

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 24, 2022  
Defendant. . 11:15 a.m.  
- - - - -

TRANSCRIPT OF CONTINUED PRETRIAL CONFERENCE AND  
STATUS CONFERENCE  
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 Mr. Reffitt, we have Mr. William Welch, and representing the United States, we have Mr. Jeffrey Nestler and Ms. Risa Berkower. And Mr. Reffitt is appearing by way of video.

THE COURT: All right. Good morning again, everyone.

Just for the record, Mr. Welch, I take it Mr. Reffitt continues to consent to appear for these pretrial hearings by video conference pursuant to the Chief Judge's standing order relating to the pandemic?

MR. WELCH: Yes; that's right, Your Honor.

THE COURT: All right. So we have a lot of various issues to cover today. We need to talk about the remaining -- any remaining issues with voir dire and the jury instructions, at least those issues we can resolve pretrial.

And then I think it probably makes sense to start with some of the logistical stuff up front just to make sure we all cover that, and if something comes to mind later that we missed, please let me know.

First, in terms of public access, I know there have been a number of inquiries about access to the trial. And as Mr. Nestler stated last hearing, the Chief Judge's latest order

1 relating to the pandemic does open the courthouse to the public,  
2 and therefore, the public and the media will be able to watch  
3 and hear the trial, as well as voir dire, from live feeds to all  
4 three courtrooms.

5 We will start in the Ceremonial Courtroom with the general  
6 voir dire. We will move to Courtroom, I think it is, 16, for  
7 the individual voir dire, and then the trial will be in  
8 Courtroom Number 14. And there will be live feeds for all those  
9 courtrooms. And in addition, there will likely be seats in  
10 Courtroom 16 for the individual voir dire.

11 The Court plans to provide as much public access as is  
12 possible. As I've said before, there will be several other  
13 trials going on in the courthouse at the same time, but I am  
14 hopeful that the court will be able to have more than one  
15 overflow courtroom. They're working on the logistics for that,  
16 as well as a media room. So those details are being finalized  
17 now. So I expect there will be a media advisory issued tomorrow  
18 with details relating to media.

19 Any questions there?

20 MR. WELCH: No, Your Honor.

21 MR. NESTLER: No, Your Honor.

22 THE COURT: Mr. Welch, you were going to check on the  
23 number of family members who would be attending the trial, in  
24 the courthouse and viewing the trial from the overflow  
25 courtroom. Of course, that can't be family members who will be

1 witnesses at the trial, but can you tell me how many members of  
2 Mr. Reffitt's family will be present in the overflow courtroom?  
3 And I will make sure that we have seats reserved for them.

4 MR. WELCH: Mr. Reffitt, correct me if I'm wrong, I  
5 think it was about a half a dozen, six people.

6 THE DEFENDANT: It's going to be more than that.  
7 Closer to ten.

8 THE COURT: I will need to check on that. I take it,  
9 Mr. Reffitt, these are people who can all sit next to each other  
10 and not socially distance?

11 THE DEFENDANT: I believe that would be correct. I'm  
12 not sure how it's going to work actually.

13 THE COURT: We try -- with the Chief Judge's safety  
14 and health protocols that the Court has put into effect in  
15 consultation with experts, we try to have six feet of distance.  
16 But I would think -- between individuals in the courtroom. But  
17 I would think if these are family members who are already not  
18 socially distancing themselves, then perhaps they could be on  
19 one row.

20 Does that make sense, Mr. Reffitt?

21 THE DEFENDANT: They're relatives that live in the  
22 same house.

23 THE COURT: I would propose, and I have to confirm  
24 this, Mr. Welch, I don't want to overpromise anything, but I  
25 would propose that there be one row available for Mr. Reffitt's

1 family that should be able to accommodate those individuals.

2 Also, Mr. Nestler, you had asked about attorneys for  
3 government witnesses who might be there to protect privileges  
4 like Secret Service protocols or whatever, and I have confirmed  
5 that there will be a seat inside the well. It will either be at  
6 the bench right in front of the gallery, or it will be a place  
7 in the jury box somewhere behind the witness, where the witness  
8 will be seated.

9 And I'm also trying to get a telephone for that person in  
10 the event there are sensitive legal issues that arise that need  
11 to be handled. That would make it easier for everyone. So I'm  
12 working on it.

13 MR. NESTLER: Thank you.

14 THE COURT: Let me run through -- let's see. Before I  
15 run through the voir dire process, Mr. Welch, has Mr. Reffitt  
16 gotten what he needs from D.C. Jail in terms of haircut and  
17 everything else, or do you need my help?

18 MR. WELCH: No, we need your help, Your Honor. I've  
19 sent in a request, and he's also been making requests, and the  
20 response I got -- well, the normal procedure is you send in a  
21 fax to a particular number. That's the way it's been for years,  
22 and it always worked. Now it goes to a voicemail box, and you  
23 can't send a fax -- even though I'm dialing the same number.  
24 I've checked the program statement; I am dialing the correct  
25 number. I e-mailed Deputy Warden Michelle Jones, and the

1 response was that according to their medical stay in place dated  
2 February 14th, barbering and cosmetology services resume for  
3 fully vaccinated people, both active residents and those with  
4 upcoming jury trials. But that doesn't actually make anything  
5 happen.

6 THE COURT: He has an upcoming jury trial. So what's  
7 the problem?

8 MR. WELCH: I don't know.

9 THE COURT: I'm going to have Mr. Hopkins work on this  
10 during the hearing. I don't know if he will be able to make any  
11 headway. But I certainly will do whatever needs to be done to  
12 make sure that happens.

13 I know that's frustrating, Mr. Reffitt.

14 MR. WELCH: Just so you know, my client tells me that  
15 since they normally don't do those activities on weekends, it  
16 would need to be done tomorrow in order for it to be done by  
17 Monday.

18 THE COURT: Like I said, I've got Mr. Hopkins working  
19 on that now while we're in this hearing.

20 Anything else with regard to D.C. Jail while we're at it,  
21 Mr. Welch?

22 MR. WELCH: Not that I'm aware of. That is the one  
23 issue.

24 THE COURT: Okay. So let me just run through -- I  
25 know we discussed this generally last week, but let me just run

1 through jury selection in a little more detail than I might have  
2 done last week.

3 We talked about both sides want four alternates. I think  
4 that's prudent, given the circumstances. So that means we will  
5 have 12 jurors. We will have four alternates. We will also  
6 have the ten potential defense peremptories and the six for the  
7 government, plus two alternate strikes for the defense and for  
8 the government. So if I've done my math right, that means we  
9 need a total of 36 jurors, and maybe we qualify one or two  
10 extra, depending on the hour of the day.

11 And in terms of how this will work, when you come into the  
12 Ceremonial Courtroom on Monday morning, I will want to meet with  
13 you all very briefly to get your random numbers, whatever  
14 numbers you want to pick for the alternates between 1 and 16.  
15 So we don't want the alternates to be 13, 14, 15, 16. So you  
16 all will give me two numbers, you know, confidentially, and  
17 also, you can tell me then whatever your signal is that you've  
18 agreed on for strikes for cause that you think are -- both think  
19 are appropriate in the individual voir dire.

20 After that, you will get your list of potential jurors from  
21 the jury office, and the jury will be brought in. They will be  
22 brought in in numerical order and the way in which they appear  
23 on the sheet.

24 So have you all had a chance to talk to Mr. Hopkins and  
25 Mr. Cramer both about technology and about the layout of the

1       courtrooms? Is that something you've done, both of you?

2               MR. WELCH: I've done that, Your Honor.

3               THE COURT: So you understand how the jurors will be  
4       seated and in what order in the Ceremonial Courtroom?

5               MR. WELCH: We didn't go into that part. I met with  
6       Mr. Cramer yesterday afternoon, and he kind of laid out the  
7       technology in 14 for me.

8               THE COURT: All right. If that would be helpful for  
9       you all to see in advance how the jury will be seated, we can  
10      get you a plan that shows you that.

11              In terms of technology, have you both told Mr. Cramer with  
12      your opening statements whether you want to stand at the podium  
13      or use a lapel mic?

14              MR. WELCH: Yes.

15              THE COURT: And what have you chosen to do?

16              MR. WELCH: I will stand at the podium. Mr. Cramer  
17      was explaining that apparently with the lapel mic it can fade in  
18      and out sometimes, and you're really better off, he encourages  
19      you using the actual wired mic. You're tethered, but at least  
20      it's reliable and people can hear you.

21              THE COURT: What about you, Mr. Nestler or  
22      Ms. Berkower?

23              MR. NESTLER: We are meeting with Mr. Cramer this  
24      afternoon.

25              THE COURT: All right. So anyway, there will be a set



1 seat for each juror. Once they're all seated in the proper  
2 order, then I will read my introductory remarks. After that,  
3 I'll read the general voir dire questions, which we're going to  
4 talk about in a moment. After that process is complete, you  
5 know, each juror at their seat will have a note card and a  
6 pencil, and I will ask the general questions. And if they have  
7 a yes answer to any of my questions, they will write that number  
8 on the note card.

9 So then once that process is complete, we will leave the  
10 Ceremonial Courtroom, and we will go to Courtroom 16, and then  
11 the jurors will be brought in one by one again in the order that  
12 they were seated, the order that they appear on the list. And I  
13 will be given the note card, and I will let you know what  
14 questions they've answered yes to, and I will follow up with  
15 them.

16 Again, we will talk about this when we get to the specific  
17 voir dire questions, but I do intend to follow-up with some of  
18 the questions you all suggested for general voir dire  
19 individually, because I feel like there's some questions that  
20 are much broader, and I'm concerned about having too many  
21 overlapping questions. I want to be able to follow up based on  
22 their yes answers. So we can talk about that more in a minute.

23 So I will ask them follow-up questions, and then you will  
24 each have an opportunity to ask questions as well. And as I  
25 said last week, after you've asked your questions and the juror,

1 potential juror leaves the courtroom, that is the time when you  
2 will need to make any strikes for cause, and if you don't, your  
3 strikes for cause are waived. So we will have that argument  
4 about each juror as soon as the juror leaves the courtroom.

5 Do you all understand?

6 MR. WELCH: Yes.

7 MR. NESTLER: Yes, Your Honor. Can I ask a clarifying  
8 question? Last week, you indicated there will be approximately  
9 50 jurors in the Ceremonial Courtroom.

10 THE COURT: I don't -- I've been having discussions  
11 with the court staff about whether it makes sense to have a  
12 couple of public seats in that Ceremonial Courtroom. I don't  
13 know if that makes sense. They're hashing it out. But if not,  
14 we'll have 50. If so, we might be one or two short of that.

15 All right? So --

16 MR. NESTLER: Understood. And if I might ask, in  
17 Courtroom 16 during individual voir dire, do you expect the  
18 prospective juror to sit in the witness stand?

19 THE COURT: I think the way it works is they'll be in  
20 the jury box, I think. John Cramer would be the best person to  
21 confirm that, but I could be wrong.

22 Did you cover that, Mr. Welch, with him?

23 MR. WELCH: He pointed out that the witness would be  
24 in the jury box. I would think that the various venire people  
25 would be like witnesses. We did not specifically discuss

1 jurors.

2 THE COURT: I think they will be in the jury box, but  
3 I will check on that, and we can have Mr. Hopkins let you know.  
4 Again, I think the desire is to socially distance. But I do  
5 expect there to be room for some members of the public in that  
6 individual voir dire room, Courtroom 16.

7 But each juror will be brought in individually. The others  
8 will be waiting in the Ceremonial Courtroom or will be just  
9 outside in the hallway, probably in the Ceremonial Courtroom  
10 waiting their turn.

11 So we will handle the strikes for cause immediately after  
12 the potential juror leaves, and once we've qualified 36 or maybe  
13 one more, again depending on the time, we will likely -- I hope  
14 this is on, you know, if not Monday, on Tuesday -- I think we go  
15 back to the Ceremonial Courtroom, and if it goes into a later  
16 date and we don't have the Ceremonial Courtroom, as I've  
17 discussed already and you all agreed, we will have to use two  
18 regular-sized courtrooms for the peremptory strikes.

19 But I am hopeful that we will be in the Ceremonial  
20 Courtroom, and the jurors will, I think at this point, again be  
21 seated in their original positions. The ones that have been  
22 stricken for cause, of course, are gone. And you will exercise  
23 your peremptory challenges at the same time. You will share  
24 your lists with each other and then with the courtroom deputy.  
25 And after that, you'll go through the same with the alternates.

1           And once we have a jury selected with the alternates, I  
2       will address any other challenges to the jury. And after those  
3       are resolved, we will excuse the remainder of the jurors.

4           So again, we're going to be working in the order that  
5       they're called in. So to the extent there are extra jurors that  
6       weren't stricken either for cause or with a peremptory, they're  
7       going to be at the end of the list, and they'll just be excused.

8           Does that make sense to you all?

9           MR. WELCH: Yes.

10          THE COURT: Okay. All right. Any questions about  
11       that process?

12          MS. BERKOWER: Just a few questions, Your Honor. Good  
13       morning.

14          Has the Court decided on whether counsel and the  
15       prospective jurors will be wearing masks during the  
16       individualized voir dire?

17          THE COURT: So I wanted to get to that, and I'm going  
18       to in just one second. I just got a text from Mr. Hopkins. So  
19       let me share some of this.

20          So I will do an order regarding Mr. Reffitt's haircut. So  
21       I hope that will do the trick.

22          MR. WELCH: Thank you.

23          THE COURT: And I'm informed that the juror will  
24       actually be in the jury box, not on the witness stand. All  
25       right?

1           In terms of masks, that's another issue I did want to talk  
2       to you all about. My view is this: I will be wearing a mask at  
3       all times except when I'm speaking for a long period of time,  
4       like in the voir dire process. I will otherwise wear a mask.

5           In terms of witnesses, I'm inclined to not have the  
6       witnesses wear masks.

7           Does either side disagree with that?

8           MR. WELCH: No.

9           MS. BERKOWER: That's fine with the government, Your  
10      Honor.

11          THE COURT: Mr. Nestler, yeah? It looked like you  
12      were saying something.

13          MR. NESTLER: No. Ms. Berkower beat me to it.

14          THE COURT: Okay. I thought you were talking, too.  
15      In terms of the jurors, on that one, I'm interested in your  
16      view, but I'm inclined to say that jurors who want to be  
17      unmasked can be unmasked, and those who want to wear a mask  
18      would be provided a clear transparent mask.

19          Any objection to that?

20          MS. BERKOWER: No objection from the government.

21          MR. WELCH: No objection.

22          THE COURT: And in terms of attorneys, I think I will  
23      leave that up to you all to make those decisions. Look, if  
24      you're not talking, though, I expect you to be masked at the  
25      table.

1 Does everyone agree?

2 MR. WELCH: Yes.

3 THE COURT: Anyone sitting at the table, I think,  
4 should be masked for safety reasons.

5 MS. BERKOWER: To clarify that, then, Your Honor, what  
6 I heard you say, and I want to make sure it is correct, that  
7 when we are speaking, either addressing the Court or a witness  
8 or during voir dire for prospective jurors, it is at our  
9 discretion whether we wear a mask or not, but otherwise, when  
10 we're not doing that, we will be wearing our mask?

11 THE COURT: That's correct. And I think you all have  
12 informed me you're all vaccinated; right?

13 MS. BERKOWER: Yes, Your Honor.

14 THE COURT: For the other two, Mr. Welch, Mr. Nestler?

15 MR. WELCH: True.

16 MR. NESTLER: Yes, Your Honor.

17 THE COURT: So yes, you have that correct.

18 MS. BERKOWER: Thank you. And I had just one or two  
19 other questions about voir dire, Your Honor.

20 THE COURT: Of course.

21 MS. BERKOWER: After you -- when you first give your  
22 introductory remarks before you ask the voir dire questions you  
23 provided to counsel, will those introductory remarks include the  
24 statement of the case that the parties have submitted?

25 THE COURT: It will; it will. I intend to, you know,

1 say a little bit more. I intend to welcome them and tell them  
2 what an important service they're performing. I'll use what  
3 you've submitted to describe the case. I will start out by  
4 saying this case relates to the events of January 6. I'll use  
5 your language in the way you've described the case and explain  
6 the charges against Mr. Reffitt. I will also make the point  
7 that this is an important case to both sides, and I'll tell  
8 them -- I'll summarize the process they're about to go through.

9 And I will really emphasize a good bit in detail that they  
10 can't talk about the case, they can't do any research, they  
11 can't use their phones during the voir dire process, they can't  
12 get into conversations with people in the courtroom or outside  
13 the courtroom about anything specific relating to this case.  
14 They can tell them that they're potentially going to serve as a  
15 juror in a criminal case, but not get into anything more than  
16 that.

17 Do you all have any issues with that overview?

18 MS. BERKOWER: That's fine with the government, Your  
19 Honor.

20 MR. WELCH: No issue.

21 THE COURT: No issue, okay.

22 MS. BERKOWER: The next question that I have, I wanted  
23 to make sure I understood, you said that we will pick numbers of  
24 who we want to make alternates. Do you mean like just pick a  
25 random number?

1           THE COURT: 1 to 16. You can pick 1 and 2, 15 and 16.  
2           You can pick 8 and 3, whatever. Ideally, these alternates are  
3           interspersed in the -- it's not a box, but a big gallery box.  
4           We don't want anyone to know they're an alternate until the end.

5           MS. BERKOWER: Understood. I assume we will be  
6           submitting those random numbers prior to even receiving the list  
7           of jurors?

8           THE COURT: Yes.

9           MS. BERKOWER: Great. The next question was, it  
10          sounds like Your Honor, I think based on our last hearing, you  
11          were calling in 100 prospective jurors.

12          THE COURT: 80 jurors, 80 jurors, and I do think,  
13          because there are other trials going on, I think that if we  
14          needed more, I would hope that there would be some additional  
15          available.

16          MS. BERKOWER: Is there a time -- it sounds like we  
17          will be addressing the first 50 in the Ceremonial Courtroom at  
18          the outset. Is there a time that you're going to direct the  
19          other remaining 30 to return?

20          THE COURT: Yeah, I'm interested in your thoughts on  
21          that. I think -- I guess my inclination might be to have them  
22          come back the next morning or have just a few touch base in the  
23          afternoon.

24          But what are counsel's thoughts on this?

25          MR. WELCH: Your Honor, I think you're going to have



1 to make a judgment call on that one. It is possible that what  
2 you just said makes sense if things are going slowly. On the  
3 other hand, if things happen to be going quicker, we could find  
4 ourselves --

5 THE COURT: I definitely don't want to be in that  
6 position. So here's what I will do. I will confer with the  
7 jury office, and we will make our best determination. I'm just  
8 always reluctant to have jurors sitting around the court all day  
9 when there's a low likelihood we're going to get to them. But I  
10 hear you, and I share your desire to move this. So we may well  
11 tell the other 30 to come back after lunch. We're certainly not  
12 getting to them before lunch.

13 MS. BERKOWER: I agree with that, Your Honor.

14 THE COURT: Okay. These are great questions,  
15 Ms. Berkower.

16 MS. BERKOWER: Okay. And then the next clarification  
17 point I wanted to ask about relates to, you mentioned there  
18 would be a plan for the seating of jurors. Is that something  
19 the clerk's office will provide to us, effectively a seating  
20 chart or --

21 THE COURT: Yes. I will see if we can't provide that  
22 to you today or tomorrow.

23 MS. BERKOWER: Thank you. Just one other point, I  
24 think for the 30 that won't be involved in the initial general  
25 voir dire, will Your Honor be addressing your opening remarks to

1       them?

2               THE COURT:  Oh, good point.  No, no, I think I have to  
3       go through them again because I don't think they can fit in the  
4       courtroom.  So we're going to do, you know, two full rounds  
5       unless there are not enough strikes for cause to get up to that  
6       second batch.

7               MS. BERKOWER:  Okay.  And then the last question that  
8       I think I had was about the alternate strike.  I know Your Honor  
9       mentioned that there would be a separate round for alternate  
10      strikes after the initial -- excuse me, peremptory strikes for  
11      alternate jurors.  Do you anticipate doing that in two tranches,  
12      because I think we were going to pick four alternates, and each  
13      side would have two strikes, or did Your Honor want us to --

14              THE COURT:  Why wouldn't we do them all at once?  Is  
15      there a reason not to?  It seems to me you've got the eight  
16      sitting there, and you exercise your -- each exercise your two  
17      alternate strikes.

18              MS. BERKOWER:  Understood, Your Honor.  I just wanted  
19      to understand.

20              THE COURT:  Just in a normal case, you have four  
21      sitting there.  But you need to have one strike.

22              Any objection to doing it all at once, Mr. Welch?

23              MR. WELCH:  No objection, Your Honor.

24              THE COURT:  Ms. Berkower?

25              MS. BERKOWER:  No, Your Honor.  That's fine.

1 THE COURT: Okay. Anything else?

2 MS. BERKOWER: Yes. Just with regards to timing, I  
3 did want to flag for the Court that, as the Court is aware in  
4 our filing about the identity of our witnesses, we are having  
5 several members of the Capitol Police Department testify at the  
6 trial and Secret Service agents as well. I wanted to flag for  
7 the Court that the State of the Union address is actually  
8 Tuesday evening. And I know that that event is a very  
9 significant event, involving both of those agencies.

10 So at present, given where we are with jury selection, it  
11 would be our preference to start with witnesses Wednesday  
12 morning if we finish jury selection on Tuesday afternoon. Of  
13 course, we don't want to keep the jury waiting or anything like  
14 that, but --

15 THE COURT: Can you not even have your lead Capitol  
16 Police witness available for -- to testify in the event things  
17 move quickly?

18 MS. BERKOWER: Yes, we can, if necessary. We just  
19 wanted to flag that that event was happening, and we will plan  
20 to have that person available if it looks like we will -- we're  
21 making steady progress and will be in a position to start  
22 witnesses in the afternoon Tuesday.

23 THE COURT: Is your first witness -- do you know who  
24 that will be?

25 MS. BERKOWER: Yes, Your Honor. It's a Capitol Police

1 Department officer. It will be Shauni Kerkhoff. Former.

2 Excuse me.

3 THE COURT: It's a she; correct? Is his or her  
4 testimony expected to be lengthy?

5 MS. BERKOWER: I think she will be a lengthy witness,  
6 Your Honor.

7 THE COURT: So yes, I think -- we'll have a better  
8 sense, Ms. Berkower, seeing how Monday goes. But if things go  
9 chop chop, it would be good to have more than her available.  
10 But it's just so hard to predict right now.

11 MS. BERKOWER: Understood, Your Honor. We may, then,  
12 in that case, change some of the order just to account for those  
13 agencies' needs on that evening.

14 THE COURT: Okay. I understand. And I'm not saying I  
15 won't be sensitive to that. Let's just discuss it. It's just  
16 in the abstract very difficult to be definitive right now.

17 MS. BERKOWER: Thank you.

18 THE COURT: All right. Anything else about jury  
19 selection?

20 All right. In terms of opening statements, assuming the  
21 jury is selected and it's not at the end of the day, I will  
22 immediately do introductory instructions after the jury is sworn  
23 and move right into openings.

24 Is either side planning on using any demonstrative  
25 exhibits? And if so, can you all clear those with one another

1 ahead of time, and let me know if there's an issue?

2 MR. NESTLER: The government is planning to use a  
3 couple of small demonstrative exhibits, and we will make sure we  
4 clear them with Mr. Welch.

5 THE COURT: Okay. Mr. Welch, if you have any  
6 objections to them, will you let me know as soon as possible?

7 MR. WELCH: I will, and I would expect to have an  
8 objection to anything that's not in evidence being presented to  
9 the jury before it's properly entered in evidence.

10 THE COURT: Do you expect that, Mr. Nestler, or is  
11 this -- what is it? Diagrams and the like or things that are  
12 not controversial?

13 MR. NESTLER: They're not controversial, but we're  
14 planning for a couple of still frames from videos. So they're  
15 not evidence yet, but we plan for them to be in evidence through  
16 our first witness.

17 MR. WELCH: I don't agree to that, Your Honor. I'm  
18 not going to agree to that. It has to be in evidence.

19 THE COURT: On that front, Mr. Welch, have you looked  
20 at the government's exhibit list, and have you -- do you have  
21 objections to them, you know, publishing at the same time they  
22 authenticate it?

23 MR. WELCH: Some of them, I would. As long as  
24 something is actually authenticated. My concern is, there are a  
25 lot of exhibits that are not going to be controversial, such as

1 the photographs taken during the search. I understand that  
2 would expedite things. There's a lot of exhibits. My concern  
3 is that there are going to be exhibits, perhaps -- videos, these  
4 still frames that Mr. Nestler is talking about, and it's going  
5 to be a matter of whether they have the right witness on the  
6 stand to authenticate these things or --

7 THE COURT: But you know which witness is introducing  
8 each exhibit. Do you think there's going to be a problem based  
9 on what you have?

10 MR. WELCH: Not necessarily, but I don't want to agree  
11 to this and then if, for whatever reason, things go out of  
12 order, the witness doesn't, you know, appear when they're  
13 supposed to appear, I don't want to have agreed to put something  
14 in.

15 THE COURT: All right. And I'm not trying to force  
16 you to do that. I just -- my impression from what you've said  
17 to date is there are no authentication issues, and it seemed  
18 like with the information the government's given you might be  
19 able to determine whether you would object to those exhibits if  
20 the proper witness reflected on the exhibit list is testifying.

21 Mr. Nestler, I think you're just going to have to  
22 communicate with Mr. Welch witness by witness, and we'll have to  
23 make those calls if he has an objection. I'm with him. I don't  
24 want the jury seeing exhibits that can't be properly  
25 authenticated, but I very much appreciate the government's

1 efforts to move this along. And to the extent you're able to  
2 agree, Mr. Welch, it would make the trial move more smoothly.

3 But I hear you. You all just keep discussing and let me  
4 know witness by witness if you see a problem.

5 MR. WELCH: Will do.

6 MR. NESTLER: Understood, Your Honor.

7 THE COURT: All right. Anything else?

8 MR. NESTLER: We will share the short demonstratives  
9 with Mr. Welch as soon as they're prepared. We're having our  
10 team create them, but we do believe they're going to take screen  
11 shots of surveillance video that we plan to display to the jury  
12 in opening. Of course, it's not going to be evidence at opening  
13 because it hasn't been admitted yet.

14 THE COURT: All right. Mr. Welch, you can take a  
15 look, and let me know your objections. Okay? Maybe you will  
16 object to some but not all. I don't know. Take a look.

17 Can you do that today or tomorrow, Mr. Nestler, so that  
18 we're not delaying the start on Monday?

19 MR. NESTLER: Yes, Judge.

20 THE COURT: Okay. Thank you. All right. Any other  
21 logistical matters that I've missed?

22 Oh, Mr. Nestler, I need a second binder of exhibits no  
23 later than Monday.

24 MR. NESTLER: Yes, Judge. Was the Court able to get  
25 the electronic versions we submitted?

1           THE COURT: I have not seen them. I can't answer  
2 that. We will let you know promptly if not.

3           MR. NESTLER: Thank you. We will prepare them, an  
4 additional binder.

5           THE COURT: Okay. And thank you, Mr. Welch, for  
6 yours.

7           Any objections -- I haven't had a chance to look either,  
8 but any surprises in those exhibits that either side thinks  
9 warrant a pretrial motion?

10          MR. NESTLER: The exhibits we obtained from the  
11 defense, we believe those are impeachment exhibits.

12          MR. WELCH: That's correct.

13          MR. NESTLER: We will make any objections as necessary  
14 if they're offered for their own impeachment value. I don't  
15 believe Mr. Welch is intending to introduce any of them  
16 affirmatively.

17          THE COURT: Mr. Welch, you've had the exhibits for a  
18 while. Any concerns you missed earlier?

19          MR. WELCH: No, Your Honor. We will see if they have  
20 the right witness to actually get things in when the time comes.

21          THE COURT: Okay. All right. So let's -- if we've  
22 covered the logistics --

23          MR. NESTLER: One other logistical piece, Judge, and  
24 that has to do with the exhibits and public access.

25          THE COURT: Oh, yes. Thank you. I want you making



1       those available the day they're shown to the jury. Are you  
2       planning on doing that?

3               MR. NESTLER: Yes. We were planning to ask the  
4       Court's permission, consistent with Chief Judge Howell's  
5       Standing Order 21-28, to do so and informing the Court of the  
6       government's position in advance of offering them, which is what  
7       Chief Judge Howell asked us to do. Our position is that if  
8       they're admitted, they should be released to the public.

9               THE COURT: Okay. And I agree.

10              You agree, Mr. Welch?

11              MR. WELCH: That's not a problem, if something's  
12       properly admitted into evidence.

13              THE COURT: I'm sorry?

14              MR. WELCH: I said that won't be a problem if  
15       something is properly admitted into evidence.

16              THE COURT: Okay. You keep saying, Mr. Welch, if  
17       things are properly admitted. Do you think there's a set of  
18       exhibits that they can't lay the proper foundation?

19              MR. WELCH: No, I'm not thinking that, Your Honor.  
20       Basically, you know, that's a game plan. It's almost like a  
21       travel itinerary. It's aspirational. Sometimes you get places  
22       when you've scheduled, but a lot of times, things don't go as  
23       planned. I don't want to have agreed to something ahead of  
24       time, and they can't produce the proper witness or the witness  
25       is not saying what they thought the witness was going to say,

1 and I've already agreed to let them show it to the jury. I  
2 don't want to do that.

3 THE COURT: Okay. I get it; I get it. If there's  
4 some custodian somewhere who you think they need, I guess we'll  
5 just have to address that in the middle of trial.

6 Mr. Nestler, anything you want to add on that?

7 MR. NESTLER: No. So the Court is aware, we're  
8 planning to use the same DropBox method that our colleagues used  
9 for pretrial hearing exhibits, which is at the end of the day,  
10 we will have some of our support staff download the admitted  
11 exhibits.

12 THE COURT: Would you be able to help Mr. Welch in the  
13 event he admits exhibits? He probably doesn't have the access  
14 to that. Is that something that you all could coordinate to  
15 make sure it happens with defense exhibits as well?

16 MR. NESTLER: Yes, Your Honor.

17 THE COURT: Mr. Welch?

18 MR. WELCH: That would be fine.

19 THE COURT: Thank you for raising that. I intended to  
20 say that right at the outset, Mr. Nestler. I'm glad to hear  
21 that's what the government was planning anyway.

22 Okay. Have we covered everything? Let me know if  
23 something comes to mind, but let's jump into the voir dire.

24 As you all saw from the updated draft of voir dire  
25 questions that the courtroom deputy or law clerk sent to you,

1 I've incorporated some but not all of the parties' proposed  
2 questions into the general voir dire. That's not because I  
3 don't think those are good questions. As I've said before, I  
4 think some are potentially overlapping and not as broad as the  
5 ones that are in the questionnaire, and I really want to make  
6 sure we draw out the yes and then follow up.

7 So I did adopt the defense's question regarding whether  
8 anyone has such strong feelings, and wherever we say "feelings,"  
9 I put "feelings or opinions," about events at the Capitol on  
10 January 6 that would make it difficult to be a fair, and where  
11 we say "fair," I say "fair and impartial juror" in this case.

12 I will follow up with the government's version. I  
13 understand the government's point that that's an appropriate  
14 inquiry, to ask whether they can decide this case solely based  
15 on the evidence and the instructions as I give them. Again, I  
16 just think it's more appropriate as follow-up.

17 So to be clear, the proposed questions I will ask during  
18 individual follow-up include whether the juror has followed the  
19 news about specific individuals involved in the events, and I do  
20 think that that's more than covered by question 3 that talks  
21 about, Have you followed the news about events at the Capitol.

22 Clearly, that encompasses covering specific individuals as  
23 well. I also intend to ask in individual follow-up whether the  
24 juror has seen anything in the news about the allegations in  
25 this case involving Mr. Reffitt. Again, you know, I ask them,

1 Have you seen or heard anything in the news or elsewhere about  
2 Guy Wesley Reffitt. That's broader. This is a more particular  
3 question I will ask.

4 And then the other question that's not in the general is  
5 whether the juror has formed an opinion about the guilt of other  
6 individuals, not Mr. Reffitt. I'm asking that one in the  
7 general, but other individuals.

8 And again, I will follow up with that when we're talking  
9 about to the extent they've followed individual defendants other  
10 than Mr. Reffitt. That would, in my view, be an appropriate  
11 follow-up question.

12 So I do intend to ask all of those. As I said, I also  
13 intend to allow you all to ask follow-up. So to the extent I  
14 forget, and I don't think I will, but if I do or if I don't ask  
15 the question in just the right way, you are certainly welcome to  
16 do so.

17 You okay with that, or do you want to fight for one of  
18 those to be in the general?

19 MS. BERKOWER: I think the plan Your Honor has  
20 proposed sounds fine. One additional request we would make in  
21 the individual follow-up by the Court would be if they have  
22 formed an opinion, whether they are able to set aside that  
23 opinion.

24 THE COURT: Definitely; definitely. That will always  
25 be asked.

1 MS. BERKOWER: All right. I think if those questions  
2 are included, then the government's comfortable with what Your  
3 Honor has proposed.

4 THE COURT: You too, Mr. Welch?

5 MR. WELCH: I think that would be fine. That's an  
6 appropriate follow-up question.

7 You had asked a moment ago about whether any of these  
8 individual voir dire questions might be appropriately a general  
9 one. And I think that one that might would be the one about  
10 whether they've formed an opinion about the guilt of anyone who  
11 was involved in January 6. If you miss that in the general, if  
12 it's only a follow-up, there might be people in the venire who  
13 do feel that way, who would answer that question, who haven't  
14 necessarily followed Mr. Reffitt but who have already formed an  
15 opinion on Mr. Reffitt.

16 THE COURT: Aren't those people -- don't they have to  
17 answer yes to, Have you followed the news about the events that  
18 took place at the U.S. Capitol? And that's when I would get  
19 into -- that's a yes question that would open the door to all of  
20 these.

21 MR. WELCH: Yeah, but it --

22 THE COURT: Here's my concern, Mr. Welch. I'm not  
23 arguing that this isn't an appropriate question to ask at all.  
24 I just get concerned about the pool getting confused. I mean,  
25 Mr. Reffitt's on trial here, not somebody else. He's not

1 charged with a conspiracy. And I really don't want to start  
2 getting the jurors focused on all of these other cases.

3 MR. WELCH: No, no, we certainly wouldn't want to do  
4 that.

5 What I am concerned about, though, is someone might say,  
6 Well, I've never heard of Mr. Reffitt but I do feel strongly,  
7 I've already formed an opinion about the guilt of people who  
8 were involved in the events on January 6, even though they  
9 haven't heard about Mr. Reffitt.

10 THE COURT: What about this. What about if I change  
11 question 4 to: "Have you heard or seen anything in the news or  
12 elsewhere about Guy Wesley Reffitt or anyone else associated  
13 with the January 6 events?"

14 MR. WELCH: That would be helpful.

15 THE COURT: That will provoke a yes answer for anyone  
16 who thinks they need to convict someone other than Mr. Reffitt.  
17 That will draw out a yes, and I will follow up with whether they  
18 have formed opinions about these.

19 I think it's potentially confusing to start getting into  
20 questions at the outset about forming opinions as to guilt or  
21 innocence of other individuals who aren't on trial or charged in  
22 any way as co-conspirators of Mr. Reffitt.

23 I hear you. I am going to spend a good bit of time with  
24 this. I'm not going to just ask these three follow-up  
25 questions. I'm going to be reactive to what they say. If you

1 all think I haven't done a thorough enough job, you may do so.

2 All right?

3 MS. BERKOWER: May I ask one clarification on Your  
4 Honor's proposed change to question 4?

5 THE COURT: Yes.

6 MS. BERKOWER: So would the question then ask if they  
7 have heard or seen anything in the news or elsewhere about  
8 Mr. Reffitt, the defendant in the case, or other individuals?  
9 I'm questioning the phrasing, because question 3 does address  
10 did you follow the news and events.

11 THE COURT: I think Mr. Welch wants to focus on  
12 people. So I would propose adding "or any other" -- let me ask  
13 this, Mr. Welch: Your defense is not like mistaken identity, is  
14 it? You're going to say Mr. Reffitt was present there, right,  
15 during follow-up? If I ask the jurors "if you hear evidence  
16 that he was present at the Capitol that day, is that enough for  
17 you to convict him?" you don't have a problem with me asking  
18 questions referring to his presence there, do you?

19 MR. WELCH: No.

20 THE COURT: All right. Then I might say something  
21 like -- but I'm open to suggestions -- "or any other individual  
22 who was present at the Capitol on January 6 of 2021."

23 Does that work, something like that?

24 MR. WELCH: Yes.

25 MS. BERKOWER: Understood, Your Honor. I just wanted

1 to have clarity on how the question would be phrased. Thank  
2 you.

3 THE COURT: All right. So also in response to  
4 Mr. Welch's concern, I did modify the question about firearms to  
5 include a specific reference to both handguns and rifles.

6 I'm also going to ask each juror about previous jury  
7 experience generally, not just experience in a criminal case. I  
8 think he's right, whether it's civil, criminal, grand jury, I  
9 want to get a yes answer to that question.

10 Let's see. Does that cover everything for voir dire? I do  
11 want to talk about jury instructions. But any other concerns?  
12 As I said, I tweaked the language throughout.

13 MS. BERKOWER: Not from the government, Your Honor.  
14 Thank you.

15 THE COURT: Do you have any objections to the minor  
16 changes I made, Mr. Welch, like, for example, adding "strong  
17 feelings or opinions" or "fair and impartial" and things like  
18 that throughout?

19 MR. WELCH: No objection to that.

20 THE COURT: Okay. So if we're all set on the general  
21 proposed voir dire and the anticipated individualized voir dire,  
22 I will move on to jury instructions.

23 All right. Before we get into specific edits to the jury  
24 instructions, I wanted to ask you all just stylistically, when I  
25 look at these instructions, particularly those relating to



1 Counts 2 and 4 that have both the substantive count, the  
2 definition, and then the "attempt" language, I myself found it a  
3 little confusing, because certain counts have three and four  
4 separate pages.

5 And I was wondering how you all might feel about the Court  
6 taking the definitions section, the relevant definitions, and  
7 reading them into the elements, or do you prefer keeping the  
8 elements of each substantive offense pure, just elements  
9 without, for example, a definition of "official proceeding"  
10 under the element that refers to official proceeding?

11 I'm interested in your views on that. Mr. Welch?

12 MR. WELCH: I would like them to be separate. I think  
13 the elements and the definitions need to be distinct.

14 THE COURT: All right. Then that settles that.

15 In that case, I do think -- and I will give you a copy  
16 early in the trial, maybe even the first day, I will give you a  
17 copy of the current set of jury instructions as we've discussed,  
18 you know, today, so that you can look at them as you have time  
19 during trial. Again, we will have time at the charging  
20 conference to address other issues. I just want you to have the  
21 time you need to look at them.

22 But I do think it's important in that case, if we're going  
23 to keep them as-is, that I give the jurors some lead-in about  
24 the fact that the defendant is charged with a substantive  
25 offense and, in addition, an attempt at aiding and abetting.

1           And there's a section of definitions I'm going to read just  
2   to ground them in why they're getting multiple pages for, say,  
3   Count 4. It seems like they need a little bit of guidance  
4   getting through this set of instructions.

5           MR. WELCH: Perhaps, Your Honor, it might make sense  
6   to move the definitions after the attempt and the aiding and  
7   abetting portion. So you could say, okay, here's the elements  
8   of the crime. It can also be committed by attempt. It can also  
9   be committed by aiding and abetting. And then here are the  
10   definitions that you need.

11           THE COURT: Yeah, I like that.

12           What do you think, Mr. Nestler or Ms. Berkower?

13           MR. NESTLER: That's both a good suggestion and Your  
14   Honor's suggestion of having an introductory sentence with --  
15   for Count 2, "You may find the defendant guilty of the elements  
16   below or under a theory of aiding and abetting which I will  
17   describe to you shortly or under a theory of attempt" --

18           THE COURT: I just think it's confusing. It's hard to  
19   keep it all straight. So I will propose something, and you all  
20   can give feedback. But I also like your suggestion, Mr. Welch,  
21   to move the definitions to the end. I think that's cleaner and  
22   gives better structure. So I will take a look at that.

23           So moving on to Count 1, the civil disorder count, I do  
24   agree with the government, and I appreciate the additional  
25   authority. I do agree that it's appropriate to include the

1 words "or travel" in the definition of "commerce." As the  
2 government knows, commerce has been defined in other statutes to  
3 mean travel, trade, traffic, commerce, transportation, or  
4 communication among the several states and between the District  
5 of Columbia and any state.

6 So I do think -- 922(g) also, the "in or affecting commerce  
7 element" is satisfied if the firearm traveled in interstate or  
8 foreign commerce. And they cited, I think, the *Scarborough* case  
9 as well.

10 I'm just concerned, as I said before, that without the  
11 inclusion of the word, the jury won't understand what it means  
12 for a defendant to transport in commerce any firearm.

13 Mr. Welch, initially, you had no objection to including  
14 travel. Do you disagree with the legal authority that the  
15 government has given?

16 MR. WELCH: I don't disagree with the legal authority.  
17 The issue being, it was initially proposed that we would delete  
18 it by agreement. And my concern is --

19 THE COURT: No, you originally proposed that I include  
20 it with agreement, and I raised the issue that I didn't think  
21 you all had provided any authority. And then Mr. Nestler said  
22 we can strike it. And I said I think it's an important thing,  
23 but you need to give me more authority.

24 Now they've done so. And I'm just wondering whether you  
25 disagree with the legal authority.

1           MR. WELCH: I think one of the issues as far as this  
2       legal authority goes is that it needs to be clear that commerce  
3       or travel in commerce would be at any point.

4           My understanding from the 922(g) context is that it's  
5       manufactured in one state, it moves in commerce to the ultimate  
6       purchaser. It's not something that the purchaser does with  
7       it --

8           THE COURT: 922(g) isn't -- I don't think all those  
9       are that way, are they, with the purchaser?

10          MR. WELCH: My understanding is it refers to basically  
11       the manufacturing and sales process. It is not referring to  
12       somebody taking something that they own, that they do not sell  
13       or give to anyone else, and just happened to travel with it.  
14       They're not buying or selling anything.

15          THE COURT: You think in this context, this civil  
16       disorder offense, it contemplates a defendant selling the  
17       firearm rather than having it in possession for the civil  
18       disorder? I don't see how that can be the case. And 922(g)  
19       contains a possession of a gun, too.

20          MR. WELCH: It's possession, but the gun is not moving  
21       in commerce at that point. It's moving in commerce when it's  
22       made by one person and transferred to another across a state  
23       line.

24          That is what I understand commerce --

25          THE COURT: Here's what I'm going to do. I am very

1 strongly leaning towards including "travel." If you all want to  
2 provide some additional briefing, Mr. Welch, to set out your  
3 arguments, you can do that. But I'm not convinced based on what  
4 you've said so far. But if you want to give me some contrary  
5 authority or a different way to read these cases, I will  
6 consider it before -- and take it up at the charging conference.  
7 As it stands now, I think the government's provided adequate  
8 authority for the "travel" to be in it, but I'm certainly  
9 interested in your argument. So I will consider that at the  
10 charging conference.

11 So one issue that neither side has raised but I'm concerned  
12 with is in the definition of "firearm" that comes directly from  
13 the statute, Title 18 United States Code Section 232. I'm  
14 concerned that a juror might not understand what a frame or  
15 receiver of a firearm is. Should we add a little bit more to  
16 the definition from the case law on what those terms mean?

17 I assume a holster would not count as a receiver or frame,  
18 but what do the parties think about further elaborating on what  
19 that means?

20 And is this like the dangerous weapon issue, that the  
21 government doesn't really need the frame or receiver and we  
22 should just cut it out to avoid any confusion if the jury  
23 convicts based on an empty holster? Mr. Nestler?

24 MR. NESTLER: We favor including the statutory  
25 definition.

1           THE COURT: What's your view on what those terms mean?  
2 I don't know what a frame or receiver of a firearm is.

3           MR. NESTLER: They're a part of the firearm. So the  
4 frame and the receiver are a part of what the firearm is.

5           So I believe the point of this is that even if the firearm  
6 itself was somehow not functional, the frame or receiver of the  
7 firearm still makes it a firearm.

8           THE COURT: Could we add a statement to that effect?  
9 I don't know. It wasn't intuitive to me, the receiver at least.

10          MR. NESTLER: I understand Your Honor's point, and if  
11 we want to add a clarification sentence, that actually is  
12 perfectly fine with the government to explain frame or receiver  
13 or to explain that a holster is not --

14          THE COURT: One or the other or both.

15          Mr. Welch, I assume you don't object.

16          MR. WELCH: I don't object, as long as it makes clear  
17 that a holster -- if we do this at all, it needs to explicitly  
18 say that a holster is not a part of the firearm.

19          THE COURT: Are you not asking for this? Am I raising  
20 something you would rather not be added?

21          MR. WELCH: No, I would think it's a good point, and I  
22 think that we need to make clear to the jury that a holster is  
23 not a firearm.

24          THE COURT: Okay. All right. I'm inclined, based on  
25 what you said, Mr. Nestler, to just add a sentence. Again, I

1 will give you all the copy, basically saying what you just said,  
2 that a frame or receiver is a part of a firearm, not a holster.

3 Any objection to that? You all can wordsmith it once you  
4 get it. That's, in essence, what it would say.

5 MR. NESTLER: That general sentiment is fine with the  
6 government.

7 THE COURT: Okay. Moving on to the second offense,  
8 the obstruction offense, I will adopt the government's proposal  
9 to flip the order of the elements, as I said before, so the  
10 actus reus comes first, followed by the three mens rea elements.

11 I also fixed the typo that said "any official proceeding"  
12 and changed it to "an," and I will change the "an official  
13 proceeding" to "the official proceeding" for the intent element.

14 And finally, I will change the natural and probable effect  
15 of the conduct "was to obstruct" to "would be to obstruct."

16 But I won't adopt the other proposals by the government and  
17 the defense. I am going to retain that the defendant "acted  
18 with intent to obstruct" instead of the government's  
19 proposed the defendant "intended to obstruct." I think the  
20 formulation is consistent with the case law.

21 See *U.S. v. Mintmire*, 507 F.3d at 1289, and *U.S. v. Bedoy*,  
22 827 F.3d at 510. Basically, those cases say a defendant must  
23 act knowingly with the intent to obstruct.

24 I will also retain "acted with unlawful purpose" instead of  
25 the government's proposed "have an improper purpose." Again, I

1 think that's consistent with the case law, not only *Mintmire*,  
2 *Mintmire* at 1289, but *U.S. v. Gordon*, 710 F.3d at 1161, acting  
3 corruptly within the meaning of Section 1612(c)(2) means acting  
4 with an improper purpose.

5 And I recognize that these cases do use "improper purpose"  
6 instead of "unlawful purpose," but as I've explained, I'm  
7 concerned about "improper" being too vague in this context. In  
8 particular, the D.C. Circuit has cautioned against relying on  
9 vague, nebulous terms like "improper," "immoral," as I said in  
10 the *Sandlin* opinion at 22, quoting *Poindexter* at 951 F.2d at 379  
11 through -80. So the Court will retain "unlawful purpose."

12 Finally, I do reject the defense's request and will retain  
13 the language "engaging in other independently unlawful conduct"  
14 in the example. This language is consistent with my ruling in  
15 *Sandlin* where I held a defendant uses corrupt means when those  
16 means are independently criminal. That's the *Sandlin* opinion at  
17 24.

18 It's also consistent with this Circuit's case law. *U.S. v.*  
19 *North*, 910 F.2d at 943. And that's *Silberman's* concurring and  
20 consenting opinion.

21 It also helps the jury understand that bribery isn't the  
22 only means by which someone can act corruptly.

23 Mr. Nestler, as I said last hearing, I still remain  
24 concerned about the government's unlawful or improper purpose  
25 theory. Last week, when I said what's the difference between



1     what you're saying and, you know -- what's the distinction  
2     between "corruptly" and "specific intent" that the government  
3     has to prove to convict Mr. Reffitt of obstructing an official  
4     proceeding, you said "not much," and I just don't think -- I  
5     think this Circuit's case law suggests otherwise, and you're  
6     conflating corruptly with intentionally.

7             And I'm concerned that if the government's theory is  
8     evidences to mean, and I understand that to mean that the  
9     government intends to prove that Mr. Reffitt assaulted or  
10    attempted to assault or aided and abetted in an assault, if the  
11    jury doesn't buy that theory, I don't think the jury could  
12    convict the defendant on the sole basis that he intended to  
13    obstruct or impede the official proceeding. I think that would  
14    read corruptly out of the statute.

15            So if the government's theory ends up being the unlawful  
16    purpose was more than to stop or delay the vote, you know, for  
17    example, it was to pull members out of the room or something  
18    like that, then that might be different. But even in that  
19    context, I wonder whether the means doesn't collapse into the  
20    purpose there. If ultimately the purpose is to stop or delay  
21    the vote, I just don't think that can be -- that theory would be  
22    appropriate in terms of improper purpose, and he could be  
23    convicted of that alone without any unlawful means being used.

24            So I think I've made my position clear.

25            Anything more you want to say with regard to that? We can

1 address it at the appropriate time, but you've assured me you're  
2 not going to get into that. It would be inappropriate anyway to  
3 argue any sort of theory in the opening. But I just want to be  
4 real clear that I have concerns about that theory. As I see  
5 this, this is an unlawful means case. But I could envision in  
6 certain cases an unlawful purpose. I just don't think the stop  
7 or the delay of the vote is in and of itself an unlawful or  
8 improper purpose necessarily, a criminal one, that is.

9 MR. NESTLER: And the government's position is that  
10 the defendant's intent at the time he went to the Capitol  
11 grounds and did his actions, even if his actions were not  
12 independently unlawful, why he was there is the purpose. And so  
13 he was there to drag legislators out by their heels.

14 THE COURT: If that's how you're defining the purpose,  
15 then if that's how you're defining the purpose, then I think you  
16 have a different -- that would be different, if that's the end  
17 purpose. But if the purpose is just to, quote, stop or delay  
18 the vote, that's a purpose that I don't think would need to  
19 be -- the standard you need to meet.

20 MR. NESTLER: Right. And I think we're saying the  
21 same thing actually, Judge. Our position is that the  
22 defendant's purpose for why he was at the Capitol building was  
23 itself corrupt, which we say improper, and we understand the  
24 Court's ruling about unlawful, but what was in his head of why  
25 he was there, so not the means. Even if he didn't assault or

1 aid and abet anyone else to assault an officer, the reason that  
2 he was unlawfully on the Capitol grounds was for that improper  
3 purpose, which is to drag the legislators out by their heels.

4 THE COURT: All right. Assault, you know, batteries,  
5 all of that works. What doesn't work are these vague, you know,  
6 terms like stopping and delaying the vote or interfering with  
7 police officers, you know, without that -- interfere by  
8 shouting. I.

9 Think the government needs to be crisp with its theory.  
10 And so long as it is, it will go to the jury, but if it's not,  
11 it won't.

12 MR. NESTLER: Understood.

13 THE COURT: All right. Anything else on that? I want  
14 to move on to the entering or remaining in a restricted building  
15 or grounds with a firearm.

16 MR. NESTLER: No, Your Honor.

17 THE COURT: All right. Of course, I will accept the  
18 parties' proposal to remove references to a deadly or dangerous  
19 weapon. I think that will be clear for the jury.

20 Okay. With -- I have questions on the knowingly mens rea,  
21 Mr. Nestler. I don't know if this is you or Ms. Berkower. But  
22 as you pointed out, the government has to show that the  
23 defendant knowingly entered or remained in the restricted  
24 building or grounds without lawful authority; right? That's  
25 number 1. And number 2, the defendant has to know that he

1       lacked the lawful authority to be there; correct?

2               MR. NESTLER:   Yes.

3               THE COURT:   And I think there's a 3.   I think he has  
4       to know that he possessed the firearm, that he used or carried  
5       the firearm.   If someone dumped the firearm in his backpack,  
6       that wouldn't be a crime, this crime at least.

7               Do you agree?

8               MR. NESTLER:   Yes, Your Honor.

9               THE COURT:   Okay.   So Mr. Welch, you haven't raised  
10       it, but I take it you don't object that they've got to show  
11       knowingly as to all three of those.

12              MR. WELCH:   Correct.

13              THE COURT:   It concerns me, folks, when I'm reviewing  
14       these last minute and I'm catching things like that.   Mr. Welch,  
15       that's a big issue, and I want to make sure that you're  
16       carefully looking at these jury instructions, because that would  
17       be a big omission to not have the knowing use or carrying of the  
18       firearm.

19              MR. WELCH:   It would.

20              THE COURT:   Okay.   I think that covers it.   Have I  
21       missed anything?

22              MR. NESTLER:   On the following page on that Count 3  
23       instruction, we had a couple of additional edits --

24              THE COURT:   Remind me.   I don't have your filing in  
25       front of me.   What were they?

1           MR. NESTLER: Removing "the vice president elect" from  
2 the definition as protected by the Secret Service and removing  
3 the paragraph defining "dangerous or deadly weapon" --

4           THE COURT: Yes.

5           MR. NESTLER: And then adding a sentence that says the  
6 term "firearm" has the same meaning I gave you previously.

7           THE COURT: Yes. Do you agree with all of those,  
8 Mr. Welch? No objection to those proposed changes?

9           MR. WELCH: Correct.

10          THE COURT: Okay. All right. I think that's it for  
11 me.

12          If you all have any issues with the demonstrative exhibits,  
13 those kinds of things, either file something or -- I would  
14 prefer you file something. But at a minimum, send an e-mail to  
15 the chambers e-mail so I'm aware. It would be good again to  
16 resolve this before the end of the week so that we start ready  
17 to go Monday morning and we can get through these jurors as  
18 quickly as possible.

19          MR. NESTLER: Thank you, Your Honor. Just to be  
20 clear, we are planning on meeting Monday morning at 9:00 a.m.?

21          THE COURT: 9:00 a.m. I'll get your numbers. You  
22 just write them on a piece of paper and hand them to me. Then  
23 you will get the juror sheet, and you will -- any other  
24 issues -- if there's an argument I need to hear Monday morning,  
25 I hope not, but that would be the time to do that as well.

1           MR. NESTLER: Understood. Do you know what time the  
2 Ceremonial Courtroom will be open for us to get there?

3           THE COURT: Let me ask Mr. Hopkins that question.

4           Mr. Hopkins?

5           COURTROOM DEPUTY: I will be there early. I will be  
6 there probably around 8:00. So if you want to get there at the  
7 same time, that's fine. I will be there early.

8           MR. NESTLER: Thank you, Mr. Hopkins. And just to be  
9 clear, Judge, we will bring the 50 jurors in, do the general  
10 voir dire, do the individual voir dire for those 50, and then we  
11 will return to the Ceremonial Courtroom either late Monday or  
12 some time on Tuesday and do general voir dire for the remaining  
13 30 jurors?

14          THE COURT: Correct.

15          MR. NESTLER: That makes sense.

16          THE COURT: Okay. I think Ms. Berkower makes a great  
17 point. We might not necessarily want to leave them until  
18 Tuesday if things are going really smoothly. We may want to --  
19 my initial inclination to bring them back the next morning may  
20 not be the right one.

21          But we will have to come back and go through the whole  
22 spiel again.

23          MR. NESTLER: In other words, I think Your Honor  
24 indicated we would maybe try to talk to one or two of them, but  
25 we can't, really. We have to have all 30 back at once.

1           THE COURT: We do. I wish we could jam more people in  
2 all of these courtrooms. But we're trying to be safe. We're  
3 trying not to have a COVID outbreak as a result of us not  
4 following the safety protocols that the experts have told us we  
5 should follow.

6           Numbers are dropping, but still, the most recent advice we  
7 received, which is in the last few days, is don't let down your  
8 guard, it's still precarious to not have social distancing and  
9 masks. Maybe later in the year, this won't be a problem and  
10 these trials can go forward with the public closer together, but  
11 right now, we're told that you really need to keep social  
12 distancing and you need to keep masks on. So that's what we're  
13 doing.

14           MR. NESTLER: Thank you, Your Honor. It all makes  
15 sense.

16           THE COURT: All right, then.

17           Mr. Reffitt, do you have any questions, concerns other than  
18 the haircut, which I'm going to put out an order immediately  
19 about?

20           THE DEFENDANT: No, Your Honor. That's pretty much  
21 all I want taken care of at this point. The rest will be on my  
22 counsel.

23           THE COURT: I'm sorry. I couldn't hear the last part.

24           THE DEFENDANT: The rest will be on counsel.

25           THE COURT: Mr. Welch, anything we can do to help you

1 with access to Mr. Reffitt and all that? Are you having any  
2 issues?

3 MR. WELCH: No, that hasn't been an issue, but I would  
4 ask whether Mr. Hopkins could accommodate a breakout after we're  
5 done.

6 THE COURT: Yes, of course.

7 So Mr. Welch, in terms of the family members, we're going  
8 to have one pew that I think can accommodate Mr. Reffitt's  
9 family. All right?

10 MR. WELCH: All right. Will that actually be during  
11 the trial itself, or is that just during the voir dire?

12 THE COURT: I'm going to have to talk to court staff  
13 about that. I think that the expectation was that there would  
14 be a small number. With this number, I don't know that I'm  
15 saying all of them will be in the voir dire room itself. I will  
16 have Mr. Hopkins get back to you on this. We're talking  
17 overflow courtroom on all of this, though.

18 You understand that; right?

19 MR. WELCH: Yes.

20 THE COURT: Except for individual voir dire maybe.

21 MR. WELCH: Okay. I understand what you're saying.  
22 And I guess what I would be asking, then, is when we get to the  
23 actual trial and we're in 14, then could they at least in one of  
24 the overflow courtrooms have a row for them so that they can not  
25 be out in the hall?



1           THE COURT: That's what I'm saying, that they wouldn't  
2 have to line up. Generally, it's first come/first served, but  
3 there will be a row reserved for them so they don't have to get  
4 here super early. But it's not in the actual courtroom, because  
5 we've got so many people, with the jurors in the gallery, with  
6 the four alternates, and with the trial teams and with the  
7 witnesses and with the attorneys for the witnesses. There are a  
8 lot of people, and it's hard to space them out in the courtroom.

9           So except for the individual voir dire -- which maybe we'll  
10 accommodate, probably not all ten of them, but maybe one or two.  
11 I will get back to you on that. They will certainly have a row  
12 in an overflow courtroom.

13           MR. WELCH: Okay.

14           THE COURT: All right. Thank you all. See you on  
15 Monday. And if there's a need to jump on line, like a telephone  
16 call or something like that tomorrow, we can do that. I don't  
17 know that we would have Mr. Reffitt necessarily available, but  
18 you all let me know. If there's some issue that can be handled  
19 without his presence that can be taken care of before Monday,  
20 let me know.

21           MS. BERKOWER: We will. Thank you.

22           (Proceedings adjourned at 12:26 p.m.)  
23  
24  
25

## 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 26, 2022

13 SIGNATURE OF COURT REPORTER

DATE  
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