

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, . February 3, 2022
Defendant. . 12:40 p.m.
- - - - -

PUBLIC TRANSCRIPT OF CONTINUED PRETRIAL CONFERENCE
(SEALED PORTION REDACTED)
BEFORE THE HONORABLE DABNEY L. FRIEDRICH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: JEFFREY NESTLER, AUSA
RISA BERKOWER, AUSA
United States Attorney's Office
555 Fourth Street Northwest
Washington, D.C. 20530

For the Defendant: WILLIAM WELCH, III, ESQ.
5305 Village Center Drive
Suite 142
Columbia, Maryland 21044

Official Court Reporter: SARA A. WICK, RPR, CRR
333 Constitution Avenue Northwest
U.S. Courthouse, Room 4704-B
Washington, D.C. 20001
202-354-3284

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P R O C E E D I N G S

(All participants present via video conference.)

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

Representing the United States, we have Mr. Jeffrey Nestler and Ms. Risa Berkower, and representing Mr. Reffitt, we have Mr. William Welch. And Mr. Reffitt is appearing via video.

THE COURT: All right. Good afternoon again, everyone. For the record, this is a video conference hearing being conducted pursuant to the Chief Judge's standing order relating to the pandemic.

So I have reviewed the parties' supplemental briefs that were filed in connection with the government's motion in limine to allow Special Agent Hightower to provide lay witness testimony about the firearm holster at issue in this case.

I am prepared to rule, but before I do so, I just wanted to ask both sides if there's any additional argument, new arguments that you would like to make. Mr. Welch?

MR. WELCH: No, Your Honor. As long as you received -- I believe my latest paper on that was paper number 96 that was filed on the 1st. It's called "Amended Supplemental Response."

THE COURT: Yes, I did see that. Thank you. Can you tell me what the difference was between the two?

MR. WELCH: Sure. I'm happy to do that.

1 What I realized is that there was some additional
2 information that I wanted to cite from the government's paper
3 number 93 that basically related to Agent Hightower's
4 professional experience. So I added that on page 3, basically
5 an additional paragraph. The first full paragraph on page 3 of
6 paper number 96 is the only difference. And so that's it.

7 THE COURT: Okay. And just to be clear, Mr. Welch,
8 you are not seeking to call your own expert in this case if the
9 Court were to qualify Hightower as an expert?

10 MR. WELCH: That's correct.

11 THE COURT: So you would not?

12 MR. WELCH: We would not.

13 THE COURT: Okay. Anything from you, Mister --
14 Ms. Berkower? This is your motion.

15 MS. BERKOWER: Nothing more, Your Honor. We will just
16 rest on what we filed.

17 THE COURT: Okay. All right. Having carefully
18 reviewed the supplemental filings, particularly the
19 government's, I have a clearer sense now of what Special Agent
20 Hightower's proposed trial testimony is, and I do agree with the
21 government that it falls on the lay rather than the expert side
22 of the line.

23 But I will say that I do believe, based on the information
24 the government has provided about the special agent's education,
25 training, and experience, I do think that he could qualify as a

1 firearms expert, but I don't believe it's necessary to do so,
2 given the nature of his testimony. I think it falls, as I said,
3 on the lay rather than expert side of the line. His testimony
4 is certainly helpful to determining a fact in issue, namely
5 whether Mr. Reffitt was carrying a gun at the Capitol.
6 Consistent with Rule 703, it's also rationally based on the
7 special agent's perceptions rather than any specialized
8 knowledge about firearms.

9 I also -- so let me just review so we are clear on what the
10 ruling is. I will permit the special agent to provide testimony
11 in certain respects, but I will limit it in others.

12 So first, the special agent can testify that he recognized
13 the holster in the bedroom because he owned several Blackhawk
14 SERPA holsters and he has used them for firearms both in his
15 work and at home. He can testify that he -- in the decade plus
16 he's served as special agent he's used this holster to carry his
17 service weapon.

18 Unless the defense opens the door to this on
19 cross-examination and the agent needs to say this in order to
20 answer the question truthfully, I don't think there's any need
21 for the government to elicit testimony about the agent's role as
22 a special firearms trainer for 15 years, nor do I think there's
23 a need to elicit the fact that he's a firearms enthusiast.

24 Based on what the government has represented, it appears to
25 the Court that the basis of his testimony is simply his daily

1 use of the holster.

2 Have I read that correctly, Ms. Berkower?

3 MS. BERKOWER: Yes, that's right, Your Honor. I think
4 I -- we included the fact that he is a firearms enthusiast to
5 explain why he may know some of the things about -- like he has
6 shopped for these items. So that's why he knows what the
7 material -- what it's made of, what the options are, that you
8 can buy it in matte black or a shinier black, things of that
9 nature.

10 So that was the only basis in our mind for the relevance of
11 the fact that he's a firearms enthusiast, because that's the
12 kind of knowledge you might get if you were shopping for this
13 product. We just wanted to explain why he knew that.

14 So we don't have to elicit that fact, that he's a firearms
15 enthusiast.

16 THE COURT: Okay. I don't want to heighten his
17 testimony, and I don't want -- I think that could be prejudicial
18 to Mr. Reffitt.

19 So again, as I've said, the special agent can testify based
20 on his personal observations that the holster he saw in
21 Mr. Reffitt's bedroom was a Blackhawk SERPA holster. He can
22 talk about the distinctive features of the holster, namely that
23 the holster has an L-shaped auto-locking finger retention device
24 that a user has to push to release the weapon; that the holster
25 comes with an attachment that can flip to a user's pants; and I

1 think it's fine that he testify based on his knowledge of this
2 gun and what he's seen in stores and owned himself that it comes
3 in a matte black.

4 With respect to the photo in the bedroom, he can testify
5 that the photo of the holster, you know, fairly and accurately
6 depicts what he saw in Mr. Reffitt's bedroom.

7 I assume that that's the case, Ms. Berkower? He was a part
8 of the search?

9 MS. BERKOWER: Yes, Your Honor. He was not the agent
10 who collected the item, but he observed it in place and would
11 say that what's in the photograph is a fair and accurate
12 depiction of what he saw in the bedroom.

13 THE COURT: And you will introduce the photo through
14 him?

15 MS. BERKOWER: I think we actually have another
16 witness who will be introducing the photograph, but yes, he will
17 testify about the photograph.

18 THE COURT: Okay. He can also -- with respect to the
19 photo of Mr. Reffitt at the Capitol, he can also testify that
20 the photo appears to show a holster on his right --
21 Mr. Reffitt's right hip, and he can explain why it looks like a
22 Blackhawk SERPA to him.

23 Based on -- I did look at the blown-up photograph, and I
24 can see more clearly what the government's trying to elicit in
25 terms of the finger retention device and the attachment that can

1 be seen in the photo. So I think that's appropriate as well.

2 He is the witness that would also deal with the
3 demonstrative exhibit, not the Blackhawk SERPA holster that
4 Mr. Reffitt owned that wasn't seized but the one that's
5 identical to it?

6 MS. BERKOWER: Correct.

7 THE COURT: Okay. And he can point out the
8 distinctive features on the demonstrative exhibit. He can show
9 how the holster and the attachment work with clothing. He can
10 demonstrate how the finger retention device works. And he can
11 show how the firearm fits into the holster.

12 And I don't think -- although I was concerned about it at
13 first, I don't now think that the distinctive features on the
14 holster, such as the finger retention device or the way in which
15 the holster attaches, constitute specialized knowledge within
16 the purview of Rule 702. Again, it's clear to me now that the
17 special agent will be grounding his baseline and personal
18 experience and will be using that baseline to evaluate an event
19 that he personally observed rather than deriving his baseline
20 from specialized techniques or the research of others and then
21 assessing it -- assessing an event at issue in a case even if he
22 didn't witness it, as is the case in *Atlanta Channel, Inc.* And
23 that's at 2021 Westlaw 4243383. That's a Judge Contreras case.

24 I do think a layperson who has familiarity with firearms
25 and used the Blackhawk SERPA holster on a frequent basis would,

1 like the special agent, be able to recognize and identify its
2 distinctive features. And I cite *U.S. v. Conn*, 297 F.3d 548 at
3 554, a Seventh Circuit case.

4 And based on the government's proffer, I understand that
5 the special agent will not -- you don't intend to elicit any
6 expert testimony about the way in which the firearm was
7 manufactured or operates other than how it fits in the holster;
8 correct?

9 MS. BERKOWER: Yes; that's right.

10 THE COURT: All right. And then you also represent
11 that the special agent will not testify based on the photograph
12 that he believes Mr. Reffitt possessed a firearm at the Capitol;
13 correct?

14 MS. BERKOWER: That's right, Your Honor. I think the
15 photograph, there is some silver coloring on part of the
16 photograph that we will probably -- that I will point out with
17 him, but we won't ask him to draw any conclusions beyond that,
18 just that there's a silver object that appears to be at the top
19 of the holster.

20 THE COURT: Okay. Well, I don't see that as giving an
21 expert opinion on the ultimate issue in the case, as Mr. Welch
22 has argued. Again, this is based on his personal experience.
23 He personally viewed the holster in Mr. Reffitt's bedroom, and
24 he viewed photos of that holster subsequently, the holster in
25 the bedroom and what appears to be a holster on Mr. Reffitt

1 during the Capitol riot as reflected in the other photo. And he
2 will be using his personal experience to evaluate both what he
3 saw in Mr. Reffitt's bedroom and in the photos that he's
4 reviewed in his investigation of this case. So I will permit
5 that testimony to be introduced.

6 Next I want to talk about the parties' proposed
7 instructions for the obstruction count. And I have a few
8 questions I want to discuss with each side, and I also want to
9 give you a chance to think about and provide written comment on
10 some proposed edits that I'm inclined to make. Of course, we're
11 not going to finalize the jury instructions until the charging
12 conference once the evidence is in at trial, but I do think it's
13 important to resolve some of these more thorny legal issues
14 before trial, particularly with respect to this count about
15 which there's been so much pretrial litigation.

16 So I appreciate your efforts to do so, and yours as well,
17 Mr. Welch. The record is very clear you haven't waived any
18 objections by giving the Court feedback on this.

19 But I do want to say, Mr. Welch, with respect to your
20 proposal, much of it conflicts with this Court's decision in
21 *Sandlin*, which you're aware of. So I just want to review the
22 specific areas that I find problematic with your instruction in
23 light of the rulings I've already made in this case and in
24 *Sandlin*.

25 First, the Court will not adopt Mr. Reffitt's proposed

1 definition for "official proceeding." You've emphasized,
2 Mr. Welch, that the proceeding at issue here is one before a
3 court, judge, or federal agency, as well as Congress, and also a
4 federal grand jury investigation. That's language you want in
5 the jury instruction. But as I and a half a dozen other judges
6 on this court have held, the defendant need not have intended to
7 instruct, impede, or influence the due administration of justice
8 to violate Section 1512(c)(2). The statute just requires an
9 intent to obstruct an official proceeding, which includes
10 proceedings before Congress, and such proceedings need not
11 relate to the administration of justice. So that's my *Sandlin*
12 opinion at 8 through 9. So I'm rejecting that.

13 I'm also rejecting the argument you've raised that to
14 violate Section 1512(c)(2) a defendant needs to influence
15 another to violate a legal duty. Judge Mehta specifically
16 addressed this in the *Caldwell* case and explained that
17 "corruptly" in Section 1512 is used -- (c)(2) is used in the
18 intransitive sense. The defendant's own behavior must be
19 corrupt; he need not corrupt another. And that's *Caldwell*, 2021
20 Westlaw 6062718 at 10.

21 The Court, although it considered it and I will hear any
22 additional argument, but I'm really also not inclined to define
23 "corruptly" by referencing an intent to gain an advantage for
24 oneself or another. It's true that the motive typically
25 involves an expectation of financial gain or other benefit to

1 oneself or another, but not always. And as I explained in
2 *Sandlin*, I think what the government needs to prove is that the
3 defendant acted either with unlawful means or to achieve an
4 unlawful end. In a moment, when we get into the government's
5 instructions, I'm going to share some specific language I would
6 like both sides to consider.

7 I think that the "unlawful" language will sufficiently
8 guard against the vagueness and imprecision of a term like
9 "improper purpose," and of course, the government's also going
10 to have to prove that Mr. Reffitt acted with a specific intent
11 to impede an official proceeding.

12 Finally, Mr. Welch, I'm not inclined to instruct the jury
13 that the defendant must have acted dishonestly. It's true, of
14 course, that the Supreme Court held in *Arthur Andersen* that the
15 1512(b) jury instructions were flawed because they omitted the
16 word "dishonestly." But here, "dishonestly" doesn't fit the
17 nature of this charge, and I think it's unnecessary, given that
18 I do intend to instruct the jury that the defendant must have
19 acted with consciousness of wrongdoing. So I think that covers
20 that.

21 But Mr. Welch, any additional remarks you want to make that
22 are not in your papers on those issues?

23 MR. WELCH: No, Your Honor. We've covered our
24 position in the papers. We understand the Court's ruling, but
25 we maintain our position.

1 THE COURT: And I think I covered -- in the order on
2 the Reffitt denial without prejudice of the motion to dismiss, I
3 think I covered your point that -- addressing whether the
4 government had provided sufficient factual evidence. And just
5 to be clear, as I made clear in that order, I never ordered the
6 government to provide all the factual evidence that it intends
7 to offer at trial to prove the obstruction charge. Indeed, at
8 the time I entered that order, you had the government's exhibits
9 and grand jury testimony, *Jencks*, et cetera. So I did not order
10 that. I simply asked the government to clarify their theories
11 of obstruction. So I don't view that their failure to produce
12 that is problematic in any way.

13 All right. Turning to the government's instructions, is
14 this you, Ms. Berkower, or Mr. Nestler?

15 MR. NESTLER: That's me, Your Honor.

16 THE COURT: Okay. I first wanted to ask you, on page
17 2 -- before I get there, am I right, Mr. Nestler, I think that
18 the Seventh Circuit is the only circuit to have a pattern
19 instruction on the 1512(c)(2)? Is that why you chose that?

20 MR. NESTLER: Yes, Your Honor. That's the only
21 pattern instruction we found.

22 THE COURT: Okay. Well, same here. So I am inclined
23 to use it as a baseline, but I do have a few suggested edits.

24 Looking first at page 2, I notice that you omitted the
25 term "influence," which appears in the statute, along

1 with "obstruct" and "impede," and I assume that was an
2 intentional omission and the government does not intend to press
3 an influence theory here?

4 MR. NESTLER: Correct, Your Honor. The government is
5 affirmatively deciding to not press an influence theory, and we
6 are restricting ourselves in that regard.

7 THE COURT: Okay. All right. Then a question on your
8 official proceeding instruction at the top of page 3, can I
9 instruct the jury as a matter of law that the joint session
10 qualifies as an official proceeding, or does the jury need to
11 find for itself that the joint session qualifies, according to
12 the definition that I gave in my ruling in *Sandlin*?

13 MR. NESTLER: Your Honor can instruct the jury that it
14 does qualify. The way that we drafted the language, we feel,
15 was not as explicit. I believe the defense's position actually
16 does have the Court instructing the jury that the proceeding
17 does qualify as an official proceeding. That's not our
18 submitted proposal.

19 THE COURT: Well, I thought -- maybe his is more
20 explicit. But you say, "As used in Count 2, the term 'official
21 proceeding' means Congress's joint session."

22 So you're not intending that to be an instruction to the
23 jury that official proceeding -- a joint session equals an
24 official proceeding? I read it that way, but now I see what
25 you're saying. You're not intending that?

1 MR. NESTLER: If the Court is inclined to do so and
2 the defense does not object, which is how we read defense's
3 instruction, that's acceptable to the government, but we did not
4 affirmatively propose that.

5 THE COURT: Mr. Welch, what is your position on this?
6 Does the Court instruct the jury that Congress's joint session
7 is an official proceeding, or should the Court just give the
8 definition of an official proceeding consistent with its ruling,
9 again noting your objections, and let the jury make that
10 finding?

11 MR. WELCH: I think it would be more appropriate for
12 the jury to make that finding as opposed to the Court to
13 instruct to make that finding.

14 THE COURT: All right. Well, I may -- on quick read,
15 Mr. Nestler, I was reading this to suggest that you were asking
16 me to instruct the jury in that way. So I will think about how
17 to tweak that a little bit to be a little clearer so they don't
18 have the same impression.

19 All right. On the same page, Mr. Nestler, you've proposed
20 that the Court instruct the jury that an official proceeding
21 need not be pending or about to be instituted at the time of the
22 offense. If the official proceeding was not pending or about to
23 be instituted, the government must prove beyond a reasonable
24 doubt that the official proceeding was reasonably foreseeable to
25 the defendant. Mr. Welch included similar language in his

1 instruction.

2 I don't have a problem with this. It's consistent with my
3 ruling in *Sandlin*. But I'm just wondering, in this case,
4 correct me if I'm wrong, but isn't it the case that the joint
5 session was actually taking place when Mr. Reffitt was outside
6 the Capitol interacting with Capitol Police? And if so, I know
7 it was at some point delayed, but if that was simultaneous and
8 that's what the evidence will show, isn't this unnecessarily
9 confusing to the jury to include this, you know, reasonable
10 foreseeability and all of that language?

11 MR. NESTLER: We think it's helpful to have in there,
12 Judge. As a factual matter, yes, the joint proceeding was
13 ongoing. It started at 1:00 p.m. It didn't conclude until
14 January 7th at 3:45 a.m.

15 That being said, the two Houses had separated to debate an
16 objection to one of the states' votes. And so at the time that
17 Mr. Reffitt happened to have been committing his acts at the
18 Capitol, the Senate and the House are meeting in their own
19 separate chambers.

20 So while it is correct that the joint proceeding was still
21 technically happening, the two Houses were meeting separately.
22 For that reason, we don't know what the defense is intending to
23 argue. We think it's safer to include this language to make it
24 clear that even if a juror believed the proceeding itself wasn't
25 actually happening at 1:45 p.m. or 2:00 p.m., that's what the

1 defendant was intending to do, was to prevent the joint
2 proceeding from rejoining themselves in --

3 THE COURT: All right. I understand.

4 Mr. Welch, I take it you agree with the government on this?

5 MR. WELCH: Yeah, I wouldn't dispute that, Your Honor.

6 THE COURT: You would dispute what?

7 MR. WELCH: No, I said I would not dispute that. I
8 mean, proceedings have recesses. You think of it like -- as
9 we've taken the position, it's like a court proceeding. You can
10 have a recess during a trial. You're not actually in the
11 proceeding --

12 THE COURT: No, understood. But are you saying -- I
13 think your proposal had the same language in it. Are you
14 suggesting I take it out or leave it in?

15 MR. WELCH: No, leave it in, please.

16 THE COURT: Okay. All right. Mr. Nestler, your
17 proposal incorporates one element of the nexus requirement, that
18 the proceeding was reasonably foreseeable to Mr. Reffitt, but it
19 does not include the nexus requirement that the natural and
20 probable effect of the defendant's conduct would be the
21 interference of the proceeding. And I think in *Sandlin* I cited
22 *U.S. v. Friske*, 640 F.3d, 1288 at 1291, Eleventh Circuit case
23 that I was quoting, as well as *U.S. v. Phillips*, 583 F.3d at
24 1264, a Tenth Circuit case in which that circuit said a
25 conviction is proper under the statute if interference of the

1 official proceeding is a natural and probable effect of the
2 defendant's conduct.

3 Do you object to the Court including this language in the
4 instruction?

5 MR. NESTLER: Yes, we don't believe that language is
6 necessary here. I'm just pulling up the Seventh Circuit's
7 pattern instruction so I can -- on this point, if the Court
8 would give me a brief indulgence.

9 (Pause.)

10 MR. NESTLER: The defendant is also charged with
11 attempt for the proceeding, and we don't believe that second
12 part of the nexus requirement would be required here. It
13 focuses on the defendant's intent, and his intent is that the
14 proceeding was going to be reasonably foreseeable to him.

15 THE COURT: All right. Mr. Welch, what's your
16 position on this?

17 MR. WELCH: Well, we think that it ought to be
18 required as a proposed fourth element that we had which speaks
19 to this, that there was a relationship in time, causation, and
20 logic, that his specific conduct would interfere with the
21 proceeding. Even an attempt requires some sort of action, and
22 that action would have to have some sort of relation to
23 interfering with the proceeding.

24 THE COURT: And even with an intent, Mr. Nestler, why
25 wouldn't -- maybe this nexus wouldn't apply to him specifically

1 but to the others who were trying to impede who he is trying to
2 help. I mean, I'm going to think about this, and I am going to
3 give you all a chance to respond to this and to some other
4 issues I'm going to raise. So I'm going to give you a chance to
5 put your best arguments in writing. But I want to think about
6 this one. I'm not -- I know the Seventh Circuit pattern
7 instruction doesn't have it, but it's the only circuit that has
8 a pattern instruction, and I'm not sure that the Tenth or the
9 Eleventh might not include that language. So I want to think
10 about this more. Again, I will give you a chance to set forth
11 your arguments on this issue in greater detail.

12 MR. NESTLER: Yes, Judge.

13 THE COURT: Another substantive change that I'm
14 considering is to the definition of "corruptly." So it's very
15 similar, but it's structured slightly differently. What I'm
16 inclined to substitute for this paragraph that the government
17 has, this paragraph that begins at the bottom of 3 and extends
18 to the top of page 4, I'm inclined to define "corruptly" in this
19 way: "Corruptly means to act knowingly with consciousness of
20 wrongdoing and with the specific intent to obstruct or impede.
21 The person may act corruptly by acting with an improper"
22 person -- "purpose," sorry, "to accomplish either, one, an
23 unlawful end or result by lawful or unlawful methods or means
24 or, two, a lawful end or result by some unlawful method or
25 means."

1 So it's similar to the government's formulation, but it's a
2 little more specific. And I'm proposing adding "by lawful or
3 unlawful methods or means" to the first prong because I think we
4 should make clear that a person acts corruptly when he or she
5 acts with a purpose to achieve an unlawful end and he uses
6 unlawful means to do so. That means he satisfies both prongs,
7 the means and the purpose. So that's something for you all to
8 think about.

9 I'm also inclined to strike -- I'm inclined to strike the
10 definition of "consciousness of wrongdoing." If the parties
11 want a definition for that phrase, I would propose simply
12 stating that it means an understanding or awareness that what
13 the person is doing is wrong. But I'm not inclined to use the
14 terms that have been criticized in cases, immoral, depraved, and
15 evil. I don't think that's necessary with consciousness of
16 wrongdoing. So I'm proposing striking that.

17 And in terms of the authority that would support this
18 proposal that I'm giving you for the definition of "corruptly,"
19 this is similar. The "unlawful ends and/or unlawful means"
20 definition is often used in bribery cases, but it was referenced
21 approvingly by Justice Scalia in *Aguilar*, 515 U.S. 593 at 616
22 through 17. Two cases from the Eastern District of Pennsylvania
23 use a similar formulation for Section 1512(b) and 1512(c)(1).
24 One is *U.S. v. Norris* at 553 F.Supp.2d, 492 at 521. That was
25 affirmed in 419 F. App'x 190 by the Third Circuit. And then

1 *U.S. v. Fumo*, 2009 Westlaw 1688482 at 54. These are two --
2 again, two Pennsylvania -- Eastern District of Pennsylvania
3 cases.

4 And finally, I'm not inclined to give these examples that
5 the government's proposed. I don't think they're necessary,
6 given the definition the Court will provide. They strike me as
7 more appropriate argument than instruction.

8 So those are my thoughts. If either side wants to provide
9 any feedback right now, I'm happy to hear it. I'm also going to
10 give you a little bit of time to respond in writing.

11 Mr. Nestler, anything you would like to say about any of
12 those points?

13 MR. NESTLER: No, Your Honor. I think it's important
14 from the government's perspective to hear what the defense's
15 willingness to accept these proposed instructions are or not,
16 and that may affect what we would propose. So if Your Honor is
17 suggesting something, it might make sense for the defense to
18 weigh in --

19 THE COURT: For sure. What I was inclined to do is
20 give you all each maybe until like February 8 to weigh in, and
21 then to the extent you wanted to respond to what the other
22 filed, to do that by the 11th of February.

23 MR. NESTLER: That would be fine.

24 THE COURT: Does that make sense to both sides?

25 MR. WELCH: Yes.

1 THE COURT: Okay. Mr. Welch, anything you want to
2 raise right now?

3 MR. WELCH: No, Your Honor. I want to consider what
4 you've said. I want to take a look at the cases that you've
5 cited.

6 THE COURT: Okay. All right. And again, I want to
7 make really clear for the record, Mr. Welch, your objections to
8 this track that the Court's on are well noted, and you're not
9 waiving them by proposing changes to this language. Given where
10 I am, given what my rulings have been, it's not helpful to
11 propose language that's inconsistent with those at this point.
12 What I'm looking for is, you know, tweaks to -- that you think
13 will make the instruction better that I'm settling on.

14 And again, I don't think that that's going to waive
15 Mr. Reffitt's right to appeal my decision, you know, in his case
16 if you were to do that.

17 MR. WELCH: I understand.

18 THE COURT: Okay. So I did want to raise a scheduling
19 matter. I would like to revisit this instruction at the
20 hearing -- at the next hearing we have scheduled on February 18.
21 We have it scheduled now for 9:00 a.m. I have a conflict now,
22 and I'm wondering whether we could push this back to as late as
23 noon.

24 And I haven't checked with Mr. Hopkins on this.
25 Mr. Hopkins, can you tell us what's available, assuming

1 Mr. Nestler and Mr. Welch are available Friday afternoon -- are
2 you, Counsel?

3 MR. NESTLER: Yes, Your Honor.

4 MR. WELCH: I'm looking. That would not be a problem.
5 That's fine. We can move that.

6 THE COURT: Okay. So Mr. Hopkins, do we have any time
7 for Mr. Reffitt to appear on video conference in the afternoon
8 of the 18th?

9 COURTROOM DEPUTY: Absolutely, Your Honor. We can
10 start as early as 12:30, if you would like.

11 THE COURT: Okay. Why don't we do -- would 1:00 work
12 for you all?

13 MR. WELCH: Yes.

14 MR. NESTLER: That's fine.

15 THE COURT: Would we have a good hour, hour and a
16 half, Mr. Hopkins?

17 COURTROOM DEPUTY: No.

18 THE COURT: Okay. Then let's --

19 COURTROOM DEPUTY: We would probably have -- let me
20 look just to make sure. But it looks like we would probably
21 have about 45 minutes.

22 THE COURT: Then let's move it up. I would like to
23 move it up even to 12:00 if we can get the time. I just want to
24 make sure we have the time we need to settle on these
25 instructions. And maybe if the parties are close to agreement,

1 this won't take long, but if it is going to take long, I'd like
2 to work through all of that on the 18th.

3 COURTROOM DEPUTY: Generally speaking, they can't do
4 12:00 because that's when they have lunch. So we can start at
5 12:30. We could get an hour in; we could definitely get an hour
6 in.

7 THE COURT: Can you push for an hour and a half just
8 in case?

9 COURTROOM DEPUTY: I will do what I can.

10 THE COURT: Okay. Thank you.

11 So we will take that up. And also at that time, I will try
12 to, assuming that we have time, discuss trial courtroom
13 logistics. I'm sorry for the confusion earlier this week, but I
14 hope you all had a chance to meet with Mr. Cramer, and if you
15 haven't had your questions answered, I know he's very receptive,
16 and the same with the rest of the court staff.

17 So there's going to be a lot of moving around, as I think
18 you know now. We're going to do the general voir dire in the
19 Ceremonial Courtroom and then move to another courtroom, I think
20 it's Courtroom 16, for individualized voir dire, and then
21 ultimately move to Courtroom 14 for the trial, and there will be
22 overflow/media rooms. So I just want to make sure that you all
23 have your questions and concerns answered and that we're all on
24 the same page about the trial logistics before the 28th.

25 Is there any specific issues that you all want me to check

1 on and be prepared to get back to you on on the 18th?

2 MR. NESTLER: Two points, Judge. One is we did talk
3 to Mr. Cramer. We deferred meeting with him until the week
4 before the trial. We thought that may make more sense so we
5 will have our laptop ready and everything. But he's been
6 incredibly responsive and helpful. So thank you.

7 And then to answer your question about other issues, we
8 just wanted to make sure the public will have the availability
9 to view and listen to the voir dire. I don't know if Your Honor
10 knows now or later.

11 THE COURT: Yeah, I think that there will be at least
12 one room available for that. I will confirm that, but that's my
13 understanding. They will not be in the courtroom because of the
14 COVID restrictions, but that throughout the trial, there will be
15 multiple cameras in the courtroom showing different
16 perspectives, views, evidence that's being shown, witness,
17 several different camera shots at any given time, and those will
18 be open, my understanding is, throughout the trial. So I will
19 confirm that.

20 You said there were two issues, Mr. Nestler.

21 MR. NESTLER: Sorry. The question was more about not
22 the trial itself but the voir dire, so both the general voir
23 dire in the Ceremonial Courtroom and also the individual voir
24 dire in Courtroom 16, that the same public availability exists
25 for those.

1 THE COURT: That's my understanding, yes.

2 MR. NESTLER: And the other issue we will ask the
3 Court to make just a brief record on at some point is that the
4 courthouse is accessible to the public during the trial such
5 that the public can come in. We just wanted to make sure that
6 was going to be on the record.

7 THE COURT: Yes; yes. I think I've made that clear,
8 but I will reiterate that with specificity. Like every -- I
9 guess this is expected to be a high-profile case. There are
10 times when seats fill up, but there will be access for the
11 public, and there will be people ensuring that that all goes
12 smoothly.

13 MR. NESTLER: That's great, Judge. To be more
14 specific, at some point if we could make a record that Chief
15 Judge Howell's standing orders don't restrict any public access
16 to the courthouse during the time of the trial such that the
17 public can -- any member of the public can show up at the
18 courthouse and listen in an overflow room if there's space and
19 not be on the public line.

20 THE COURT: Right. And as I've made clear, my public
21 courtroom line will not be open. The public will have to be in
22 the courthouse to listen and see what's going on in the
23 courtroom. So yes, I will make that very clear.

24 MR. NESTLER: Thank you.

25 THE COURT: And I had one thought, but I've lost it.

1 Anything else, Mr. Welch?

2 MR. WELCH: Just going back for a moment, on the
3 citations that you gave us, would you be able to include those
4 in the minute order? I assume there will be some minute order
5 about this proceeding. I didn't get the third one. I have
6 *Aguilar, Norris*, and I missed the third one.

7 THE COURT: Okay. Let me just give it to you now
8 because I don't know that I will put that in the minute order.
9 And these, I think, were, I think, cited in my opinion. But
10 *U.S. v. Fumo*, F-u-m-o.

11 MR. WELCH: Fumo, okay.

12 THE COURT: And it's 2009 Westlaw 1688482, and that's
13 at 54. So I think you should be able to get it with that. And
14 I don't recall whether there was an opinion or not, but you've
15 got the cite.

16 MR. WELCH: Thank you.

17 THE COURT: *Aguilar* was.

18 All right. So I know we do -- correct me if I'm wrong, but
19 you all have been unable to resolve the sealed issue that we
20 need to take up now; is that right?

21 MR. NESTLER: That's correct, Your Honor. But before
22 we get there, I just have a clarifying question about the
23 pretrial statement that we have due on Monday, the 7th.

24 THE COURT: Yes.

25 MR. NESTLER: What is Your Honor's expectation with

1 regard to the jury instructions there? I saw in the order you
2 wanted all of the jury instructions. Does that include both
3 preliminary and post-trial?

4 THE COURT: Yeah, it would be helpful, if it's not too
5 much trouble, just because we're going to be working off an
6 electronic copy. So if you all can do that with ease.

7 You all have agreed to most of them; right?

8 MR. NESTLER: Right. And I didn't know if now was a
9 good time, then, to discuss some of the instructions the defense
10 had asked for that we object to for the post-trial instructions.

11 THE COURT: Well, flag -- I have not focused on those
12 right now, Mr. Nestler. So I want -- thanks for reminding me.
13 We will take that up next time. But flag for me the ones that
14 you object to, just so I -- you don't need to argue it right
15 now, but you can briefly summarize what your concern is.

16 MR. NESTLER: Sure. The defense has asked for
17 instructions for immunized witness. We don't believe that's
18 necessary here.

19 THE COURT: I had a question about that. Does the
20 government have such a witness?

21 MR. NESTLER: Yes. We believe that the comments in
22 the instruction makes clear that the general credibility
23 instruction is more than adequate for instructing the jury and
24 that a special instruction about immunized witness is not
25 necessary.

1 THE COURT: Okay. What else?

2 MR. NESTLER: And then the remainder of the defense's
3 instructions that we did not already agree to we don't think
4 have any applicability. They asked for an instruction about
5 informants. We do not have any informants. They ask for an
6 instruction about expert witnesses, which we don't have, and
7 then also for things that we don't believe are going to come up
8 at the trial, which is witnesses who will refuse to answer
9 questions or invoke the Fifth or inconsistent statements or the
10 defendant's statements to the police and how the jury should
11 evaluate those.

12 THE COURT: Well, those are things that we would take
13 up in the charging conference. I get your point that some of
14 those may not be necessary.

15 But Mr. Welch, given my ruling, you agree that the expert
16 witness instruction is not needed?

17 MR. WELCH: It would not be. If there's no expert
18 testimony, then there would be no need for that instruction.

19 THE COURT: Okay. And do you think that there's a
20 need for the informant instruction?

21 MR. WELCH: I think perhaps there is, Your Honor. I
22 think that kind of what gets the case going and certainly what
23 gets the second part of the case going in terms of the charges
24 related to January the 11th, there is someone who is informing
25 the authorities and someone who is making recordings of the

1 defendant and then supplying those to the police.

2 And I'm not sure why that person was necessarily doing
3 that. I had understood the Court's instruction about proposing
4 instructions that basically you wanted to be alerted to
5 potential issues.

6 THE COURT: No, and I'm glad you did. This is
7 helpful. This is very helpful to deal with this up front. I'm
8 glad you did.

9 MR. WELCH: Sometimes we don't know what witnesses are
10 actually going to do until they get on the stand and they do it.
11 And I know you want to avoid that then suddenly being a
12 surprise. So I just wanted to alert you. If it doesn't come to
13 pass, then we will say it's not needed.

14 THE COURT: Mr. Nestler, can you -- without revealing
15 too much of the case, can you explain why you think that the
16 instruction's not appropriate?

17 MR. NESTLER: We don't believe that the witness that
18 Mr. Welch is referring to would be classified as an informant.
19 An informant has a particular definition in the law, and there
20 was no one acting as an informant at the time that these
21 recordings were made.

22 THE COURT: Okay. All right. Well, I think the -- so
23 I will take a look at the immunized witness instruction and the
24 general credibility of witnesses instruction and see whether I
25 think that's appropriate.

1 You're confirming there is an immunized witness?

2 MR. NESTLER: Yes.

3 THE COURT: So I will take a look at that and give you
4 feedback on the 18th.

5 I think with regard to the informant instruction -- and I'm
6 striking the expert witness instruction in light of what -- you
7 agree, Mr. Welch; correct? So I'm striking that. But the
8 informant, the witness's refusal to answer or implication of the
9 Fifth Amendment and the informant instruction -- and what was
10 the other one? Defendant's statements? I think all of those
11 will have to wait.

12 So the only real issue I need to resolve or could resolve
13 now is this immunized witness instruction. So I will take a
14 look at that. That's helpful.

15 Anything else? Have we missed something, Mr. Welch, that
16 you've proposed that we haven't addressed and that the
17 government hasn't raised also?

18 MR. WELCH: The only thing that we need to do, and I
19 know now is not the appropriate time because of what you alluded
20 to earlier, I think we do need a hearing to just nail down
21 exactly what the understanding is on that issue that we alluded
22 to earlier.

23 Do you understand what I'm saying?

24 THE COURT: The sealed matter that I referenced?

25 MR. WELCH: I'm sorry?

1 THE COURT: So I had said I was going to take up the
2 sealed matter after this hearing.

3 MR. WELCH: Yes, that's it.

4 THE COURT: Okay. So I'm going to address that in
5 just a moment. I'm going to take a brief break. If you could
6 stay on, I will come back on and address that with you.

7 MR. WELCH: Okay.

8 THE COURT: Now I'm remembering what I thought of
9 earlier, and that is, Mr. Welch, what, if anything, do you need
10 from me to ensure that Mr. Reffitt has the shave, has the
11 haircut, whatever he wants and needs for trial and clothing and
12 all that? Do you need the Court's assistance to make sure he's
13 ready to go on the 28th?

14 MR. WELCH: The one thing I know that has come up is
15 that there are various COVID protocols. And I have tried to get
16 the proof that Mr. Reffitt has had a COVID test, and the
17 response from the D.C. DOC was that I need a HIPAA release from
18 him, which I've mailed to him, and his mail has been very slow.

19 THE COURT: Why do you need this? Who is requiring
20 it?

21 MR. WELCH: Well, as I understand, it's basically how
22 he is handled, how he is treated in going back and forth to the
23 jail. So if I can provide that, he gets treated a little bit
24 better than if I don't.

25 And the holdup is that I've sent this -- because it

1 requires his signature. The person that handles this at the DOC
2 wants it from him. But my concern is that there will be a lag.
3 He's only getting mail from the beginning of December now.

4 THE COURT: Okay. Continue to work on it. I will do
5 whatever you need as we get closer to facilitate that.

6 MR. WELCH: The other two issues, in the past I've had
7 pretty good luck with the fax that I submit letting the jail
8 know when somebody has court, and they typically honor those.
9 They just want there to be a court date is really what it boils
10 down to. We have a couple. So I will take care of that, and I
11 will let you know if there's a problem.

12 And then finally, his clothes, I have a potential order if
13 I need it, but in the past, the marshals have been fine with me
14 just bringing the clothes to the lockup and giving him the
15 clothes beforehand.

16 THE COURT: Check with them ahead of time. I just
17 don't want there to be delays because of COVID protocols. Okay?

18 MR. WELCH: Uh-huh.

19 THE COURT: All right, then. If that's all --

20 MR. NESTLER: Judge, can I raise one more jury
21 selection issue? I don't need to know the answer now, but maybe
22 we can talk about it on the 18th. In the Ceremonial Courtroom,
23 how many prospective jurors will fit at once?

24 THE COURT: So I'm going to estimate, because I'm not
25 remembering exactly, but I think it's 50, and then I think there

1 would be another group. So a very large group will report, and
2 50 will be brought in for the general questioning, and then
3 we'll go to the other courtroom and do the individualized voir
4 dire, so that that group of 30-plus is likely to be sent away
5 because it'll take some time to get through the 50.

6 But I would expect in all likelihood we will have to go
7 through the general voir dire twice. It's more cumbersome, and
8 that's why I'm really trying to anticipate things so everything
9 goes smoothly that day.

10 MR. NESTLER: That's helpful for us to know. I'm just
11 asking about scheduling. Does Your Honor also have the
12 Ceremonial Courtroom on the 1st, or do we have to go back on the
13 2nd?

14 THE COURT: Let's see. I have it on the 28th and, I
15 hope, the 1st. Why do you ask?

16 MR. NESTLER: My understanding from trying to read the
17 master trial calendar that we get periodically, that jury
18 selection will take place on Mondays and Wednesdays.

19 THE COURT: Oh, I'm glad you raised that. I need to
20 check on that. I'm hoping not, and if so, then perhaps we can
21 whittle the second group down to a small enough group where I
22 can do it in smaller batches in my own courtroom. That would be
23 nice. I really don't want to have a day gap between for this
24 jury. I'm very glad you raised that.

25 My understanding was I had it for Monday and Tuesday, but

1 you may well be right, in which case I will talk to the court
2 staff about what we can do on Tuesday.

3 MR. NESTLER: If that were the case, would Your Honor
4 intend to then do the two different tranches both on Monday in
5 the Ceremonial Courtroom, and then we could do the whittling in
6 the individual courtroom for the rest of the day on Monday and
7 Tuesday?

8 THE COURT: Perhaps. I don't know whether I could fit
9 30 safely in my courtroom.

10 MR. NESTLER: No, my suggestion was that they --

11 THE COURT: You're saying the opposite. To me, it
12 seems like it would be helpful to -- I don't know. You all tell
13 me. Would you prefer to have the general done for both groups
14 the first day and then send a pack away, maybe not to come back
15 for 24 hours or whatever, depending upon how quickly things
16 move, or would you -- your preference be to have the individual
17 voir dire immediately after?

18 I assumed the latter, but if you all are fine with doing
19 the general en masse, I think we could perhaps -- I want to
20 check with court staff, but that might be feasible.

21 MR. NESTLER: The answer depends on whether we have
22 Monday or Tuesday. So we do prefer the latter, but if we had to
23 have that Tuesday gap, then we may prefer the former.

24 THE COURT: And what I'm not sure, what I was saying,
25 Mr. Nestler, it may be that if we didn't have the Ceremonial

1 Courtroom on Tuesday and we just had my trial courtroom, that
2 they could fit the 30 in my courtroom for general and then send
3 them to another courtroom while we do the individual. That was
4 what I was trying to say. So I don't know if 30 can fit in an
5 individual courtroom, but I think so. It may be close.

6 MR. NESTLER: That's up to the Court. I didn't expect
7 that would be the answer.

8 THE COURT: Okay. Mr. Welch, do you have a
9 preference, not on the location but on whether or not we do all
10 the general at once and then send a group home or that we get
11 through the first tranche general and individual and then bring
12 back the second group for general and specific?

13 MR. WELCH: I think it might make sense to do the
14 general in one fell swoop, and here's why, because we might not
15 have as many as we hoped for the individualized. It depends on
16 how people answer some of these general questions. I mean, if
17 people are answering the general questions in such a way to say
18 no, I can't be fair, then we may not have as many for individual
19 voir dire after doing the first batch of 50.

20 THE COURT: So you mean before we even talk to jurors
21 individually, you think that the answers -- well, but they're
22 simply going to say they have information. They're just going
23 to write down a number. We don't have a questionnaire in this
24 case.

25 MR. WELCH: No, but here's why I'm thinking this. I

1 was involved in a state court trial in Baltimore several years
2 ago that involved really, really horrible facts involving an
3 infant. And when you put that question up front, it was
4 knocking out -- we ended up having like six separate panels that
5 we went through before we could even do a jury selection. So
6 sometimes --

7 THE COURT: What question are you asking? You're
8 asking, "Have you heard of Mr. Reffitt?" And someone is certain
9 to say, perhaps, yes and write that number down. But then how
10 does that tell us that they should be disqualified for cause?

11 MR. WELCH: Well, the question in the joint proposed
12 section (b)(4) that I proposed, "Does anyone have such strong
13 feelings about events at the Capitol on January 6 that it would
14 make it difficult to be a fair juror in this case?" That's a
15 general question, and you could get a response to that, and
16 people might say -- if half the room stands up and says yeah --

17 THE COURT: Well, that's one I'm going to have to
18 throw. We can't just take a yes answer to that and assume they
19 can't be fair and impartial without really drilling down on
20 that. Do they just not want to serve, is that why they're
21 saying that, or do they really, really think they cannot be fair
22 and impartial? So that would be flushed out in the
23 individualized voir dire.

24 So I don't think that what you're saying is likely going to
25 happen. In other words, I can't imagine any yes answer leads us

1 to disqualify a whole group en masse.

2 So given that, Mr. Welch, given that I would proceed to
3 individualized voir dire even in that circumstance, what is your
4 position on the timing? Would you rather do all the general up
5 front, or would you prefer to stagger it?

6 MR. WELCH: I prefer to do it all as one, but it's not
7 a huge deal one way or the other.

8 THE COURT: Okay. Let me check on this, and we can
9 discuss this on the 18th. All right? I can't answer the
10 logistical questions right now, but I'm very happy you've raised
11 it.

12 All right. I think I've excluded time through trial;
13 correct?

14 MR. WELCH: I believe so.

15 MR. NESTLER: Yes.

16 THE COURT: Anything else from the government?

17 MR. NESTLER: No, Your Honor.

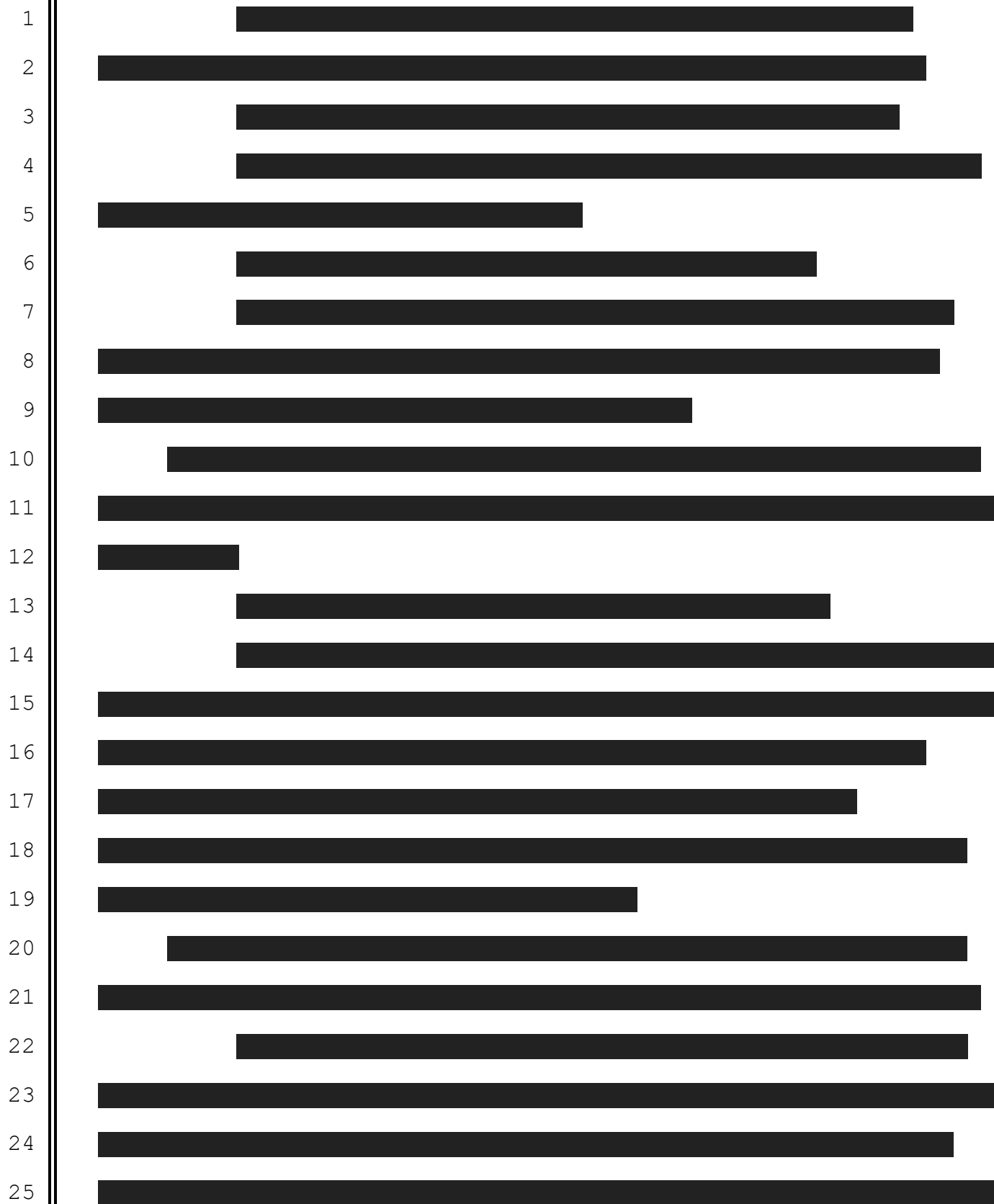
18 THE COURT: From the defense other than the sealed
19 hearing which we will come back to in a moment?

20 MR. WELCH: No, just the sealed matter.

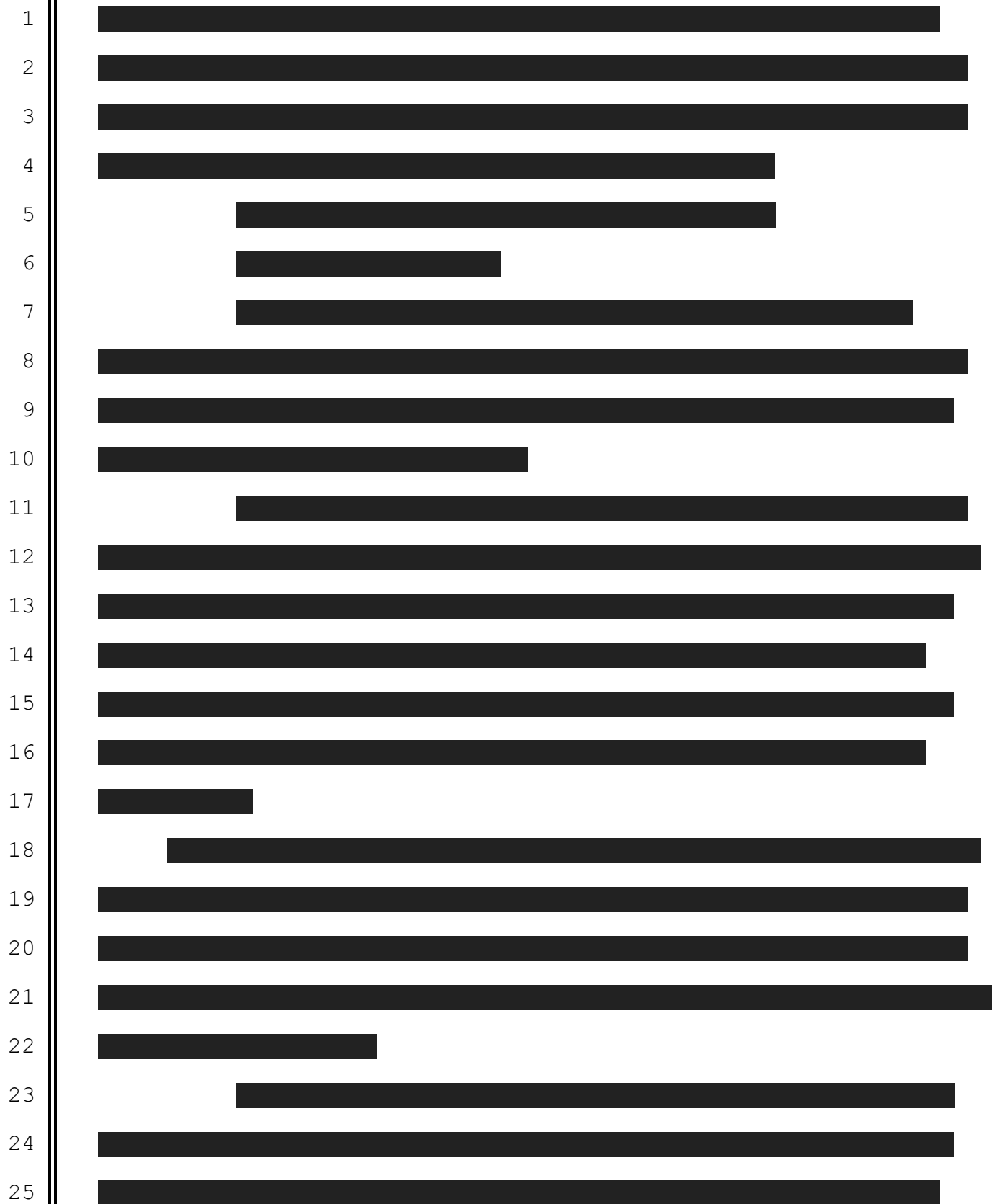
21 THE COURT: Okay. All right, then. So I'm going to
22 step off and, Mr. Hopkins, have you disconnect the public line,
23 and I will be back on in just five minutes.

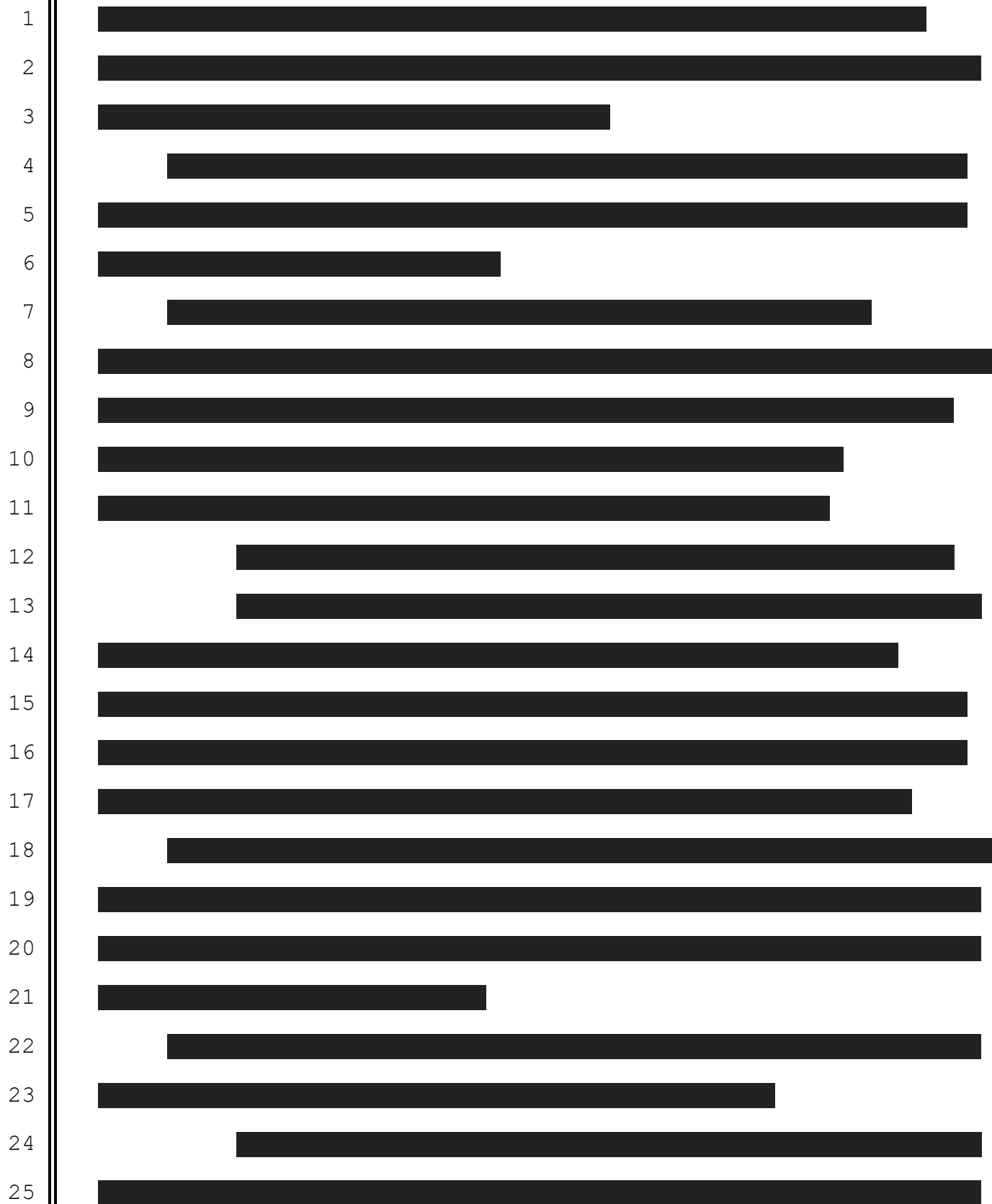
24 (Recess.)

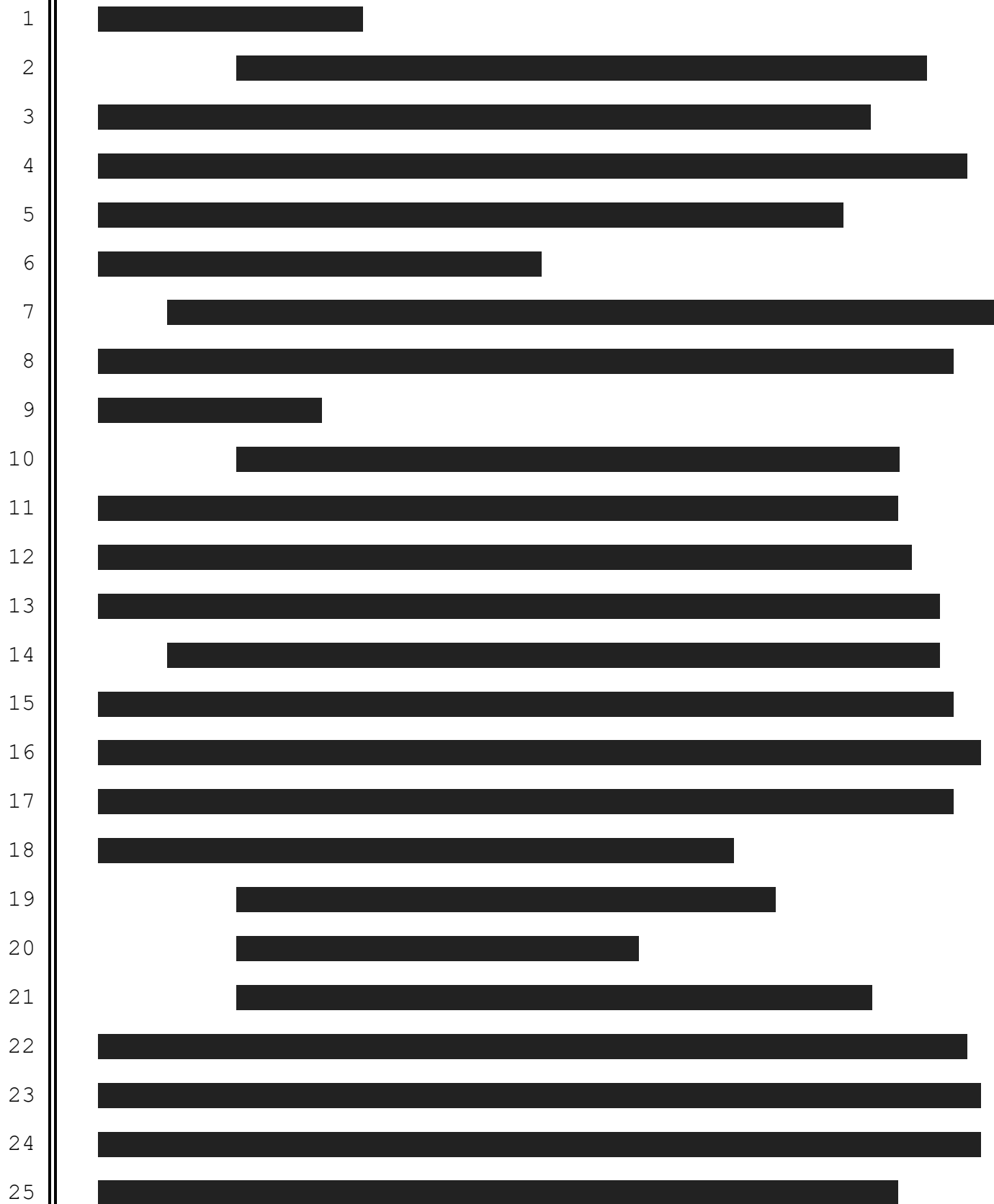
25 (The following occurred under seal.)

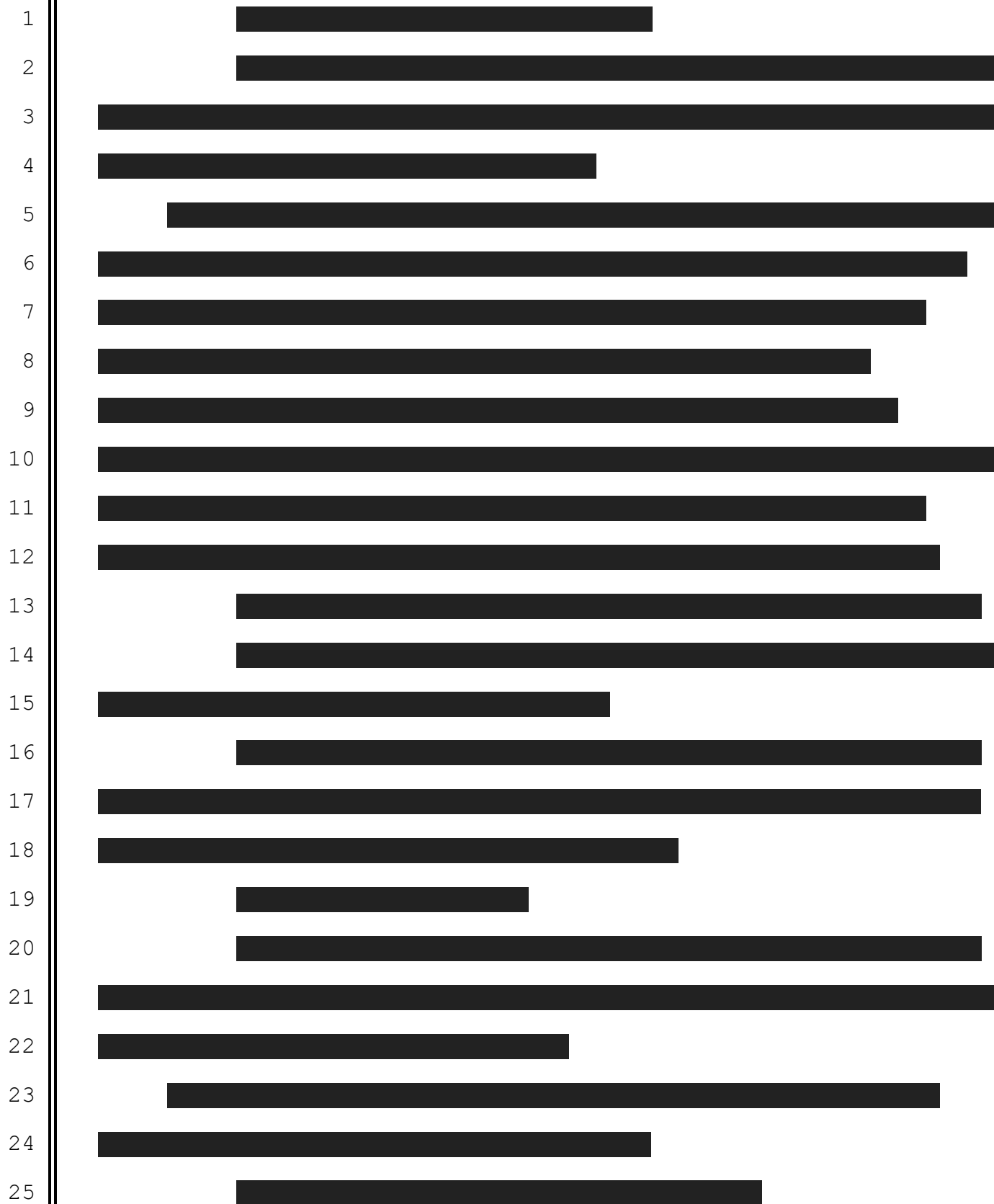


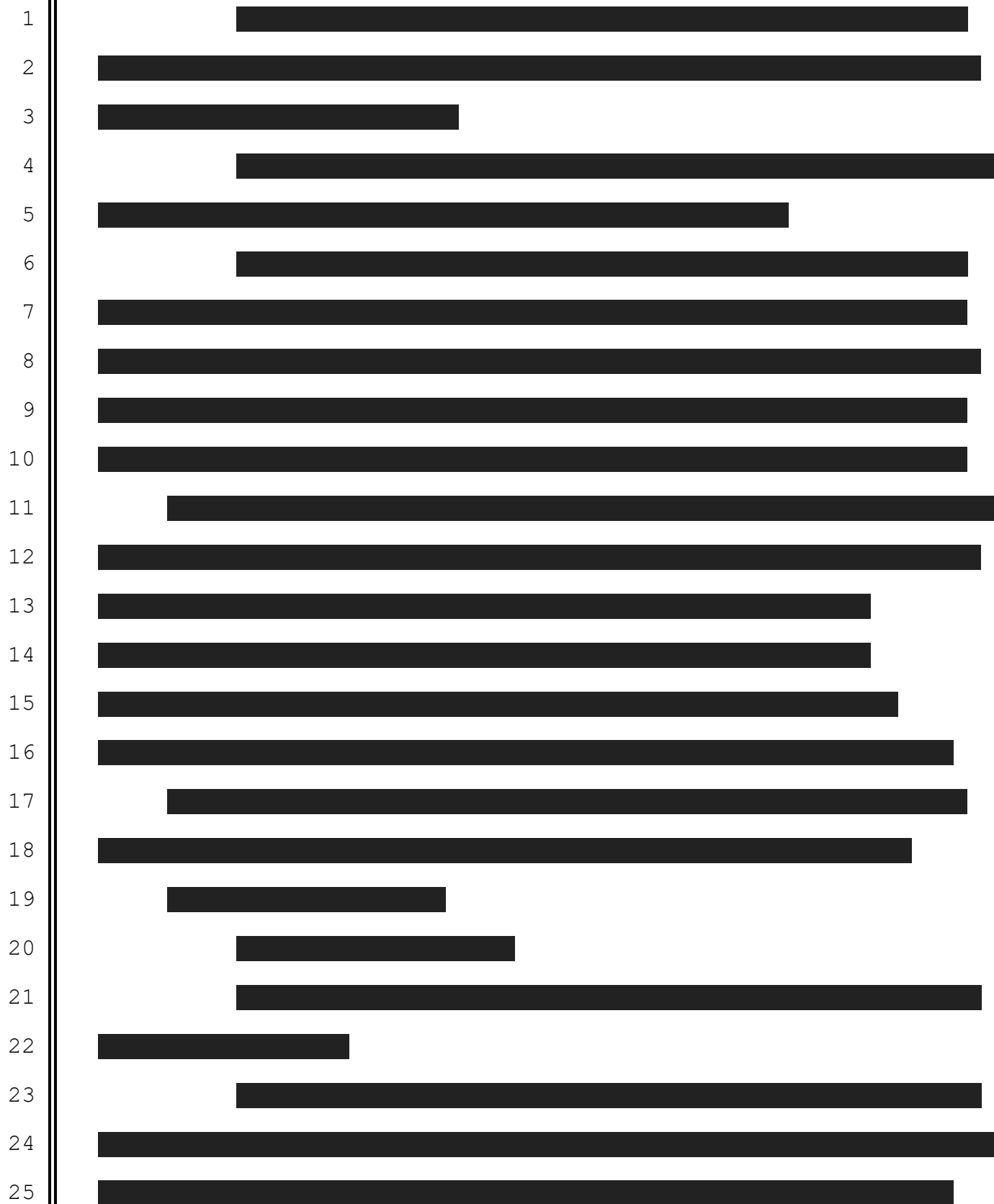


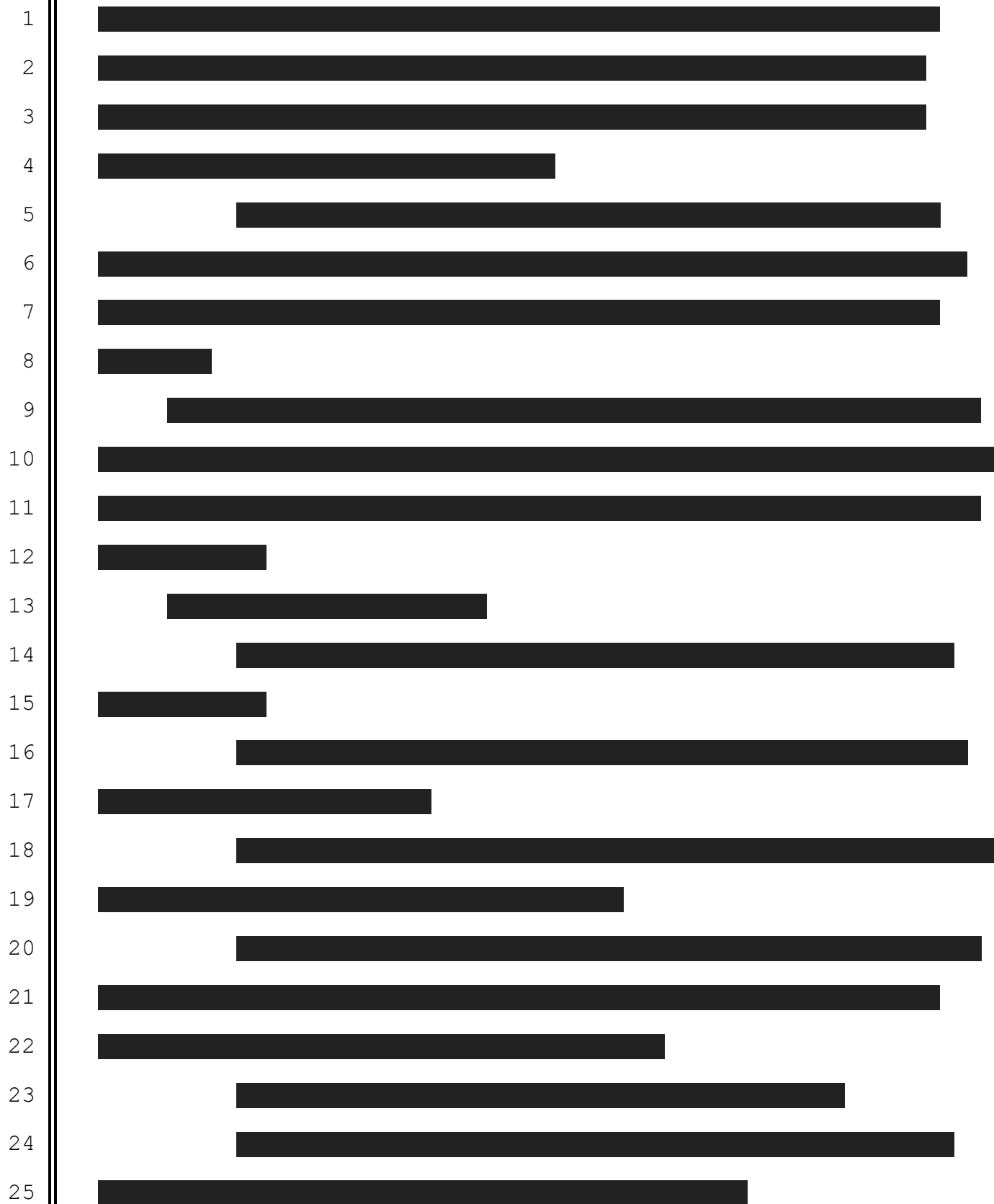












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4 (End of sealed proceedings.)

5 (Proceedings adjourned at 1:57 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 7, 2022

13 SIGNATURE OF COURT REPORTER

DATE
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