AR-15 is
19 equal to military-grade weapon, so I disagree with
20 it.

21 BY MR. WELLS:

22 Q. What were you asked about in this
23 litigation in terms of rate of fire?

24 A. Is it validated? Is it legitimate? It

1 can be. The sustained rate certainly has control
2 of that. The cyclic rate is physically impossible
3 to achieve but scientifically true.

4 So it is based on just measuring
5 one cycle of operation and multiplying that --
6 dividing that into 60 seconds, but we haven't found
7 anybody that can reload that fast and carry enough
8 ammunition to do it.

9 So cyclic rate is not a term we
10 tend to use very often because it is unachievable.
11 We do use these other rates where we will give
12 time/seconds, like fire one round every three
13 seconds.

14 The commander will decide, based
15 on his evaluation of the mission, how much time he
16 needs to expose his force to close it in. Then he
17 determines how much ammunition he needs to have
18 available or how much he can afford to lose and
19 still get to the objective, pull a limited advance,
20 and still deny a counterattack.

21 Q. Do you agree that rate of fire is a
22 concept -- that term is used in the Marine Corps?

23 A. Yes. We use the term, "rate of fire" in
24 some form of command in the assignment portion of

1 a fire command.

2 Q. And do you have an understanding as to
3 whether that is also true in the Army?

4 MR. BRADY: Objection. Vague. Calls for
5 speculation.

6 THE WITNESS: I would speculate they use the
7 same. We stole their publicist. We have their
8 terms, so we use the term "rate of fire" because of
9 them.

10 BY MR. WELLS:

11 Q. And I think you discussed this a little
12 bit, but I may have missed some of it. Explain to
13 me what is the difference is between cyclic rate,
14 and rate of fire.

15 A. Cyclic is a sub-performance -- so rate
16 of fire has multiple levels, right? One shot.
17 Sustained rate, 12 to 15 rounds a minute. Rapid
18 sustained rate up to 45 rounds per minute. That is
19 actually a very new term for me. I didn't know the
20 Army stuck it in their post.

21 And then, cyclically, it is just
22 a scientific wonderland of what you could do if the
23 world were perfect and you had a bunch of full
24 magazines and are able to carry them.

1 Q. Which concept is more useful in your
2 perspective -- from your perspective, in training
3 Marines? Is it cyclic or rate of fire?

4 MR. BRADY: Objection. Compound.

5 THE WITNESS: Again, I think I lost you.
6 Cyclic rate is a form of rate of fire. It is not
7 different. It is just one of the rates of fire;
8 slow, medium, fast. Cyclic is the fastest. Does
9 that make sense?

10 BY MR. WELLS:

11 Q. I think so, but is it fair to say that
12 the point you are making is that cyclic rate is
13 essentially a theoretical concept because it is
14 based on conditions that don't really exist in the
15 real world?

16 A. Yes, sir. What happens is you would
17 have to have 30 full magazines available. Remember
18 I said we could only load, like, 28 rounds where
19 the magazine fails to lock, and the magazine would
20 also -- you would have to have sufficient rounds
21 available and able to carry them, realistically.
22 Not just lay them on table in front of you. How
23 could you get them and get them reloaded?

24 A good shooter is a second and a

1 half. Most shooters are in this 3-to-10-second
2 magazine change. So now you will have to use a
3 robot to do the reloads. Not a human. Because of
4 the fragilities of human skills. So you just can't
5 get the conditions set to truly test if that is
6 true.

7 Q. Earlier we looked at an exhibit attached
8 to your report discussing the M27 infantry
9 automatic rifle, and it had 700-to-900-round cyclic
10 rate listed. Do you recall that?

11 A. I do.

12 Q. What is the typical combat load in a
13 Marine carrying an M27?

14 MR. BRADY: Objection. Vague.

15 THE WITNESS: It is -- we do a METT-K
16 analysis. So what is my mission? What is the
17 enemy's conditions? What is the weather? What is
18 available; time, space, logistics?

19 So without a mission being
20 assigned, and I'm just standing around on guard
21 duty, I typically will have one magazine in the
22 rifle and 6 on my body.

23 Once I get a mission assigned,
24 there is no standard there is no chain. It has to

1 have that METT-T analysis to determine how much
2 ammo, how much time? What danger areas do we have
3 to cross, and how long do we think it will take to
4 do that? So we will build out the solution for
5 each mission.

6 Q. Would you expect the Marine -- an
7 individual Marine equipped with an M27 ever to
8 carry 700 to 900 rounds on their person?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: Not at all. The most you could
11 probably carry is 350 rounds, and it is usually 7
12 magazines fully loaded and another 210 available on
13 a butt pack somewhere to reload with.

14 Now the automatic rifle -- the
15 guy that is in that role, he will probably be
16 carrying 14 fully loaded magazines. And that
17 rifle, when we bought it, we wanted 100-round drum,
18 but we could not get it to work. We did not want a
19 belt feed because they are unreliable during
20 assaults. They tend to get disrupted and not feed
21 properly, so we went back to the box for 30 rounds
22 because that is the only reliable high-level
23 magazine we could find. Highest capacity we could
24 find.

1 Q. Is it fair to say that actually firing
2 at the cyclic rate of 700 to 900 rounds with an M27
3 would burn through a Marine's ammunition in 30
4 seconds?

5 MR. BRADY: Objection. Vague. Incomplete
6 hypothetical.

7 THE WITNESS: I don't think that is fair to
8 say. I don't think anybody could reload that fast.
9 No. I don't think that is fair to say.

10 I don't think anybody could
11 reload that fast in under 30 -- certainly not in 30
12 seconds. Even if you were just wasting ammo, and
13 not trying to manage the recoil and keep the shots
14 in a specific area, which forces you to slow down.

15 BY MR. WELLS:

16 Q. I want to show you what we previously
17 looked at. It was marked as Deposition Exhibit 3,
18 which was the 2008 publication, "Field Manual
19 3-22.9." Do you recall looking at this document
20 earlier?

21 A. I do. For years.

22 Q. You said you looked at these for years?

23 A. Yes, I've seen these. These are what we
24 quote in order to get meritorious promotions. This

1 data that just appears, where you are supposed to
2 hit the "I believe" button and verify.

3 Q. Do you believe -- so I'm showing you
4 what has been marked as page 21, which has Bates
5 Number of OAG003216, and it is a chart labeled
6 "Characteristics of M16/M4 series weapons." Do you
7 see that?

8 A. I do.

9 Q. Do you have any reason to dispute the
10 information that is in this chart?

11 MR. BRADY: Objection.

12 THE WITNESS: I do. At the very bottom where
13 it talks about maximum effective range, you can
14 find zero study to get us that information. This
15 turned out to be "graduated range" was the term
16 before 1960. And since then, the terms moved from
17 "graduated range," how far the sights slide, to
18 "effective range," implying that they are equally
19 capable and all fine. So that is incorrect. And
20 cyclically, I've never been able to test.

21 Q. Other than those two particular
22 categories, maximum effective range and cyclic
23 rate, do you dispute anything else we see in this
24 chart, on OAG003216?

1 MR. BRADY: Objection. Misstates testimony.
2 Vague. Compound.

3 THE WITNESS: These look achievable under
4 maximum effective rate of fire. I don't know that
5 I would dispute any of these right now.

6 BY MR. WELLS:

7 Q. All right. In your expert report, you
8 note that there is a second question of a
9 practicable rate of fire to maintain accuracy. Do
10 you recall that from your expert report?

11 A. Not immediately. That is shooter based.
12 That is a good training problem to have. Auto
13 increases, an effective rate of fire on something
14 measurable.

15 Q. Do you agree that whatever rate of fire
16 is selected, it is important for -- to maintain
17 accuracy?

18 MR. BRADY: Objection. Vague.

19 THE WITNESS: You would have to define what
20 accuracy is because to me, accuracy is the area in
21 which the enemy potentially could be hiding in that
22 I have been ordered to shoot towards, and those
23 studies I quote, there is benefit in just shooting
24 around the area, not knowing exactly where they are

1 hiding and increasing the chance for a hit as well
2 as increasing the psychological suppression of the
3 end.

4 So, accurate enough -- good
5 enough not precision shots. I don't want to keep
6 shooting the same leaf.

7 Q. And what you just described, though,
8 that is a military setting you are referring to; is
9 that right?

10 MR. BRADY: Objection. Vague.

11 BY MR. WELLS:

12 Q. Was that a yes?

13 A. Yes.

14 Q. I put back up on the screen your report,
15 page 10. Directing your attention to the top there
16 it says "What's more, there is the separate
17 question of a practical rate of fire to maintain
18 accuracy." Do you see that statement?

19 A. I do.

20 Q. And you wrote that?

21 A. I did.

22 Q. And do you agree that it is important to
23 assess whether, in the rate of fire, it is
24 important someone is maintaining accuracy?

1 MR. BRADY: Objection. Vague.

2 THE WITNESS: I do. A level of accuracy is
3 determined by the enemy.

4 BY MR. WELLS:

5 Q. And in this paragraph, would you agree
6 that you describe how a range increases, the rate
7 of fire should decrease to maintain accuracy; is
8 that right?

9 A. Yes.

10 Q. And that is something that the military
11 trains?

12 A. Yes. We have this phrase that we use.
13 "Stability increases." As stability increases, you
14 can increase range with equal accuracy. Meaning
15 I'm standing. I could shoot at a certain level of
16 accuracy.

17 If I wanted to go further with
18 the same level of accuracy, I could increase
19 stability, like a supported kneeling against the
20 wall. And then to get even further accuracy, I
21 could go to a squatting; two elbows on two knees.

22 So as stability increases, equal
23 level of accuracy increases with range.

24 Q. So directing your attention to the last

1 sentence in this paragraph where it says, "So the
2 practical rate of fire for M16 is also much greater
3 than the practical rate of firearm for a
4 semi-automatic firearm in a self-defense situation
5 where there is a particular target or target
6 causing a threat." What do you mean here?

7 A. Well, I mean I have automatic fire, so I
8 can triple the amount of rounds I put out.

9 Q. Does that mean the M16 is a superior
10 weapon for a self-defense situation?

11 MR. BRADY: Objection. Vague.

12 THE WITNESS: For the military it is.

13 BY MR. WELLS:

14 Q. What about in a civilian setting?

15 MR. BRADY: Objection. Vague.

16 THE WITNESS: It would equal the same
17 capability. So let's follow through that thought.
18 I'm in my home. My most likely target is 7 yards
19 away. The most efficient way to increase the hit
20 potential against that target is with automatic
21 fire. Having trained to do so -- because that is
22 not easy. You have to manage recoil.

23 We have a significant training
24 effort to manage that recoil both in semi-auto

1 methods and in auto. I would say that a pistol
2 caliber carbine that doesn't overpenetrate is
3 easier on recoil and is smaller in size, that
4 automatic fire would be the fastest way to end that
5 self-defense problem. But you can't just get there
6 by buying and sitting, you have to train for it.

7 Q. Okay. I'm going to direct your
8 attention to the next two sentences here on Page
9 9 -- of your -- or I'm sorry, your expert report
10 where you write, "In sum, there really is no way of
11 reliably determining a, quote, "rate of fire,"
12 closed quote for semi-automatic firearms in light
13 of these variables.

14 "One thing is for certain,
15 however, the rate of semi-automatic fire is
16 significantly less than that of automatic fire."

17 Do you agree with those
18 statements?

19 A. Yes.

20 Q. So in your opinion, there is really no
21 way of reliably determining a rate of fire for a
22 semi-automatic firearm?

23 A. The previous slides indicate some of the
24 variables. The shooter has to be trained to manage

1 recoil. Now he can shoot faster, but it is not
2 effective. He is not having any effect with his
3 bullets. He's probably shooting the ceiling.

4 So the thought here is I have
5 got to understand how to manage my recoil. Have a
6 weapon system that fits me. And then train to
7 develop a more efficient rate of fire that has an
8 effect against the opponent.

9 Q. So in the second sentence in this
10 paragraph, when you say, "One thing is for certain.
11 The rate of semi-automatic fire is significantly
12 less than that of automatic fire." What rate of
13 semi-automatic fire are you using to make that
14 comparison in this sentence?

15 A. Sustained and rapid. Because of the
16 volume I could put out otherwise, is faster. If I
17 can manage the recoil, then any semi -- any
18 additional action of pulling the trigger. The
19 additional action of pulling the trigger delays the
20 rate of volume of bullets that are going downward.

21 Q. And you said sustained and then rapid
22 semi-automatic rapid fire. So that is that
23 15-rounds per minute and 45-rounds per minute
24 figure that we discussed earlier. Is that right?

1 MR. BRADY: Objection. Vague. Misstates the
2 testimony.

3 THE WITNESS: That is correct. And that would
4 be situational, depending which one of these I
5 would choose. Now, if I'm a highly trained
6 shooter, short-range target, an automatic fire is
7 going to benefit me, especially in a room clearing.
8 Possible target inside will come after me,
9 automatic fire would benefit me from that shooter.
10 And depending on shooter capability, 3-25 will do
11 it. Once he gets further than that, you are more
12 effective to reduce the target if you slow down and
13 aim.

14 Q. What numerical value are you using in
15 the second sentence to make the comparison for
16 automatic fire?

17 A. I think I was using automatic burst,
18 just pulling the trigger and getting more bangs out
19 of that trigger. So semi-automatic, I get one
20 shot. With burst, I get three. With an auto, I
21 get whatever time frame I hold the trigger back.
22 Whether it is 1round or 30. So it is a simple math
23 of one trigger pull equals more.

24 Q. So before you gave a 45-round figure for

1 a rapid semi-automatic fire, and you are saying
2 that the rate of fire -- and that rate of fire is
3 significantly less than that of automatic fire.
4 What is the numerical rate per minute, rounds per
5 minute for automatic fire you're using for your
6 benchmark there?

7 MR. BRADY: Objection. Vague. Compound.

8 THE WITNESS: I've never tested it. I just
9 know I get more shots out per trigger pull.

10 BY MR. WELLS:

11 Q. All right. I'm going to direct your
12 attention to the bottom of your expert report, Page
13 10. Do you see where it says "sustained rate of
14 fire?

15 A. I do.

16 Q. What does that mean?

17 A. The ability to shoot for long duration
18 without overheating my rifle is what that tends to
19 mean.

20 That usually stays 10 to 15
21 rounds per minute. That is about the duration of
22 my entire combat load, which is usually seven
23 magazines of 28 rounds.

24 Q. You write here that "Using our

1 experience as trainers, were we to estimate a
2 starting expectation for untrained shooters to
3 achieve a rate of fire with relative accuracy, 50
4 percent hits on human-size target. Under no stress
5 of life-threatening events. Shooting primarily,
6 firing from the standing position, firing
7 semi-automatic fire with some reasonable degree of
8 accuracy, we would start with these distances,
9 rates and time frames, keeping careful notes for
10 future refinement."

11 Did you write that?

12 A. I did.

13 Q. And below that then you included a chart
14 with three columns. The left column labeled
15 "distance" and right column labeled "time". Is
16 that right?

17 A. That's right. I have no experiment to
18 justify these. These are my opinions on paper.

19 Q. And coming up with this opinion, you are
20 assuming an untrained shooter. Is that right?

21 A. Yes. I'm assuming an untrained shooter
22 because that really delays their reload time
23 significantly.

24 Q. What weapon were you assuming in

1 developing an assessment?

2 A. You know what? I just picked any AR in
3 my brain. But any -- an M4 suffices. It is
4 actually harder than an M16-A4 with a big buttstock
5 and long barrel is fatiguing. So you start seeing
6 degradation of accuracy here and accuracy is a
7 component of conditions.

8 Q. Accuracy being a component of the
9 conditions, meaning that --

10 A. I'm sorry. I said 50 percent hits on
11 human-size target. That is the accuracy component
12 to the conditions. Instead of just shooting to
13 send rounds somewhere forward, there is going to be
14 a metric here that slows down the shooter because
15 now they need to achieve 50 percent hits.

16 Without that metric in there,
17 they just pull the trigger and shoot somewhere
18 else. We don't know if that was of any other
19 value. So by giving him some conditions, he is
20 standing. He has to have 50 percent hits on
21 human-size targets. When we say "human-size
22 targets," we have a training target that is 20
23 inches wide and 40 inches tall. It is called an
24 "echo silhouette." That is what we use in all

1 training engagements developing initial skills,
2 then the targets get harder after that; hiding,
3 smaller, obscure.

4 Q. And the "rate of fire" column then, for
5 instance, 7 to 10 yards in that row, you assume a
6 rate of fire of 35 to 50 rounds per minute in a
7 60-second time period. Is that right?

8 A. Correct.

9 Q. And with that 50 percent accuracy
10 assumption, you would expect between 17 and a half
11 to 25 of those rounds to actually hit a human-size
12 target. Is that right?

13 A. Correct.

14 Q. And that is within a 7-to-10-yard
15 distance?

16 A. Correct.

17 Q. Am I right that the rapid semi-automatic
18 rate that we looked at and the marksmanship
19 publication from the military is 45 rounds per
20 minute. Is that right?

21 A. Yes.

22 Q. Do you agree with that, as a rapid
23 semi-automatic achievable rate for a Marine or a
24 soldier?

1 MR. BRADY: Objection. Vague. Compound.

2 THE WITNESS: It's too vague. I need a
3 condition statement. I need to know where you
4 learned. How far is the target? What is my hit
5 rate percentage? Because these are all going to
6 change that rate of fire.

7 If he is shooting 45 rounds a
8 minute and hits one target at 30 yards, that is
9 ineffective. That is a horrible rate-of-fire
10 decision.

11 So without having the full
12 statement of what equipment am I wearing? What
13 position am I shooting from? Supported or not
14 supported? What is the distance of the target?
15 And what is the standard I need to achieve upon
16 completion? None of those are in those theoretical
17 rates of fire to have a conversation. It makes
18 them theoretical still.

19 So these other conditions change
20 that because when a novice, an untrained shooter,
21 shoots and he doesn't manage recoil well, it might
22 be 3 to 5 seconds before they get their sights back
23 to the target. They are not going to meet that
24 rate of target because now I have an accuracy

1 component they have to get to.

2 Q. How did you select the distances in the
3 left-hand column?

4 A. I selected a start point and asked Mike
5 what he thought of those. It was Mike Musselman.
6 He modified it somewhat because we had lower
7 expectations of capability. I probably had doubled
8 that range. He had -- and he said I don't think
9 so, and then we got into a discussion on how long
10 does it take a novice to reload. We ended up with
11 this 5 to 10 -- this is just based on our own
12 experience, training people to shoot, in general,
13 has now been exciting to see capabilities develop
14 very quickly.

15 It is a low capabilities, low
16 speeds. Maybe they are nervous. And this is about
17 somebody shooting, which all of that goes away when
18 you are trying to survive as well as shoot.

19 Q. So is it fair to say that these
20 estimates -- well, in developing estimates like
21 this, it is hard to do because there are some
22 variables that you would need to assume or
23 consider?

24 MR. BRADY: Objection. Vague. Compound.

1 THE WITNESS: I think you could have that --
2 you could get 50 variations of this chart depending
3 on every person you talk to.

4 So without running an experiment
5 and controlling what is the level of knowledge of
6 the shooter, what is the size of the target and
7 what position they are going to shoot from; what
8 equipment will they use. Are you familiar with it?
9 Even the untrained shooter needs some level of
10 training, or they will never get it reloaded. They
11 will never achieve anything past the first 28
12 bullets.

13 Q. Would real-world incidents where you
14 know some of those variables be more useful in
15 developing an estimate for rate of fire?

16 MR. BRADY: Objection. Vague. Compound.

17 THE WITNESS: It would help me set up a
18 controlled -- I mean even if there is just two
19 people, random knowledge in perpetuity, and put
20 them through it and see what they come up with.

21 BY MR. WELLS:

22 Q. Did you consider the rate of fire that
23 has been documented in mass shootings in the United
24 States in developing your estimates?

1 MR. BRADY: Objection. Vague.

2 THE WITNESS: I know the volume of fire in
3 some of them, but, no, I did not prepare that.

4 BY MR. WELLS:

5 Q. Why not?

6 A. I didn't take the time to look for them.
7 This was based on me training some people on my
8 range, and why I thought they were capable of
9 doing, based on years of shooting with them --
10 either my range shooter or a range in Virginia when
11 I was living there -- and where I thought their
12 capabilities were. Now, this is a human-sized
13 target. I don't normally give them that size. I
14 normally give them, like, a pipe load. When I'm
15 doing this, that's the lethal area. I want to
16 narrow down the scope of misses.

17 Q. All right. I'm going to direct your
18 attention now to page 11 of your expert report, and
19 there is a section called "Self-Defense."

20 Do you see that?

21 A. I do.

22 Q. And you begin that section by saying,
23 "Based on our training and experience, it is our
24 opinion that the training and experience that you

1 are referencing is training and experience you
2 obtained in the military, plus those two civilian
3 trainings that we discussed before." Is that
4 right?

5 A. That is right.

6 Q. And is it fair to say that the purpose
7 of your military training was to prepare for combat
8 against peer threats?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: Predominantly I had to switch
11 gears for back to low intensity, but, yes,
12 predominantly our focus was on the worst case
13 scenario, peer threat.

14 BY MR. WELLS:

15 Q. And would you agree that not all the
16 training you received in the military was relevant
17 to civilian self-defense scenarios?

18 MR. BRADY: Objection. Vague.

19 THE WITNESS: I doubt these explosions were of
20 much value or use mortar, so, yes.

21 BY MR. WELLS:

22 Q. Right. So the training on rocket
23 launchers would not be relevant for civilian
24 self-defense?

1 A. Correct.

2 Q. And training on anti-tank weapons would
3 not be relevant for civilian self-defense?

4 A. Correct.

5 Q. What about training on a 50-caliber
6 sniper rifle? Would that be relevant for civilian
7 self-defense?

8 MR. BRADY: Objection. Vague.

9 THE WITNESS: It would not be my choice as a
10 self-defense weapon.

11 BY MR. WELLS:

12 Q. Would training that you received on
13 grenade launchers in the military be relevant for
14 self-defense?

15 MR. BRADY: Objection. Vague. Calls for
16 speculation.

17 THE WITNESS: Not likely.

18 BY MR. WELLS:

19 Q. All right. Directing your attention to
20 paragraph A here, on page 11 of your expert report,
21 you wrote, "The AR platform rifle has been the most
22 significant design in weaponry for common use among
23 the public over the last 60 years."

24 How would you define "AR

1 platform rifle"?

2 A. An adjustable buttstock with a buffering
3 system and the shortest barrel as I can possibly
4 get it and the lightest weight overall. Probably a
5 red dot sight is quick and easy to keep both eyes
6 open on the target and present the box magazine.

7 Q. You wrote that the AR-15 platform rifle
8 has been the most significant design in weaponry
9 for common use among the public over the last 60
10 years. What were you basing that opinion on?

11 A. Well, I have two daughters, and I
12 started them shooting AR platforms when they were 8
13 years old. There was no way even in consideration
14 that I was going to introduce them that would knock
15 them over or break a bone to introduce them to an
16 M590 pump shotgun that would, again, break a bone
17 and knock them over, but the AR design -- it was a
18 .22 caliber sub-caliber as well as hundreds and
19 hundreds of those civilians and Marines that I have
20 worked through on these platforms. This platform
21 is the most adjustable to fit their body size, has
22 the recoil buffering system to not make them
23 flinch, buck or jerk. Three bad marksmanship
24 behaviors. That allows them to have the strength

1 to point at the target -- even the young girls.
2 They are not going to point at it for an hour but
3 to be competitive with it. No other semi-auto or
4 slug or pump shotgun and no pistols -- pistols are
5 extremely hard for people to manage. They can't
6 point them at the target at a very short distance.
7 It is easier to miss with a pistol than a rifle
8 design that points naturally at the target.

9 So I base that on my years of
10 training people how to utilize all these; hunting
11 scopes, rifles -- sniper rifles, pistols, shotguns.

12 I've shot competitions with
13 them, and in all of those it always comes back to
14 simple design that fits the shooter, that is
15 well-balanced, doesn't knock them over. Doesn't
16 create marksmanship flaws, and it is easy to aim
17 with.

18 Now, they get in trouble
19 managing their recoil, and they get in trouble
20 reloading.

21 Q. Who gets in trouble?

22 A. The shooters that I've been training
23 with. On these novice shooters, they have a little
24 bit of trouble trying to reload the thing when it

1 runs dry, and then -- even with this buffer, they
2 still have trouble keeping the sights down on the
3 target without a training program. How to manage a
4 body behind the weapon system to prevent get a
5 plain backbone instead of popping upwards.

6 Q. Are you referring to the AR-15 platform?

7 A. I am. And in every other design that
8 does not have a buffering system is 100 times
9 worse; shot guns, hunter rifles to get that second
10 shot in is so far worse than the AR design.

11 So when it comes down to
12 incapacitate and volume seems to be the best
13 incapacitate tool that we have right now, that
14 metrics that nobody can define. It turns down the
15 volume and destroys the most tissue. The AR is
16 designed to do that.

17 To get it faster while they are
18 trying to kill me. That is the civilian context.
19 In the civilian world -- I will say this: If
20 somebody breaks into my door, I'm the first
21 responder. The second guy that shows up, whatever
22 timeline he is, he is the second responder, and he
23 shows up with an automatic rifle. And the third
24 responder, the SWAT force shows up even later than

1 that second guy, and he shows up with an automatic
2 weapon.

3 If it is good enough for them,
4 why would it not be good enough for me when I'm
5 fighting first?

6 Q. Was the original AR-15 designed by
7 Eugene Stoner, which was select fire with an
8 automatic fire setting, designed for common use
9 among the public?

10 MR. BRADY: Objection. Vague. Calls for
11 speculation.

12 THE WITNESS: That is speculative. I do know
13 he designed it hoping to target a military,
14 contract and he got turned down, so he started
15 building it out for civilians. The military wasn't
16 interested in it. They wanted to stick with 308s
17 and bigger bullets and they weren't interested --
18 he did build the AR-10 at the same time. They
19 weren't interested in it.

20 So in order to fund his
21 lifestyle he offered it to this market, but to be
22 fair, he was earmarking this target and just didn't
23 make it initially.

24 Q. In the first sentence of paragraph A

1 here, you use the word "common use among the
2 public" -- the phrase "common use among the public.

3 Where did you -- how did you
4 reach that conclusion that this particular weapon
5 system is common use among the public?

6 A. Supreme Court Elena Kagan just recently
7 said -- she rephrased it. I've heard it over and
8 over again. You know, 28 million in common use is
9 the last number I read, but I just listened to the
10 Supreme Court Justice say the very same thing on
11 the bump stock of these commonly used weapons.

12 So I think it is an inherent
13 conversation.

14 Q. Other than the sources that you just
15 described, did you rely on anything else in
16 offering this opinion about common use among the
17 public?

18 A. Residual reading over many years has led
19 me to understand that the AR-15 platform is the
20 most commonly used weapon amongst all designs.

21 I don't have evidentiary points, but
22 I can try to drag them up. Whether that is through
23 NRA, NSSF or Gun Owners of America, this is a very
24 common spoken phrase of common use weapons.

1 Q. And when you use "common use" here in
2 this particular sentence, you were relying on a
3 statement in the Supreme Court opinion on
4 discussing buttocks; is that right?

5 MR. BRADY: Objection. Misstates the
6 testimony.

7 THE WITNESS: No, sir. Her statement came out
8 after the fact. I relied upon my readings over
9 many years, over conversations around even lawsuits
10 about can you ban these weapons. And in those
11 lawsuits were phrases from the courts of "this is a
12 common use weapon."

13 BY MR. WELLS:

14 Q. Do you have a personal opinion as to
15 whether or not AR-15 platform rifles should be
16 banned for civilian use?

17 A. I would not ban them. Yes, I do have a
18 personal opinion.

19 Q. You mentioned earlier, and you mentioned
20 in paragraph A here, the importance of the limited
21 recoil of the 5.56-by-45-millimeter cartridge when
22 fired from an AR-15 platform rifle.

23 Did you also mention that when
24 you started your children out firing AR-15 platform

1 rifles, you did so with .22 rimfire ammunition; is
2 that right?

3 A. Yes, sir. I had an insert to an AR-15.
4 I pulled both out and put in changed the charging
5 handle and then they could learn how to hold the
6 weapon, how to aim the weapons. How to manage the
7 recoil without a heavier bullet than they were
8 prepared for. So they probably didn't shoot until
9 11 or 12 years old.

10 Q. So is it your understanding that
11 556-by-45-millimeter calibers is more common in the
12 AR-15 platform than .22 rimfire?

13 MR. BRADY: Objection. Vague.

14 THE WITNESS: Absolutely more common. I don't
15 know that the .22 rimfire sub-caliber device is
16 sold that well.

17 I know it has been available. I
18 don't know -- because you lose distance. So most
19 people want to maintain the weapon as it is
20 designed to be able to experiment and develop
21 skills with it, so. The .22 has very limited use.
22 The .22 rimfire. It is very, very limited use and
23 only in training.

24 BY MR. WELLS:

1 Q. So in making your recommendation about
2 civilian self-defense weapon, you recommend the
3 556-45-millimeter over the .22, but you would agree
4 that the 556-45-millimeter cartridge has greater
5 recoil, right?

6 MR. BRADY: Objection. Compound.

7 THE WITNESS: Yes, it does.

8 BY MR. WELLS:

9 Q. So why did you make that recommendation?

10 A. It has, like, 10 times more power. The
11 recommendation of using 5.56 mm because it is the
12 centerfire bullet. The rim rifle bullet is
13 completely unreliable. They don't always fire.
14 The way they are designed, it may not engage. They
15 are very prone to not feeding and chambering
16 properly.

17 So the only military I have ever
18 heard of using is the Israeli Mossad, who is
19 conducting assassinations with .22 ram fire. No
20 one else outside of some occasional training
21 programs or marksmanship development programs,
22 nobody else is using .22 rimfire.

23 The smallest center fire bullets
24 that are predominantly in use are the 556-by-45 or

1 the civilian equivalent of .223 Remington.

2 Q. So is it fair to say there is a trade
3 off that you're accounting for. While you may
4 increase the recoil, you get more power with the
5 556-by-45-millimeter cartridge compared to a .22
6 rimfire, and you are willing to accept that
7 trade-off; is that right?

8 A. In development of skills, I'm willing to
9 accept that trade off. So I'm not willing to
10 recommend that a .22 for self-defense bullet by any
11 means. I would recommend it is silly. Don't do it
12 at all.

13 And 556, is so common that it is
14 less expensive than alternatives, at 22-250 or
15 .243. Those bullets can cost \$3.00 each. This is
16 40 cents. So now you get volume of time on gun and
17 learn skills.

18 Q. Right, but I'm asking specifically about
19 the trade-off and the self-defense scenarios. So
20 you mentioned the benefits of lower recoil, but
21 actually the 5.56 x 45-millimeter cartridges, you
22 acknowledge, has higher recoil than a .22 rimfire,
23 but you, nonetheless, recommend a 556-45-millimeter
24 cartridge for use in self-defense in the home

1 despite that comparative recoil because the 556 545
2 millimeter cartridge is more powerful. Is that
3 fair to say?

4 A. It is. And the likely lethality of the
5 .22 bullets should not be something you bet your
6 life on. I wouldn't put those in the same
7 comparison.

8 The 556 should be compared to
9 something like the 6.8 or 7.62, and this is the
10 mildest of all the recoiling, high-volume type of
11 platforms. So a .22 would never come into this
12 conversation. Even into the conversation of
13 self-defense. It would be a poor choice and a high
14 risk to do that.

15 Q. You would agree that in addition to the
16 556-by-45-millimeter cartridge, there are AR-15
17 platform rifles available in semi automatic that
18 fire 6.5 Grendel ammunition?

19 A. There are.

20 Q. And there are also AR-15 is that fire
21 300 blackout ammunition?

22 A. There are, yes.

23 Q. And there are AR-15 semi-automatic
24 rifles that fire 7.62-by-39-millimeter ammunition?

1 A. Yes.

2 Q. Would all of those have higher recoil
3 than a 556-by-45-millimeter cartridge?

4 A. 300 Blackout M would be approximate. It
5 is just more expensive, lower volume because they
6 don't sell as many of them, so it costs more per
7 shot fired at training.

8 All of the others have higher
9 recoil results that you mentioned, and more so than
10 that, probably there is 6.5 Creedmoor semi-autos.
11 They had a remake. Another poor choice.
12 Semi-autos.

13 Q. And the 300 Legend?

14 A. I'm not familiar with that.

15 Q. How about 450 Bushmaster?

16 A. I've seen that. It shoots like a small
17 school bus going down range. I would not recommend
18 it. I remember when Trijicon was testing some of
19 those out, and kind of a fad, came and went.

20 Q. Is it fair to say that there are
21 particular cartridges for the AR-15 that are larger
22 caliber that would have significantly higher recoil
23 than a 556-45-millimeter cartridge?

24 MR. BRADY: Objection. Compound.

1 THE WITNESS: Yes, you could go with a longer
2 projectile like a 77 grain to get -- I don't know
3 without special equipment you would notice the
4 recoil change. It is just shooting farther and
5 better. But I think the recoil on the shooter
6 without special equipment would be the same.

7 Q. But --

8 A. I am sorry. We could even mitigate that
9 with a good muzzle break, which pulls the weapon
10 slightly forward as the bullet is leaving, and it
11 reduces the recoil even further.

12 Q. I'm a little confused, then. If you are
13 firing 6.5 Grendel round out of an AR-15, are you
14 going to feel more recoil than your standard
15 5.56-5.45 millimeter cartridge?

16 A. I would opionate, yes, you will, but I
17 don't have any experience.

18 Q. All right. The firearm that you
19 recommend for home defense would be 11.5 inch -- I
20 assume that means barrel, AR platform short barrel
21 rifle with a suppressor, loaded with a 30 round
22 magazine, a 1,000-lumen flashlight on the side rail
23 and an adjustable bump stock to allow the weapon to
24 fit the clothing worn at the time it is needed?

1 A. After you pay your two tax stamps, yes.

2 Q. Why do you say "after you pay your two
3 tax stamps"?

4 A. Both of those are NFA items. The
5 11-and-a-half-inch barrel is an NFA item, and the
6 suppressor is an NFA item. So both of those have
7 to be stamped.

8 It is potential -- the work
9 around if you don't want to have any type of optic
10 on it, you use a pistol brace and achieve that
11 shorter barrel, but you have a lousy buttstock at
12 the end of the day. You can meet the stock well,
13 and it doesn't repeat the shots well. So you
14 introduce a new problem trying to take this little
15 weird shortcut with the arm brace.

16 Q. And you say "NFA," is that National
17 Firearms Act; is that right?

18 A. Yes, sir.

19 Q. Do you know whether suppressors are
20 legal in Illinois?

21 MR. BRADY: Objection. Calls for a legal
22 conclusion.

23 THE WITNESS: I do not know.

24 BY MR. WELLS:

1 Q. Why is the 1,000 lumen flashlight
2 necessary?

3 MR. BRADY: Objection. Misstates the
4 testimony.

5 THE WITNESS: It is kind of the market
6 standard right now. This is more cost-effective.
7 It is shocking to the eye. When you blind somebody
8 with that light and it stuns them a bit, they give
9 you more time for your response. It lets you
10 clearly see what you are up against, whether or not
11 they are armed, enabled or whether or not they are
12 just lost, drunk or on drugs.

13 So that flashlight takes a lot
14 of the assumptions out, and it works as a tool in
15 your favor to buy time.

16 BY MR. WELLS:

17 Q. Are there scenarios in the military
18 where you are using an M4 or M16 when you wouldn't
19 want a flashlight mounted on your weapon because
20 you would want to conceal your location?

21 MR. BRADY: Objection. Compound.

22 THE WITNESS: We have flashlights on all of
23 our weapons in one means or another, and we have
24 good detailed conversations of when to use them.

1 So if I'm in a long hallway of
2 the school and I'm having to look underneath the
3 staircase, I may not be able to see under there, so
4 I will hit it with a white light to see; however,
5 if I don't have a good external security force, I
6 would not turn the light on because that would
7 indicate to somebody on the outside shooting in
8 where I'm at, and they would draw fire.

9 So there are tactical
10 considerations. There is good and bad for both.
11 It is just another tool available for us when the
12 time is needed.

13 BY MR. WELLS:

14 Q. Directing your attention to paragraph C
15 on page 11 of your rebuttal report here. Paragraph
16 C discusses the features that are specifically
17 referenced in the Illinois statute. You know that
18 those features Illinois -- on rifles that Illinois
19 restricts; EG pistol grips, barrel shrouds,
20 adjustable removable stocks and flash crushes do
21 not serve any unique military purpose.

22 What do you mean by "unique
23 military purpose"?

24 MR. BRADY: Objection. Mr. Wells, I just want

1 to point out, I believe you said "rebuttal report."
2 I'm not sure this is the rebuttal report.

3 MR. WELLS: I'm sorry. The initial report.

4 THE WITNESS: It is not unique to the civilian
5 as they are to the military. So it is not unique,
6 so you can have a comfortable grip, so you can
7 sustain a longer duration of holding the weapon.

8 It is not unique to have a
9 barrel shroud that prevents your hand from getting
10 hot if you did fire off 15, 20 rounds and the
11 barrel started getting hot.

12 Adjustable, removal stocks are
13 critical to adjusting the weapon to fit the
14 shooter's stature, whether it 6'6 or 5'1, so the --
15 and we have seen zero evidence that a pistol grip
16 versus a historic, slight curved buttstock enhances
17 or detracts from accuracy or speed of engagement or
18 mobility.

19 It just tends to fit the natural
20 lay of the hand with the thumb pointing upwards
21 without any odd rotations. So it is comfortable
22 longer, perhaps. But I don't gain or lose anything
23 with a pistol grip. Compared to a mini-14, does
24 not have a pistol grip.

1 Barrel shrouds could be
2 important for all of us. Barrels get hot. I don't
3 know about removable buttstocks or why you would
4 want to remove it at all but adjustable, absolutely
5 made to fit the shooter.

6 Q. And you mentioned barrel shrouds, and I
7 think you mentioned that a barrel shroud is
8 important when you are discharging, for instance 15
9 or more rounds and the barrel gets hot. At what
10 point in your experience, when you are discharging
11 rounds from an AR-15, does the barrel start to get
12 hot?

13 MR. BRADY: Objection. Vague. Misstates the
14 testimony.

15 THE WITNESS: It also varies on the
16 temperature outside. So, you know, December with
17 20 degrees, I probably have double the time before
18 July, 105 degrees, the barrel gets hot.

19 In the military we wear gloves.
20 So that retards the felt heat. Our new weapon
21 systems have free-floating rails where we don't
22 pull the barrel out of alignment because of some
23 tension or stigmatic pressure. So there is
24 different reasons for using those. So barrel

1 shroud I use as a definition for a free-floating
2 handguard rail, and the original M4s -- I'm sorry.
3 The M16A2s have a -- M16A4 had a full rail, and we
4 put these rubber manta rail covers on those to
5 reflect heat away from our hands.

6 Q. Do you agree that a pistol grip serves
7 the same purpose on the military M4/M16 as it does
8 on a civilian AR-15?

9 MR. BRADY: Objection. Vague.

10 THE WITNESS: If the same purpose is to have a
11 comfortable handgrip and to pull the weapon
12 slightly backwards, then yes.

13 BY MR. WELLS:

14 Q. Do you agree that the barrel shroud
15 serves the same purpose on a military M4/M16, as it
16 does on a civilian AR-15?

17 MR. BRADY: Objection. Vague.

18 THE WITNESS: It does. It just keeps my hand
19 from getting hot.

20 BY MR. WELLS:

21 Q. Do you agree that a vertical foregrip
22 serves the same purpose on a military M4/M16, as it
23 does on a civilian AR-15?

24 MR. BRADY: Objection. Vague.

1 THE WITNESS: We've moved away from those
2 vertical foregrips in the military. Civilians
3 haven't yet. It tends to cause the weapon to be
4 pulled downward on the shot, and it slows down the
5 second and third follow on shots. That was also
6 kind of a fad.

7 My hand gripping the forward end
8 and pulling backwards suffices.

9 Q. Do you agree that it serves the same
10 purpose vertical foregrip in the military as the
11 phrase context?

12 MR. BRADY: Objection. Vague.

13 MR. WELLS: I'm using purpose in the same way
14 in which you used it in your report when you used
15 the phrase "unique military purpose".

16 THE WITNESS: And I just said we moved away
17 from them because they were hindering marksmanship.
18 So the initial intent was to have a repeatable
19 place to put your hand and pull backwards on the
20 buttstock.

21 There was negative consequence
22 in doing so that pulled down on the barrel gun that
23 shot and then created a marksmanship flaw.

24 So the solution to that was to

1 not use it as a place to grip the full hand, but to
2 use it as a backstop to put my hand on the forend
3 or the barrel, in this case, and pull backwards
4 against that vertical grip as a means to get steady
5 pressure backwards, stabilizing the shot.

6 So it is an enhancement to
7 accuracy. In that sense, yes. It is just as
8 useful to enhance accuracy to a civilian than it
9 might be useful to a military person.

10 BY MR. WELLS:

11 Q. Do you agree that a flash suppressor
12 serves the same purpose on a military M4/M16 as it
13 does on a civilian AR-15?

14 MR. BRADY: Objection. Vague.

15 THE WITNESS: I do. I don't like them. The
16 flash suppressor is supposed to protect me, the
17 shooter, from losing low-light vision from the
18 flash of the muzzle but it served no purpose on
19 managing recoil. I would prefer to see a muzzle
20 brake that helped pull some recoil off of the
21 shooter.

22 They both have the same purpose
23 -- is to prevent me from having night blindness
24 from the flash of the unburnt powder escaping the

1 barrel.

2 Q. Does it have any role in avoiding being
3 detected by the enemy?

4 MR. BRADY: Objection. Vague.

5 THE WITNESS: No. That flash is pretty good.
6 We are not managing all of the powder burn, so the
7 flash is still there. So flash suppressor is for
8 the shooter, not for the enemy. Prevent the
9 shooter from losing night vision -- night
10 blindness.

11 BY MR. WELLS:

12 Q. I'm directing your attention to Exhibit
13 4 to your rebuttal report, which, again, is TC 3229
14 Bates-stamped May 13th, 2016, particularly page 46.
15 The top of the page says "vertical foregrip." Do
16 you see that?

17 A. I do. I don't agree with it.

18 Q. What specifically don't you agree with?

19 A. In testing these on multiple targets --
20 engaging this during the combat marksmanship
21 development program, we tried to do this, and it
22 forced us to overtravel. So when I shoot the first
23 target, transition to the second and third targets,
24 it forced us to over travel.

1 The better position was just a
2 hand on the foregrip in front of that vertical grip
3 with a thumb pointing at the target.

4 So the technique that was
5 developed was shoot the first target, head and eyes
6 towards the second target, and the thumb will
7 immediately point the weapon at the target.

8 The vertical foregrip does not
9 support that behavior and slowed down engagements,
10 increased misses. We stopped using it as it was
11 designed. We didn't ask for it. It is called "the
12 special operations modification kit." It just came
13 with it. So everybody thought you were going to be
14 -- you know, the next Navy SEAL if you used it. We
15 stuck it on there. We tested it with a hindrance.

16 BY MR. WELLS:

17 Q. You disagree with the statement that
18 vertical foregrips assist in transitioning from
19 target to target in close-quarter battle combat?

20 A. I do.

21 Q. In making your recommendation about a
22 weapon for self-defense, would you recommend
23 against having a vertical foregrip?

24 A. I would.

1 Q. Do you agree that the same rules of
2 physics in shooting fundamentals apply whether the
3 person is using the firearm as in the military or
4 not?

5 MR. BRADY: Objection. Vague.

6 THE WITNESS: Yes.

7 BY MR. WELLS:

8 Q. And those same rules of physics would
9 apply to a 5.56, 545-millimeter-round fired from an
10 M14 or M16 as to 5.56, 545-millimeter round fired
11 from a civilian AR-15, correct?

12 MR. BRADY: Objection. Vague. Compound.

13 THE WITNESS: No, they are not. The physics
14 of the M14 is going to show significant increase
15 recoil impulse at heavier platform, longer
16 platform, so pointing at target to target is going
17 to be slower. Holding it up for any duration of
18 time is going to be more difficult. And managing
19 recoil to get the sight to follow on shots is going
20 to be slower. So, no. I don't agree with that.

21 BY MR. WELLS:

22 Q. But in performing testing at your home
23 on the M855 and M855A1 cartridges, you used
24 civilian AR-15, correct?

1 A. I did. Maybe I misunderstood the
2 question because I thought you were talking about
3 M14.

4 Q. No. No. No. I'm sorry. I was asking
5 about M4/M16.

6 A. Oh. No. I'm sorry. I heard M14. No
7 buffer system.

8 So M14/M16, the trade space now
9 is length and weight. The M4 is shorter. Your
10 shorter barrel. That weight comes closer to my
11 body. It is easier to manager. Easier to point
12 faster. So let's start over and ask that question
13 again.

14 Q. Yes. I think it got confused. I think
15 you may have heard me say M14. I'm not talking
16 about the M14. I'm asking the basic question about
17 a 556-by-45 millimeter NATO round that is shot from
18 an M4 rifle, M4. The same rules of physics will
19 apply to that 556 NATO round if it is shot from a
20 civilian AR-15, correct?

21 MR. BRADY: Objection. Vague.

22 THE WITNESS: Yes. I think if you match up
23 the systems, you know, the military just prescribed
24 what we put on there. The civilian one might be

1 lower impulse if we put on a muzzle brake. But the
2 military will have a flashlight.

3 Q. Okay. Give me just -- it is 4:11. Why
4 don't we take a five-minute break real quick. I
5 think I'm done. I just want to double-check here.
6 So let's be back at 4:15.

7 (Recess.)

8 MR. WELLS: The clock struck 4:15, and we've
9 been going for a long time. So I want to get you
10 done here, Mr. Eby.

11 BY MR. WELLS:

12 Q. Before we wrap up, I do want to express
13 my appreciation for your participation today. I
14 think it's been a very helpful conversation to
15 understand your testimony.

16 In looking back on the testimony
17 that you've given today, are there any answers or
18 anything you wish to amend?

19 MR. BRADY: Objection. Vague. Compound.

20 THE WITNESS: No.

21 MR. WELLS: I don't have any further questions
22 at this time.

23 THE WITNESS: May I ask you a question?

24 MR. BRADY: No.

1 MR. WELLS: Once we go off the record, I'd be
2 happy to chat with you. Do you have anything?

3 MR. BRADY: No, sir.

4 MR. WELLS: Would you like to reserve
5 signature? Sean said he would like to reserve
6 signature.

7 MR. BRADY: It is my understanding that Miss
8 Duffy needs to get some clarification from the
9 witness before there is a draft of the transcript.
10 Pending that and his review, yes, reserved.

11 MR. WELLS: So at this point, again, we are
12 concluded and we can go off the record.

13 FURTHER DEPONENT SAITH NAUGHT

14 (Proceedings concluded at 4:30
15 p.m.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CALEB BARNETT, et al.,)	
	)	No. 3:23-cv-209-SPM
	)	No. 3:23-cv-141-SPM
Plaintiffs,)	
Vs.)	
	)	No. 3:23-cv-192-SPM
	)	No. 3:23-cv-192-SPM
KWAME RAOUL, et al.,)	
)	
Defendants,)	
-----)	
)	
FEDERAL FIREARMS)	
LICENSEES OF ILLINOIS)	
, et al.)	
Plaintiffs,)	
vs.)	
)	
JAY ROBERT "JB" PRITZKER,)	
Et al.)	
Defendants.)	

I, JEFFREY EBY, state that I have read the foregoing transcript of the testimony given by me at my deposition on the 18th day of July, 2024, and that said transcript constitutes a true and correct record of the testimony given by me at said deposition except as I have so indicated on the errata sheet provided herein.

JEFFREY EBY

No corrections (Please initial)____
Number of errata sheets submitted _____ (pages.)
SUBSCRIBED AND SWORN to
Before me this ____ day
Of _____, 20__.

NOTARY PUBLIC

1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF COOK)

3 I, Deborah A. Duffy, CSR, RPR, do hereby
4 certify that JEFFREY EBY was duly sworn by me to
5 testify the whole truth, and that the foregoing
6 deposition was recorded stenographically by me and
7 was reduced to computerized transcript under my
8 direction, and that the said deposition constitutes
9 a true record of the testimony given by said
10 witness.

11 I further certify that the reading and
12 signing of the deposition was not waived, and that
13 the deposition was submitted to SEAN BRADY,
14 plaintiff's counsel, for signature. Pursuant to
15 Rule 30(e) of the Federal Rules of Procedure, if
16 deponent does not appear or read and sign the
17 deposition within 30 days, the deposition may be
18 used as fully as though signed, and this
19 certificate will then evidence such failure to
20 appear as the reason for signature not being
21 obtained.

22 I further certify that I am not a relative or
23 employee or attorney or counsel of any of the
24 parties, or a relative or employee of such attorney
or counsel, or financially interested directly or
indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my
hand this 9th

Deborah A. Duffy

Deborah A. Duffy, CSR, RPR
Illinois CSR License 084-002516

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate.

The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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