

BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, .  
Plaintiff, . Case Number 21-cr-32  
vs. .  
GUY WESLEY REFFITT, . January 20, 2022  
Defendant. . 1:12 p.m.  
- - - - -

TRANSCRIPT OF PRETRIAL CONFERENCE  
BEFORE THE HONORABLE DABNEY L. FRIEDRICH  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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## P R O C E E D I N G S

(All participants present via telephone or video conference.)

COURTROOM DEPUTY: Your Honor, we are in Criminal Action 21-32, United States of America versus Guy Reffitt.

If I could have the parties identify themselves for the record, beginning with the United States.

MR. NESTLER: Good afternoon, Your Honor. Jeff Nestler on behalf of the United States.

MS. BERKOWER: Good afternoon, Your Honor. Risa Berkower for the United States.

MR. WELCH: Good afternoon, Your Honor. William Welch on behalf of Guy Reffitt, who joins us by telephone. And he consents to doing so pursuant to the CARES Act and the court's standing order.

THE COURT: All right. Thank you all.

And Mr. Reffitt is appearing by telephone because he's still in quarantine? Is that correct, Mr. Welch?

MR. WELCH: My understanding was that his specific quarantine was over, but this is the way that he could join us today, and we didn't want to put things off any longer.

COURTROOM DEPUTY: Forgive me for interrupting, Your Honor. I'm sorry. Mr. Reffitt is still in the -- he just came out of the breakout room. He just came out.

Mr. Reffitt, I just called the case -- I'm sorry. Go

1 ahead, Your Honor.

2 THE COURT: Good afternoon, Mr. Reffitt. The  
3 courtroom deputy just called the case, and the attorneys just  
4 announced their appearance. And your attorney just stated that  
5 you did consent to appear by telephone this morning. The rest  
6 of us are on video. And you're on telephone, I understand,  
7 because of issues with quarantine that should be resolved soon.

8 Is he correct that you do consent to appear for this  
9 hearing by telephone?

10 THE DEFENDANT: Yes, Your Honor, that is correct.

11 THE COURT: Okay, then. So before the Court right now  
12 is the defendant's motion to reconsider the detention order, as  
13 well as several motions in limine that I will take up in a  
14 moment.

15 I'm not going to focus on jury instructions today. I know  
16 that, Mr. Welch, you just filed something last night relating to  
17 the 1512 charge, which I'm reviewing, and Mr. Nestler and  
18 Ms. Berkower, I will give you until -- I will give you a week.  
19 Originally, I had proposed that both sides file proposed jury  
20 instructions and both sides file any opposition. Mr. Welch  
21 didn't file at the beginning. So I will give the government a  
22 chance to respond to what he filed if you choose to. You don't  
23 have to, but I will give you a week to do that. And I will  
24 discuss those at the next hearing that we set.

25 But today I did want to address particularly the detention

1 motion that's been pending for some time and the motions in  
2 limine. Any need for additional argument on that, Mr. Welch?  
3 I've read the briefs of both sides. Anything new you would like  
4 to add?

5 MR. WELCH: No. Those are the additional facts that  
6 we are asking the Court to consider as far as the detention  
7 order is concerned. Beyond that, we don't have any additional  
8 testimony or evidence to present, just those additional facts in  
9 the paper.

10 THE COURT: Okay. Anything additional from you,  
11 Mr. Nestler or Ms. Berkower?

12 MR. NESTLER: No, Your Honor.

13 THE COURT: All right. So let me rule on that first,  
14 and then we will move on to the motions in limine.

15 Before the Court is Mr. Reffitt's motion to reconsider the  
16 detention order. Under the Bail Reform Act, the defendant shall  
17 be released before trial unless a judicial officer determines  
18 after a hearing that no condition or combination of conditions  
19 will reasonably assure the appearance of the person and the  
20 safety of any other person in the community. That's 18 U.S.C.  
21 Section 3142(e) (1).

22 In making this determination, the Court must consider four  
23 factors: First, the nature and circumstances of the offense  
24 charged; second, the weight of the evidence against the person;  
25 third, the history and characteristics of the person; and

1 fourth, the nature and seriousness of the danger to any person  
2 or the community that would be posed by the person's release.  
3 That's Section 3142(g).

4 On May 13, 2021, the Court denied Mr. Reffitt's motion to  
5 revoke the Magistrate Judge's detention order, Magistrate Judge  
6 Faruqui, finding that the 3142(g) factors supported his  
7 continued detention.

8 In particular, the Court found that Mr. Reffitt presents a  
9 danger to the community in light of his general dangerousness  
10 and his acts of obstruction.

11 Under Section 3142(f) of the Bail Reform Act, a detention  
12 decision may be reopened at any time prior to trial if new  
13 information surfaces that has a material bearing on the issue of  
14 whether there are conditions of release that would reasonably  
15 assure the appearance of such person as required and the safety  
16 of any other person in the community. 18 U.S.C. Section  
17 3142(f).

18 New and material information must consist of truly changed  
19 circumstances rather than simply a defendant's own evaluation of  
20 his character or the strength of the case against him. *United*  
21 *States v. Lee*, 451 F.Supp.3d. That's at 5, a D.D.C. case. And  
22 to be material, the new information must affect the analysis of  
23 one or more of the Section 3142(g) factors.

24 In his motion, Mr. Reffitt has not presented new  
25 information that casts doubt on the Court's previous findings on

1 the Section 3142(g) factors. He points primarily to the  
2 continuing COVID-19 pandemic and the rising numbers in the D.C.  
3 Jail. The pandemic has no bearing on any of the 3142(g)  
4 factors, and Mr. Reffitt has since caught COVID-19.

5 Mr. Reffitt also refers to the U.S. Marshals Service's  
6 findings about the unsanitary conditions at the D.C. Jail.  
7 Mr. Reffitt is housed in the Central Treatment Facility, not the  
8 Central Detention Facility which the Marshals Service's report  
9 highlighted as not meeting appropriate conditions. In contrast,  
10 the Marshals Service described the conditions at CTF where  
11 Mr. Reffitt is housed as largely appropriate and consistent with  
12 federal prisoner detention standards.

13 Finally, to the extent that Mr. Reffitt argues that his  
14 continued detention violates the Eighth Amendment, the Supreme  
15 Court has upheld the constitutionality of the Bail Reform Act.  
16 *U.S. v. Salerno*, 4081 U.S. 739. And to satisfy the Act, the  
17 District Court must identify an articulable threat posed by the  
18 defendant to an individual or the community before ordering the  
19 defendant's detention. *U.S. v. Munchel*, 991 F.3d at 1283.

20 This Court did so in its May 13, 2021, ruling. Nothing  
21 Mr. Reffitt presents in this motion alters the Court's previous  
22 conclusion. Therefore, the Court denies the motion.

23 Moving on to the motions in limine, there are three to  
24 consider: First, the defendant's motion in limine to exclude  
25 certain language from captions in Government Exhibit 204, then

1 the government's motion in limine to permit the government to  
2 elicit lay opinion testimony, and finally, the government's  
3 motion in limine to limit the cross-examination of Secret  
4 Service agent witness.

5 I will start with the more straightforward ones first. It  
6 appears that the parties are in agreement with respect to  
7 Mr. Reffitt's motion in limine to exclude certain language from  
8 captions in Government Exhibit 204.

9 Mr. Welch, am I right? Given that the government has  
10 agreed to remove explanatory captions from the exhibit, do you  
11 agree your objection has been addressed?

12 MR. WELCH: That would be acceptable, Your Honor. My  
13 understanding is that I'm going to be provided with a corrected  
14 copy of that exhibit so that I will be able to satisfy myself  
15 that whatever we're objecting to is gone. I don't have it yet,  
16 but --

17 THE COURT: Understood. I will leave that open, but  
18 assuming you're provided that, then you have no objection to me  
19 denying the motion as moot?

20 MR. WELCH: Correct.

21 THE COURT: Okay. All right. Turning next to the  
22 government's motion in limine to limit the cross-examination of  
23 Secret Service agency witnesses, the government seeks to limit  
24 the scope of the cross-examination of a Secret Service witness  
25 to include only whether the Capitol breach interfered with a

1 federally protected function and whether the Capitol was  
2 restricted on January 6 of 2021. The government also moves to  
3 preclude the defense from cross-examining the witness about  
4 Secret Service safety protocols and the nature of Secret Service  
5 protected details.

6 Mr. Welch, have I read your response accurately? You do  
7 agree that so long as the government does not raise questions  
8 about the Secret Service protocols and protective details in the  
9 direct examination, that you will not elicit testimony about,  
10 one, where the vice president or his family or their motorcade  
11 were taken on January 6 after the Capitol riot began; two, you  
12 won't elicit testimony about where protectees or their  
13 motorcades are taken at the Capitol or any other government  
14 building whenever an emergency occurs; and three, you won't  
15 elicit testimony about the number and type of agents the Secret  
16 Service assigns to protectees? Am I reading your response  
17 correctly?

18 MR. WELCH: That is correct.

19 THE COURT: Okay. But you would like to ask the  
20 agents about whether Mr. Reffitt's actions on January 6 affected  
21 their protection of the vice president or his family or any  
22 other actions that day by the Secret Service agents; is that  
23 right?

24 MR. WELCH: Correct.

25 THE COURT: And Mr. Nestler, you do agree that that's



1 appropriate cross-examination by Mr. Welch?

2 MR. NESTLER: Yes, if he wants to ask that question,  
3 that's fine. We believe the answer will be no.

4 THE COURT: Okay. Understood.

5 Mr. Welch, you can ask the question, but because the  
6 government need not prove that Mr. Reffitt himself personally  
7 interfered with the Secret Service agents' performance of their  
8 federal functions that day, I'm not going to allow a lot of  
9 cross-examination on this point.

10 You do agree? I think the joint jury instructions -- you  
11 do agree that the government need not do that to convict  
12 Mr. Reffitt of violating Section 231; right? So you're talking  
13 about asking a question or two and no more; right?

14 MR. WELCH: Correct. As you know, I had listed, you  
15 know, areas -- you know, there is the suggestion in some of the  
16 government's papers that, you know, Mr. Reffitt would have been  
17 a threat to the Vice President of the United States, and we want  
18 to make the point to the jury that no, he wasn't, that they  
19 never saw each other, he never reached out and touched the vice  
20 president. Because a jury might, hearing that, think that he  
21 was. We just want to make sure that it's clear he wasn't.

22 THE COURT: Again, a question or two along those  
23 lines, but there's not a need to dwell on this and, perhaps,  
24 confuse the jury about what the government has to prove. They  
25 don't have to prove that he personally interfered with the

1 Secret Service that day; right?

2 MR. WELCH: Right. I understand that, yeah.

3 THE COURT: All right. Okay. So I think we're all on  
4 the same page there.

5 Mr. Nestler, anything else you would like to say in  
6 response to what I've said?

7 MR. NESTLER: No, Your Honor. Thank you.

8 THE COURT: Okay. With respect to Mr. Reffitt's  
9 supplemental memorandum that requests to seek photographs of  
10 Vice President Pence waiting in an underground garage on  
11 January 6 because they allegedly proved that the Capitol grounds  
12 were not, quote, restricted for purposes of Section 1752(a)(1)  
13 while Mr. Reffitt was on the Capitol grounds, explain to me,  
14 Mr. Welch, why is this relevant, given how the statute defines  
15 "restricted grounds" where a Secret Service protectee is or will  
16 be temporarily visiting? Why is this relevant here?

17 MR. WELCH: Well, this is relevant because of the  
18 concern that we have with what I mentioned previously about the  
19 government having mentioned it in some papers, creating the idea  
20 that Mr. Reffitt created a threat, was a threat to the Vice  
21 President of the United States, that if that somehow came up, I  
22 would want to be able to show the photograph that apparently  
23 might even be something that a news agency has, to show that  
24 they don't depict Mr. Reffitt in the company of the vice  
25 president ever.

1           THE COURT: Mr. Nestler, despite what's in your  
2 papers, is this an evidentiary point that the government is  
3 going to be pressing at trial, that Mr. Reffitt personally,  
4 personally did threaten the vice president or his security  
5 detail?

6           MR. NESTLER: We're not planning to argue that  
7 Mr. Reffitt himself personally threatened the vice president.  
8 We're planning to argue that Mr. Reffitt and the mob itself  
9 threatened the vice president.

10          We are -- I think we've been very clear from the outset,  
11 Your Honor, that Mr. Reffitt never actually entered the Capitol  
12 building, but he did stand on the Capitol building stairs. So  
13 no, we're not planning to make that argument that Mr. Welch is  
14 saying, that Mr. Reffitt personally threatened the vice  
15 president.

16          THE COURT: And again, Mr. Welch, given the statute  
17 defines "restricted grounds" as those where a Secret Service  
18 protectee is or will be temporarily visiting -- and that's  
19 Section 1752(c) (1) (B) -- and this is the definition you all have  
20 accepted in your jury instructions, they need not show that  
21 there's any interaction between the two.

22          I get your point. To the extent there's a suggestion made  
23 that he engaged with the vice president's security detail, that  
24 would be legitimate cross. But they're not going there, and I  
25 don't see the relevance of this photograph. I don't see --

1 given that the government has proffered that the evidence will  
2 show that Mr. Reffitt and Mr. Pence were at the Capitol at the  
3 same time, at 1:47 p.m. The government's proffered also that  
4 even if they weren't on the Capitol grounds at the same time,  
5 the vice president intended to return to the Capitol grounds  
6 later that day until the Electoral College results were  
7 certified.

8 So, you know, any photograph showing that the vice  
9 president temporarily left the Capitol grounds seems to me  
10 irrelevant here.

11 MR. WELCH: Right. And generally speaking, in that  
12 context, I would agree. My concern was that even though the  
13 government need not show that Mr. Reffitt personally was a  
14 threat, if somehow the testimony were to come out otherwise, if  
15 somehow the evidence were presented otherwise, I don't want the  
16 jury getting the false impression that my client posed an  
17 immediate threat personally to the Vice President of the United  
18 States.

19 Even if they don't have to show it, I don't want that kind  
20 of evidence somehow coming up and then being caught flat-footed  
21 and not being able to show that hey, he was never in the  
22 presence, in the company of the vice president.

23 THE COURT: All right. I think that there's a  
24 distinction between what you're worried about and what the  
25 government intends to bring out at trial. And if that's not

1 borne out, then we will revisit this. All right?

2 MR. WELCH: Okay. And I hope that the Court is  
3 correct about that, because --

4 THE COURT: Mr. Nestler, I trust you all are going to  
5 be careful not to insinuate that Mr. Reffitt himself was engaged  
6 with the security detail? It seems as though he was far removed  
7 from those folks.

8 MR. NESTLER: Correct. To be clear, Mr. Reffitt was  
9 engaged with Capitol police officers on the west side of the  
10 Capitol building, and that's where we're focused as to  
11 Mr. Reffitt's actions. We do plan to have at least two  
12 witnesses, probably three witnesses, talk about the riot itself  
13 and the vice president had to evacuate, the effect on the  
14 official proceeding and Congress. But that is not focused on  
15 Mr. Reffitt. That's focused on proving up the 231 charge and  
16 the 1512(c)(2) charge.

17 THE COURT: Okay. All right. So I don't see the  
18 relevance based on what's being proffered here, Mr. Welch.  
19 Again, we can revisit it if the evidence at trial shows  
20 something else, but I'm taking the government at its word here.

21 All right. So the final motion in limine is the  
22 government's motion in limine to permit the government to elicit  
23 lay opinion testimony from an FBI agent who the government wants  
24 to testify about the firearm holster that's visible in  
25 photograph exhibits of Mr. Reffitt at the Capitol.

1           And as I understand it, Mr. Nestler, the government wants  
2           that witness to be able to compare the holster in those  
3           photographs to the holster that was found in Mr. Reffitt's  
4           bedroom; is that correct?

5           MS. BERKOWER: Your Honor, it will be me speaking to  
6           this.

7           THE COURT: Sorry, Ms. Berkower.

8           MS. BERKOWER: No problem.

9           Yes, Your Honor. We would like -- there's sort of two  
10          pieces to this. There are photographs of Mr. Reffitt at the  
11          Capitol in which what appears to be a holster is visible on his  
12          person, and there's a photograph of a holster that was found on  
13          a nightstand in his bedroom when his home in Texas was searched.

14          THE COURT: By the way, do you also have the holster,  
15          and is that something that you will be introducing as evidence?

16          MS. BERKOWER: We only have a photograph of the  
17          holster found in the bedroom. We don't have the physical item.

18          THE COURT: Why? It wasn't seized?

19          MS. BERKOWER: It was not seized. It was photographed  
20          but not seized. There's a loaded firearm inside of the holster  
21          that was seized, but the holster itself was only photographed.

22          THE COURT: But the firearm was seized?

23          MS. BERKOWER: Correct.

24          THE COURT: And are you -- is that an exhibit, the  
25          firearm, that you will show to the jury?

1 MS. BERKOWER: It is, Your Honor. I believe we -- we  
2 had been in talks with Mr. Welch back when the case was set for  
3 trial in October about scheduling a time for him to come in and  
4 review that evidence. We do have it here in Washington at the  
5 Washington Field Office. But we do plan to introduce it, and we  
6 will give Mr. Welch the opportunity to examine it.

7 THE COURT: Okay. So you are -- you're basically  
8 asking me to allow the agent to look at two photographs and say  
9 that the holster in the two photographs is the same?

10 MS. BERKOWER: Well, I don't think we actually even  
11 are asking to go that far, Your Honor. What we're asking is a  
12 little bit different, which is we're asking him to look at the  
13 photograph of Mr. Reffitt on January 6 and give his view that he  
14 recognizes the holster to be a particular kind of holster.

15 We're also asking him --

16 THE COURT: Okay. Stop on that. So based on the  
17 photographs you've provided in your briefing, he is going to be  
18 able to identify this particular holster?

19 MS. BERKOWER: So I understand that the photographs in  
20 the brief may not be as clear -- I think we can get a better  
21 photograph. It was hard to get a photograph --

22 THE COURT: Let me hold this up. It's -- that's what  
23 you're talking about?

24 MS. BERKOWER: I think the one on the next page is a  
25 little bit clearer.

1 THE COURT: This one?

2 MS. BERKOWER: It was hard to format it large enough  
3 and clearly enough in the brief, but in our exhibit, it is -- I  
4 believe one of those is at least -- is a higher quality photo  
5 that we can blow up, and there is a certain characteristic of  
6 this holster. It has a particular kind of finger lock --

7 THE COURT: And what -- sorry I keep interrupting, but  
8 it's hard to see in this photograph, but you're saying that  
9 finger lock is visible in a better photograph of this, copy of  
10 this photograph?

11 MS. BERKOWER: The case agent, when he saw the photo  
12 and zoomed in on it, that he knew immediately based on the way  
13 it was configured that it was that particular kind of holster.  
14 And I think he could better explain the specific, like, details  
15 of why that is. I know one of them had to do with the finger  
16 lock mechanism on it.

17 THE COURT: Okay. Well, one of the struggles I have  
18 with your request is that you're asking him to identify this  
19 holster, you say, based on, first of all, his work as a case  
20 agent in this case, and that's -- of course, special agents can  
21 talk about the work they do in a case. He could talk about the  
22 photograph that was taken of the holster that wasn't seized. He  
23 can talk about all of that as a case agent.

24 But his understanding of what type of holster this is is  
25 stemming not from that, not what he did in this case other than



1 looking at the photograph, but rather, it's based on two things.  
2 One, you say he has expertise, a certain degree of expertise as  
3 an FBI agent who is, quote, trained in firearms. That sounds  
4 pretty specialized to me, and that seems, based on the cases  
5 I've reviewed, like it's on the line, you know, the 702 line,  
6 the specialized knowledge. Two, you say you want him to testify  
7 based on his personal experience as a owner of this holster.

8 And I don't think the government can have it both ways. I  
9 don't think you get to lump in his expertise that he has as a  
10 firearms trainer and as a FBI agent who uses firearms and has a  
11 level of knowledge about them that far exceeds what the normal  
12 gun owner might have.

13 That's really stepping over the line, I think, and I think  
14 the case law in the circuit makes clear that courts should be  
15 concerned about jurors giving too much weight to that kind of  
16 testimony, particularly when it's a law enforcement agent.

17 So I don't understand why the government thinks that that  
18 prong of his knowledge can be brought out at all. The other  
19 one's a closer issue, but explain to me why that's not crossing  
20 the line to let him testify based on his experience as a  
21 firearms trainer at the FBI that this is a particular type of  
22 holster because of the finger lock on the gun.

23 That seems very specialized knowledge. That's not -- that  
24 extends beyond what he should be permitted to testify as a lay  
25 witness as opposed to an expert.

1 MS. BERKOWER: Yes, Your Honor.

2 For clarity's sake, we may not have been as clear about  
3 this as we should in the briefing. He has a long experience in  
4 the FBI with firearms and being a firearms trainer. This  
5 particular type of holster, it's available to anybody  
6 commercially, as Mr. Reffitt, we believe, had it himself, not  
7 just to law enforcement witnesses. And the FBI used to use this  
8 type of holster. They discontinued it. And this agent  
9 continues to use it in his personal life.

10 So that's --

11 THE COURT: But some of his knowledge about this stems  
12 from his work in the FBI with firearms; right? He's not just  
13 someone who bought this holster from a gun store and had a gun  
14 and recognized it. It seems to me that you're wanting to elicit  
15 more from him, not just you're a gun owner who has this holster  
16 and knows what guns fit in this holster and knows what this  
17 holster looks like. But you're, it seems to me, awfully close  
18 to an expert who is trained in firearms, who has used this  
19 particular holster in your many years with the FBI. That  
20 doesn't seem like a normal lay witness testimony.

21 MS. BERKOWER: Well, Your Honor, I think the case law  
22 really stems, when it comes to the distinction between lay and  
23 expert testimony, on the level of personal knowledge that the  
24 witness has. And I don't think the case law distinguishes  
25 between the manner in which you get the personal knowledge, so

1 long as it is through -- results from a process of reasoning  
2 familiar in everyday life.

3 And at the end of the day, what we're asking the Court to  
4 permit is for this witness to recognize a product that he has  
5 used in his life. And I think that it is a process that's  
6 family to everybody. It's not asking him to use a holster in  
7 any particular or specialized way, but really just based on his  
8 experience with this product to say whether he recognizes it  
9 based on his familiarity with its attributes.

10 And I understand the Court is concerned that the jury may  
11 draw extra, you know, special inferences about it if we were to  
12 elicit that he recognizes it because he has experience with it  
13 in the FBI. If the Court would prefer, we could just limit the  
14 questioning about how much experience he had with it in the FBI  
15 to instead elicit how many years of experience he's had with  
16 this particular holster just by handling it and owning it and  
17 using it, and that may de-emphasize the fact that some of his  
18 personal knowledge comes from law enforcement experience.

19 THE COURT: Do you intend to bring out that he's a  
20 firearms trainer at the FBI when you introduce the witness to  
21 the jury?

22 MS. BERKOWER: I think if the Court would find that to  
23 be giving undue weight to his testimony, we wouldn't have to do  
24 that. Really, the key for us is that he has personal experience  
25 with this product, he knows the ins and outs of this product,

1 and he recognized the photo of it when he saw it.

2 I understand that when it comes to firearms not everyone  
3 has as much knowledge of certain kinds of products as others, as  
4 other people may. But I think a good analogy would be something  
5 like a hammer. Anybody could own a hammer. A hammer that's  
6 available, a certain brand of hammer that's available in a  
7 hardware store, anyone could own it. A carpenter would probably  
8 have more familiarity with recognizing it, but the average  
9 person who owns it and has it in their home tool box also could  
10 recognize it.

11 And that's really what we're asking the Court to permit  
12 this agent to do, is he says, oh, I recognize that product that  
13 Mr. Reffitt is carrying because I'm so familiar with it, I see  
14 that little detail on the side of it, level-one finger retention  
15 device -- that's the technical word for it; I don't think I  
16 characterized it correctly earlier -- because I've seen this and  
17 I've used it myself before. We're not asking him to draw any  
18 inferences about it. We're not asking him to draw inferences  
19 about how Mr. Reffitt got it.

20 And unlike some of the opinion from law enforcement that I  
21 think troubled the D.C. Circuit, where the officer is using  
22 training to be able -- law enforcement training, specialized  
23 training to make inferences about everyday observation. So for  
24 instance, I saw a bulge in a pocket, and the inference I drew  
25 from my law enforcement training was that that may be a weapon.

1           We're really instead just asking for something much more  
2       basic and something far less specialized to law enforcement  
3       training, which is he recognized a brand of product that he  
4       personally had familiarity with.

5           THE COURT:   You're also asking him, though, to link  
6       the two, are you not, the two photographs?

7           MS. BERKOWER:   Well, I think our plan was just to  
8       point out that he found -- that the FBI found this type of  
9       holster in his bedroom and he found -- and this type of holster  
10      is visible on Mr. Reffitt's person on January 6. I don't think  
11      we would be asking the witness to opine that it's the same  
12      holster.

13          THE COURT:   Okay.

14          MS. BERKOWER:   Or the exact holster.

15          THE COURT:   How long has this agent himself personally  
16      owned firearms versus, you know, been exposed to this in his job  
17      at the FBI?

18          MS. BERKOWER:   To make sure I understand Your Honor's  
19      question --

20          THE COURT:   If he were restricted to just his personal  
21      ownership of the gun, how long has he owned -- I'm sorry, the  
22      holster? Do you know the answer to that question?

23          MS. BERKOWER:   I don't, Your Honor. I could find that  
24      out.

25          THE COURT:   I was just curious. Let's say he's owned

1       it for five years hypothetically. Is it the government's  
2       position that the government could call any individual, non-law  
3       enforcement officer to the stand to say, I've owned this holster  
4       for five years, and it looks like it's -- the one in the  
5       photograph looks like it's the one I own? Is that the  
6       government's position? It's just like any gun owner taking the  
7       stand and testifying?

8               MS. BERKOWER: I think -- I could see why Mr. Welch  
9       might object to us doing that based on the relevance of that  
10      witness in any other way.

11             THE COURT: But is the relevance not the same? You're  
12      basically wanting a person to identify the holster that appears  
13      in that photograph to the extent anyone can.

14             MS. BERKOWER: I think the answer to your question is  
15      yes.

16             THE COURT: All right. So all you seek to have this  
17      agent do is identify the holster in the photograph by name?

18             MS. BERKOWER: Yes.

19             THE COURT: And nothing more than that? Do you expect  
20      the agent to then say this holster holds these types of guns?

21             MS. BERKOWER: Well, the agent, I think, would say  
22      that this type of holster is designed to specially hold a  
23      particular type of handgun. My understanding, and I think we  
24      did include this in our brief, is that that brand contains small  
25      variations to fit different brands of firearms. But I don't

1 think he would say anything more than that, just he knows that's  
2 the case from owning one. But I don't think we would elicit  
3 much more than that.

4 THE COURT: And why can't the jurors look at these two  
5 pictures and draw the same conclusions?

6 I guess you don't have the holster. You need somebody to  
7 give the holster a name; is that right?

8 MS. BERKOWER: I think that's the idea, Your Honor.

9 THE COURT: So you're really using this agent who is  
10 familiar with this holster to do that, to say this is X type of  
11 holster? I forget the name of it.

12 MS. BERKOWER: Correct.

13 THE COURT: And you're using it to say it holds  
14 various guns, including the gun that will be introduced in  
15 evidence?

16 MS. BERKOWER: Yes. I think he would say that this  
17 brand of holster can be used for a Smith & Wesson handgun,  
18 period. We would separately introduce the fact that a  
19 Smith & Wesson handgun was found on a nightstand in  
20 Mr. Reffitt's bedroom.

21 THE COURT: Does he have -- in his private life, does  
22 he also own the specific handgun, so he knows it fits that  
23 holster?

24 MS. BERKOWER: This agent personally uses these  
25 holsters for Glock-branded handguns, not Smith & Wesson

1 handguns.

2 THE COURT: So how does he know the other fact? Is  
3 that because of his experience as an agent?

4 MS. BERKOWER: I think it's because of his  
5 experience -- that's a good question. I'm not entirely sure. I  
6 don't think it's from being an agent, because I know that the  
7 agents use Glock handguns. I don't -- I'm not fully sure how he  
8 knows that. It may just be as a gun enthusiast, but we could  
9 certainly find that out.

10 THE COURT: Okay. That would be helpful to know.

11 All right. I interrupted you at one point, Ms. Berkower,  
12 if there's more that you want to explain in terms of how you  
13 intend to use this agent's testimony if I permit it.

14 MS. BERKOWER: I think only just to finish the thought  
15 that the extent that the D.C. Circuit has expressed concern  
16 about agents drawing upon their law enforcement experience to  
17 give lay testimony that then draws inferences for the jury,  
18 that's not what we're trying to do here.

19 So for instance, an agent who would testify that they saw a  
20 particular bulge or individual walking in a certain way that  
21 might indicate -- that was an observation from which they drew  
22 the inference based on their law enforcement training that the  
23 person was carrying a weapon or was concealing drugs or other  
24 contraband. That's not the type of testimony that we're trying  
25 to elicit here. And we understand why that would be



1       problematic, because that is drawing on specialized law  
2       enforcement training to make that inference, and that's not a  
3       lay opinion. That's not the kind of process of reasoning  
4       familiar in everyday life to people.

5               Instead, like I think we've already discussed, we're really  
6       just asking the agent to identify a product. And the Rules  
7       Committee in 2000, the 2000 Explanatory Notes noted that they  
8       were not trying to exclude some lay opinion testimony. I think  
9       one of the prototypical types of lay opinion testimony that they  
10      identified was the appearance of things and identifying things.

11             And one of the cases that they cited which we included in  
12      our supplemental authority for the Court gave a good example of  
13      that, that people who are familiar with narcotics by using them  
14      and having personal experience with them could testify that  
15      something was a particular narcotic. That was, if not an  
16      experience that jurors may have had, at least a reasoning  
17      process that would be familiar to them.

18             THE COURT: One other thing that was brought out by  
19      the cases is that the courts look at whether the facts that a  
20      witness is observing is requiring that witness to apply the  
21      knowledge that's greater than the average layperson or, in this  
22      case, the average gun owner.

23             So when you start talking about things like not just a  
24      holster, there's a name of it, but this holster can hold all  
25      these different types of guns, is that getting, you know,

1 farther beyond what a gun enthusiast would know, a regular  
2 layperson? Is that crossing that line in some way?

3 MS. BERKOWER: Well, Your Honor, I don't think that we  
4 are going to try to go much further than just asking what type  
5 of firearm would this holster hold and how do you know that. We  
6 could ask that. I think we would ask what -- how do you  
7 recognize this, what makes you able to recognize this, because I  
8 think that is a question that the jury may have, and I think he  
9 would identify the level-one finger retention device as a unique  
10 feature that allowed him to recognize it.

11 THE COURT: But is a regular gun owner going to know  
12 that? I mean, this agent has been exposed presumably to a lot  
13 of different firearms and a lot of different gun holsters in his  
14 job. So he's almost like a gun shop owner maybe, not the  
15 neighbor next door who has a firearm.

16 And would a gun shop owner testify as an expert, or would  
17 he or she just testify based on, you know, his -- it seems like  
18 that person might be more of an expert who knows all the  
19 different holsters and knows that this is the only one out of  
20 all these thousands of holsters that has this finger lock or is  
21 visible?

22 I don't know. I'm asking. I don't know the answers to  
23 these questions.

24 MS. BERKOWER: I think we do plan for this testimony  
25 to be pretty limited, and I don't -- I think probably there are

1       circumstances under which a gun shop owner could qualify as an  
2       expert and other testimony that would simply -- would still be  
3       within the category of lay testimony and really would come down  
4       to personal knowledge and experience.

5               And here, we're really drawing on the agent's personal  
6       experience with this particular product that would allow him to  
7       identify the product. And I don't think it's outside the realm  
8       of the average experience of a person who owns this holster to  
9       recognize it through the level-one finger retention device.

10              I know there could be other circumstances in which a wider  
11       set of questions would be asked that might, you know, get into  
12       territory that would be more specialized, but really, this is  
13       just about identifying -- the ability to identify a product that  
14       you have personal knowledge of from using it during your life  
15       for several years.

16              THE COURT: And again, the special characteristics --  
17       characteristic that makes this holster unique is what? The  
18       finger --

19              MS. BERKOWER: The level-one finger retention device.  
20       You have to push it down by the user's index finger in order to  
21       remove the gun. That's a feature that anybody who employed this  
22       would know about, because in order to get the gun out you have  
23       to push down on the retention device to get the gun out. It's  
24       not like a tiny feature on the side that only someone would know  
25       if they've examined it closely. It's a primary feature of the

1 product.

2 THE COURT: So are you going to try to put the gun in  
3 the holster? I know you don't have that holster, but are you  
4 going to introduce that style of holster?

5 MS. BERKOWER: I think that --

6 THE COURT: How are you going to present his testimony  
7 saying this gun fits this holster?

8 MS. BERKOWER: We do have a -- we do have that style  
9 of holster in the possession of the FBI that we were going to  
10 make available to Mr. Welch to inspect, and we were going to  
11 potentially try to introduce that separate item with, of course,  
12 making it clear that that's not something -- this was not the  
13 same one that was found in the defendant's bedroom.

14 THE COURT: Necessary to his testimony is knowledge  
15 that a lot of other holsters don't have the same level-one  
16 finger retention device; right?

17 MS. BERKOWER: Yes.

18 THE COURT: And again, is that something a normal  
19 layperson knows, or is it someone with the long history of being  
20 a federal agent and trained in firearms knows that this is a  
21 unique feature of this holster?

22 MS. BERKOWER: I think it's knowledge that anyone who  
23 has used this holster would know, be that through your  
24 experience in law enforcement owning it or be that through your  
25 experience of having bought it on Amazon or from a gun shop.

1 That's personal knowledge that anyone who owns the holster would  
2 know, and it doesn't have to come from specialized training.

3 Whether there are special ways to use the holster above and  
4 beyond that basic feature, I honestly don't know, but we  
5 certainly wouldn't be seeking to elicit it here. It's more  
6 just, how do you know that this is the product that you saw? I  
7 know it because it has this very unique feature, that's one of  
8 the primary features of the product that anybody who owns it  
9 would know about, because you can't use it unless you are  
10 familiar with how to use that feature.

11 THE COURT: Why wouldn't the government just seek to  
12 qualify someone as an expert and have an expert testify about  
13 this?

14 MS. BERKOWER: Well, I think if Your Honor -- if Your  
15 Honor isn't going to permit this as lay opinion, that's  
16 something we will consider doing. This just seemed to fall  
17 clearly enough on the line of lay opinion that we believed that  
18 we could proceed this way.

19 THE COURT: So if I deny this, then you're going to  
20 file -- you're going to give notice of expert testimony and --

21 MS. BERKOWER: I think we would consider doing that.  
22 This is a relatively -- we believe this is relevant testimony --

23 THE COURT: I definitely agree it's relevant, yeah.

24 MS. BERKOWER: But in our view, it's basic enough  
25 to -- a composition of this product -- which again, I think we

1 would be in a different spot, Your Honor, if this was equipment  
2 that was only available to law enforcement or to the military  
3 and, therefore, was not something you could go out and purchase  
4 in any gun store or online or sporting goods store, and  
5 therefore, how to use a product of this type or how to recognize  
6 a product of this type is something that you could only know  
7 through law enforcement training, which is the kind of testimony  
8 that the D.C. Circuit has had a problem with, only law  
9 enforcement would know to draw this inference from that  
10 observation.

11 And that's just not the case here. This is really, I  
12 think, as simple as being able to identify a specific tool that  
13 is available to the general public that this particular witness  
14 has personal familiarity with.

15 THE COURT: But is the fact that the level-one finger  
16 retention device is unique to this holster, is that -- that's  
17 also a question. Is that known to the general layperson? Would  
18 a layperson be able to competently testify like this agent will  
19 about this holster without the breadth and training and  
20 experience that this agent possesses?

21 MS. BERKOWER: I don't think we need to even go that  
22 far, Your Honor. I understand what the Court is saying, and to  
23 be honest, I don't actually know the answer. But I don't think  
24 that's the testimony we would be eliciting.

25 THE COURT: But the problem is, on cross, Mr. Welch is

1 going to go after him, how can you possibly say this holster,  
2 based on this three-inch view of this holster, is the same as  
3 whatever the name is. In order to answer the questions, he's  
4 going to have to explain -- if I'm inclined to admit this, I  
5 really do have concerns about, as I've stated, about getting  
6 into the fact that this agent is a trainer in firearms and  
7 getting into all of that just because of the statements that the  
8 circuit has made about concerns with crossing that line with a  
9 law enforcement agent who is not qualified as an expert.

10 So that's a concern. I think we have to anticipate that  
11 your two questions are not just the end of the discussion; there  
12 will continue to be probing on this on cross. And if an agent's  
13 going to honestly answer those questions, he's probably -- you  
14 can't tell me now how he knows about the level-one finger  
15 retention device and how prevalent it is than other holsters?  
16 It's possible the defense goes there, and then we will have a  
17 situation where we have an agent sharing all of his highly  
18 specialized knowledge in order to answer the questions  
19 truthfully, and that's a concern.

20 I will hear from Mr. Welch, but I think what I need is more  
21 specifics based on some of the questions I've asked here, and if  
22 not this witness, then is the government -- the government would  
23 seek then to qualify Agent Hightower as an expert?

24 MS. BERKOWER: Your Honor, maybe I'm getting a little  
25 ahead of myself. I know one thing we did want to ask the Court

1       for was a scheduling order for the lead-up to trial. So I think  
2       we would -- if we were to -- if Your Honor was to require expert  
3       and not lay opinion on this, we would certainly consider that.

4               THE COURT: I mean, at this point, we're, what, six  
5       weeks away from trial? I think the government needs to be  
6       giving notice immediately. And I'm not ready to resolve this  
7       today. So I think by Monday you need to provide that, if that's  
8       a backup position you want, so that Mr. Welch has time to get  
9       his competing expert. All right?

10              MS. BERKOWER: Yes, Your Honor.

11              THE COURT: Anything else you would like to add,  
12       Ms. Berkower?

13              MS. BERKOWER: Not at this time. Thank you.

14              THE COURT: All right. Mr. Welch?

15              MR. WELCH: Your Honor, in its papers, the government  
16       has said that what it wants to elicit from the agent was that  
17       the defendant was, quote, wearing a holster. So they're going  
18       to ask the agent to look at that picture that you have in the  
19       paper before you and say that Mr. Reffitt was wearing a holster.

20              That's not something that the jurors could not look at and  
21       decide for themselves. They don't need a law enforcement agent  
22       who the government concedes, based on his experience --

23              THE COURT: Well, they are talking about more than  
24       just is he wearing a holster. It talked about this holster has  
25       this name.



1           MR. WELCH: Well, they do, but the issue ends up  
2 becoming is the picture of Mr. Reffitt on the Capitol steps, is  
3 he wearing a holster in that picture. And that's what they're  
4 asking the agent, relying on his experience --

5           THE COURT: Is that what you're objecting to?  
6 Clearly, in the picture he is wearing a holster. That's not  
7 prejudicial. The photograph shows this.

8           MR. WELCH: The photograph shows whatever the  
9 photograph shows. The jury doesn't need a law enforcement  
10 witness who is a firearms trainer to come in and tell them what  
11 they're looking at in a picture.

12          If Your Honor is saying that it is obvious to you that that  
13 picture shows Mr. Reffitt wearing a holster, then the government  
14 doesn't need this lay opinion testimony at all, because the  
15 jurors should be able to draw that conclusion for themselves.

16          THE COURT: But the government is saying more than  
17 that. It wants to try to identify this holster, and the way it  
18 does that is by this special level-one finger retention device  
19 that they say is observed on a better blown-up picture, I guess,  
20 of this photograph.

21          MR. WELCH: Well, number 1, I haven't seen that, and  
22 number 2, they've also told you today that this agent gained  
23 whatever knowledge that he has of his own because he owned the  
24 same brand -- or used, excuse me, used the same brand through  
25 his law enforcement experience, and then after whatever agency

1 he was working for was no longer using that particular weapon,  
2 he happens to like weapons, so he continues to have the stuff.

3 So he is absolutely relying on his specialized experience  
4 in order to then say yeah, I personally know this. Yeah, he  
5 personally knows it, because he has expertise that he has  
6 gained.

7 THE COURT: So you agree, Mr. Welch, this is relevant  
8 testimony?

9 MR. WELCH: It's relevant.

10 THE COURT: Okay. But you just think that the  
11 government should have to produce an expert to elicit it?

12 MR. WELCH: I'm saying that, number 1, it would be  
13 necessary for the person to be an expert, yes, in direct answer  
14 to Your Honor's question, yes.

15 But furthermore, even then, he's not supposed to be  
16 testifying and telling the jury what they're seeing in the  
17 picture of Mr. Reffitt on the steps of the Capitol, which is  
18 what they're asking him to do. They say so.

19 THE COURT: He can say this appears to be a holster.  
20 Presumably, his testimony is not --

21 MR. WELCH: Quoting from their papers, they want the  
22 agent to say, quote, he was wearing a holster and thus likely a  
23 firearm.

24 THE COURT: Well, this is not the key point. The crux  
25 of the matter is how far they can go with trying to identify the

1 particular type of holster. If he sees this and it appears to  
2 him that that's a holster and a certain type of holster, you're  
3 objecting to that testimony even coming from an expert?

4 MR. WELCH: Yes, because that's the ultimate issue. A  
5 couple of the charges are that the obligation is that the  
6 defendant was armed. So basically --

7 THE COURT: The holster doesn't mean that he's armed.

8 MR. WELCH: Well, but they're saying in their papers  
9 and thus likely he was. I mean, that's their point. That's  
10 what they're trying to prove. They're trying to have this agent  
11 come in and tell the jury what they're seeing and what to  
12 conclude.

13 THE COURT: Ms. Berkower, is the agent going to  
14 testify that that holster is loaded with a firearm?

15 MS. BERKOWER: Your Honor, I think the agent will  
16 testify that he sees the holster, as Your Honor has said, and in  
17 the photograph, we would ask him if there's anything -- what is  
18 significant about that holster to him. In the photograph, you  
19 can see there's something silver in it. And so he would say  
20 there's something silver in it.

21 The firearm that was recovered from the holster in  
22 Mr. Reffitt's bedroom, in the photograph that I think we had on  
23 the screen earlier that's in our brief, it's at a different  
24 angle, and you can only see black, but in other photographs that  
25 we have that have all been provided to Mr. Welch, you can see

1       that the top of it is silver.

2               And so while I doubt that we would say "Is there a gun in  
3       there?" we would ask him what's significant about it, and he  
4       would say, "Well, there's silver in the top. It looks like  
5       there's something in it." And we would show the actual firearm.  
6       The jury could see it. And they would see that the top of it is  
7       silver.

8               THE COURT: And you will place it in a holster that  
9       you say is the same that was not seized from his bedroom?

10              MS. BERKOWER: As a demonstrative exhibit, yes.

11              THE COURT: Okay. These are the kinds of things that  
12       I've been pressing on you all need to be anticipating. There  
13       are a lot of issues here. I think the government needs to give  
14       clear photographs to the defense and to the Court on this. I  
15       think the government needs to be showing the holster that it  
16       intends to introduce; it's not the one that was seized from  
17       Mr. Reffitt's bedroom but you say matches. I think the  
18       government needs, as a backup if it wants to go down this route,  
19       to be prepared with expert notice by Monday, and Mr. Welch, I  
20       will give you time to get a competing expert, if that's what you  
21       want to do.

22              But we're arguing about very picky items in these motions,  
23       and there's some big ones that are being ignored, and this  
24       motion illustrates it's much more complicated than just this  
25       determination.

1           So I'm going to ask that you all confer, that you provide a  
2       better version of this photo that illustrates what you're going  
3       to be trying to show, that you show Mr. Welch the holster, that  
4       you provide expert testimony, and I am going to also ask you,  
5       Ms. Berkower, to say more specifically than you've done in this  
6       brief what it is exactly that you seek to elicit so that we're  
7       all really clear.

8           If I permit this either as lay testimony -- and I haven't  
9       decided this issue. It's just we're up close to trial now, and  
10      we need to proceed with notice if that's necessary so that  
11      Mr. Welch can be prepared and we don't have to bump this case  
12      again, because I know Mr. Reffitt wants to be tried at the end  
13      of February.

14          And I think there's still time for the defense to get its  
15      own expert if that's what it wants to do, but you need to -- how  
16      quickly can you file a supplemental brief that is more granular  
17      in terms of the specific testimony you seek to elicit from Agent  
18      Hightower or any other witness you might call as an expert?

19           MS. BERKOWER: Your Honor, is Wednesday too late?  
20      That would be, I believe, the 26th.

21           THE COURT: All right. I will give you until the  
22      26th, and I will give Mr. Welch until the 2nd to respond to  
23      that.

24          And again, Ms. Berkower, you all need to -- if you're going  
25      to as a backup have an expert, you need to provide that notice

1 by Monday.

2 MS. BERKOWER: Understood, Your Honor. Thank you.

3 THE COURT: And Mr. Welch, why couldn't, say, a gun  
4 owner who has familiarity be an expert in this case or maybe  
5 even a lay -- provide lay testimony or somebody who has -- owns  
6 a lot of guns him- or herself?

7 MR. WELCH: Well, anybody with the qualifications  
8 could be an expert. On the other hand -- and this is the  
9 problem. This is like a scrambled egg. The agent is like a  
10 scrambled egg in this situation, because, granted, anybody could  
11 be a lay witness. I mean, if we were just saying what's that  
12 sound and he said well, that's a gunshot, that would be one  
13 thing. Anybody might be able to recognize the sound of a  
14 gunshot.

15 But this agent gained the knowledge that they're asking for  
16 through his specialized experience as an agent. He might  
17 continue to have this stuff, you know. Someone might continue  
18 to collect old patrol cars that they drove, and everybody drives  
19 a car, so that might not end up being something that's really,  
20 you know, expertise.

21 But in this situation, this guy is an experienced firearms  
22 trainer, and you can't separate that. He gained his experience  
23 in a particular way. He gained his knowledge in a particular  
24 way.

25 THE COURT: Do you think that there could be lay

1 testimony from a nonagent who just happens to own this holster  
2 and be familiar with firearms generally but maybe not an expert?

3 MR. WELCH: I suppose if somebody owned the exact same  
4 firearm and holster themselves and say yeah, I happen to own the  
5 same one, then perhaps.

6 THE COURT: Why the firearm as well?

7 MR. WELCH: Well, because the holsters would be  
8 unique, from what I heard, to the actual firearm.

9 THE COURT: She's saying that this holster holds a lot  
10 of different firearms, one of which is the one that was seized  
11 from Mr. Reffitt's bedroom; correct?

12 MS. BERKOWER: Oh, maybe I should clarify that. The  
13 manufacturer makes this holster with minor specifications for  
14 different brands. But it's the same style; it's the same  
15 product. It just has minor specifications, I think, on the  
16 inside to hold different brands. So the Glock handgun won't fit  
17 in the one that you buy for the Smith & Wesson, but it's the  
18 same product other than the minor differences for different  
19 brands.

20 THE COURT: Okay. But Mr. Welch, would you object if  
21 they called in some person who's not an agent who owns this same  
22 holster and firearm to testify and say that that picture looks  
23 like it shows the holster I own and here's why? Is that  
24 legitimate layperson testimony?

25 MR. WELCH: I don't think that would be when you're

1 talking about the picture of Mr. Reffitt on the steps, because  
2 anybody who would do that would ultimately be giving ultimate  
3 issue testimony to say yes, that is a picture of a particular  
4 person wearing a holster with a firearm in it. That's exactly  
5 what the charge is. That's what the jury is being asked to  
6 decide, and they're telling the jury what to conclude in that  
7 situation.

8 THE COURT: This is the container for the firearm. So  
9 I don't understand why they can't testify that they observed a  
10 holster in the photograph, assuming they get a better picture  
11 than this. Not definite. It appears -- "What do you see that's  
12 significant in the photograph?" "It looks like there's a  
13 holster, and it looks like one I own." "Well, why is that?"  
14 "Well, it has this special feature."

15 Why is that testifying about the ultimate issue in the  
16 case?

17 MR. WELCH: Well, because as the government proffered  
18 in its papers, basically they want the person to say he's  
19 wearing a holster and likely armed, and they're going to say  
20 that oh, what I see in there is silver, and he had a gun with  
21 some silver on it, so therefore, he's got a gun in his holster.  
22 That's what the jury is supposed to decide.

23 THE COURT: Ms. Berkower?

24 MS. BERKOWER: I mean, the witness would not be  
25 drawing the inferences that Mr. Welch is drawing. I think those



1 are things that the government would argue based on the facts  
2 that were admitted. And to the extent that the witness can  
3 provide the basis for facts that are useful to the government's  
4 case, that's the nature of testimony, that's the nature of  
5 evidence.

6 THE COURT: Mr. Welch, I don't understand your point.  
7 In a drug case, if the government is prosecuting somebody for  
8 possession of crack cocaine and they call a witness who saw the  
9 defendant snort the cocaine, they would be allowed to elicit  
10 that testimony. And if he had a picture of it, they would be  
11 allowed to admit that.

12 MR. WELCH: What they could say is that the defendant  
13 snorted something, it was white powder. But if you have the  
14 witness do exactly what you just said, that you saw the  
15 defendant snort cocaine, that is the ultimate issue. That is  
16 for the jury to decide, whether it was cocaine.

17 THE COURT: Ms. Berkower?

18 MS. BERKOWER: Your Honor, I think Mr. Welch is  
19 actually not quite right on this point. And the Rules Committee  
20 gave a very similar example to what Your Honor gave in one of  
21 the cases that it cited. They specifically said it is  
22 appropriate for a lay witness with personal knowledge of a  
23 narcotic to testify that that was the narcotic at issue in the  
24 transaction that the defendant was engaged in because they have  
25 personal experience of it.

1           And so I would agree with Your Honor and respectfully  
2       disagree with Mr. Welch that a witness actually could testify  
3       that they had personal knowledge of a certain substance that was  
4       being used in a particular situation and recognized it to be  
5       cocaine. They could testify. That is the essence of lay  
6       opinion testimony, and that's exactly the kind of thing we're  
7       trying to elicit here, identification of a particular product  
8       based on personal experience.

9           MR. WELCH: If someone is looking at a picture or  
10      someone is watching someone snort powder, unless you test it or  
11      unless the person actually used it themselves, you wouldn't know  
12      whether it was baking soda or cocaine or some other powdery  
13      substance. That's an expert conclusion.

14          THE COURT: Okay. Have I been clear about what the  
15      government needs to do?

16          MS. BERKOWER: Yes, Your Honor, I believe so.

17          THE COURT: All right. And Mr. Welch, while we're on  
18      the subject of experts, do you intend to introduce any expert  
19      testimony at trial?

20           To the extent you do, you also -- although this is not in a  
21      written order yet, I will put it in a minute order today, you  
22      need to provide notice of experts. Now, if you're responding to  
23      theirs, obviously, you can have additional time to identify that  
24      expert. I will give you -- how long would you need to identify  
25      an expert if they give notice on Monday that they're seeking to

1 admit expert testimony relating to this issue?

2 MR. WELCH: I think we need a week, Your Honor. I'll  
3 have to make the appropriate inquiries and --

4 THE COURT: Okay. So the government will give notice  
5 of any potential expert testimony on this issue or anything  
6 else. And tell me now if you all are contemplating any other  
7 expert testimony on any issue in this case, both government and  
8 defense. Ms. Berkower or Mr. Nestler, anything else other than  
9 this?

10 MS. BERKOWER: No, Your Honor.

11 THE COURT: Okay. So that is the deadline.

12 Mr. Welch, any expert testimony from you?

13 MR. WELCH: No.

14 THE COURT: All right. So the deadline for giving  
15 notice is Monday, the 24th, and Mr. Welch, your deadline for any  
16 competing expert is one week later.

17 Let's talk about setting some future dates to address --  
18 pick up with this issue and address the jury instructions and  
19 other issues. I had some dates in front of me. I think I was  
20 going to suggest February 4. Is that a date that would work for  
21 both sides?

22 MR. NESTLER: That should be fine for the government,  
23 Your Honor.

24 MR. WELCH: I think it will be a question of when. I  
25 have an in-person sentencing hearing before Judge Bredar in

1 Baltimore that morning.

2 THE COURT: Okay. Let me just check my calendar.  
3 What time do you think you could be available, Mr. Welch?

4 MR. WELCH: Probably by 1:00.

5 THE COURT: Okay. Does that work for the government?

6 MR. NESTLER: Could we do it a little bit later, Your  
7 Honor, or on maybe even the prior day, the 3rd?

8 THE COURT: Mr. Hopkins, the 2nd and the 3rd are  
9 pretty packed. Is there any room that we could fit this in on  
10 those two days with D.C. Jail?

11 COURTROOM DEPUTY: We could do 12:30 on the 3rd.

12 MR. NESTLER: That's fine for the government, Your  
13 Honor.

14 MR. WELCH: That's fine, Your Honor.

15 THE COURT: Okay. So let's set this for 12:30 on  
16 February 3rd.

17 Actually, Ms. Berkower, you needed until Wednesday to  
18 supplement your briefing here, and I'm just wondering,  
19 Mr. Welch, can you respond by Tuesday, February 1st? To the  
20 extent you need to, and you may not, but to the extent you want  
21 to respond to the supplemental briefing that they give me on  
22 this issue on February --

23 MR. WELCH: I think that's fine. I can bump that up a  
24 day. I think you had given me until the 2nd before, but bumping  
25 it up to the 1st shouldn't be a problem.

1           THE COURT: If you can, so I have time to take a look  
2 at it before the 3rd, that would be helpful. So any  
3 supplemental briefing by the government by next Wednesday and  
4 any response to that by Tuesday.

5           And in terms of -- since everyone's schedules fill up and  
6 it's difficult to get time with D.C. Jail, I am inclined to set  
7 some periodic hearings moving forward just so that as issues  
8 arise we have cleared schedules and the ability to meet and have  
9 Mr. Reffitt present. And if there's nothing to address on those  
10 dates, then we can certainly vacate them later. But I would  
11 like to go ahead and set -- is it possible to set time, say, on  
12 February 18th at 9:00 a.m.?

13           MR. NESTLER: That's fine for the government.

14           MR. WELCH: I'm available.

15           THE COURT: Let's set another hearing for  
16 February 18th at 9:00 a.m. And what about Wednesday,  
17 February 23rd, at 10:00 a.m.? Would that work for everyone?

18           MR. NESTLER: Yes, Your Honor.

19           MR. WELCH: I'm checking. You said the 23rd; correct?

20           THE COURT: Yes.

21           MR. WELCH: At what time? Sorry.

22           THE COURT: Would 10:00 a.m. work for everyone?

23           MR. WELCH: Yes.

24           THE COURT: Mr. Hopkins, do those dates and times work  
25 for D.C. Jail?

1           COURTROOM DEPUTY: D.C. Jail can accommodate both of  
2 those dates, Your Honor.

3           THE COURT: Okay. So we will do that, and then let's  
4 also set a time on Friday, the 25th. Does 10:00 a.m. work for  
5 everybody, just last-minute issues?

6           And again, we can vacate any of these if we need to. I  
7 just don't want to get in a situation where something comes up  
8 and we can't get your schedules free and Mr. Reffitt present.

9           COURTROOM DEPUTY: 10:00 a.m. won't work for D.C. Jail  
10 on the 25th.

11          THE COURT: What time will work on the 25th?

12          COURTROOM DEPUTY: 11:30.

13          MR. WELCH: That's a problem. I have an in-person  
14 sentencing before Judge Chasanow in Baltimore that day.

15          THE COURT: Let's just set a time, then, on the 24th.  
16 11:00 a.m. on the 24th? We probably don't need it.

17          MR. WELCH: That's fine.

18          MR. NESTLER: That's fine.

19          THE COURT: Does that work, Mr. Hopkins?

20          COURTROOM DEPUTY: That does work, Your Honor.

21          MR. NESTLER: Can I ask, Your Honor, are these all  
22 going to be virtual hearings, or did Your Honor want to have a  
23 in-person hearing to make sure we're all on the same page in the  
24 courtroom before the trial?

25          THE COURT: I do know that court staff will want to

1 have you all come in and walk you through the logistics of  
2 whichever courtrooms we're in. I would suspect it will be the  
3 Ceremonial Courtroom for jury selection and then perhaps my  
4 courtroom thereafter. But that's something that I need to  
5 confirm with the court staff and the jury office and all that.

6 I apologize for the background noise here.

7 COURTROOM DEPUTY: I'm sorry, Your Honor. The 24th,  
8 was that 11:00 or 10:00?

9 THE COURT: I can't recall. I think we said 11:00.

10 MR. WELCH: We said 11:00.

11 THE COURT: Mr. Nestler, to your point, we may want to  
12 come in for one of those in person, but for now let's assume  
13 they're virtual, and we will talk at the next hearing what makes  
14 sense. I think you can do this with court staff, though.

15 MR. NESTLER: That's fine, Your Honor. It was only to  
16 the extent the D.C. Jail wasn't available, we could do something  
17 live. We will follow the Court's lead on how this works.

18 THE COURT: Yeah, that's an interesting thought. Let  
19 me think about that, Mr. Nestler. I wonder in terms of  
20 transporting Mr. Reffitt back and forth, whether that's -- I  
21 think that could be helpful.

22 Mr. Welch, do you have a view? Talk to Mr. Reffitt about  
23 this. We can certainly turn any of these into in-person  
24 hearings as we get closer, but I would like to minimize the  
25 unnecessary in-person hearings, so long as we're in the current

1 environment, but that may change.

2 MR. WELCH: I will talk to my client about that, Your  
3 Honor. I know that sometimes it results in mandatory  
4 quarantines for folks when they get pulled out and have to go  
5 back.

6 THE COURT: So Mr. Welch, I'm going to ask you to  
7 inquire about that issue with D.C. Jail, because as trial  
8 approaches, of course, we can't have him quarantined and unable  
9 to come. I'll check on my end as well. That's something to  
10 think about. He needs to be present for trial.

11 MR. WELCH: Right. But what I meant by that was, I  
12 don't think it's been an issue with them -- not necessarily them  
13 bringing someone back to trial. What I'm saying is that I think  
14 a lot of times they then get put in some sort of isolation when  
15 they're returned to the jail, and they're unable to --

16 THE COURT: Right. All of that, yes. So you check  
17 into the logistics of when you are able to meet with Mr. Reffitt  
18 and what limitations will be placed on that if we bring him to  
19 court pretrial. All right? You should look into that. That's  
20 a good point.

21 And then also just to be clear, I still intend to not have  
22 the public line open through trial. All right? There will be  
23 overflow rooms for those who want to be present, Mr. Welch, to  
24 view the trial. Mr. Reffitt's friends and family, all right,  
25 need to be present, as I've said before. Okay?



1 MR. WELCH: Yes.

2 THE COURT: All right. Anything else?

3 MR. NESTLER: Yes, Your Honor. There's one additional  
4 piece that involves discovery. We have arranged, and I don't  
5 know if Your Honor has heard, to make sure the defendant has  
6 access to evidence.com at the jail. And we've talked to  
7 Mr. Welch about this. In order to do the final step, we need  
8 Mr. Reffitt to either sign an acknowledgment on the protective  
9 order or be admonished on the record that he agrees to be bound  
10 by the protective order, and that will allow the contractor in  
11 the jail to give him access to evidence.com.

12 Given his quarantine status, Mr. Welch was not able to meet  
13 with him and get a signature. So we wanted to do that today on  
14 the record so we can facilitate him having his own access.

15 THE COURT: Okay. So what's the problem? We don't  
16 have the ability to have Mr. Reffitt actually sign the  
17 protective order?

18 MR. WELCH: What we've come up with is we have an  
19 attachment that we have agreed to. We've ironed out our  
20 differences on that. And that's what I spoke with my client  
21 about just before the hearing, and he is agreeable to this. I  
22 can certainly read it, because it's in my hand right now, and my  
23 expectation is that Mr. Reffitt would say that he agrees to  
24 these terms.

25 THE COURT: Okay. I clearly can't review this. I

1 don't have a copy of it. So if we need to do this today -- is  
2 this something that can wait until --

3 MR. WELCH: You're muted, Your Honor.

4 THE COURT: I don't have this document. Is this  
5 something that we need to do today, Mr. Nestler and Mr. Welch?

6 MR. NESTLER: We were hopeful to give the defendant  
7 access to it sooner rather than later. I'm sorry. We don't  
8 actually need Your Honor to do any of the reading. Mr. Welch  
9 can read it, and as long as Mr. Reffitt on the record agrees to  
10 be bound by it --

11 MR. WELCH: I've already gone over this with him, Your  
12 Honor.

13 THE COURT: Okay. Go ahead, Mr. Welch.

14 MR. WELCH: All right. This is the defendant's  
15 acknowledgment: "I have reviewed this protective order in its  
16 entirety and have been given the opportunity to ask any  
17 questions I may have had. I am satisfied that I fully  
18 understand this protective order, and I agree to abide by its  
19 terms. No threats have been made to me, nor am I under the  
20 influence of anything that could impede my ability to understand  
21 this protective order fully. My agreement to abide by this  
22 order shall not be construed as a waiver of any of my  
23 constitutional or statutory rights as a defendant before this  
24 court."

25 And then there is a signature line for Mr. Reffitt. And

1        what I would be willing to do, if Mr. Reffitt indicates that  
2        this is agreeable to him, I could sign it on his behalf and then  
3        file it in ECF.

4                THE COURT: Mr. Reffitt, you've heard what Mr. Welch,  
5        your counsel, has just said. Do you agree to the terms of that  
6        protective order addendum?

7                THE DEFENDANT: Yes, Your Honor, I agree to that.

8                THE COURT: And do you agree to have him sign on your  
9        behalf until he can give the paperwork to you in person?

10               THE DEFENDANT: Yes, Your Honor, I agree to him  
11        signing it, putting his name on it and signing it as agreeing to  
12        it.

13               THE COURT: What are the potential effects if he were  
14        to violate this protective order, Mr. Nestler?

15               MR. NESTLER: There are no sanctions put in the  
16        protective order itself. It's an order of the Court. So we  
17        would apply to the Court for sanctions.

18               THE COURT: Okay. Mr. Reffitt, you understand that  
19        sanctions could be imposed for your failure to abide by the  
20        conditions to which you've agreed?

21               THE DEFENDANT: Yes, Your Honor, I understand.

22               THE COURT: All right. Is there anything else,  
23        Mr. Nestler, that you would like to add to that?

24               MR. NESTLER: No, Your Honor. Thank you. We  
25        appreciate the indulgence. Nothing else from the government's

1 perspective.

2 THE COURT: Mr. Welch?

3 MR. WELCH: No, Your Honor.

4 THE COURT: All right. Thank you all.

5 (Proceedings adjourned at 2:30 p.m.)

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## 1 CERTIFICATE OF OFFICIAL COURT REPORTER

2  
3 I, Sara A. Wick, certify that the foregoing is a  
4 correct transcript from the record of proceedings in the  
5 above-entitled matter.  
6

7 Please Note: This hearing occurred during the  
8 COVID-19 pandemic and is, therefore, subject to the  
9 technological limitations of court reporting remotely.  
10

11  
12 /s/ Sara A. Wick

February 14, 2022

13 SIGNATURE OF COURT REPORTER

DATE  
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