

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 21-CR-234 (CJN)
	:	
JOSEPH W. FISCHER,	:	
	:	
Defendant.	:	

**GOVERNMENT’S MOTION FOR RECONSIDERATION OF THE COURT’S RULING
DISMISSING COUNT THREE OF THE INDICTMENT**

On March 15, 2022, the Court granted Defendant Joseph Fischer’s motion to dismiss a count charging him with a violation of 18 U.S.C. § 1512(c)(2) (Count Three), which prohibits corruptly obstructing, influencing, or impeding an official proceeding. ECF 65. Following its decision in *United States v. Garret Miller*, No. 21-cr-119 (CJN) (ECF 73), the Court found that a defendant violates Section 1512(c)(2) only when that individual “take[s] some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.” Memorandum Opinion (Mem. Op.), ECF 64, at 7-8. Because, according to the Court, the indictment did not allege or imply that Fischer took any such action, the Court dismissed Count Three. *Id.* at 8.

Reconsideration is appropriate where, as here, it furnishes a district court “the opportunity to correct [its] own alleged errors” and thereby “prevents unnecessary burdens” on the court of appeals. *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (per curiam). The government moves the Court to reconsider its ruling dismissing Count Three on two independent grounds. First, by the Court erred by following its decision in *Miller*, because *Miller* relies on an erroneous application of the rule of lenity. Rejecting an interpretation of Section 1512(c)(2)’s scope that every other member of this Court to have considered the issue and every reported case to have considered the

issue (to the government’s knowledge) has adopted, in *Miller*, the Court found “serious ambiguity” in the statute. Memorandum Opinion, *Miller*, No. 21-cr-119 (CJN) ECF 72, at 28 (D.D.C. Mar. 7, 2022) (“*Miller* Mem. Op.”). The rule of lenity applies “only if, after seizing everything from which aid can be derived,” the statute contains “a ‘grievous ambiguity or uncertainty,’” and the Court “can make no more than a guess as to what Congress intended.” *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (quoting *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998)) (emphasis added); see also *Miller* Mem. Op. at 9 (citing “‘grievous’ ambiguity” standard). Interpreting Section 1512(c)(2) consistently with its plain language to reach any conduct that “obstructs, influences, or impedes” a qualifying proceeding does not give rise to “serious” or “grievous” ambiguity.

Second, even if the Court’s document-focused interpretation of Section 1512(c)(2) were correct, such that the government must prove that Fischer “took some action with respect to a document,” Mem. Op. at 8, the Court erred in dismissing Count Three in full based on the purported insufficiency of the indictment. Count Three sufficiently alleged a violation of Section 1512(c)(2) by tracking the provision’s “operative statutory text.” *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). The indictment did not need to more specifically allege that the obstruction took the form of taking some action with respect to a document. In other words, the indictment’s allegations, by charging the operative statutory text, permissibly embrace two theories: (1) that Fischer obstructed an official proceeding by “tak[ing] some action with respect to a document,” Mem. Op. at 7; and (2) that Fischer obstructed an official proceeding without taking some action with respect to a document. The Court’s ruling finding the second theory invalid left the first theory intact. Moreover, Rule 12 of the Federal Rules of Criminal Procedure does not permit dismissal where, as here, additional facts would assist in resolving the pretrial

motion. In particular, evidence at trial could establish the documents and records used in the Certification proceeding and prove that Fischer's conduct had the natural and probable effect of destroying or imperiling those documents and records. Because the indictment's allegations sufficiently charge the first theory that Fischer obstructed the proceeding by taking action with respect to a document, the Court should not have dismissed Count Three.

I. Relevant Background

The grand jury returned a multi-count indictment that charged Fischer with, among other things, one count of congressional obstruction, in violation of 18 U.S.C. § 1512(c)(2). Congress enacted Section 1512 as a prohibition on “[t]ampering with a record or otherwise impeding an official proceeding” in Section 1102 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 807, and codified it in Chapter 73 of Title 18 of the United States Code, placing it within the pre-existing Section 1512 as subsection (c). That prohibition applies to

(c) [w]hoever corruptly--

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.

18 U.S.C. § 1512(c). Count Three charges that on January 6, 2021, Fischer “attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's Certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18.” ECF 52, at 2.

Fischer moved to dismiss that count on three primary grounds. *See* ECF 54. He argued that (1) the Certification of the Electoral College vote was not an “official proceeding”; (2) Section 1512(c)(2) did not apply to his alleged conduct because it concerns the administration of justice;

and (3) Section 1512(c)(2) is unconstitutionally vague. *Id.* Also pending before the Court was Garret Miller’s motion to dismiss the same charge, which similarly argued that (1) the Certification of the Electoral College vote was not an “official proceeding”; (2) Section 1512(c)(2) did not apply to his alleged conduct because it is limited to conduct impairing the availability and integrity of evidence; and (3) Section 1512(c)(2) is unconstitutionally vague as applied to him. Motion to Dismiss, *Miller*, No. 21-cr-119, ECF 34.

The Court ruled on Miller’s motion first. It rejected Miller’s first argument, *see Miller Mem. Op.* at 9-10, but agreed that Miller’s alleged conduct did not fall within Section 1512(c)(2)’s scope, *id.* at 10-29. The Court did not address Miller’s third argument.

In ruling in Miller’s favor, the Court focused on the word “otherwise” in Section 1512(c)(2), identifying “three possible readings” of Section 1512(c)(2)’s scope. *Miller Mem. Op.* at 11. First, Section 1512(c)(2) could serve as a “clean break” from Section 1512(c)(1), *id.* at 11-12, a reading that “certain courts of appeals have adopted,” *id.* at 14. The Court, however, identified multiple “problems” with that interpretation, all focused on the interpretation of the term “otherwise.” The Court reasoned that reading “otherwise” in Section 1512(c)(2) to mean “in a different way or manner” is “inconsistent” with the Supreme Court’s decision in *Begay v. United States*, 553 U.S. 137 (2008), which considered whether driving under the influence qualified as a “violent felony” under the now-defunct residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). *Miller Mem. Op.* at 12-14. The Court accordingly rejected the first interpretation. *Id.* at 19-20. Second, in the Court’s view, Section 1512(c)(1) could “provide[] examples of conduct that violates” Section 1512(c)(2). *Id.* at 15-16. Third, Section 1512(c)(2) could be interpreted as a “residual clause” for Section 1512(c)(1), such that both provisions are linked by the document-destruction and evidence-tampering “conduct pr[o]scribed by” Section

1512(c)(1). *Id.* at 17. After considering Section 1512(c)'s structure, "historical development," and legislative history, the Court found "serious ambiguity" as to which of the two "plausible" readings—the second and third readings identified above—Congress intended. Applying what the Court described as principles of "restraint," the Court then interpreted Section 1512(c)(2) to mean that a defendant violates the statute only when he or she "take[s] some action with respect to a document, record, or other object in order to corruptly obstruct, impede, or influence an official proceeding" (the third reading). *Id.* at 28. Because, in the Court's view, the indictment did not encompass an allegation that Miller took any such action, the Court dismissed Count Three. *Id.* at 29.

Eight days later, the Court granted Fischer's motion to dismiss Count Three. It did not directly address any of the three arguments Fischer had raised in his motion regarding Section 1512(c)(2). Instead, adopting its ruling in *Miller*, the Court found that, "for a defendant's conduct to fall within the ambit of subsection (c)(2), the defendant must 'have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.'" (Mem. Op. at 7-8 (citing *Miller* Mem. Op. at 8)). As in *Miller*, the Court found that the Superseding Indictment did not allege or imply that Fischer had taken any such action in order to corruptly obstruct, impede, or influence the Certification of the Electoral College vote, and dismissed Count Three. Mem. Op. at 8.¹

Both before and after the ruling in this case, judges on this Court have rejected a document-focused interpretation of Section 1512(c)(2). In *United States v. Sandlin*, No. 21-cr-88, 2021 WL 5865006 (D.D.C. Dec. 10, 2021), the Honorable Dabney L. Friedrich found that Section

¹ The Court's ruling suggests that, as in *Miller*, it rejected Fischer's argument that the Certification of the Electoral College vote was not an official proceeding.

1512(c)(2)'s terms are "expansive and seemingly encompass all sorts of actions that affect or interfere with official proceedings" and determined that the use of the word "otherwise" in Section 1512(c)(2) "clarifies" that it "prohibits obstruction by means *other than* document destruction." *Id.* at *5-*6. She did not view the Supreme Court's decision in *Begay* as altering that conclusion, because *Begay* rested on the ACCA's different statutory language and history. *Id.* at *6. Judge Friedrich also rejected the defendant's reliance on *Yates v. United States*, 574 U.S. 528 (2015) (plurality opinion). *Sandlin*, 2021 WL 5865006, at *6-*8. Finally, Judge Friedrich concluded that, although a plain-text construction of Section 1512(c)(2) creates "substantial overlap" with other provisions in Section 1512 and Chapter 73, it does not create "intolerable overlap." *Id.* at *7-*8 (citing *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part)) (emphasis omitted).

Decisions from other judges on this Court before *Miller* and *Fischer* followed suit. For example, in *United States v. Caldwell*, No. 21-cr-28, 2021 WL 6062718 (D.D.C. Dec. 20, 2021), the Honorable Amit P. Mehta concluded that Section 1512(c)(2) is not "limited" to conduct "affecting the integrity or availability of evidence in a proceeding." *Id.* at *11 (brackets and internal quotation marks omitted); *see id.* at *11-*19 (addressing Section 1512(c)(2)'s text and structure, *Begay*, and *Yates*). In *United States v. Mostofsky*, No. 21-cr-138, 2021 WL 6049891 (Dec. 21, 2021), the Honorable James E. Boasberg found persuasive the analysis in *Sandlin* and *Caldwell*. *See id.* at *11. In *United States v. Nordean*, 21-cr-175, 2021 WL 6134595 (D.D.C. Dec. 28, 2021), the Honorable Timothy J. Kelly reasoned that an interpretation of Section 1512(c)(2) limiting it to "impairment of evidence" could not "be squared with" Section 1512(c)(2)'s "statutory text or structure." *Id.* at *6; *see id.* at *6-*9 (addressing *Yates* and superfluity concerns). And in *United States v. Montgomery*, 21-cr-46, 2021 WL 6134591 (D.D.C. Dec. 28, 2021), the Honorable

Randolph D. Moss reached the same conclusion following an extended discussion of Section 1512(c)'s text, structure, and legislative history, as well as the *Begay* and *Yates* decisions. *Id.* at *10-*18; *see also United States v. Bozell*, 21-cr-216, 2022 WL 474144, at *5 (D.D.C. Feb. 16, 2022) (Bates, J.) (reaching the same conclusion on the scope of Section 1512(c)(2)); *United States v. Grider*, 21-cr-22, 2022 WL 392307, at *5-*6 (D.D.C. Feb. 9, 2022) (Kollar-Kotelly, J.) (same).

Following this Court's decision in *Miller*, two judges on this Court have disagreed with the *Miller* analysis. In denying a defendant's post-trial motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, Judge Friedrich indicated that she was "not inclined to reconsider" her ruling in *Sandlin* and described her points of disagreement with *Miller*. *United States v. Reffitt*, 21-cr-32, Trial Tr. 1502-05 (Mar. 8, 2022) (attached as Exhibit A). And in *United States v. Puma*, 21-cr-454, 2022 WL 823079 (D.D.C. Mar 19, 2022), the Honorable Paul J. Friedman concluded that the word "otherwise" in Section 1512(c)(2) "clarifies" that a defendant violates that section "through 'obstruction by means *other than* document destruction.'" *Id.* at *12 (quoting *Mostofsky*, 2022 WL 6049891, at *11). In reaching that conclusion, Judge Friedman rejected *Miller*'s "premise that any 'genuine ambiguity persist[s],'" *id.* at *12 n.4 (quoting *Miller* Mem. Op. at 7), and therefore found the rule of lenity "inapplicable," *id.*

II. Argument

Reconsideration of the Court's ruling is appropriate for two reasons. First, the Court erred in *Miller* (the basis of its ruling in this case) by applying the rule of lenity to Section 1512(c)(2) because, as many other judges have concluded after examining the statute's text, structure, and history, there is no genuine—let alone "grievous" or "serious"—ambiguity. Second, even if the Court's narrow interpretation of Section 1512(c)(2)'s scope were correct, the Court erred by dismissing Count Three in full because the indictment's allegations, by charging defendant using

the statutory text, validly encompassed that narrower theory, particularly if this Court were to consider proffered evidence that the government would adduce at trial. *See, e.g., United States Firtash*, 392 F.Supp.3d 872, 887 (N.D. Ill. 2019) (upholding money laundering charge in indictment based in part on government’s proffer of evidence regarding the nature of the financial transaction).

A. Legal standard

A reconsideration motion gives district courts “the opportunity to correct their own alleged errors,” which in turn “prevents unnecessary burdens being placed on the courts of appeals.” *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (per curiam). Although not provided for under the Federal Rules of Criminal Procedure, a motion to reconsider is available “as justice requires,” *United States v. Hassanshahi*, 145 F.Supp.3d 75, 80 (D.D.C. 2015) (internal quotation marks omitted), and when “necessary under the relevant circumstances,” *United States v. Caldwell*, 21-cr-28, 2022 WL 203456, at *1 (D.D.C. Jan. 24, 2022) (quoting *Cobell v. Norton*, 355 F.Supp.2d 531, 539 (D.D.C. 2005)). Reconsideration may be appropriate where a court “patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court.” *Caldwell*, 2022 WL 203456, at *1 (internal quotation marks omitted). A reconsideration motion can address issues not discussed or briefed by the parties, but it is “not simply an opportunity to reargue facts and theories upon which a court has already ruled.” *Hassanshahi*, 145 F.Supp.3d at 80-81 (internal quotation marks omitted); *see Arias v. DynCorp*, 856 F.Supp.2d 46, 52 (D.D.C. 2012) (noting that litigants who “have once battled for the court’s decision . . . should not be permitted to battle for it again”) (brackets and internal quotation marks omitted). Reconsideration

is warranted here to address two issues not presented to the Court: “the degree of ambiguity required to trigger the rule of lenity,” *Wooden v. United States*, 142 S. Ct. 1063, 1084 (2022) (Gorsuch, J., concurring), and whether a court is limited only to the indictment’s allegations when considering a pretrial challenge to the scope of conduct that a statute encompasses.

B. The Court’s ruling erroneously applied the rule of lenity.

“When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.” *Bell v. United States*, 349 U.S. 81, 83 (1955). That principle underlies the “venerable” rule of lenity, *Miller Mem. Op.* at 8 (quoting *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) (Bibas, J., concurring)), which ensures that “legislatures and not courts” define criminal activity given the “seriousness of criminal penalties” and the fact that “criminal punishment usually represents the moral condemnation of the community.” *United States v. Bass*, 404 U.S. 336, 348 (1971); see *Liparota v. United States*, 471 U.S. 419, 427 (1985) (“Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.”).

The rule of lenity, however, does not come into play when a law merely contains some degree of ambiguity or is difficult to decipher. The rule of lenity “only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.” *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (citation and internal quotation marks omitted); *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998); *Young v. United States*, 943 F.3d 460, 464 (D.C. Cir. 2019). In short, some ambiguity is insufficient to trigger the rule of lenity; instead, a court must find “grievous ambiguity” that would otherwise compel guesswork. See *Ocasio v. United States*, 578

U.S. 282, 295 n.8 (2016) (internal quotation marks omitted). “Properly applied, the rule of lenity therefore rarely if ever plays a role because, as in other contexts, ‘hard interpretive conundrums, even relating to complex rules, can often be solved.’” *Wooden*, 142 S. Ct. at 1074 (Kavanaugh, J., concurring) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)).

The Court erroneously applied the rule of lenity in this case. The Court referred to the “‘grievous’ ambiguity” standard when initially discussing the rule, *see Miller* Mem. Op. at 9, and found “a serious ambiguity” regarding the conduct that Section 1512(c)(2) reaches, *id.* at 28; *see also id.* at 22 (“[T]he Court does not believe that there is a single obvious interpretation of the statute.”). But the Court’s interpretation of Section 1512(c)(2)’s scope places undue emphasis on a single word (“otherwise”) and a single Supreme Court decision (*Begay*) that interpreted that word as used in an entirely different statute and statutory context. A proper reading of Section 1512(c)(2)’s text, structure, and history demonstrates that Section 1512(c)(2) prohibits any corrupt conduct that intentionally obstructs or impedes an official proceeding, not merely where a “defendant ha[s] taken some action with respect to a document, record, or other object,” *id.* at 28, to corruptly obstruct an official proceeding.

Simply put, the rule of lenity is “inapplicable” here. *Puma*, 2022 WL 823079, at *12 n.4. Congress made clear in Section 1512(c)(2) that it sought to protect the integrity of official proceedings—regardless of whether a defendant threatens such a proceeding by trying to interfere with the evidence before that tribunal or threatens the tribunal itself. Any such distinction between these forms of obstruction produces the absurd result that a defendant who attempts to destroy a document being used or considered by a tribunal violates Section 1512(c) but a defendant who threatens to use force against the officers conducting that proceeding escapes criminal liability under the statute. Not only does the rule of lenity not require such an outcome, but such an

application loses sight of a core value that animates the lenity rule: that defendants should be put on notice that their conduct is criminal and not be surprised when prosecuted. *See Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring) (“Lenity works to enforce the fair notice requirement by ensuring that an individual’s liberty always prevails over ambiguous laws.”). It would strain credulity for any defendant who was focused on stopping an official proceeding from taking place to profess surprise that his conduct could fall within a statute that makes it a crime to “obstruct[], influence[], or impede[] [any] official proceeding or attempt[] to do so.” 18 U.S.C. § 1512(c)(2). Confirming the absence of ambiguity—serious, grievous, or otherwise—is that despite Section 1512(c)(2)’s nearly 20-year existence, no other judge has found ambiguity in Section 1512(c)(2), including eight judges on this Court considering the same law and materially identical facts. *See supra* at 5-7.

1. Section 1512(c)(2)’s text and structure make clear that it covers obstructive conduct “other” than the document destruction covered in Section 1512(c)(1).

While Section 1512(c)(1) prohibits the corrupt destruction or alteration of documents, records, and other objects in connection with an official proceeding, Section 1512(c)(2) prohibits corrupt conduct that “otherwise” obstructs, influences, or impedes an official proceeding. Before this Court’s decision to the contrary, every reported case to have considered the scope of Section 1512(c)(2), *see Gov’t Supp. Br., Miller*, ECF 74, at 7-9,² and every judge on this Court to have

² *See, e.g., United States v. Martinez*, 862 F.3d 223, 238 (2d Cir. 2017) (police officer tipped off suspects about issuance of arrest warrants before “outstanding warrants could be executed, thereby potentially interfering with an ongoing grand jury proceeding”), *vacated on other grounds*, 139 S. Ct. 2772 (2019); *United States v. Petruk*, 781 F.3d 438, 446-47 (8th Cir. 2015) (defendant attempted to secure a false alibi witness while in jail for having stolen a vehicle); *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2014) (defendant solicited information about a grand jury investigation from corrupt “local police officers”); *United States v. Ahrensfield*, 698 F.3d 1310, 1324-26 (10th Cir. 2012) (law enforcement officer disclosed existence of undercover investigation to target); *United States v. Phillips*, 583 F.3d 1261, 1265 (10th Cir. 2009) (defendant disclosed identity of an undercover officer, thus preventing him from making controlled purchases

considered the issue in cases arising out of the events at the Capitol on January 6, 2021, *see supra* at 5-7, concluded that Section 1512(c)(2) “prohibits obstruction by means *other than* document destruction.” *Sandlin*, 2021 WL 5865006, at *5. That conclusion follows inescapably from the text of Section 1512(c)’s two subsections read together: Section 1512(c)(1) “describes how a defendant can violate the statute by ‘alter[ing], destroy[ing], mutilat[ing], or conceal[ing]’ documents for use in an official proceeding,” *Puma*, 2022 WL 823079, at *12, while “otherwise” in Section 1512(c)(2) “signals a shift in emphasis . . . from actions directed at evidence to actions directed at the official proceeding itself,” *Montgomery*, 2021 WL 6134591, at *12 (internal quotation marks omitted).

This Court was thus mistaken in concluding that this interpretation either “ignores” that “otherwise” is defined with reference to “something else,” namely Section 1512(c)(1), or fails to “give meaning” to the term “otherwise.” *Miller* Mem. Op. at 12. Far from suggesting that Section 1512(c)(2) is “wholly untethered to” Section 1512(c)(1), *id.*, “otherwise” as used in Section 1512(c)(2) indicates that Section 1512(c)(2) targets obstructive conduct in a manner “other” than the evidence tampering or document destruction that is covered in Section 1512(c)(1). *See Miller*, ECF 74, at 8. That understanding of “otherwise” is both fully consistent with each definition the Court surveys, *see Miller* Mem. Op. at 11 (noting that “otherwise” in Section 1512(c)(2) may plausibly be read as “in a different way or manner; differently”; “in different circumstances: under other conditions”; or “in other respects”) (internal quotation marks omitted), and ensures that the term is not rendered “pure surplusage,” *id.* at 12. In sum, “otherwise” makes clear that Section

from methamphetamine dealers); *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009) (false testimony before a grand jury); *United States v. Reich*, 479 F.3d 179, 185-87 (2d Cir. 2007) (Sotomayor, J.) (defendant an opposing party a forged court order that purported to recall and vacate a legitimate order, causing the opposing party to withdraw an application for a writ of mandamus).

1512(c)(1)'s scope encompasses document destruction or evidence tampering that corruptly obstructs an official proceeding, while Section 1512(c)(2)'s ambit includes "other" conduct that corruptly obstructs an official proceeding.

The fact that some cases "could be brought under either or both prongs of Section 1512(c)," *Montgomery*, 2021 WL 6134591, at *12, does not imply that Section 1512(c)(2) "would have the same scope and effect . . . if Congress had instead omitted the word 'otherwise,'" *Miller Mem. Op.* at 12. For one thing—and as noted in the government's supplemental brief in *Miller*, ECF 74, at 11-13—overlap is "not uncommon in criminal statutes," *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014), and Section 1512(c)(2)'s broader language effectuates its design as a backstop in the same way that a "generally phrased residual clause . . . serves as a catchall for matters not specifically contemplated." *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009). Moreover, interpreting the interplay of Sections 1512(c)(1) and 1512(c)(2) in this way does not foreclose a defendant from arguing that his conduct falls outside Section 1512(c)(2)'s scope because his document destruction or evidence concealment is prohibited and punishable only under Section 1512(c)(1). To be sure, practical considerations may militate against seeking such a potentially Pyrrhic victory—where success leads to reindictment under Section 1512(c)(1)—but those practical considerations provide no reason to reject the straightforward interpretation of Section 1512(c) as divided between a provision that targets evidence destruction (Section 1512(c)(1)) and a provision that applies to "otherwise" obstructive conduct (Section 1512(c)(2)). And, in any event, the "mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005).

The Court further concluded that interpreting "otherwise" in the manner described above is "inconsistent" with *Begay*, where, in the Court's view, analysis of what "'otherwise' meant"

was “[c]rucial” to the Supreme Court’s analysis. *Miller* Mem. Op. at 12. That conclusion is flawed in several respects. First, in considering whether driving under the influence was a “violent felony” for purposes of the ACCA’s residual clause, which defines a “violent felony” as a felony that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury,” 18 U.S.C. § 924(e)(2)(B)(ii), the Supreme Court in *Begay* addressed a statutory provision that has an entirely different structure than Section 1512(c)(2). *See Sandlin*, 2021 WL 5865006, at *6 (distinguishing *Begay* on the ground that, unlike the ACCA residual clause, the “otherwise” in Section 1512(c)(2) is “set off by both a semicolon and a line break”); *United States v. Ring*, 628 F.Supp.2d 195, 224 n.17 (D.D.C. 2009). Unlike in the ACCA residual clause, the “otherwise” phrase in Section 1512(c)(2) “stands alone, unaccompanied by any limiting examples.”³ *Ring*, 628 F.Supp.2d at 224 n.17. In other words, the “key feature” in Section 924(e)(2)(B)(ii) at issue in *Begay*, “namely, the four example crimes,” 553 U.S. at 147, is “absent” in Section 1512(c)(2). *Caldwell*, 2021 WL 6062718, at *14. Although this Court recognized the structural difference between the ACCA residual clause and Section 1512(c)(2), *see Miller* Mem. Op. at 18-19, it offered no reason to import *Begay*’s interpretation of “otherwise” to Section 1512(c)(2)’s differently structured provision.

Second, describing the Supreme Court’s interpretation of “what ‘otherwise’ meant” as “[c]rucial” to that Court’s decision in *Begay* is an inaccurate description of *Begay*’s analysis. The majority in *Begay* noted first that the “listed examples” in Section 924(e)(2)(B)(ii)—burglary,

³ The Court suggested in *Miller* (*Miller* Mem. Op. at 15-16) that “[t]he government also presents an alternative reading” that Section 1512(c)(1) “provides examples of conduct that violates” Section 1512(c)(2). *Id.* at 15. That is incorrect. Neither the government in *Miller* nor *Miller* nor (to the government’s knowledge) any court has proposed or adopted that construction of Section 1512(c)(2). Considering an interpretation that no party advocates and no court has adopted injects the kind of “front-end ambiguity” that “lead[s] to significant inconsistency, unpredictability, and unfairness in application.” *Wooden*, 142 S. Ct. at 1076 (Kavanaugh, J., concurring).

arson, extortion, or crimes involving explosives—indicated that the ACCA residual clause covered only similar crimes. *Begay*, 553 U.S. at 142. Those examples, the majority reasoned, demonstrated that Section 924(e)(2)(B)(ii) was not designed “to be all encompassing,” but instead to cover only “crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.” *Id.* at 142-43. The majority next drew support for its conclusion from Section 924(e)(2)(B)(ii)’s history, which showed that Congress both opted for the specific examples in lieu of a “broad proposal” that would have covered offenses involving the substantial use of physical force and described Section 924(e)(2)(B)(ii) as intending to encompass crimes “similar” to the examples. *Id.* at 143-44. In the final paragraph of that section of the opinion, the majority addressed “otherwise,” noting that the majority “[could] not agree” with the government’s argument that “otherwise” is “*sufficient* to demonstrate that the examples do not limit the scope of the clause” because “the word ‘otherwise’ *can* (we do not say *must*, cf. *post* at [150-52] (Scalia, J. concurring in judgment)) refer to a crime that is similar to the listed examples in some respects but different in others.” *Id.* at 144.

A tertiary rationale responding to a party’s argument where the majority refrains from adopting a definitive view of “otherwise” cannot be described as “crucial.” The majority’s “remarkably agnostic” discussion of “otherwise” in *Begay* explicitly noted that the word may carry a different meaning where (as here) the statutory text and context suggests otherwise. *Montgomery*, 2021 WL 6134591, at *11; see *Caldwell*, 2021 WL 6062718, at *14 (declining to depart from the “natural reading” of “otherwise” as “‘in a different way or manner’” based on the discussion in *Begay*). In short, the majority in *Begay* “placed little or no weight on the word ‘otherwise’ in resolving the case.” *Montgomery*, 2021 WL 6134591, at *11.

Third, whatever the significance of the majority’s interpretation of “otherwise” in *Begay*,

Begay's ultimate holding demonstrates why this Court should not embark on imposing an extra-textual requirement within Section 1512(c)(2). The Supreme Court held in *Begay* that Section 924(e)(2)(B)(ii) encompasses only crimes that, similar to the listed examples, involve “purposeful, violent, and aggressive conduct.” 553 U.S. at 144-45. But “*Begay* did not succeed in bringing clarity to the meaning of the residual clause.” *Johnson v. United States*, 576 U.S. 591, 600 (2015). Just as the *Begay* majority “engraft[ed]” the “purposeful, violent, and aggressive conduct” requirement onto the ACCA’s residual clause, 553 U.S. at 150 (Scalia, J., concurring in judgment) (internal quotation marks omitted), so too this Court engrafts onto Section 1512(c)(2) the requirement that a defendant “have taken some action with respect to a document, record, or other object” to obstruct an official proceeding, *Miller* Mem. Op. at 28. In the nearly 20 years since Congress enacted Section 1512(c)(2), no reported cases have adopted the Court’s interpretation, and for good reason. That interpretation would give rise to unnecessarily complex questions about what sort of conduct qualifies as “taking some action with respect to a document” in order to obstruct an official proceeding. Cf. *United States v. Singleton*, No. 06-cr-80, 2006 WL 1984467, at *3 (S.D. Tex. July 14, 2006) (unpublished) (concluding that Section 1512(c)(2) “require[s] some nexus to tangible evidence, though not necessarily tangible evidence already in existence”); see also *United States v. Hutcherson*, No. 05-cr-39, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006) (unpublished) (concluding that a violation of Section 1512(c)(2) requires proof that “an individual corruptly obstructs an official proceedings [*sic*] through his conduct in relation to a tangible object”).⁴ In brief, the Court’s interpretation is likely to give rise to the very ambiguity it purports

⁴ The Court’s interpretation of Section 1512(c)(2) resembles the reading given in *Singleton* and *Hutcherson*, both of which are unpublished and neither of which the Court cites. As noted in the main text, no other court, at least in a reported opinion, appears to have adopted the nexus-to-tangible-evidence-or-a-tangible-object standard articulated in *Singleton* and *Hutcherson*. See *United States v. De Bruhl-Daniels*, 491 F.Supp.3d 237, 250-51 (S.D. Tex. 2020) (identifying *Singleton* and *Hutcherson* as outliers from the “most popular—and increasingly prevalent—

to avoid.

The Court’s observation that only “certain courts of appeals,” *Miller* Mem. Op. at 14, have interpreted Section 1512(c)(2) to reach conduct that obstructs an official proceeding other than document destruction significantly understates the case law. Every reported case—both in the courts of appeals and in district courts—has interpreted Section 1512(c)(2) in that manner. *See Miller*, ECF 74, at 7-9 (discussing cases). Moreover, the Court’s effort to distinguish one of those cases, *United States v. Petruk*, 781 F.3d 438, 447 (8th Cir. 2015), misses the mark. That *Petruk* did not cite or discuss *Begay*, *Miller* Mem. Op. at 14, says nothing about the logic of its analysis, particularly given how “remarkably agnostic” *Begay*’s discussion of “otherwise” is. *See Montgomery*, 2021 WL 6134591, at *11. The Court likewise faulted *Petruk* for misreading the Supreme Court’s decision in *United States v. Aguilar*, 515 U.S. 593 (1995), where the Supreme Court interpreted the omnibus clause in 18 U.S.C. § 1503 to require a “relationship in time, causation, or logic,” *id.* at 599, between the obstructive conduct and the proceeding—a grand jury investigation—at issue in the defendant’s case. But the restraint the Supreme Court exercised by interpreting Section 1503 to require that “nexus” is paralleled by interpreting the same nexus requirement to apply to Section 1512(c)(2)—as other judges on this Court have done, *see Miller*, ECF 74, at 20-22 (explaining that the nexus requirement applies to Section 1512(c)(2)); *Montgomery*, 2021 WL 6134591, at *20-*21—and not by imposing an additional, atextual requirement that a defendant must “have taken some action with respect to a document” for his

interpretation of § 1512(c)(2) [as] an unlimited prohibition on obstructive behavior that extends beyond merely tampering with tangible items”); *Ring*, 628 F.Supp.2d at 225 n.18 (disagreeing with *Singleton* and *Hutcherson* but finding that the alleged conduct at issue in that case involved “some nexus to documents”). No court of appeals has cited either case.

conduct to fall within the scope of Section 1512(c)(2).⁵

2. Other tools of statutory interpretation do not undermine that straightforward reading.

Because Section 1512(c)(2)'s text and context make clear that it reaches conduct that obstructs, influences, or impedes an official proceeding in a manner other than document destruction or evidence tampering, resorting to other tools of statutory interpretation is not necessary. In any event, those tools reinforce that straightforward interpretation of Section 1512(c)(2)'s scope. *See Miller*, ECF 74, at 9-17. In reaching a contrary conclusion, the Court erred in several respects.

First, the Court suggested that reading Section 1512(c)(2) consistently with its plain language and structure as described above would “introduce something of an internal inconsistency” because Section 1512(c)(2) would have greater breadth than neighboring provisions in Section 1512. *Miller* Mem. Op. at 21; *see id.* (describing Section 1512(c)(2) as an “elephant[] in [a] mousehole[]”). That reasoning is inconsistent with *Yates*, where a plurality of the Supreme Court recognized that Section 1512 consisted of “broad proscriptions,” not “specialized provisions expressly aimed at corporate fraud and financial audits.” 574 U.S. at 541 (plurality opinion). Moreover, the narrowing construction the Court imposes on Section 1512(c)(2) fails to consider that Section 1512(c)(2) reaches more broadly precisely because other provisions within Section 1512 leave gaps that Section 1512(c)(2) fills. *Cf. Catrino v. United*

⁵ The Court's similar criticism of *United States v. Burge*, 711 F.3d 803 (7th Cir. 2013), *Miller* Mem. Op. at 15 n.7, fails for the same reason. And the Court's related criticism that *United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014), which relied in part on *Burge*, “did not even involve a prosecution under § 1503, let alone § 1512(c)(2),” *Miller* Mem. Op. at 15 n.7, falls short. The defendants in *Volpendesto* were prosecuted for, among other things, conspiracy to obstruct an official proceeding, in violation of 18 U.S.C. § 1512(k), and the jury was instructed on the elements of 18 U.S.C. § 1512(c)(2). *See United States v. Volpendesto*, 08-cr-115, Dkt. No. 518, at 88-95 (N.D. Ill. Dec. 22, 2010).

States, 176 F.2d 884, 887 (9th Cir. 1949) (“The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.”).

Second, the Court worried that a reading of Section 1512(c)(2) that encompasses obstructive conduct unrelated to documents or records would give rise to “substantial superfluity problems.” *Miller* Mem. Op. at 21. But even a “broad interpretation of § 1512(c)(2) does not entirely subsume numerous provisions within the chapter,” and any overlap with other provisions in Section 1512 is “hardly remarkable.” *Sandlin*, 2021 WL 5865006, at *8; *accord Nordean*, 2021 WL 6134595, at *8. More troubling, by interpreting Section 1512(c)(2) to require “some action with respect to a document,” *Miller* Mem. Op. at 28, the Court risks rendering Section 1512(c)(2) itself superfluous in light of the “broad ban on evidence-spoliation” in Section 1512(c)(1), *Yates*, 574 U.S. at 541 n.4 (plurality opinion) (internal quotation marks omitted). Moreover, because Section 1512(c)(1) includes both completed and *attempted* evidence tampering, *see* 18 U.S.C. § 1512(c)(1) (reaching “[w]hoever corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, *or attempts to do so*) (emphasis added), it is unlikely that a defendant who “take[s] some action with respect to a document, record, or other object,” *Miller* Mem. Op. at 28, has not also taken a “substantial step” toward altering, destroying, mutilating, or concealing that document sufficient to fall within the scope of Section 1512(c)(1). *See United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014) (explaining that the “general meaning of ‘attempt’ in federal criminal law” is “an action constituting a ‘substantial step’ towards commission of a crime and performed with the requisite criminal intent”).

The canon against superfluity, which is “strongest when an interpretation would render

superfluous another part of the same statutory scheme,” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013), is even stronger when it renders superfluous “other provisions in the *same enactment.*” *Freytag v. Comm’r*, 501 U.S. 868, 877 (1991) (emphasis added; internal quotation marks omitted); *cf. Yates*, 574 U.S. at 543 (plurality opinion) (“We resist a reading of § 1519 that would render superfluous an entire provision passed . . . as part of the same Act.”). That principle comes into play here because Sections 1512(c)(1) and 1512(c)(2) were enacted together as part of the Sarbanes-Oxley Act. *See Miller*, ECF 74, at 15-16.

Third, the Court’s discussion of statutory and legislative history, *Miller Mem. Op.* at 23-28, provides no sound reason to deviate from the straightforward interpretation of Section 1512(c)(2) described above. For example, the Court suggested that Congress would have had no reason to add Section 1512(a)(2)(B) three months after enacting Section 1512(c)(2) if the latter provision were construed broadly. *Miller Mem. Op.* at 25. Section 1512(a)(2)(B) prohibits the use or threatened use of physical force against “any person” with the intent to “cause or induce any person” to take one of four actions, including “alter[ing], destroy[ing], mutilat[ing], or conceal[ing] an object with intent to impair the integrity or availability of the object for use in an official proceeding.” 18 U.S.C. § 1512(a)(2)(B)(ii). But as the Court noted, *Miller Mem. Op.* at 21 & 23, unlike Section 1512(a)(2)(B), Section 1512(c) aimed generally to impose “direct” liability for obstructive conduct that was not directed at intimidating or influencing another person, *see Miller*, ECF 74, at 16.⁶ Understood in that light, Section 1512(a)(2)(B) operates harmoniously

⁶ The Court suggested (*Miller Mem. Op.* at 22 n.10) that Section 1512(c)(2) could be read as “creating ‘direct’ liability for the other types of conduct covered by § 1512—that is, that it makes criminal an individual doing directly those things for which the rest of § 1512 requires action directed at another person.” Although the government’s supplemental brief in *Miller* described Section 1512(c)(2) in those terms, *see Miller*, ECF 74, at 16 (“Section 1512(c) aimed at closing a ‘loophole’ in Section 1512: the existing prohibitions did not adequately criminalize a defendant’s *personal* obstructive conduct *not* aimed at another person.”), the Court decided (*Miller Mem. Op.*

with both subsections in Section 1512(c): Section 1512(a)(2)(B)(ii) reaches a defendant's use of force or threatened use of force at *another person* in order to cause that person to destroy documents in connection with an official proceeding; Section 1512(c)(1) reaches a defendant's direct destruction of documents in connection with an official proceeding; and Section 1512(c)(2) reaches a defendant's non-document-related conduct that obstructs or impedes an official proceeding. And while the legislators who enacted Section 1512(c) in the Sarbanes-Oxley Act undoubtedly had document shredding foremost in mind, *see Miller Mem. Op.* at 26-28; *accord Miller*, ECF 74, at 15 (noting floor statements addressing concern about document shredding in the *Arthur Andersen* prosecution), "it is unlikely that Congress was concerned with only the type of document destruction at issue in the *Arthur Andersen* case." *Montgomery*, 2021 WL 6134591, at *16. In other words, "there is no reason to believe that Congress intended to fix that problem only with respect to 'the availability or integrity of evidence.'" *Id.*

Finally, an interpretation of Section 1512(c)(2) that imposes criminal liability only when an individual takes direct action "with respect to a document, record, or other object" to obstruct a qualifying proceeding leads to absurd results. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (rejecting interpretation of a criminal statute that would "produce results that were not merely odd, but positively absurd"). That interpretation would appear, for example, not to encompass an individual who seeks to "obstruct[], influence[], or impede[]" a congressional proceeding by explicitly stating that he intends to stop the legislators from performing their constitutional and statutory duties to certify Electoral College vote results by "drag[ging] lawmakers out of the Capitol by their heels with their heads hitting every step," *United States v.*

at 22 n.10) "not [to] address" the interpretation "further" because "[n]either party presses this argument (or anything like it)."

Reffitt, 21-cr-32 (DLF), Trial Tr. 1502, carrying a gun onto Capitol grounds, *id.* at 1499, and then leading a “mob and encourag[ing] it to charge toward federal officers, pushing them aside to break into the Capitol,” *id.* at 1501-02, unless he also picked up a “document or record” related to the proceeding during that violent assault. The statutory text does not require such a counterintuitive result.

C. Even if the Court’s interpretation of Section 1512(c)(2)’s scope were correct, pretrial dismissal based on the indictment’s allegations is premature.

Reconsideration is additionally appropriate even if the Court adheres to its interpretation of Section 1512(c)(2)’s scope because dismissal of Count Three in full is improper under Rules 7 and 12 of the Federal Rules of Criminal Procedure.

An indictment is sufficient under the Constitution and Rule 7 of the Federal Rules of Criminal Procedure if it “contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend,” *Hamling v. United States*, 418 U.S. 87, 117 (1974), which may be accomplished, as it is here, by “echo[ing] the operative statutory text while also specifying the time and place of the offense.” *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). “[T]he validity of an indictment ‘is not a question of whether it could have been more definite and certain.’” *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). And an indictment need not inform a defendant “as to every means by which the prosecution hopes to prove that the crime was committed.” *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976).

Rule 12 permits a party to raise in a pretrial motion “any defense, objection, or request that the court can determine *without a trial on the merits.*” Fed. R. Crim. P. 12(b)(1) (emphasis added). It follows that Rule 12 “does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds” unless the government “has made a full proffer of evidence”

or the parties have agreed to a “stipulated record,” *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005)—neither of which has occurred here. Indeed, “[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn’t authorize its disposition before trial.” *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.).

Although Fischer has styled his challenge to Section 1512(c)(2)’s scope as an attack on the indictment’s validity, the scope of the conduct covered under Section 1512(c)(2) is distinct from whether Count Three adequately states a violation of Section 1512(c)(2).⁷ Here, Count Three of the indictment puts Fischer on notice as to the charges against which he must defend himself, while also encompassing both the broader theory that a defendant violates Section 1512(c)(2) through any corrupt conduct that “obstructs, impedes, or influences” an official proceeding *and* the narrower theory that a defendant must “have taken some action with respect to a document,” *Miller* Mem. Op. at 28, in order to violate Section 1512(c)(2). The Court’s conclusion that only the narrower theory is a viable basis for conviction should not result in dismissal of Count Three in full; instead, the Court would properly enforce that limitation by permitting conviction on that basis alone. *See United States v. Ali*, 885 F.Supp.2d 17, 33 (D.D.C. 2012) (limiting the government’s aiding and abetting theory under 18 U.S.C. § 1651 to acts of piracy committed while the defendant was on the high seas but not dismissing the count), *reversed in part* by 718 F.3d 929, 941 (D.C. Cir. 2013) (disagreeing with the district court’s limitation on aiding and abetting liability under Section 1651). Critically, cases involving successful challenges by defendants concerning whether their *conduct*—and not merely the allegations against them—falls within the scope of the

⁷ This Court’s ruling does not appear to announce a new rule that its narrowed interpretation of Section 1512(c)(2)’s scope creates a new offense *element* that must be alleged in an indictment.

charged statute arise not under Rule 12 but following trials that establish the evidentiary record necessary to determine precisely what the defendant's conduct entailed. *See, e.g., Marinello v. United States*, 138 S. Ct. 1101, 1105 (2018) (considering scope of 26 U.S.C. § 7212(a) following defendant's conviction at trial); *Yates*, 574 U.S. at 534-35 (plurality opinion) (considering scope of the phrase "tangible object" in 18 U.S.C. § 1519 following defendant's conviction at trial); *Aguilar*, 515 U.S. at 597 (considering scope of omnibus clause in 18 U.S.C. § 1503 following the defendant's conviction at trial).

It is clear why that is so. Even assuming the Court's interpretation of Section 1512(c)(2) were correct, and that the government therefore must prove "Fischer took some action with respect to a document, record, or other object in order to corruptly obstruct, impede[,] or influence Congress's certification of the electoral vote," Mem. Op. at 8, the Court cannot determine whether Fischer's conduct meets that test until after a trial, at which the government is not limited to the specific allegations in the indictment. And at trial, the government could prove that the Certification proceeding "operates through a deliberate and legally prescribed assessment of ballots, lists, certificates, and, potentially, written objections." *Miller*, ECF 74, at 41. For example, evidence would show Congress had before it boxes carried into the House chamber at the beginning of the Joint Session that contained "certificates of votes from the electors of all 50 states plus the District of Columbia." *Reffitt, supra*, Trial Tr. at 1064 (Mar. 4, 2022) (testimony of the general counsel to the Secretary of the United States Senate) (attached as Exhibit B). Evidence would further show that, as rioters began to breach the restricted area around the Capitol building and grounds on January 6, 2021, legislators were evacuated from the House and Senate chambers, and the staff for the Secretary of the United States Senate "took the ballot boxes and other paraphernalia of the proceeding" out of the chamber "to maintain custody of the ballots and make

sure nothing happen[ed] to them.” *Id.* at 1072.

Additional evidence could establish that Fischer’s conduct had the “natural and probable effect,” *Aguilar*, 515 U.S. at 599 (internal quotation marks omitted), of imperiling the ballots and “other paraphernalia” from the Certification proceeding. Although the government does not anticipate presenting evidence that Fischer envisioned placing or in fact placed hands on a document or record connected to the Certification proceeding, his forcible entry into the Capitol building and interference with law enforcement officers contributed to the chaos that required the Certification to stop for several hours while lawmakers evacuated their chambers and the sealed electoral ballots were removed to safety. *Reffitt, supra*, Trial Tr. at 1071-72. In that respect, Fischer “took some action[s]” with respect to Congress’s consideration of documents and records central to the Certification proceeding and thereby corruptly obstructed and impeded that Certification proceeding, including blocking lawmakers from considering such documents and records. In acting to thwart the operation of an official proceeding that involved such documents, the evidence will establish that Fischer violated Section 1512(c)(2) even under an interpretation of Section 1512(c)(2) that requires “some nexus to tangible evidence,” *Singleton*, 2006 WL 1984467, at *3, or some “conduct in relation to a tangible object,” *Hutcherson*, 2006 WL 270019, at *2; or that the defendant “have taken some action with respect to a document, record, or other object” to obstruct an official proceeding, *Mem. Op.* at 8.

III. Conclusion

For the foregoing reasons, the Court should reconsider its ruling and reinstate Count Three.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

By: /s/ Alexis J. Loeb
ALEXIS J. LOEB
Assistant United States Attorney
Detailee
CA Bar Number 269895
United States Attorney's Office
San Francisco, CA 94102
(415) 436-7168
Alexis.Loeb@usdoj.gov

/s/ James I. Pearce
James I. Pearce
Appellate Counsel to the Capitol Siege
Section
United States Attorney's Office
NC Bar No. 44691
555 Fourth Street, N.W.
Washington, DC 20530
James.Pearce@usdoj.gov
(202) 532-4991

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	Case Number 21-cr-32
Plaintiff,	.	
	.	
vs.	.	
	.	
GUY WESLEY REFFITT,	.	March 8, 2022
	.	9:30 a.m.
Defendant.	.	

TRANSCRIPT OF JURY TRIAL
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

Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.

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

2 (Jury not present.)

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

5 Representing Mr. Reffitt, we have Mr. William Welch, and
6 representing the United States, we have Mr. Jeffrey Nestler and
7 Ms. Risa Berkower.

8 THE COURT: Okay. So we'll bring the jury in. I will
9 read the concluding instructions.

10 And you all, I take it, have gone through the exhibits and
11 are all on the same page about what's going back in the jury
12 room?

13 MR. WELCH: Yes, Your Honor.

14 THE COURT: All right. And you're all okay with the
15 verdict form and the set of instructions I've read thus far and
16 you've seen?

17 MR. WELCH: I haven't seen the verdict form. I've
18 seen the instructions and read them.

19 THE COURT: The law clerk has copies. Why don't you
20 give them those two copies, and then we will have to take one
21 back to go in the binders for the jurors.

22 MR. NESTLER: The verdict form is fine with us. The
23 instructions are fine with us.

24 This morning, Mr. Welch, Mr. Hopkins, and I went through
25 all of the exhibits, physical items, the multimedia exhibits on

1 a flash drive, and also a binder with the photographs.

2 THE COURT: Okay.

3 Mr. NESTLER: And we've given them all to Mr. Hopkins
4 and --

5 THE COURT: Great.

6 MR. NESTLER: -- believe they are ready to go.

7 THE COURT: Great. Are you all going to be, if not in
8 the courthouse, nearby, 15 minutes away?

9 MR. NESTLER: Yes, Your Honor.

10 THE COURT: All right. Mr. Welch, are you okay with
11 everything?

12 MR. WELCH: Yes. I will be in the courthouse.

13 Mr. Hopkins knows where to find me.

14 THE COURT: Okay. Terrific.

15 Yes, Mr. Nestler.

16 MR. NESTLER: Sorry. The only last issue is we had
17 prepared an exhibit list to accompany our exhibits. Mr. Welch
18 objected to providing the jury with a copy of the exhibit list.
19 And so we leave that question for the Court's consideration.

20 THE COURT: Mr. Welch, how do you propose that the
21 jury is going to be able to identify what they might want to see
22 on the computer without any kind of list at all?

23 MR. WELCH: Well, Your Honor, it was all discussed
24 during the evidence phase of trial. They've been taking notes.
25 And the exhibit list is not evidence and hasn't been entered in

1 evidence. I have never had a case where the exhibit list was
2 given to the jury.

3 THE COURT: Will it be evident to the jurors what the
4 various exhibits on the computer are, or is it just number, you
5 know, random number, 201, 306?

6 MR. NESTLER: Just numbers. There's no other
7 identifying information for each file; it's just the number.

8 THE COURT: Yeah.

9 MR. NESTLER: And contrary to Mr. Welch, I've never
10 had a trial where the jury didn't have an exhibit list. I
11 usually found the jury appreciates having an exhibit list. It
12 makes their deliberations far more efficient.

13 THE COURT: Mr. Welch, in a case with this number of
14 exhibits, I just don't know how the jury can possibly find what
15 it needs to look at without some list of some type.

16 Is there anything prejudicial about the exhibit list, other
17 than it's a guide, like a table of contents to what's on the
18 computer?

19 If you can explain to me what's objectionable about the
20 list. If it's just a listing of items that are on the computer,
21 I will entertain it, but I don't see how they can possibly find
22 what they're looking for without spending hours just clicking on
23 files.

24 MR. WELCH: I need to just review it one more time and
25 make sure that there are no references like "riot" or

1 inappropriate comments in the titles.

2 THE COURT: That's fine. And I'm not whetted to the
3 exhibit list itself. I just think that the jury needs something
4 that identifies by file number what it is so they don't
5 literally click on every item in order to watch the video of,
6 you know, the pepper spray or whatever the case might be.

7 MR. NESTLER: I totally understand, Your Honor, and I
8 can go over it again with Mr. Welch. And perhaps Your Honor
9 could instruct the jury that the exhibit list is being provided
10 solely as a guide to identify certain exhibits and it's not in
11 evidence. That might ameliorate some of the defense's concerns.

12 THE COURT: All right. Do you want a few minutes to
13 take a look at it now?

14 MR. WELCH: I can read that while you're reading the
15 remaining instructions, which are not controversial.

16 THE COURT: All right. And then if you are all in
17 agreement, then I would give an instruction similar to what
18 Mr. Nestler proposed, unless you have an alternative.

19 MR. WELCH: No, that's fine.

20 THE COURT: Okay. Mr. Hopkins, do you want to get the
21 jurors?

22 COURTROOM DEPUTY: Absolutely, Your Honor.

23 (Pause.)

24 THE COURT: Mr. Welch, will you be nearby?

25 MR. WELCH: Yes, I will.

1 (Jury entered courtroom.)

2 THE COURT: Good morning, ladies and gentlemen.
3 Welcome back. I hope you had a nice evening. I have just a few
4 more instructions, and then I will -- we will recess, and you
5 can go to the jury room to begin your deliberations.

6 You will be provided with a verdict form for use when you
7 have concluded your deliberations. The form is not evidence in
8 this case, and nothing on it should be taken to suggest or
9 convey any opinion by me as to what the verdict should be.
10 Nothing on the form replaces the instructions of law I have
11 already given you, and nothing on it replaces or modifies the
12 instructions about the elements which the government must prove
13 beyond a reasonable doubt. The verdict form is meant only to
14 assist you in recording your verdict.

15 A verdict must represent the considered judgment of each
16 juror, and in order to return a verdict, each juror must agree
17 on the verdict. In other words, your verdict must be unanimous.

18 During the course of this trial, a number of exhibits were
19 admitted into evidence. Sometimes only those parts of an
20 exhibit that are relevant to your deliberations were admitted.
21 Where this has occurred, I have required the irrelevant parts of
22 the statement to be blacked out or deleted. Thus, as you
23 examine the exhibits and you see or hear a statement where there
24 appear to be omissions, you should consider only those portions
25 that were admitted. You should not guess as to what was taken

1 out.

2 I will be sending into the jury room with you the exhibits
3 that have been admitted into evidence, except for the firearms,
4 ammunition, and bear spray. You may examine any or all of them
5 as you consider your verdicts.

6 Please keep in mind that exhibits that were only marked for
7 identification but were not admitted into evidence will not be
8 given to you to examine or consider in reaching your verdict.

9 If you wish to examine the firearms, ammunition, or bear
10 spray, please notify the clerk by a written note, and the
11 marshal will bring them to you. For security purposes, the
12 marshal will remain in the jury room while each of you has the
13 opportunity to examine the evidence. You should not discuss the
14 evidence or otherwise discuss the case among yourselves while
15 the marshal is present in the jury room. You may ask to examine
16 the evidence as often as you find it necessary.

17 When you return to the jury room, you should first select a
18 foreperson to preside over your deliberations and to be your
19 spokesperson here in court. There are no specific rules
20 regarding how you should select a foreperson. That is entirely
21 up to you. However, as you go about the task, be mindful of
22 your mission: To reach a fair and just verdict based on the
23 evidence. Consider selecting a foreperson who will be able to
24 facilitate your discussions, who can help you organize the
25 evidence, who will encourage civility and mutual respect among

1 all of you, who will invite each juror to speak up regarding his
2 or her views about the evidence, and who will promote a full and
3 fair consideration of that evidence.

4 As I have mentioned frequently throughout the trial, there
5 may be reports in the newspapers or on the radio, Internet, or
6 television about this case. You may be tempted to read, listen
7 to, or watch this media coverage. But as I've explained
8 already, you must not read, listen to, or watch such reports,
9 because you must decide this case solely on the evidence
10 presented in this courtroom.

11 If you receive automatic alerts from any source, as I've
12 mentioned, you may need to change your push notifications, news
13 subscriptions, or RSS or Twitter needs. If any publicity about
14 this trial inadvertently comes to your attention, do not discuss
15 it with other jurors or anyone else. Just let the clerk know as
16 soon as it happens, and I will then briefly discuss it with you.

17 As you retire to the jury room to deliberate, I also wish
18 to remind you of another instruction that I've given you on
19 multiple occasions throughout this trial. I previously told you
20 not to communicate with anyone about that -- this case. Now
21 during your deliberations, you may not communicate with anyone
22 who is not on the jury about this case. This includes any
23 electronic communications such as e-mail or text or any blogging
24 about the case.

25 In addition, you may not conduct any independent

1 investigation during deliberations. This means you may not
2 conduct any research in person or electronically via the
3 Internet or in any other way.

4 If it becomes necessary during your deliberations to
5 communicate with me, you may send a note by the clerk or
6 marshal, signed by your foreperson or by one or more members of
7 the jury. No member of the jury should try to communicate with
8 me except by such a signed note. And I will never communicate
9 with any member of the jury on any matter concerning the merits
10 of this case except in writing or orally here in open court.

11 Bear in mind also that you are never, under any
12 circumstances, to reveal to any person, not the clerk, the
13 marshal, or to me, how the jurors are voting until after you
14 have reached a unanimous verdict. This means that you should
15 never tell me in writing or in open court how the jury is
16 divided on any matter, for example 6 to 6 or 7 to 5 or 11 to 1,
17 or in any other fashion, whether the vote is for conviction or
18 acquittal, or on any other issue in the case.

19 It is your duty as jurors to consult with one another and
20 to deliberate expecting to reach an agreement. You must decide
21 the case for yourself, but you should do so only after
22 thoroughly discussing it with your fellow jurors. You should
23 not hesitate to change an opinion when convinced that it is
24 wrong. You should not be influenced to vote in any way on any
25 question just because another juror favors a particular decision

1 or holds an opinion different from your own.

2 You should reach an agreement only if you can do so in good
3 conscience. In other words, you should not surrender your
4 honest beliefs about the effect or weight of evidence merely to
5 return a verdict or solely because of other jurors' opinions.

6 The attitude and conduct of jurors at the beginning of
7 their deliberations are matters of considerable importance. It
8 may not be useful for a juror, upon entering the jury room, to
9 voice a strong expression of an opinion on the case or to
10 announce a determination to stand for a certain verdict. When
11 one does that at the outset, a sense of pride may cause that
12 juror to hesitate, to back away from an announced position after
13 a discussion of a case.

14 Furthermore, many jurors find it useful to avoid an initial
15 vote upon retiring to the jury room. Calmly reviewing and
16 discussing the case at the beginning of deliberations is often a
17 more useful way to proceed.

18 Remember that you are not partisans or advocates in this
19 matter, but you are the judges of the facts.

20 When you have reached your verdict, just send me a note
21 informing me of this fact and have your foreperson sign the
22 note. Do not tell me what your verdict is. The foreperson
23 should fill out and sign the verdict form that will be provided.
24 I will then call you into the courtroom and ask your foreperson
25 to read your verdict in open court.

1 All right. Counsel, let's discuss the other issue.

2 (Pause.)

3 THE COURT: I just wanted to raise the issue we
4 discussed before the jurors came in.

5 MR. WELCH: No issue.

6 THE COURT: No issue, okay.

7 All right. Ladies and gentlemen, one last point I would
8 like to make is that the exhibit list is being provided to you
9 solely as a guide to help you identify the exhibits that have
10 been admitted into evidence. You should understand that the
11 exhibit list itself is not evidence in the case. It's just a
12 way for you to find what you need on the computer. All right?

13 All right, Mr. Hopkins. We will dismiss the jurors to
14 deliberate.

15 Thank you, ladies and gentlemen.

16 (Jury exited courtroom.)

17 THE COURT: All right. Anything else?

18 MR. WELCH: I don't believe so.

19 MR. NESTLER: No, Your Honor.

20 THE COURT: All right. I will be available, and we
21 will be in touch if there's a note from the jury. Thank you.

22 MR. NESTLER: Your Honor, just scheduling-wise, if we
23 don't hear anything all day, Your Honor is going to dismiss them
24 at 4:30?

25 THE COURT: Yes. And they will probably take an hour

1 break for lunch. But I won't bring them back in the courtroom
2 for that, just to dismiss them.

3 (Jury deliberations.)

4 (Call to order of the court.)

5 THE COURT: All right. So we were informed that we
6 have a verdict. I will have Mr. Hopkins bring the jurors in.
7 Before we bring them in, are there any issues to discuss?

8 MR. NESTLER: Not from the government, Your Honor.

9 MR. WELCH: No, Your Honor.

10 THE COURT: All right.

11 (Jury entered courtroom.)

12 THE COURT: All right. Good afternoon, everyone.
13 Who on the jury speaks as its foreperson?

14 (Jury foreperson raises hand.)

15 THE COURT: All right. Madam Foreperson, has the jury
16 unanimously agreed on its verdict?

17 FOREPERSON: Yes, we have.

18 THE COURT: Okay. Could you, please, hand the verdict
19 form to the clerk to inspect.

20 (Foreperson complied.)

21 THE COURT: All right. Your verdict will now be
22 published.

23 COURTROOM DEPUTY: As to Count One, transporting a
24 firearm in furtherance of a civil disorder, guilty.

25 As to Count Two, obstruction of an official proceeding,

1 guilty.

2 As to Count Three, entering or remaining in a restricted
3 building or grounds with a firearm, guilty.

4 As to Count Four, obstructing officers during a civil
5 disorder, guilty.

6 And as to Count Five, obstruction of justice, hindering
7 communication through force or threat of physical force, guilty.

8 Dated March the 8th, signed by the foreperson.

9 THE COURT: Is there a request to poll the jury?

10 MR. WELCH: Yes, Your Honor.

11 THE COURT: All right. The courtroom deputy will now
12 poll the jury.

13 COURTROOM DEPUTY: Members of the Jury, as your number
14 is called, please indicate if your individual verdict is the
15 same as they were just announced. If it is, please answer
16 "yes." If it is not, please answer "no."

17 Juror number 1?

18 JUROR: Yes.

19 COURTROOM DEPUTY: Juror number 3?

20 JUROR: Yes.

21 COURTROOM DEPUTY: Juror number 4?

22 JUROR: Yes.

23 COURTROOM DEPUTY: Juror number 5?

24 JUROR: Yes.

25 COURTROOM DEPUTY: Juror number 6?

1 JUROR: Yes.

2 COURTROOM DEPUTY: Juror number 7?

3 JUROR: Yes.

4 COURTROOM DEPUTY: Juror number 8?

5 JUROR: Yes.

6 COURTROOM DEPUTY: Juror number 9?

7 JUROR: Yes.

8 COURTROOM DEPUTY: Juror number 11?

9 JUROR: Yes.

10 COURTROOM DEPUTY: Juror number 12?

11 JUROR: Yes.

12 COURTROOM DEPUTY: Juror number 14?

13 JUROR: Yes.

14 COURTROOM DEPUTY: Juror number 16?

15 JUROR: Yes.

16 COURTROOM DEPUTY: Your Honor, the jury has been
17 polled, and the verdict is indeed unanimous.

18 THE COURT: All right. The clerk is directed to file
19 and record the verdict, the unanimous verdict.

20 All right, ladies and gentlemen. This ends your duty. And
21 as I told you many, many times during the trial when you weren't
22 supposed to talk about this case, that ends. You're now free to
23 talk about this case to anyone, but it is entirely your choice.
24 You are not obligated to talk to anyone, but you may talk to
25 anyone that you decide you want to talk to.

1 We had a lot of unexpected challenges during the trial with
2 the COVID restrictions and with issues with technology, and I
3 just want to thank you on behalf of the entire court for your
4 patience and your dedication.

5 As I said at the outset, our criminal justice system works
6 because of the willingness of citizens like you to come forward
7 and take time out of your busy schedule to fulfill this very
8 important duty. And you have done so with dedication, and we
9 are all grateful for your service.

10 So with that, I will excuse you now to the jury room.
11 Thank you again.

12 (Jury exited courtroom.)

13 THE COURT: All right. So Mr. Welch, we need to set
14 deadlines for the filing of post-trial motions. I did want to
15 address on the record your earlier motion under Rule 29. I will
16 give a brief ruling now, but I do, you know, welcome and
17 anticipate briefing from both sides on this.

18 But while I'm thinking about the calendar, does 14 days
19 give you adequate time?

20 MR. WELCH: Yes, it does.

21 THE COURT: All right. So the defense will file any
22 post-trial motions within 14 days, the government shall respond
23 within 14 days with any oppositions, and any reply within seven
24 days. If there's a need for a hearing, I will let you all know.

25 And in terms of -- well, I should wait for Mr. Hopkins to

1 set the sentencing date. Why don't I, while he's out, go ahead
2 and address the pending motion under Rule 29.

3 Mr. Welch, now that the jury has spoken, did you wish to
4 make any argument on this?

5 MR. WELCH: I do, Your Honor, but in view of the
6 Court's, not Your Honor's but another judge's ruling on a 1512
7 motion as well, I would like to consider that and see if there's
8 anything that's appropriate for me to include in my written
9 papers.

10 THE COURT: Absolutely.

11 MR. WELCH: I don't want to add any oral comments
12 now --

13 THE COURT: Okay.

14 MR. WELCH: -- because that would just complicate
15 that.

16 THE COURT: That's fine. So I'm going to give you a
17 brief ruling now. And I am familiar with that decision, and
18 I've taken a look at it. But I do welcome your briefing.

19 But considering -- this is defendant's motion, Rule 29
20 motion for judgment of acquittal on all counts that was made at
21 the close of the government's case that I reserved ruling on
22 until now.

23 Considering the evidence in the light most favorable to the
24 government, as the Court must, the Court finds that a rational
25 jury could find the essential elements of the crimes charged

1 beyond a reasonable doubt. See *U.S. v. Wahl*, 290 F.3d at 375.

2 With respect to Count One, the jury could credit
3 Mr. Reffitt's own statements captured on tape and in text
4 messages, along with Rocky Hardie and Jackson Reffitt's
5 testimony, Mr. Reffitt's cell phone records and photographs that
6 show that Mr. Reffitt transported guns in commerce from Texas to
7 D.C. in 2021.

8 The testimony of Capitol police officers and videos show
9 that the January 6 riot qualifies as a civil disorder, a public
10 disturbance that caused an immediate danger to persons and
11 property.

12 Although some testimony shows that Mr. Reffitt intended to
13 use his firearms for self-defense or to protect others, other
14 evidence, including Mr. Reffitt's own taped statements, show
15 that he was prepared, if necessary, to use at least his handgun
16 at the Capitol.

17 Thus, a jury could well find beyond a reasonable doubt that
18 Mr. Reffitt knew or intended that the guns would be used in
19 furtherance of the civil disorder in violation of Title 18
20 United States Code Section 231(a)(2).

21 For these same reasons, a rational jury could find beyond a
22 reasonable doubt that Mr. Reffitt entered or remained in a
23 restricted area with a firearm in violation of Title 18 United
24 States Code Section 1752(a)(1) and (b)(2).

25 The testimony of Capitol police officers shows that

1 Mr. Reffitt knew he was on restricted grounds and did not have
2 the lawful authority to be there, as he ignored police
3 barricades, signs, and officers' commands to retreat.

4 A rational jury could also find beyond a reasonable doubt
5 that Mr. Reffitt obstructed officers during a civil disorder in
6 violation of Title 18 United States Code Section 231(a)(3). Not
7 only did the evidence demonstrate that the January 6 riot
8 constituted a civil disorder, the parties stipulated that the
9 riot adversely affected commerce, and the riot adversely
10 affected the Secret Service's plans to protect Vice President
11 Pence and his family, thus interfering with the performance of a
12 federally protected function.

13 A jury could also reasonably credit the Capitol police
14 officers' testimony, along with video evidence of Mr. Reffitt
15 charging up the stairs to the Senate chamber, as establishing
16 his intent to obstruct, impede, or interfere with those
17 officers.

18 And separately, a jury could certainly find that
19 Mr. Reffitt took a substantial step toward obstructing,
20 impeding, or interfering with those officers.

21 A rational jury could also find that Mr. Reffitt obstructed
22 justice by threatening physical force in violation of Title 18
23 United States Code Section 1512(a)(2)(C) or that he took a
24 substantial step toward obstructing justice.

25 A jury could credit Jackson Reffitt's testimony that

1 Mr. Reffitt threatened to shoot his children or put a bullet
2 through his daughter's phone if they informed the FBI about his
3 actions on January 6, and the information that they would have
4 provided, and indeed Jackson had already provided, related to
5 federal offenses.

6 Finally, a rational jury could find beyond a reasonable
7 doubt that Mr. Reffitt obstructed an official proceeding in
8 violation of Title 18 United States Code Section 1512(c)(2) or
9 that he attempted the offense or aided and abetted others in
10 committing the offense.

11 Witness testimony revealed that because of the Capitol
12 breach Congress was forced to halt its joint session to certify
13 the electoral results. Mr. Reffitt's own taped statements and
14 video footage of his ascent on the west stairs show that he led
15 a throng of people who first breached the Capitol.

16 As he admitted to another Three Percenter, he knew that
17 Congress was in the joint session, and at a minimum, he knew of
18 and intended the natural consequence of that action that
19 Congress would be unable to continue with the joint session.

20 Plus, substantial evidence supports the charge that
21 Mr. Reffitt acted corruptly. The officers' testimony and video
22 footage shows that he assisted and encouraged others who used
23 unlawful means, namely assaults of federal officers, to forcibly
24 breach the Capitol. He led the mob and encouraged it to charge
25 toward federal officers, pushing them aside to break into the

1 Capitol.

2 He also acted with an unlawful purpose to physically over-
3 throw Congress, and he expressed this clear purpose on numerous
4 occasions before, during, and after January 6. Mr. Reffitt
5 repeatedly said that the government would be destroyed in the
6 fight and that he wanted to drag lawmakers out of the Capitol by
7 their heels with their heads hitting every step.

8 Lastly, a reasonable jury could find that Mr. Reffitt acted
9 with consciousness of wrongdoing. Despite his stated view that
10 his actions were justified and protected by the Constitution, he
11 knew, as he acknowledged, that the Capitol police officers were
12 faithfully doing their jobs when they ordered them to retreat.
13 Yet, he continually refused their orders. He also acknowledged
14 many times his violation of D.C. gun laws.

15 A jury could reasonably interpret all of his statements as
16 demonstrating his awareness that his actions were wrong.

17 For those reasons, the Court finds that a rational jury
18 could find that the government has proven all the elements of
19 the charged offenses beyond a reasonable doubt.

20 As Mr. Welch mentioned, last night, another judge in this
21 district issued an opinion dismissing the Section 1512(c)(2)
22 charge in another case, *United States v. Miller*, 21-cr-119.

23 Again, I do anticipate briefs being filed on this issue
24 with respect to the upcoming motion or motions, and I look
25 forward to reviewing them. But based on what I've read so far,

1 I'm not inclined to reconsider my earlier ruling.

2 Once the issue has been fully briefed, I will provide my
3 reasons in greater detail, but for now, let me state that I'm
4 not inclined to follow *Miller*, because as I explained in
5 *Sandlin*, the plain meaning of the words "obstruct," "impede,"
6 and "influence" are broad and encompass all sorts of actions
7 that affect or interfere with official proceedings, including
8 interfering with the evidence that may be considered in an
9 official proceeding or halting the occurrence of the proceeding
10 altogether.

11 And in my view, the plain meaning of the word "otherwise,"
12 which is defined as "any different way or manner, differently,
13 in different circumstances, under other conditions, in other
14 respects." See *Miller* opinion at 11, quoting Webster's Third
15 New International Dictionary of the English Language Unabridged
16 2002.

17 That definition does nothing to limit the expansive meaning
18 of Section 1512(c)(2)'s verbs. Rather, the word "otherwise"
19 simply indicates that a defendant violates Section 1512(c)(2) by
20 corruptly obstructing or impeding a proceeding in a manner or
21 respect that is different than altering or concealing documents.

22 Moreover, I don't believe that the Supreme Court's decision
23 in *Begay* alters this conclusion. The *Begay* Court expressly
24 indicated that its interpretation of the word "otherwise" was
25 not the only permissible one. See *Begay v. United States*,

1 553 U.S. at 144.

2 The Court held that a violent felony that otherwise
3 involves conduct that presents a serious physical risk of injury
4 to another must be similar in kind to the example crimes listed
5 before that catchall clause. That's *Begay* at 142.

6 But the *Begay* Court also recognized that "otherwise" in
7 other contexts could instead be interpreted as a link to what
8 follows the word as opposed to what comes before. *Begay* at 144.

9 And Section 1512(c) presents a sufficiently different
10 context such that I don't believe *Begay* controls here.

11 First, the two statutes are structured differently, with
12 Section 1512(c)(2) housed in a separate subsection as opposed to
13 the same sentence. Second, *Begay* found that the examples listed
14 in the Armed Career Criminal Act were insufficiently similar
15 with respect to the serious physical risk of injury that they
16 pose, such that the other violent felonies must be similar to
17 those examples beyond their degree of risk. *Begay* at 142
18 through 143.

19 By contrast, the actions covered by Section 1512(c)(1) can
20 each obstruct, impede, or influence a proceeding. So Section
21 1512(c)(2)'s residual clause can simply cover any different
22 manner of obstructing, impeding, or influencing.

23 Plus, the *Begay* Court relied on the particular statutory
24 history of ACCA, which is not replicated here. *Begay* at 143
25 through 144.

1 The Court's interpretation admittedly creates
2 superfluties, but as I explained in *Sandlin*, the same is true
3 for a narrowing construction that covers only acts affecting
4 evidence. See *Sandlin* opinion at 14 through 15.

5 Finally, the rule of lenity is inapplicable here. The rule
6 applies only when a statute is ambiguous after seizing
7 everything from which aid can be derived. *Ocasio v. United*
8 *States*, 578 U.S. at 295, Note 8, quoting *Muscarello v. United*
9 *States*, 524 U.S. at 138 through 139.

10 The Supreme Court has underscored that point through its
11 repeated use of the phrase "grievous ambiguity." See
12 *e.g., Shaw v. United States*, 580 U.S. at 71, *Salman v. United*
13 *States*, 580 U.S. at 51.

14 As Justice Kavanaugh summarized current Supreme Court
15 precedent in an opinion released just yesterday, a Court must
16 first exhaust all the tools of statutory interpretation and
17 determine the best reading of the statute before the rule of
18 lenity comes into play and only then when the Court has
19 identified a grievous ambiguity. See *Wooden v. United States*,
20 Slip Opinion at 2, Kavanaugh concurring.

21 That is not the case here. So this is not one of those
22 rare situations where lenity comes into play.

23 All right. So for all those reasons, I will deny for now
24 the defense Rule 29 motion.

25 In terms of sentencing, we're looking roughly 90 days out,

1 which I think takes us to some time the week of June 6.

2 Mr. Hopkins, if you can consult the calendar.

3 Mr. Welch, I take it this would be an in-person sentencing?

4 MR. WELCH: Yes, please.

5 THE COURT: Okay. Do you have any conflicts that
6 week?

7 MR. WELCH: No, I don't.

8 COURTROOM DEPUTY: The first week of June, Your Honor,
9 we are free that week, Your Honor.

10 THE COURT: The week of June 6?

11 COURTROOM DEPUTY: Yes, Your Honor.

12 THE COURT: All right. I will start with you,
13 Mr. Welch. Do you have a preference for that week?

14 MR. WELCH: I do not.

15 THE COURT: Mr. Nestler?

16 MR. NESTLER: No preference, Your Honor.

17 THE COURT: All right. Bear with me just a moment.

18 All right. So let's set this for sentencing on June 8 at
19 10:00 a.m. And I would ask the parties to file their sentencing
20 memoranda 14 days before sentencing, which is May 25, I think.

21 COURTROOM DEPUTY: You are correct.

22 THE COURT: And to the extent either side wants to
23 respond to the other -- I'm not asking for that, but you're
24 welcome to do so -- you should file any response by June 1.

25 Mr. Nestler, do you expect any victims to seek to be heard

1 at that sentencing hearing?

2 MR. NESTLER: It's possible, Your Honor.

3 THE COURT: Can you let us know sufficiently in
4 advance and let Mr. Welch know?

5 MR. NESTLER: Of course, Your Honor.

6 THE COURT: And does either side -- Mr. Welch, do you
7 expect the need for any expert testimony or any other
8 evidentiary testimony?

9 If you don't know now, you can let me know later. But
10 again, for planning purposes for the calendar, it would be
11 helpful to know ahead of time.

12 MR. WELCH: I don't expect that. There might be
13 mitigation witnesses.

14 THE COURT: All right. But again, reports or you
15 think testimony? You're not sure?

16 MR. WELCH: More like letters and possibly testimony.

17 THE COURT: All right. I would ask both of you to let
18 us know two weeks before.

19 Given what I've seen in the trial, I don't need the
20 government -- as I've requested in other January 6 cases, have
21 the government post things on USAfx. I have it all now. So I
22 don't need anything additional.

23 Any other issues we should discuss now?

24 All right. So we have this set for sentencing on June 8 at
25 10:00 a.m. Mr. Reffitt, we will see you back on June 8.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Thank you all.

(Proceedings adjourned at 1:57 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

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

/s/ Sara A. Wick

March 9, 2022

SIGNATURE OF COURT REPORTER

DATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, .
 . Case Number 21-cr-32
Plaintiff, .
 .
vs. .
 .
GUY WESLEY REFFITT, . March 4, 2022
 . 9:02 a.m.
Defendant. .
- - - - -

TRANSCRIPT OF JURY TRIAL
(MORNING SESSION)
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

Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

TESTIMONY

DANIEL SCHWAGER	Direct Examination.....	1053
	Cross-Examination.....	1073
	Redirect Examination.....	1075
PAUL WADE	Direct Examination.....	1077
	Cross-Examination.....	1092
	Redirect Examination.....	1093
ROCKY HARDIE	Direct Examination.....	1095
	Cross-Examination.....	1159
	Redirect Examination.....	1165

EXHIBITS RECEIVED

Government 411, 415, 500, 501.15 through 501.18, 504 through 507, 702, and 703.....	1048
Government 410 and 221.....	1077
Government 405, 111, and 163.....	1094

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: Good morning, everyone. So there is just one brief matter that I wanted to talk to you all about under seal. I know there's a logistical issue. We could go in the jury room. That would take her longer. I think we could also do it -- it shouldn't take that long -- by the phone.

(Sealed bench conference.)

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[Redacted text block]

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

[Redacted text block containing 25 lines of obscured content]

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

[Redacted text block containing 25 lines of obscured content]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(End sealed bench conference.)

MR. NESTLER: I just have some logistical matters.

THE COURT: And I have a couple of things, too.

COURTROOM DEPUTY: Your Honor, I don't think I actually called the case for the record.

For the record, Your Honor, we're in United States of America versus Guy Reffitt, Docket Number -- Criminal Action 21-32.

Representing Mr. Reffitt, we have Mr. William Welch, and representing the United States, we have Mr. Jeffrey Nestler and Ms. Risa Berkower.

Thank you, Your Honor.

THE COURT: Go ahead, Mr. Nestler.

MR. NESTLER: Thank you, Your Honor.

There are several exhibits that we believe are admissible pursuant to a certification from a business record and/or from they're self-authenticating. We thought, in the interest of

1 efficiency, we would just ask the Court and counsel now to have
2 them pre-admitted so that when we show them to the juror we're
3 not --

4 THE COURT: Yes. And I want to address that issue
5 generally.

6 I take it you have no objection, Mr. Welch, to introducing
7 these just outside the presence of the jury, or alternatively,
8 as soon as the jury comes in, you can say that?

9 What's your pleasure, Mr. Welch? But I want to start
10 moving things in in bulk.

11 MR. WELCH: That would be fine, but I need to know
12 what specific ones they are talking --

13 THE COURT: It's probably the Constitution --

14 MR. NESTLER: I can read it right now.

15 COURTROOM DEPUTY: Forgive me, Mr. Welch. If you can
16 move the microphone closer.

17 MR. NESTLER: So these exhibits would be 411, the
18 folio from the Melrose Hotel. We have a business record
19 certification. 415, Mayor Bowser's curfew order, which is a
20 public document. We have Exhibit 500, which is the Twelfth
21 Amendment; Exhibits 501.15 through 501.18, which are 3 U.S.C.
22 15 through 3 U.S.C. 18, which are public documents. We have
23 Exhibit 504, which is Senate Concurrent Resolution 1, also a
24 public document. Exhibits 505 and 506 are screen shots from the
25 video inside of the House and Senate chambers which we have

1 business record certifications for. Exhibit 507 is a video
2 montage that contains some of those same video clips with the
3 same certifications, as well as Congressional Record snippets,
4 which are public documents.

5 Those are the materials we're going to be referring to,
6 Your Honor, and then there's also two additional stipulations we
7 intend to also read in while the witnesses are on the stand.
8 Those are Exhibits 702, about the Electoral College, and 703,
9 about Safeway and commerce.

10 THE COURT: Any objections, Mr. Welch?

11 MR. WELCH: No, now that I know what they are.

12 THE COURT: Okay. Any objection to him just moving
13 those now --

14 MR. WELCH: No.

15 THE COURT: -- or do you want him to do it in front of
16 the jury?

17 MR. WELCH: No, it's just a matter of knowing what
18 they're going to do. As long as I know. They don't tell me
19 what they're doing. They just do stuff.

20 THE COURT: So you move to admit all that?

21 MR. NESTLER: Yes.

22 THE COURT: No objection?

23 MR. WELCH: No objection.

24 THE COURT: So all of those exhibits are admitted.

25 (Government Exhibits 411, 415, 500, 501.15 through 501.18,

1 504 through 507, 702, and 703 received into evidence.)

2 THE COURT: Now, Mr. Nestler and Ms. Berkower, today
3 we have the agents, I think, Wade and Kennedy. Tomorrow, we
4 have Hightower and Lane. I think that's right. Regardless --

5 COURTROOM DEPUTY: Monday.

6 THE COURT: Thank goodness it's Friday.

7 All right. I know a number of those witnesses will move in
8 physical items, and those will have to be done one by one. But
9 there's no need to -- correct me if I'm wrong, Mr. Welch, but I
10 see no need for things like photographs and videos, when they
11 have the right witness on the stand, to not say, "You have
12 reviewed Exhibits 1 through 20, and do they fairly and
13 accurately represent?"

14 Do we need to do these, you know, authenticate and publish
15 individually, Mr. Welch?

16 MR. WELCH: We wouldn't if they would just tell me
17 ahead of time.

18 THE COURT: Okay.

19 MR. WELCH: They don't tell me. They just do this
20 stuff, Your Honor.

21 THE COURT: All right. I know that they did try to
22 tell you which witness would be introducing the exhibits, and
23 you wanted them to be individually authenticated.

24 But I think given how this has gone, we're really slowing
25 things down, and it's putting the jurors to sleep. So I would

1 like you all to talk before each witness and make sure Mr. Welch
2 has no issue. And if not, then at the outset, move them all in.

3 MR. NESTLER: We can do that right now, Your Honor.
4 The witness who has the bulk of the remaining exhibits is
5 Ms. Kennedy, who took the photographs during the search warrant
6 of the defendant's house.

7 We would move to batch admit all of those photographs.
8 They are in the 100 series in our exhibit list. They've been
9 provided to defense counsel many weeks ago.

10 THE COURT: Any objection, Mr. Welch?

11 MR. WELCH: No. And that would be fine, too. And
12 just for the sake of clarity, the reason this became a problem
13 is when they changed up the other day who they were going to --

14 THE COURT: Mr. Welch --

15 MR. WELCH: They didn't tell me --

16 THE COURT: -- I saw in the witness list -- so the
17 exhibit list just said "certification." But the witness list
18 mentioned three witnesses would be looking at that document or
19 that exhibit, I think it was 200, and it was identified that
20 that witness -- I don't remember the name of that witness, but
21 that that witness would be referring to that exhibit.

22 So you should have been on notice. I understand why you
23 thought it was coming in with a different witness, given its
24 location on the exhibit list. But they did give you notice of
25 that.

1 MR. WELCH: It's not that these things aren't out
2 there. We can look at this. This is a --

3 THE COURT: I know, it's long; it's long. All right.

4 MR. WELCH: And we can't anticipate what they're going
5 to do. They don't tell me what they're going to do, Your Honor.
6 They just do stuff.

7 THE COURT: But we're all on the same page for the
8 remainder of the trial; right? We can move these things today
9 at least? We've covered this one witness for the morning, and
10 then at lunch, you all talk, and let's cover the other ones for
11 the afternoon.

12 Let's just -- the jurors are -- it's mind-numbing to do
13 these one by one.

14 MR. NESTLER: We concur, Your Honor. And just so Your
15 Honor is aware, we've introduced the bulk of our exhibits
16 already through our first three witnesses.

17 THE COURT: Yes, I realize that. I was asleep at the
18 switch for a while.

19 MR. NESTLER: And now we plan to have these witnesses
20 testify about some of these remaining exhibits but do not have
21 to introduce much more.

22 THE COURT: All right. And when we get to, for
23 example, the Capitol Police, I get that you want to play certain
24 aspects so that the jury can hear the audio that wasn't clear
25 the first day, but to rewatch all that, I really think that

1 you're losing your jurors.

2 MR. NESTLER: We understand, Your Honor.

3 THE COURT: Okay. Schwager is the Senate counsel?

4 MR. NESTLER: Yes, your Honor.

5 THE COURT: So he is going to testify to some of what
6 he saw that day in the chamber, right, in the gallery?

7 MR. NESTLER: Yes, Your Honor.

8 THE COURT: I take it none of this relates to the
9 Ashli Babbitt shooting?

10 MR. NESTLER: Correct, Your Honor.

11 THE COURT: All right. And how much -- at some point
12 I think the potential prejudicial effect of what actually
13 happened in and around that room exceeds the probative value as
14 to Mr. Reffitt. I get that you are entitled to present some
15 evidence of how close they got, but he never got in the
16 building.

17 So I just want to make sure you're not spending a lot of
18 time on that part of the case, because it's really minimal
19 probative value for him. All right?

20 MR. NESTLER: We do need to prove that --

21 THE COURT: The obstruction. But I just -- the
22 shooting and all of that seems too far.

23 MR. NESTLER: We're not mentioning the shooting at
24 all. It's not a part of the case.

25 THE COURT: Okay. I just wanted to make sure.

1 MR. NESTLER: This is Mr. Schwager talking about the
2 official proceeding, why it was happening, what he saw, where he
3 went, and then his experiences in the Senate chamber and being
4 evacuated.

5 THE COURT: Okay. Great. Anything else for you,
6 Mr. Welch?

7 MR. WELCH: No, Your Honor.

8 THE COURT: All right.

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

10 THE COURT: So we've got a few minutes. Maybe the
11 jurors are here early. Do you want to go check?

12 COURTROOM DEPUTY: I can check, but don't hold your
13 breath.

14 (Pause.)

15 THE COURT: Just one issue. The law clerk noticed, in
16 reviewing the rough transcript last night, there were five
17 exhibits where they were offered by the government, there was no
18 objection, and then the government immediately said publish it
19 to the jury, and I didn't say they're admitted.

20 We'll need to look and see what the exhibits are. But I
21 just want to make sure for the record that I've admitted them.
22 I intended to admit all of them, and I want to make the record
23 clear as to that. So we will get those exhibit numbers and just
24 do that outside the presence of the jury at some point.

25 MR. WELCH: I don't think that's going to be a

1 problem. There is nothing that has been admitted that I made an
2 objection to and you hadn't ruled on or anything.

3 MR. NESTLER: All right. My recollection is, I
4 thought Your Honor had said "admitted." So it may have been
5 just --

6 THE COURT: I probably thought I said admitted when
7 you said what you said.

8 MR. NESTLER: I apologize if I published something and
9 Your Honor hadn't actually said admitted.

10 THE COURT: No worries.

11 MR. NESTLER: May I step out for one minute?

12 THE COURT: Sure.

13 (Pause.)

14 (Jury entered courtroom.)

15 THE COURT: Good morning, ladies and gentlemen.
16 Welcome back. I know you're happy it's Friday. I think we all
17 are. I want to remind you that we will be stopping at 4:00
18 today. And the government is prepared to call its next witness.

19 MR. NESTLER: Thank you, Your Honor. The government
20 calls Daniel Schwager.

21 DANIEL SCHWAGER, WITNESS FOR THE GOVERNMENT, SWORN

22 DIRECT EXAMINATION

23 BY MR. NESTLER:

24 Q. Good morning, sir.

25 A. Good morning.

1 Q. If you are comfortable, you are permitted to remove your
2 mask.

3 Could you please tell us what your name is.

4 A. Dan Schwager.

5 Q. And how do you spell your name?

6 A. Schwager is S-c-h-w-a-g-e-r. Dan is common spelling.

7 Q. Mr. Schwager, what was your title on January 6, 2021?

8 A. I was the general counsel to the Secretary of the U.S.
9 Senate.

10 Q. What does the general counsel to the Secretary of the U.S.
11 Senate do?

12 A. I have multiple responsibilities. Chiefly, I advise the
13 Secretary of the Senate on a host of issues, on legal issues
14 related to her work, on policy issues, on operational issues,
15 and then a lot of general counsel duties, contracts, continuity
16 of government, things like that.

17 Q. What does the Secretary to the U.S. Senate do?

18 A. The Secretary can be thought of as the chief administrative
19 officer of the Senate. She is an officer to the Senate. She
20 has some constitutional functions, many statutory functions.
21 She is responsible for the financial administration of the
22 Senate. She is responsible for many administrative offices, the
23 curator of the Senate, the historian, the public records, office
24 of public records, and she's also responsible for the staffing
25 of the floor of the Senate chamber.

1 The -- all of the different types of legislative clerks are
2 under the Secretary's supervision. The parliamentarian is under
3 the Secretary's supervision.

4 Q. How many people approximately work for the Secretary of the
5 Senate?

6 A. Around 225 or so.

7 Q. How long did you serve as general counsel to the Secretary
8 of the Senate?

9 A. Almost six years.

10 Q. And how long did you work in Congress total?

11 A. Almost ten years.

12 Q. How long have you been a lawyer?

13 A. Over 20.

14 Q. Do you still work for the Secretary of the Senate?

15 A. I do not.

16 Q. How long ago did you leave?

17 A. At the end of January, this year.

18 Q. So just about a month ago?

19 A. Correct.

20 Q. Why did you leave?

21 A. I was called by a recruiter and offered an opportunity for
22 a job that was a great opportunity in a lot of ways for me.

23 Q. Do you now work at a non-profit organization?

24 A. I do.

25 Q. Mr. Schwager, how many houses of Congress are there?

1 A. Two houses of Congress.

2 Q. Can you please name them?

3 A. The Senate and the House of Representatives.

4 Q. Let's start with the House of Representatives. What is the
5 title of the person who is in charge of the House of
6 Representatives?

7 A. Well, the member who is -- the person who is chosen by all
8 of the members to perform leadership roles is the Speaker of the
9 House of Representatives.

10 Q. And who held the role of Speaker of the House of
11 Representatives as of January 6, 2021?

12 A. Nancy Pelosi.

13 Q. And moving to the Senate side now, who is the person who is
14 in charge of the agenda and the day-to-day sort of functioning
15 of the Senate?

16 A. Right. The person, the party who holds the majority of
17 seats in the Senate chooses from amongst themselves a person to
18 manage the agenda and the day-to-day operations. That person is
19 known as the majority leader.

20 Q. And who was the majority leader of the U.S. Senate on
21 January 6 of 2021?

22 A. Senator Mitch McConnell.

23 Q. And under the Constitution, is there a different person who
24 formally presides over the United States Senate?

25 A. Yes, the President of the Senate is different from the

1 majority leader.

2 Q. And who is the President of the Senate?

3 A. The President of the Senate is the Vice President of the
4 United States.

5 Q. And as of January 6 of 2021, who was the Vice President of
6 the United States?

7 A. Mike Pence.

8 MR. NESTLER: At this time we're going to put on the
9 screen, Ms. Rohde, if you could, a stipulation between the
10 parties. It's stipulation -- it's Exhibit 702. If you could
11 just highlight the text for me, Ms. Rohde.

12 Mr. Hopkins, if you could please publish that to the jury.

13 And I will now read to the jury stipulation -- Government
14 Exhibit 702.

15 "The United States and defendant Guy Reffitt agree and
16 stipulate to the following:

17 "On January 6, 2021, a joint session of the United States
18 Congress convened at the U.S. Capitol. During the joint
19 session, elected members of the United States House of
20 Representatives and the United States Senate were meeting in
21 both the House and Senate chambers of the Capitol to certify the
22 vote count of the Electoral College of the 2020 presidential
23 election, which had taken place on Tuesday, November 3, 2020.

24 "On January 6, 2021, the House of Representatives began its
25 session at approximately 12:00 p.m., the Senate began its

1 session at approximately 12:30 p.m., and the two Houses met
2 together at approximately 1:00 p.m. in the House of
3 Representatives chamber to begin the joint session.

4 "Vice President Mike Pence was in the Capitol building and
5 presiding over the joint session. At approximately 1:15 p.m.,
6 the House and Senate adjourned to their separate chambers for up
7 to two hours to resolve a particular objection.

8 "At approximately 2:12 p.m., Vice President Pence evacuated
9 the Senate chamber, and approximately one minute later, the
10 senator who had become the presiding officer in Vice President
11 Pence's absence declared the Senate would stand in recess.
12 Senators evacuated the Senate chamber."

13 THE COURT: Ladies and gentlemen, let me remind you
14 that a stipulation of fact is something you should consider as
15 undisputed evidence.

16 MR. NESTLER: Thank you, Your Honor.

17 And just continuing on to page 2, two additional
18 paragraphs.

19 "At approximately 2:15 p.m., Speaker Nancy Pelosi, who was
20 presiding over the House of Representatives, evacuated the House
21 chamber, and approximately 15 minutes later, the representative
22 who had become the presiding officer in her absence declared
23 that the House would stand in recess. Representatives evacuated
24 the House chamber.

25 "The Senate and House resumed meeting at approximately

1 8:06 p.m. and 9:02 p.m. respectively. Congress's joint session
2 continued until approximately 3:44 a.m. on January 7, 2021, when
3 it completed the certification of the Electoral College vote."

4 BY MR. NESTLER:

5 Q. At this time I would like to display to the jury Government
6 Exhibit 500, already in evidence.

7 Are you familiar with the Constitution of the United
8 States, Mr. Schwager?

9 A. Generally, yes.

10 Q. Go to page 2, please, Ms. Rohde.

11 And this is Amendment Twelve. Do you know what the Twelfth
12 Amendment is, Mr. Schwager?

13 A. I do.

14 Q. I'm going to ask you to read the highlighted portion here
15 of the Twelfth Amendment to the U.S. Constitution, please.

16 A. The first portion says, "The electors shall meet in their
17 respective states and vote by ballot for President and Vice
18 President."

19 The second highlighted section says, "Which lists they
20 shall sign and certify and transmit sealed to the seat of the
21 government of the United States, directed to the President of
22 the Senate, the President of the Senate shall, in the presence
23 of the Senate and House of Representatives, open all the
24 certificates and the votes shall then be counted. The person
25 having the greatest number of votes for president shall be

1 president."

2 Q. Just remind us, who is the President of the Senate?

3 A. The Vice President of the United States.

4 Q. At this time we will go to Government Exhibit 501.15,
5 already admitted into evidence, and this is a portion of the
6 United States Code.

7 Are you familiar with the United States Code, Mr. Schwager?

8 A. Generally, yes.

9 Q. What is it?

10 A. It is the compilation of the federal laws of the United
11 States of America.

12 Q. And if you could, please, read the title of 3 United States
13 Code 15.

14 A. "Congress shall be in session on the Sixth day of January
15 succeeding every meeting of the electors. The Senate and House
16 of Representatives shall meet in the hall of the House of
17 Representatives at the hour of 1 o'clock in the afternoon on
18 that day, and the President of the Senate shall be their
19 presiding officer."

20 Q. Thank you. Do you know what the hall of the House of
21 Representatives is?

22 A. Yes. We refer to it as the House chamber.

23 Q. Is that in the U.S. Capitol building?

24 A. It is.

25 Q. If we could now go, Ms. Rohde, please, to Exhibit 501.16,

1 already admitted into evidence. It's 3 United States Code.

2 Mr. Schwager, if you could read the highlighted portion for
3 us.

4 A. "Such joint meeting shall not be dissolved until the count
5 of electoral votes shall be completed and the result declared."

6 Q. In this section, when you see the word "dissolved," what
7 does that mean as a part of your job?

8 A. The adjournment of that session, that day's session, or it
9 could be multiple sessions.

10 Q. Dissolve, does that mean end?

11 A. Yes.

12 Q. Let's go to Exhibit 501.17, which is Title 3 of the United
13 States Code, Chapter 17. Can you please read the highlighted
14 portion.

15 A. "When the two Houses separate to decide upon an objection
16 that may have been made to the counting of any electoral vote."

17 Q. Mr. Schwager, what does it mean when the Houses separate?

18 A. Since the joint session is in the House chamber, the Senate
19 walks back to the Senate chamber, and they each deliberate on
20 their own in their own chambers. The House stays in the House
21 chambers.

22 Q. Thank you. Ms. Rohde, if you could pull up Exhibit 501.18,
23 already admitted into evidence.

24 And if you could, please, just read the highlighted portion
25 for us, Mr. Schwager.

1 A. "While the two Houses shall be in meeting as provided in
2 this Chapter, the President of the Senate shall have power to
3 preserve order."

4 Q. Thank you. Now let's move, please, to Exhibit 504,
5 Ms. Rohde, already admitted into evidence.

6 And this is Senate Concurrent Resolution 1. What is a
7 Senate Concurrent Resolution, Mr. Schwager?

8 A. A Concurrent Resolution is something short of a law, but
9 it's a legislative act that both chambers agree to. And if it's
10 called a Senate Concurrent Resolution, then it originates in the
11 Senate.

12 Q. And if you could, please, read the highlighted portion
13 here.

14 A. "Resolved by the Senate, the House of Representatives
15 concurring, that the two Houses of Congress shall meet in the
16 hall of the House of Representatives on Wednesday, the 6th day
17 of January, 2021, at 1:00 post meridian, pursuant to the
18 requirements of the Constitution and laws relating to the
19 election of President and Vice President of the United States,
20 and the President of the Senate shall be their presiding
21 officer."

22 Q. Thank you. Ms. Rohde, if you could go down to the bottom
23 to the signature section.

24 And do you see at the bottom where it says "attest" and
25 there is somebody's name above Secretary of the Senate?

1 A. I do.

2 Q. Who is that?

3 A. Julie E. Adams was the Secretary of the Senate at that
4 time.

5 Q. Was she your boss?

6 A. She was.

7 Q. Okay. Let's move on. If you could take that down, please,
8 Ms. Rohde.

9 Do you know what the Congressional Record is, Mr. Schwager?

10 A. I do.

11 Q. What is it?

12 A. It is the compilation of the proceedings of each chamber of
13 Congress for every -- every day.

14 Q. Thank you. At this time I would like to display for the
15 jury Government Exhibit 507, already admitted into evidence.

16 Mr. Hopkins, if you could take it down from the jury screen
17 just for a quick second. Thank you. And if you could put it
18 back up, please. Thank you.

19 At this time -- it does have audio. Agent Ryan, if you
20 wouldn't mind manning our speaker contraption. Thank you.

21 (Video played.)

22 Q. If you could pause for a minute, Ms. Rohde.

23 Mr. Schwager, do you see those young people walking into
24 the House chamber?

25 A. I do.

1 Q. Do you see what they're carrying?

2 A. I do.

3 Q. What are they carrying?

4 A. They are carrying what we refer to as the Electoral College
5 ballots. They're certificates of votes from the electors of all
6 50 states plus the District of Columbia.

7 Q. And how do you know what's inside of those boxes?

8 A. I was involved in ensuring that the ballots were placed
9 inside those boxes.

10 Q. Thank you. If we could, please, continue, Ms. Rohde.

11 (Video played.)

12 Q. Can you, please, pause right there, Ms. Rohde.

13 Mr. Schwager, do you see yourself in this video?

14 A. I do.

15 Q. Could you, please, tell us which side you're on and what
16 you're doing?

17 A. From our perspective, I'm to the left of the Vice President
18 and standing up in front of the -- in between the bottom desk
19 and the middle desk.

20 Q. Is there anything in front of you?

21 A. Yes. There is an Electoral College ballot box, as we refer
22 to it.

23 Q. Thank you. If we can continue, Ms. Rohde.

24 (Video played.)

25 Q. Do you see what chamber we're looking at here,

1 Mr. Schwager?

2 A. That's the Senate chamber.

3 Q. Who is the person sitting in the presiding officer's chair
4 in the Senate chamber?

5 A. The President of the Senate, Vice President Pence.

6 Q. This is at 1:39 p.m., according to the time stamp at the
7 bottom; is that correct?

8 A. That's what it says.

9 Q. If we could go forward to the next slide, please.

10 And at 1:48 p.m., who was sitting in the presiding
11 officer's chair?

12 A. Still the President of the Senate.

13 Q. And if we can go forward, at 1:54 p.m.?

14 A. President of the Senate.

15 Q. And if we can go forward, at 2:00 p.m.?

16 A. President of the Senate.

17 Q. If we can go forward, at 2:05 p.m.?

18 A. President of the Senate.

19 Q. And if we can go forward, at 2:10 p.m.?

20 A. President of the Senate.

21 Q. Thank you. If we could then move to Government
22 Exhibit 506, Ms. Rohde, already admitted into evidence.

23 Do you recognize what chamber this is, Mr. Schwager?

24 A. That is the House chamber.

25 Q. Who is standing at the presiding officer's chair in the

1 House chamber?

2 A. It looks like Nancy Pelosi. It's a little blurry.

3 Q. This is at 1:43 p.m.

4 If we can move to the next slide, at 1:48 p.m.?

5 A. Speaker Pelosi.

6 Q. If we could move forward, at 1:54 p.m.?

7 A. The Speaker.

8 Q. 1:49?

9 A. The Speaker.

10 Q. If we could move forward, at 2:04 p.m.?

11 A. The Speaker.

12 Q. If we could move forward, at 2:10 p.m.?

13 A. The Speaker.

14 Q. If we could move forward, at 2:14 p.m.?

15 A. The speaker.

16 Q. If we could move forward. And that is the final slide.

17 Thank you.

18 Okay. Mr. Schwager, let's talk about your role on
19 January 6 of 2021 and what you observed.

20 If we could, please, start, Mr. Rohde, by pulling up
21 Exhibit 507 and going to 540 on the counter at approximately
22 2:13 p.m. If we could just stop it at 540.

23 So up on the screen in front of you, Mr. Schwager, this is
24 approximately 2:13 p.m. Can you identify what chamber we're
25 looking at here?

1 A. Senate chamber.

2 Q. Are you visible in this view?

3 A. I am.

4 Q. Can you please tell us where you're positioned?

5 A. As you're facing this exhibit, the door on the right, I'm
6 just inside to the left of the door on the right facing forward,
7 the bald guy.

8 Q. Are you standing or sitting?

9 A. I am standing up.

10 Q. Sorry. You mentioned that you're the bald guy?

11 A. I am usually the bald guy, yes.

12 Q. Got it. Okay. Were you in this position the entire time
13 the Senate was having its proceeding?

14 A. I was not.

15 Q. Why did you take yourself to this position at this time
16 around 2:13 p.m.?

17 A. Prior to this, maybe a few minutes, judging by Officer
18 Billings (phonetic), prior to this I had been told that -- I
19 was standing at the back of the chamber.

20 MR. WELCH: Objection.

21 (Bench conference.)

22 THE COURT: I take it you're not offering this for the
23 truth?

24 MR. NESTLER: That's correct, to explain why he ended
25 up where he ended up.

1 THE COURT: All right. So Mr. Welch, if you want an
2 instruction, I can give that.

3 MR. WELCH: Please.

4 (End of bench conference.)

5 THE COURT: Ladies and gentlemen, the testimony you're
6 about to hear this witness say is not being offered for the
7 truth of the matter, but to explain why he took the actions he
8 took.

9 BY MR. NESTLER:

10 Q. Please continue, Mr. Schwager.

11 A. Thank you. Just prior to this, I had been informed by a
12 Senate staffer that protestors had come into the Capitol
13 building, had breached the Capitol building, and I immediately
14 went down to that position to be near the Secretary of the
15 Senate, my boss, so I could -- and the legislative clerks on the
16 dais, so I could assist them and advise the Secretary and help
17 with whatever came next.

18 Q. Just prior to you moving down to this position, who had
19 been presiding over the Senate chamber?

20 A. The last senator presiding who recessed the Senate would
21 have been the President Pro Tempore, which is Senator Chuck
22 Grassley -- was Senator Chuck Grassley at that time.

23 Q. And prior to Senator Chuck Grassley being there at the
24 presiding officer's chair, did you see who was there just before
25 him?

1 A. Yeah, the President of the Senate, Vice President Pence.

2 Q. Did you see Vice President Pence leave the Senate chamber?

3 A. I did.

4 Q. How would you characterize his departure from the Senate
5 chamber?

6 A. He was accompanied by several people that I believed to
7 be -- that were not senators. I don't know. They appeared to
8 be officers or Secret Service or something like that.

9 Q. Had you seen them before?

10 A. I don't recall if I had seen any of them before. I don't
11 recall if any of them were people I was familiar with or not.

12 Q. And when you saw Vice President Pence leave the Senate
13 chamber with these people who you assumed to be his security
14 people, what did you believe was happening?

15 A. Well, I knew we were in a dangerous situation and that we
16 were about to go into some protocols we had drilled on for
17 locking down, for when the chamber was under threat.

18 Q. Did you see Senator Grassley leave the chamber?

19 A. I don't recall exactly when Senator Grassley left the
20 chamber. I saw him coming down from the presiding officer's
21 chair on the dais.

22 Q. And the person standing in the presiding officer's chair at
23 2:13 p.m., is that a Capitol police officer?

24 A. It is.

25 Q. What did that make you think about what was happening at

1 this time?

2 A. Well, I had already recognized what was happening as a part
3 of our procedures that we had drilled on when there is a -- for
4 when there is a threat to the chamber. And so I believed that
5 those were the procedures and those were the posture that we
6 were under.

7 Q. Around this time, what, if anything, did you observe about
8 the doors to the Senate chamber?

9 A. At that time, as we had practiced, the Capitol police
10 officers or door keepers were locking all of the doors to the
11 galleries and some of the external doors on the chamber floor.

12 Q. Are these small doors or large doors?

13 A. They're very tall doors. They're large, ornate, wooden
14 doors, and I saw one small police officer had to jump up to lock
15 one.

16 Q. Do they make noises when they open and close?

17 A. Typically, we try to avoid them making noises to disturb,
18 but they are heavy doors.

19 Q. How did you feel when you saw the doors started being
20 locked?

21 A. Again, I already -- from the moment -- from the moment I
22 was told that protestors had breached the Capitol, I was in a
23 state of alarm, and we were in a grave situation at that point,
24 to my understanding. And closing the doors was just -- locking
25 the doors was just a part of what we had trained for, and I,

1 frankly, was happy that they were being locked.

2 Q. Were the people inside of the Senate chamber, yourself
3 included, given any instructions around this time?

4 A. Yes. The Capitol police officer on the -- who was standing
5 by the presiding officer's chair, his purpose there was to
6 instruct us that there was a threat and to give us further
7 instructions from the Capitol Police for our safety.

8 Q. Shortly after that, did you come to notice any additional
9 Capitol police officers with any weapons inside of the Senate
10 chamber?

11 A. Yes. I took particular notice of a Capitol police
12 officer -- who I assumed to be a Capitol police officer. He was
13 in plain clothes but with an orange sash and a very long, very
14 large long gun standing right in the center of the chamber right
15 between the majority leader's desk and the minority leader's
16 desk.

17 Q. Had you experienced that during any of the drills you had
18 practiced?

19 A. I don't recall if they ever used an actual gun in those
20 drills or not. Nothing stands out to me that I've ever seen
21 something like that.

22 Q. What did you think when you saw a Capitol police officer
23 with a long gun standing in the well of the Senate chamber?

24 A. Again, I was already in a state of alarm, and things like
25 that, frankly, comforted me, because I already knew there was

1 a -- my perception already was that we were under severe threat.

2 Q. Did there come a time when you left the Senate chamber?

3 A. There did.

4 Q. And why did you leave the Senate chamber?

5 A. We were instructed by the Capitol Police to evacuate.

6 Q. What, if anything, did you do with the boxes containing the
7 certificates of the votes at the time that you were leaving the
8 Senate chamber?

9 A. I had moved closer to the table before we evacuated, the
10 table where the ballots were, to make sure that while we were
11 standing there waiting for instructions -- lots of people were
12 moving around, and I wanted to make sure nobody was opening the
13 boxes or touching the ballots.

14 At the time we evacuated, a number of our staff and floor
15 staff took the ballot boxes and other paraphernalia of the
16 proceeding with us. I did not personally carry a ballot box at
17 that time. I carried some other paraphernalia.

18 Q. And why was it important to take the ballot boxes and other
19 paraphernalia with you as you evacuated the Senate chamber?

20 A. First of all, we need to maintain custody of the ballots
21 and make sure nothing happens to them. There are, by law, other
22 sets, but these were the ones we were using for the proceeding,
23 and we needed to protect those.

24 In addition, it was possible that we would need to
25 reconvene in another location to complete the proceeding. I

1 knew the mission was to complete the proceeding, and so whether
2 we did it in the chamber or whether we had to reconvene in
3 another location, we needed those with us for the proceeding.

4 Q. Were the senators able to continue meeting when they were
5 not in the chamber here?

6 A. Were they able to? They did not reconvene outside of the
7 chamber. They -- if it had become necessary, we could have.

8 Q. I'm talking about in the Senate chamber here. Did the
9 senators -- were they able to meet in the Senate chamber after
10 the time you evacuated?

11 A. Yes.

12 Q. While you were evacuated, were the senators meeting in the
13 Senate chamber?

14 A. No, I'm sorry, not until we had come back at a later time.

15 MR. NESTLER: Thank you. No further questions.

16 THE COURT: Mr. Welch?

17 MR. WELCH: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. WELCH:

20 Q. Good morning, Mr. Schwager.

21 A. Good morning.

22 Q. My name is Bill Welch. I'm also going to ask you some
23 questions.

24 A. Certainly.

25 Q. To the best of your recollection, was the time stamp of

1 approximately 1:14 p.m. on January 6 accurate as far as when the
2 joint session in the House chamber adjourned?

3 A. I wasn't looking at my watch. So I don't have an
4 independent recollection.

5 Q. Okay. Would that be the same as far as the other time
6 stamps that we saw in Government Exhibit 507?

7 A. Yeah, I don't have any independent recollection of the
8 exact second at which any of these proceedings happened.

9 Q. Okay. Would you have any reason to believe that any of
10 them were incorrect?

11 A. No.

12 Q. When you were in the Senate chamber and we saw you on
13 Government Exhibit 507, you didn't see my client, Mr. Reffitt,
14 did you?

15 A. No.

16 Q. So when you left the Senate chamber at the direction of the
17 Capitol Police and had to go wherever you went, you did not see
18 my client, Mr. Reffitt, did you?

19 A. I don't know if he was in the periphery of my vision in one
20 of the groups that we might have passed by. So I don't know.

21 Q. As you sit there right now -- please, feel free, take a
22 look. Mr. Reffitt, take your mask down.

23 As you look at him, have you ever seen this man before?

24 A. I don't know.

25 MR. WELCH: Pass the witness.

1 THE COURT: Any further questioning?

2 MR. NESTLER: Thank you, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. NESTLER:

5 Q. Just briefly, Mr. Schwager, Mr. Welch asked you about the
6 word "adjourned," the House adjourning or the Senate adjourning
7 to its chamber.

8 During the joint session of Congress, when the two Houses
9 are no longer meeting as a joint body but as separate bodies,
10 what do you call that?

11 A. I'm sorry. I missed that the word "adjourned" was used. I
12 would have corrected that.

13 Adjourning is at the end of a session for the day or
14 proceeding. We had recessed for the purpose of reconvening. So
15 we had withdrawn to the Senate chamber. But the proceeding for
16 the day had not been adjourned officially.

17 Q. And we went over the law earlier that used the
18 word "dissolved." What happens when the joint session is
19 dissolved? What's going on at that point?

20 A. The Vice President, President of the Senate, presiding
21 officer of the joint session, would have gaveled us out is how
22 we say it, and he would have declared the session dissolved.

23 And then I think -- I don't recall whether he adjourned the
24 joint session in the Senate or whether the Speaker did or what
25 happened at that point.

1 Q. But until the joint session is dissolved, is the joint
2 session still ongoing?

3 A. It is, and it could have been for a long time.

4 But yes, the joint session was not dissolved until some
5 time after 3:00 a.m.

6 Q. And were you still there?

7 A. I was.

8 MR. NESTLER: No further questions.

9 THE COURT: May this witness be excused?

10 MR. WELCH: Yes, Your Honor.

11 THE COURT: All right. Thank you, sir.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Nestler, your next witness?

14 MR. NESTLER: Thank you, Your Honor. The United
15 States calls United States Secret Service Special Agent Paul
16 Wade.

17 THE COURT: Mr. Nestler, will there be multiple
18 exhibits for this witness?

19 MR. NESTLER: There will be three. Two of them have
20 not been moved in yet, but I will move them in now.

21 THE COURT: Do you have any objection, Mr. Welch, to
22 the government admitting the two exhibits? Which numbers?

23 MR. NESTLER: Exhibit 410, the Head of State
24 Notification Worksheet.

25 MR. WELCH: No objection to that.

1 MR. NESTLER: And Exhibit 221 is a surveillance video
2 clip.

3 MR. WELCH: No objection to that.

4 THE COURT: All right. Those exhibits are admitted.
5 (Government Exhibits 410 and 221 received into evidence.)

6 MR. NESTLER: Thank you, Your Honor.

7 PAUL WADE, WITNESS FOR THE GOVERNMENT, SWORN

8 DIRECT EXAMINATION

9 BY MR. NESTLER:

10 Q. Good morning, sir.

11 A. Good morning.

12 Q. Can you please state and spell your name.

13 A. Paul Wade, W-a-d-e.

14 Q. And where do you work?

15 A. I'm with the United States Secret Service.

16 Q. And if you could do me a favor, that large black thing in
17 front of you is a microphone. Move a little bit closer to it
18 when speaking. Thank you.

19 What is your position with the United States Secret
20 Service?

21 A. I am a assistant to the Special Agent-in-Charge.

22 Q. Are you also a Special Agent?

23 A. Correct.

24 Q. What does the assistant to the Special Agent-in-Charge do?

25 A. It's a supervisory special agent position.

1 Q. And how many people do you supervise?

2 A. Four special agent staff assistants.

3 Q. Where is your physical office located?

4 A. At the United States Capitol.

5 Q. How long have you been with the United States Secret
6 Service?

7 A. 22-and-a-half years.

8 Q. You say your physical office is at the United States
9 Capitol. Which part of the United States Secret Service are you
10 in? Which division?

11 A. Liaison Division.

12 Q. And what does the Liaison Division do?

13 A. We primarily coordinate Secret Service protectee visits to
14 the Capitol.

15 Q. And what is the mission of the United States Secret
16 Service?

17 A. Dual mission. It's investigations and protection.

18 Q. And who are you supposed to protect?

19 A. We protect the president, vice president, and their
20 families, and foreign heads of state that visit the country.

21 Q. Is the Secret Service part of an executive department of
22 the United States government?

23 A. Correct.

24 Q. Which one?

25 A. It is the Department of Homeland Security.

1 Q. Let's talk about prior to January 6 of 2021. What, if
2 anything, did you do to prepare for security on January 6th?

3 A. Prior to January 6, we -- the security plan was primarily
4 under the Capitol Police Board, their policies and procedures.
5 We did conduct a couple walk-throughs and sent formal
6 notification to the Capitol Police.

7 Q. And did you have various conversations with your colleagues
8 at the Capitol Police on a regular basis about security and
9 issues like that?

10 A. Correct. We were also planning for the inauguration. So
11 yeah, almost daily.

12 Q. Let's pull up on the screen, Ms. Rohde, Exhibit 410,
13 previously admitted into evidence. And if you could highlight
14 the top portion.

15 Are we looking at an e-mail here, Special Agent Wade?

16 A. Correct.

17 Q. Who sent this e-mail?

18 A. Lanelle Hawa.

19 Q. Who is Lanelle Hawa?

20 A. She was one of my agents that I supervised at that time.

21 Q. Were you copied on this e-mail?

22 A. Yes.

23 Q. What was the purpose of her sending this e-mail?

24 A. The HOS notification is a Head of State Notification, and
25 it is our formal notification to the United States Capitol

1 Police of a Secret Service protectee visit.

2 Q. And in the subject line, there are three individuals
3 listed. Vice President Michael Pence, was he a Secret Service
4 protectee?

5 A. Yes.

6 Q. Was Mrs. Pence?

7 A. Yes.

8 Q. And was Charlotte Pence?

9 A. Yes.

10 Q. And if we could scroll to the next page, please, and if we
11 could start at the "USCP (tail) car," and highlight that,
12 Ms. Rohde.

13 What is a USCP (tail) car rendezvous location, Agent Wade?

14 A. That's the location the United States Capitol Police would
15 send a vehicle to join up with our protectee's motorcade.

16 Q. And where was the Capitol Police's vehicle supposed to join
17 up with the protectee's motorcade for January 6 of 2021?

18 A. The Naval Observatory.

19 Q. And who lives at the Naval Observatory?

20 A. The Vice President.

21 Q. And if we could just scroll down, please, to the itinerary.

22 And why does the Secret Service include an itinerary on the
23 information it provides to the Capitol?

24 A. It's the latest information derived from staff and
25 sergeant-at-arms entities on the Capitol complex of the

1 protectee's itinerary.

2 Q. And so according to the proposed itinerary, approximately
3 what time was the Vice President supposed to arrive at the
4 United States Capitol?

5 A. Approximately 12:30.

6 Q. And when it says "via M/C to Senate carriage," what does
7 that mean?

8 A. Via motorcade.

9 Q. And why does the Vice President travel in a motorcade?

10 A. It's an organized Secret Service-protected motorcade.

11 Q. And why does he use a motorcade, not in a regular car, for
12 instance?

13 A. For his protection.

14 Q. And where was the motorcade supposed to stage and wait for
15 the Vice President while he was inside of the Capitol on
16 January 6?

17 A. On the east side of the Capitol, known as the Plaza.

18 Q. Which agency is ultimately responsible for the Vice
19 President's security and safety while he is at the Capitol
20 building?

21 A. The United States Secret Service.

22 Q. Let's pull up on the screen, if you could, Ms. Rohde,
23 Exhibit 601A, already admitted into evidence.

24 Do you recognize the building in the center of this
25 photograph, Agent Wade?

1 A. Yes.

2 Q. What is it?

3 A. The United States Capitol.

4 Q. I want to talk about the perimeter on the west side between
5 the Peace monument and the Garfield monument. Are you familiar
6 with those monuments?

7 A. Yes.

8 Q. On the morning of January 6, 2021, did you personally
9 observe that security perimeter?

10 A. Yes.

11 Q. What role, if any, would you have had if you believed that
12 the Capitol Police's security perimeter on January 6 of 2021 was
13 inadequate to protect your protectees, including the Vice
14 President?

15 A. We could have raised any objections to United States
16 Capitol Police.

17 Q. And on January 6, did you believe the security perimeter to
18 be adequate to protect your protectee when you saw it that
19 morning?

20 A. Yes.

21 Q. If we can take this down, please, Ms. Rohde.

22 So, on January 6, 2021, Agent Wade, did the Vice President
23 actually arrive at the Capitol complex?

24 A. Yes.

25 Q. How do you know?

1 A. Because I saw him.

2 Q. Approximately what time did he arrive?

3 A. Approximately 12:37.

4 Q. And what was your role in facilitating his arrival?

5 A. I was there with an additional liaison to facilitate access
6 for the Vice President, Mrs. Karen Pence, and their daughter
7 Charlotte Pence.

8 Q. And what's your role with respect to his security while he
9 is there?

10 A. I was dedicated to Mrs. Pence and Charlotte Pence.

11 Q. When the Vice President got to the United States Capitol,
12 did he make his way to the Senate chamber?

13 A. Yes. Well, he first went to his office.

14 Q. And around the time he went to the Senate chamber, what did
15 you do?

16 A. The Senate chamber -- well, first, they went there -- they
17 went to his office as a family. He went onto the Senate floor.
18 And then I took Mrs. Pence and Charlotte up to the third floor,
19 to the gallery level.

20 Q. And while they were watching the proceeding from the third
21 floor gallery level, what were you doing?

22 A. I was in the hallway outside the gallery.

23 Q. And did there come a time when the Vice President left the
24 Senate chamber to go to the House chamber?

25 A. Yes.

1 Q. At that time what did you do?

2 A. I escorted Mrs. Pence and Charlotte Pence via the third
3 floor over to the House gallery.

4 Q. And did they enter the House gallery?

5 A. Yes.

6 Q. And at the time they entered the House gallery, what did
7 you do?

8 A. I stood outside the House gallery.

9 Q. Did there come a time when you escorted Mrs. Pence and
10 Charlotte Pence from the House gallery back to the Senate
11 gallery?

12 A. Yes.

13 Q. When you arrived back at the Senate gallery, what did you
14 do?

15 A. I staged again outside the Senate gallery and engaged my
16 counterparts from the Capitol Police and the vice presidential
17 detail.

18 Q. Did there come a time when you left that area outside the
19 Senate gallery?

20 A. Yes.

21 Q. Why?

22 A. After briefing up my counterparts on any potential
23 emergency action procedures, I then went to the basement --
24 responded to the basement level to obtain some inauguration
25 paperwork.

1 Q. And the basement level of the Capitol, is that where your
2 office is?

3 A. Yes.

4 Q. And you mentioned earlier you were also planning for the
5 inauguration around this time; is that right?

6 A. Yes. I was the lead liaison planner for the inauguration.

7 Q. While you were in the basement of the United States
8 Capitol, what, if anything, did you hear that was out of the
9 ordinary?

10 A. I was only down there a few minutes, and then I heard
11 scuffling and running about outside my office.

12 Q. What did you think at that time?

13 A. As I went out -- as I went -- peered outside, I saw
14 officers running and scrambling and saying that people were
15 breaching the bike racks.

16 Q. What did you think to do?

17 A. I immediately went to the protectees on the second floor.

18 Q. And is there a certain place that you went to meet up with
19 the protectees?

20 A. Yes. Knowing that his office was on the second floor
21 outside the chamber, that's where I responded.

22 Q. That's the Vice President's ceremonial office?

23 A. Correct.

24 Q. And when you got to the Vice President's ceremonial office,
25 did you observe Mrs. Pence and Charlotte Pence?

1 A. Yes.

2 Q. Was the Vice President there as well?

3 A. Yes.

4 Q. Where is the Vice President's ceremonial office located
5 with respect to the Senate chamber itself?

6 A. It's on the north side of the chamber.

7 Q. Is it very close to the chamber?

8 A. Yes, just outside the -- what they call the Senate floor.

9 Q. Let's discuss the motorcade we talked about a little while
10 ago. Around this time, did you have any concerns with respect
11 to the Vice President's motorcade?

12 A. Yes.

13 Q. What concerns were those?

14 A. Based on the intel we were receiving from officers and from
15 folks outside in the motorcade, that people were breaching the
16 bike rack and running onto the plaza. So at that point, our
17 first thought is to relocate the motorcade if we could not use
18 it to relocate the Vice President, if needed.

19 Q. And why is it important to relocate the motorcade if people
20 were around it? In other words, what's the problem if people
21 are near the motorcade?

22 A. The way the intel was, there was perceived threat on the
23 plaza from people breaching the bike racks.

24 Q. At this time I'm going to pull up Government Exhibit 220,
25 which has been admitted.

1 And are you familiar with this view?

2 A. Yes. That's the east plaza.

3 Q. And all of those cars in the center of this view, do you
4 know what those cars are?

5 A. Yes. The Vice President's motorcade.

6 Q. And is this what the Vice President's motorcade looked like
7 approximately on January 6 of 2021 at around 1:58 p.m.?

8 A. I did not witness it get staged there, but that is a common
9 staging location for the motorcade.

10 Q. Got it.

11 So if we could play this forward.

12 (Video playing.)

13 Q. Do you see all those cars moving?

14 A. Yes.

15 Q. Which cars are those?

16 A. Those are -- that's the motorcade package for the Vice
17 President.

18 Q. And are they at this time leaving the east plaza, where
19 they were supposed to be staged?

20 A. Correct.

21 Q. Okay. You can stop it there, Ms. Rohde. Thank you.

22 Let's go back to your presence in the Vice President's
23 ceremonial office, Agent Wade. Did there come a time when the
24 Secret Service escorted the Vice President out of his ceremonial
25 office?

1 A. Yes.

2 Q. What role did you have with respect to that?

3 A. After communicating with my liaison and additional Capitol
4 Police, the information received led us to believe that there
5 was imminent threat, as people were breaching the building at
6 that time. So the decision was made that the Vice President
7 should be relocated.

8 Q. And did you escort him while he was being relocated?

9 A. Yes.

10 Q. I'm going to pull up on the screen Government Exhibit 221,
11 already admitted into evidence.

12 And before we start playing it, Ms. Rohde, can you help us
13 understand, Agent Wade, what we're looking at here? Where was
14 this view?

15 A. You're looking at a lobby area just outside the rear of the
16 Senate chamber. So that wooden and glass door enters the back
17 lobby area of the Senate floor, which goes into the Senate
18 chamber.

19 Q. And how close is the Vice President's ceremonial office
20 once one enters through these wooden doors with the glass
21 inserts?

22 A. Just inside to the right.

23 Q. Do you see a blonde woman down on the first landing here?

24 A. Yes.

25 Q. And who is that?

1 A. That's Lanelle Hawa.

2 Q. And she's the one who works for you who sent that e-mail
3 that we talked about earlier?

4 A. Correct.

5 Q. And the man with his arms outstretched, do you know what
6 agency he works for?

7 A. Actually, if you could rewind that so I could be clearer.

8 Q. Sure. We can play it forward for a second. If you could
9 pause it there.

10 Do you know what agency he works for?

11 A. Yeah, the Secret Service.

12 Q. And do you know what's about to happen here?

13 A. Yes. This was just prior to us moving the Vice President.

14 Q. And if we could play it forward.

15 (Video played.)

16 Q. And then stop. This is at 2:25:54 p.m.

17 Who is the man who is just about to walk down the stairs?

18 A. Which gentleman?

19 Q. Sure. Why don't we rewind for a second.

20 The back gentleman.

21 A. That would be me.

22 Q. So that's you right there where we see the back of your
23 head?

24 A. Yes, the third person just about to get to the staircase.

25 Q. And if we could play it forward, stopping at 2:26 even.

1 (Video played.)

2 Q. Who is the woman with the darker blonde hair on the right
3 side?

4 A. In the front, the first female is Karen Pence.

5 Q. And who is the woman behind her with the lighter blonde
6 hair?

7 A. Charlotte Pence.

8 Q. And if we could play it forward for an extra two seconds.

9 (Video played.)

10 Q. And stop it there. Who is the person with the white hair
11 at 2:26:01 who is facing backwards briefly?

12 A. That's Vice President Mike Pence.

13 Q. And if we could play it forward, Ms. Rohde.

14 (Video played.)

15 Q. Thank you, Ms. Rohde. You can take it down.

16 Agent Wade, did you stay with the Vice President and his
17 family after he exited the area of the Senate chamber?

18 A. Yes.

19 Q. And did you return with the Vice President and his family
20 to the Senate chamber area in the evening of January 6 of 2021?

21 A. Yes.

22 Q. At approximately what time?

23 A. Approximately 7:00 p.m.

24 Q. Now, how would you compare the number of Secret Service
25 personnel at the time you left the chamber when we just looked

1 at it at about 2:25 to the time you returned to the chamber at
2 about 7:00 p.m.?

3 A. We added additional agents for his return.

4 Q. And why did the Secret Service add additional agents for
5 the Vice President's return?

6 A. Even though the Capitol Police gave us the all clear and
7 they had several tactical teams sweeping the building, just to
8 ensure his safety.

9 Q. Earlier in your testimony, you used a phrase "emergency
10 action."

11 Do you remember doing that?

12 A. Yes.

13 Q. Is that a Secret Service phrase?

14 A. Yes.

15 Q. What does an emergency action mean to a layperson?

16 A. An emergency action plan is something you'd execute if a
17 threatening action or a threatening event happened to a
18 protectee where you had to either move, relocate, or extract a
19 protectee from a situation.

20 Q. Did the Secret Service take any emergency actions on
21 January 6 with regard to the safety and security of Vice
22 President Pence and his family?

23 A. Yes.

24 Q. Can you name some of those emergency actions for us?

25 A. Well, it was a relocation for his safety.

1 Q. So when you relocated the Vice President and his family,
2 that was an emergency action?

3 A. Yes.

4 Q. And what about bringing additional Secret Service personnel
5 to the Capitol?

6 A. That could be considered as well, yes.

7 Q. And what about relocating the Vice President's motorcade?

8 A. Yes.

9 MR. NESTLER: Thank you. No further questions.

10 THE COURT: Mr. Welch?

11 MR. WELCH: Thank you.

12 CROSS-EXAMINATION

13 BY MR. WELCH:

14 Q. Good morning, Agent Wade.

15 A. Good morning, sir.

16 Q. My name is Bill Welch. I'm also going to ask you some
17 questions.

18 To the best of your recollection, was the time stamp on the
19 last video that we watched with you and Vice President Pence
20 walking down those stairs at 2:28 p.m., was that approximately
21 correct, to the best of your recollection?

22 A. Yes.

23 Q. When you initially went and -- when you initially arrived
24 at the Capitol on January 6, you did not see my client
25 Mr. Reffitt, did you?

1 A. No.

2 Q. Now, when you went to Mrs. Pence and Charlotte Pence and
3 met with them because you were assigned to protect them, you did
4 not see my client Mr. Reffitt, did you?

5 A. No.

6 Q. And when you went with them to the Senate gallery and you
7 were in the hall, you did not see my client Mr. Reffitt, did
8 you?

9 A. At no point on January 6 did I see your client.

10 Q. At no point?

11 MR. WELCH: Court's indulgence.

12 I'll pass the witness.

13 THE COURT: Anything further?

14 MR. NESTLER: Just briefly, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. NESTLER:

17 Q. Agent Wade, did you take those emergency actions,
18 relocating the Vice President and his family and the motorcade,
19 because of a specific person's actions?

20 A. No.

21 Q. Why did you take all those actions?

22 A. Because we were advised there were hundreds of people
23 breaching the U.S. Capitol building.

24 MR. NESTLER: No further questions.

25 THE COURT: All right. May this witness be excused?

1 MR. WELCH: Yes, Your Honor.

2 THE COURT: All right. Thank you, sir.

3 THE WITNESS: Thank you.

4 THE COURT: So ladies and gentlemen, we can take a
5 break now or start with the government's next witness. Does
6 anyone need a break?

7 Anyone on the trial teams need a break?

8 MS. BERKOWER: We're ready to start, Your Honor. And
9 there are three exhibits that are to be admitted: 405, 111, and
10 163.

11 THE COURT: Why don't you confer with Mr. Welch and
12 see if we can pre-admit those.

13 (Pause.)

14 MS. BERKOWER: Your Honor, I've spoken to Mr. Welch.
15 I believe he does not object to pre-admitting 405, 111, and 163.

16 THE COURT: Is there any objection, Mr. Welch?

17 MR. WELCH: No, Your Honor.

18 THE COURT: All right. Those exhibits are admitted.

19 (Government Exhibits 405, 111, and 163 received into
20 evidence.)

21 MS. BERKOWER: Your Honor, the government calls Rocky
22 Hardie.

23 ROCKY HARDIE, WITNESS FOR THE GOVERNMENT, SWORN

24 THE WITNESS: May I remove my mask?

25 MS. BERKOWER: You may.

DIRECT EXAMINATION

BY MS. BERKOWER:

Q. Good morning.

A. Good morning.

Q. Can you please say and spell your name.

A. My whole name?

Q. Yes.

A. Rocky Hardie, R-o-c-k-y H-a-r-d-i-e.

Q. What state are you from?

A. Texas.

Q. What part of Texas?

A. In the Austin area.

Q. And do you work?

A. Yes, I do.

Q. What kind of work do you do?

A. I build -- I manufacture in-ear earphones for listening to music.

Q. Did you previously belong to a group called the Texas Three Percenters?

A. Yes.

Q. Do you know someone named Guy Reffitt?

A. Yes.

Q. Did you meet him through that group?

A. Yes.

Q. And in January of last year, did you travel to D.C. with

1 him?

2 A. Yes.

3 Q. Were you present on the U.S. Capitol grounds on January 6?

4 A. Yes.

5 Q. Did you also travel back to Texas with Mr. Reffitt?

6 MR. WELCH: Objection.

7 THE COURT: Overruled.

8 BY MS. BERKOWER:

9 Q. You may answer.

10 A. Yes.

11 Q. So I'm going to ask you questions about each of those
12 topics. Okay?

13 A. Okay.

14 Q. But I'm going to ask you about a few other things first.

15 Starting with the Texas Three Percenters, you said you were
16 a member of that group?

17 A. Yes.

18 Q. Do you also call yourselves by an acronym?

19 A. You mean the Three Percenters by an acronym or --

20 Q. The Texas Three Percenters, do you go by an acronym?

21 A. An acronym?

22 Q. Is TTP something that you all call the group?

23 MR. WELCH: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: Yes, TTP is what we're known as also.

1 BY MS. BERKOWER:

2 Q. Approximately when did you join TTP?

3 A. I'm not exactly sure. It was either the end of 2019 or the
4 first part of 2020.

5 Q. Why did you join TTP?

6 A. A matter of concern for my safety. I was -- during the
7 summer, they had a lot of riots, and the news media that I would
8 watch on YouTube, for instance, showed a lot of antifa burning
9 things down, destroying things, breaking windows, throwing fire
10 bombs at police officers and everything.

11 There is this one video where a guy, they're a part of BLM
12 or somebody, and he says, "Oh, you think this is just down here?
13 We're coming to your community." And I got to thinking, well,
14 in my community, I don't know -- I don't know anybody that
15 could, you know, could watch my back.

16 And so I started looking around for some group of people
17 that was like-minded, that if I got in trouble I could pick up
18 the phone and say hey, I need some help.

19 Q. And when you were in TTP, did you have a role assigned to
20 you in the group?

21 A. I did.

22 Q. What was the role?

23 A. I was the comms officer, state-level comms officer.

24 Q. What does "comms" mean?

25 A. Comms is short for communications.

1 Q. And what are the beliefs of TTP?

2 A. The beliefs of TTP? Well, I will tell you, when I joined,
3 I asked if they were racists, and they said no. I said are
4 you -- are you like a white supremacist group, and they said no.
5 I said do you hate the government, and they said no.

6 Q. Mr. Hardie, could you please explain what the beliefs of
7 the group are?

8 A. What they are? Okay. The beliefs of the group -- well,
9 part of it is that they support law enforcement, and they
10 believe in supporting the Constitution, and they believe in
11 supporting the government as long as it follows the
12 Constitution.

13 Q. And what does the Three Percenters' part of the group name
14 mean?

15 A. The term 3 percent comes from the concept that during the
16 Revolutionary War of 1776, out of the whole population, only
17 3 percent actually took action, and that the other 97 percent
18 were happy to be under the King's rule.

19 Q. And did TTP ever have in-person meetings?

20 A. Yes.

21 Q. Who was the leader of TTP?

22 A. The state leader was Russ Teer.

23 Q. Did he have nicknames in the group?

24 A. He did.

25 Q. What are the nicknames?

1 A. His was "Dead Shot."

2 Q. Did he also have a handle on online communications?

3 A. Bowen, William Bowen.

4 Q. Now, was Guy Reffitt in this group?

5 A. Yes.

6 Q. Did he have a job assigned to him?

7 A. Yes. Well, I would say loosely assigned, but assigned,
8 yes.

9 Q. What was his job?

10 A. He was like a vetting officer. So if anybody wanted to
11 join, he would do research on them to see what their background
12 was before they're admitted.

13 Q. Did you meet him in person through the group?

14 A. Yes.

15 Q. And was one of the group meetings at his house?

16 A. Yes.

17 Q. Are you still a member of TTP?

18 A. No.

19 Q. Around when did you leave the group?

20 A. It would -- I think late -- gosh. It was -- I had a visit
21 by the FBI. I don't remember the exact date, but it was shortly
22 thereafter I was thinking, well, okay, this is not really what I
23 want to --

24 Q. Was that before or after January 6 of 2021?

25 A. It was after January 6th.

1 Q. Now let's talk about your relationship with Mr. Reffitt.

2 Okay? Did you ever hang out with him?

3 A. A little bit.

4 Q. Let's talk about the first time you hung out with him.

5 Okay?

6 A. Okay.

7 Q. Where did you meet when you went to hang out with him?

8 A. We met at a park.

9 Q. And was this before or after the 2020 election?

10 A. Before.

11 Q. Why were you interested in meeting him in person?

12 A. Because I had talked to him on the phone. I thought he was
13 an interesting person, and I thought we had similar beliefs.

14 Q. Was there anything else that drew you to him in particular?

15 A. Yeah. In life, most people talk, but they don't do. And
16 he seems to be a person that actually does things. He gets
17 things done.

18 Q. And why was that significant to you?

19 A. Well, because I'm kind of the same way, you know? If I say
20 I'm going to do something, I'm going to do it.

21 Q. And when you met, did you bring your cell phones with you?

22 A. We did bring them, yes.

23 Q. Did you have them with you while you were sitting in the
24 park together?

25 A. Not on my person, no.

1 Q. Do you know if he had his on his person?

2 A. I believe he did not.

3 Q. And why didn't you have your phones with you?

4 A. Because we have a general belief that we can be listened
5 to, and we didn't want to be listened to.

6 Q. So where was your phone?

7 A. In my car.

8 Q. Did you talk about politics when you were in the park with
9 him?

10 A. Yes. We talked about a variety of things, but yes,
11 politics.

12 Q. Generally speaking, did you have similar views?

13 A. Yes.

14 Q. And what did you talk about with respect to politics that
15 day?

16 A. We talked about how the country is pretty much going down
17 the tubes, and we talked about what's going on in Washington and
18 the people that seemed to be corrupt and destroying our country.

19 Q. Were there any people in particular that you felt were
20 destroying the country?

21 A. Well, yes, there were. We talked about a few.

22 Q. Who?

23 A. Well, one would be Nancy Pelosi. We pretty much felt like
24 she's evil incarnate.

25 Q. And anyone else?

1 A. Let me think. Well, we talked about President Trump, you
2 know, and we talked about what he stood for in the country and
3 everything and trying to make things right.

4 Q. Now, you mentioned you were drawn to Mr. Reffitt because
5 you felt he was someone who did things?

6 A. Yes.

7 Q. Did you talk about doing things with him?

8 A. We -- let's see. I don't remember specifically at that
9 time if we talked about doing things. There were -- there was a
10 thing in Temple at one point, but I don't remember exactly what
11 we talked about.

12 Q. Did you speak about your philosophy on when it might be
13 appropriate to take action?

14 A. I don't have a specific memory, but I would say that we --
15 we do ask ourselves, or we did ask ourselves, you know, how far
16 do you let things go before you have to take action and protect
17 your country.

18 Q. And when you say "take action to protect your country,"
19 what kind of action were you talking about?

20 A. I don't think that we had a specific -- we didn't have a
21 specific action, but -- let me think just a moment.

22 There was no singular event, for instance, that we were
23 discussing.

24 Q. Well, let me be clear. When you were referring to action,
25 were you talking about political action?

1 A. It was nebulous. Political action is one.

2 Q. Did you also talk about when it might be appropriate to use
3 violent action?

4 A. I know at various times that topic came up. I don't recall
5 at that particular meeting if we talked about any kind of
6 violent action, but we knew that something has to be done at
7 some point.

8 Q. Did the term "1776" come up at that meeting?

9 A. At that particular meeting? I don't recall if that term
10 came up, but I'm familiar with the term and what it means.

11 Q. Did you previously tell the FBI that at that meeting you
12 talked about it being 1776?

13 A. Oh, you mean like the scenario that we're in is like 1776?

14 Q. Yes.

15 A. Yes.

16 Q. Can you explain what that part of the conversation was
17 about?

18 A. Okay. Well, during 1776 is the time of the Revolutionary
19 War when the colonists were rebelling against the King of
20 England. And the idea was that the king was a tyrant and the
21 people had no redress of grievances.

22 And so basically, the -- this time frame that we're in now
23 is analogous to 1776, where a lot of people in society feel like
24 their government's not listening to them, and so they have no
25 choice but to rebel in some form.

1 Q. So let's go on to a different topic. After the 2020
2 election, did you have concerns about the integrity of the
3 election?

4 A. Yes, I did.

5 Q. Did you believe the results needed to be recounted?

6 A. Yes.

7 Q. Do you still -- or excuse me.

8 Did you believe the election was stolen?

9 A. Yes, I did.

10 Q. Do you hold those beliefs today?

11 A. Today? Yes, I do.

12 Q. After the election but before January 6, did you
13 communicate with others in TTP about these views?

14 A. Yes.

15 Q. And did other people in TTP share those views?

16 A. Yes.

17 Q. Did you discuss this issue with Mr. Reffitt?

18 A. Yes.

19 Q. What was his view of whether the election was stolen?

20 A. He agreed. He felt like the election was stolen.

21 Q. Let's talk now about your trip to D.C. When did you start
22 considering traveling to D.C. for January 6?

23 A. It was probably a week or ten days, something like that,
24 beforehand.

25 Q. And during that time period, were you on a messaging chain

1 with TTP members?

2 A. Yes.

3 Q. Why were you considering going to D.C. initially?

4 A. I guess a couple of reasons. One, I felt like what's
5 happening in our country right now has historical context. I
6 felt like the -- my perception that the election was stolen is
7 very, very significant. It's kind of a catastrophic event for
8 our country, and I felt like I needed to be there. The
9 president said hey, you know, I'd like 10 million people to show
10 up, and I said, well, I think maybe I need to be counted.

11 And then we had some communications on -- on the Telegram,
12 and then I saw something and said, well, okay, I think I need to
13 go.

14 Q. So let's pull up some of that Telegram now. Ms. Rohde, if
15 we could have Government Exhibit 1B4.1, going to PowerPoint
16 slide 2 and 3, and we will start with 2.

17 Mr. Hardie, do recognize you this to be a message that you
18 received over Telegram?

19 A. Yes.

20 Q. Who sent this message?

21 A. That would be Mr. Reffitt, who is also known as Call to
22 Arms.

23 Q. Was that his handle on Telegram?

24 A. Yes.

25 Q. Could you read this message out loud, please.

1 A. Okay. "We march on D.C. January the 6th with every beating
2 American heart. We drain the swamp. The House and Senate must
3 be held accountable for the tyrannical against the republic of
4 the people. I will be leaving on January 4th to make the trip
5 and stand in solidarity or fight if needed. Those of you
6 patriots that are true blooded warriors can join or you can join
7 or be tread on. It's a commitment and that's no doubt, yet the
8 travel, commitment, and time will either be sacrificed now for
9 the greater good of the future. Or we will lose the moment
10 forever. Not making the sacrifice for this short time in your
11 life could be detrimental for the rest of your life. Stand and
12 be counted."

13 Q. What date was that sent?

14 A. December 21st, 2020.

15 Q. Was this one of the messages you considered when making a
16 decision to travel?

17 A. Yes, I did, you know.

18 Q. Could you explain how this impacted your decision?

19 A. Well, I was already thinking about it, and then I read
20 this, and I said, well, I need to go.

21 Q. And what about this in particular made you want to go?

22 A. Stand and be counted, because it was pretty much what I was
23 thinking on my own.

24 Q. Now, have you participated in various Telegram messaging
25 threads with members of TTP?

1 A. Yes.

2 Q. Did some of those include the defendant Mr. Reffitt?

3 A. Yes.

4 Q. Generally speaking, what is the tone of the exchanges in
5 those messaging threads?

6 A. The tone? Could you clarify "the tone" a little bit?

7 Q. Well, generally speaking, do people speak in stark terms in
8 the messaging threads?

9 A. In stark terms? I think so. I think there's kind of an
10 apocalyptic tone that permeates the thought process.

11 Q. And before January 6, how seriously did you take messages
12 that had apocalyptic tone?

13 A. I didn't take them that serious. I understand that people
14 were concerned. I was concerned. But nobody -- you know, I
15 didn't think people would go down and do anything like other
16 than go to some local or regional protest and things like that.

17 Q. Now, did you take the trip to D.C. with Mr. Reffitt?

18 A. Yes.

19 Q. How did you decide to travel with him?

20 A. You mean what led to my decision?

21 Q. How did it come about that the two of you traveled
22 together?

23 A. Okay. Well, I was already planning to go by myself, and
24 then I got word from Mister -- from the leader of TTP, Russ
25 Teer, and he said, Oh, well, Call to Arms wants to go, and his

1 travel companion dropped out. He said, You might want to
2 contact him.

3 I did. I called him, and he said yeah, and I said, okay,
4 great, we can save some money, let's go.

5 Q. And after that, did you connect with Mr. Reffitt about the
6 plans?

7 A. Yes.

8 Q. So what did he tell you about the plan?

9 A. What did he tell me? Well, we discussed the travel. I
10 said, Well, how are we going to get there, what's our path? And
11 he said, We're going to travel up -- I forget what the
12 interstate is, and we will spend the night in Nashville, and
13 then we'll go from there to D.C. on the night before the event.

14 Q. Did you discuss flying?

15 A. I don't recall discussing flying. I think we decided
16 immediately on that we were going to drive.

17 Q. And who made the bookings for any hotels you were going to
18 stay at?

19 A. Mr. Reffitt.

20 Q. Now, during that conversation, did he explain the reason
21 why he wanted to go to D.C.?

22 A. Well, he wanted to go to D.C. to -- do you have maybe a
23 specific question on that?

24 Q. Well, did you talk about your separate reasons for wanting
25 to go?

1 A. Yeah, we talked.

2 Q. And you said you wanted to go to be counted --

3 A. Right.

4 Q. -- and to stand and be counted? Is that what you testified
5 to a few minutes ago?

6 A. Right.

7 Q. What was his part of that conversation? Why was he saying
8 he wanted to go?

9 A. Well, we discussed and we talked about the need for the
10 people who are the corrupt people to be removed and replaced
11 with people who are not corrupt.

12 Q. That was something that he raised or that you raised?

13 A. He raised.

14 Q. And what was he saying about needing to -- about these
15 corrupt people? What did he express about them?

16 A. That they need to be dragged out. And he said no matter
17 whether they're Republican or Democrat, they're all corrupt,
18 they need to be dragged out and replaced with people that are
19 patriotic to the country.

20 Q. What went through your mind as he said things like that?

21 A. Well, I had pictures in my mind. I'm a visual person.
22 So -- well, I didn't think it was something that anybody was
23 going to act on. I had no concept before I went to D.C. that
24 there would be anything other than people standing around
25 listening to the president and then going and standing around

1 the Capitol building.

2 Q. So did he share any specific plans with you to actually go
3 and remove people from the building?

4 A. We had discussions that at the time it seemed like we were
5 joking around, and I considered it hyperbole. And we talked
6 about Nancy Pelosi in particular.

7 Q. Now, with regard to your plans in D.C., did you expect that
8 you would go to the Capitol area, the building, Capitol building
9 area?

10 A. I didn't have a clear idea how it would unfold, because I
11 had never really been there. I knew that the general plan was
12 that we would listen to the president speak, and then at some
13 point, the whole group of people can move toward the Capitol.

14 Other than that general idea, I didn't have anything
15 specific.

16 Q. Well, what did you think was going to happen at the Capitol
17 itself?

18 A. Well, you know, part of me counted -- I watched people do
19 protests on TV with signs and everything. So I thought that
20 with that many people, there was probably over a million people
21 there, that's pretty significant, and I thought for sure that
22 people in the Capitol building would look out the window and say
23 wow, look at all those people, maybe we need to think about
24 this, you know.

25 Q. Now, let me ask you a few follow-up questions on that.

1 A. Okay.

2 Q. Did you know what was happening inside the Capitol building
3 that day?

4 A. Well, in general terms. I knew what I read from the media
5 or heard, and that was that they were going to certify the vote.

6 Q. So you knew they were meeting inside?

7 A. Yes, uh-huh.

8 Q. And when you said you were hoping they'd look outside, what
9 exactly were you hoping they would look outside and do?

10 A. Well, I know that they were supposed to be certifying the
11 vote. In my mind, I was like they would -- somebody would say
12 hey, you know -- there was a political struggle going on in that
13 building and in our society. Some people want to stop the vote
14 or want to recertify or cancel it or whatever, and others don't.

15 And so I thought somewhere, somebody would look at it and
16 say okay, we're going to do something. The end result would be
17 that they didn't certify the vote that day.

18 Q. They did not certify?

19 A. In my mind, that was the objection -- the objective, was
20 that by our presence there, that they would not certify the vote
21 that day.

22 Q. Now, as you were planning the trip with Mr. Reffitt, did
23 you discuss bringing firearms to D.C.?

24 A. Yes, we did.

25 Q. Could you explain what discussion you had with him?

1 A. The only thing that I -- well, there's a couple of things.
2 We discussed it. I don't remember how it came about, but I
3 remember that we had a discussion.

4 And I have a concealed carry license in Texas, and I asked
5 what about reciprocity laws -- we're traveling through these
6 states, are we going to have any issues. And we discussed,
7 well, it seems like every state that we're going to go through
8 is going to have reciprocity except for D.C.

9 Q. And who had the information about what the laws were in the
10 different places you would be going?

11 A. Well, I understood the basics of reciprocity. I didn't
12 know anything about D.C. law. And Mr. Reffitt knew a little bit
13 more than I did, and he said well, we can do these things, but
14 we can't do those things.

15 Q. And when he said -- did he know about the laws in D.C.
16 specifically?

17 A. I don't know how much he knew.

18 Q. Did he give you information about the laws in D.C.?

19 MR. WELCH: Objection.

20 THE COURT: Overruled.

21 THE WITNESS: I don't remember anything specific, but
22 I do remember that we discussed is it legal in D.C. to have a
23 handgun.

24 BY MS. BERKOWER:

25 Q. And what was your discussion about that?

1 A. Well, it's not legal. And I said, Well, how about getting
2 a permit? And he said, Well, you're not going to get a permit
3 in D.C.

4 Q. So going into that conversation, did you know it was not
5 legal to have a handgun in D.C. without a permit?

6 A. Yes, we did.

7 Q. Did you personally know that before you spoke with
8 Mr. Reffitt?

9 A. Yes, I did.

10 Q. How did you know that? I thought you just said you didn't
11 know much about the laws.

12 A. Well, I know that I've read that it's almost impossible to
13 get a -- there may be laws that say yes, you can have a permit,
14 but in practical terms, you're probably not going to get one.

15 Q. So who provided you with that information?

16 A. I was reading the -- in that part, I was reading the media.
17 I think we both discussed and agreed that we weren't going to
18 get a permit.

19 Q. So what conclusions did you reach, at the end of that
20 discussion about firearms, as to whether you would bring
21 firearms to D.C.?

22 A. Well, first of all, what's the purpose? The purpose was
23 for self-defense, you know. And that's based on the things that
24 I had seen on the media before, with all the burning and the
25 looting and the fire bombing and stuff like that. I had no idea

1 what to expect.

2 At one point, we discussed, you know, what are the
3 consequences, and are we willing to risk the consequences. And
4 we decided that -- I think we used an expression it's better to
5 be tried by a jury of 12 than carried by six.

6 Q. What does that mean to you?

7 A. That means basically if you violate a handgun law and
8 you -- you'll probably go to jail, and at some point you will
9 get out, but if you die, you're not coming back.

10 Q. And what conclusion did you reach about whether or not you
11 would bring guns to D.C. during that discussion?

12 A. Well, we agreed on that one concept, and we said okay,
13 we're willing to take that risk. We felt like that nobody would
14 ever know, nobody would ever get hurt. We would be in, we would
15 be out, nobody would know, and we would go on with our life.

16 Q. Now, before we go any further, I'm going to ask you a few
17 questions about an agreement you entered into with the
18 government. Okay?

19 A. Okay.

20 Q. Ms. Rohde, if we could please have Government Exhibit 405,
21 which is in evidence, and may we publish it, please.

22 Mr. Hardie, do you recognize this exhibit?

23 A. Yes, I do.

24 Q. Is this an agreement you entered into with the government?

25 A. Yes.

1 Q. Did you sign this document?

2 A. I did.

3 Q. Did your attorneys sign this document?

4 A. Yes.

5 Q. And did Mr. Nestler sign this document on behalf of the
6 government?

7 A. Yes.

8 Q. So let's talk about the terms. And Ms. Rohde, if we could
9 please go back to the first page. Thank you for scrolling down.

10 Do you see the date on this document?

11 A. It says May 19, 2021.

12 Q. Did you first enter into this agreement in connection with
13 testimony you gave to the grand jury that was investigating this
14 matter?

15 A. I'm sorry. Could you repeat that, please?

16 Q. Did you first enter into this agreement in connection with
17 testimony you gave to the grand jury?

18 A. Yes.

19 Q. And do you understand the agreement to also cover your
20 testimony here today?

21 A. Yes.

22 Q. Does this agreement require you to testify about both what
23 Mr. Reffitt did and what you did, even if that testimony
24 incriminates you?

25 A. Yes.

1 Q. And in exchange, has the government agreed not to use your
2 testimony to bring a criminal case against you?

3 A. That's correct.

4 Q. To be clear, though, does this mean the government cannot
5 charge you with a crime for what you did on January 6?

6 A. I believe -- oh, okay. Could you state that again, please?

7 Q. Does this agreement prevent the government from charging
8 you with a crime for what you did on January 6?

9 A. No.

10 Q. So you can still be prosecuted for what you did?

11 A. It's possible.

12 Q. Is it the case that the government could bring a case
13 against you so long as it doesn't use the statements you gave in
14 connection with that agreement?

15 A. Yes.

16 Q. And does the FBI know information about you concerning
17 January 6 from sources other than your testimony?

18 A. Yes.

19 Q. Before this agreement existed, did you voluntarily talk to
20 FBI agents about what you did?

21 A. Yes.

22 Q. Did the FBI search your business?

23 A. Yes.

24 Q. Did the FBI search your house?

25 A. Yes.

1 Q. Did the FBI seize your firearms?

2 A. Yes.

3 Q. And did the FBI seize and search your electronic devices
4 such as your phone?

5 A. Yes.

6 Q. Court's brief indulgence.

7 So Ms. Rohde, you can take that down.

8 Mr. Hardie, let's talk now about your trip itself. Okay?

9 A. Okay.

10 Q. Where did you leave from to go to D.C. for January 6?

11 A. I left from my home near Austin.

12 Q. How did you meet up with Mr. Reffitt?

13 A. I drove to his home in Wylie.

14 Q. When you got to his house, who else was there?

15 A. To my knowledge, only Mr. Reffitt and myself.

16 Q. And what did you -- what did you do when you got to his
17 house?

18 A. We -- I pretty much transferred things from my car into his
19 car.

20 Q. And what did you pack?

21 A. Well, I packed clothing, and then I had an AR-15,
22 ammunition, and then I had a concealed handgun and extra
23 ammunition.

24 Q. Where did you put your AR-15?

25 A. The AR-15 was in a plastic case with a lock on it. It was

1 broken down into two pieces, and it was put in the back cargo
2 area.

3 Q. And I think, Ms. Rohde, if we could, please, show
4 Government's Exhibit 106 in evidence. And Mr. Hopkins, please
5 publish it to the jury. Thank you.

6 Do you recognize this vehicle?

7 A. Yes.

8 Q. What vehicle is it?

9 A. It's a Chevy Equinox. It's the vehicle we rode to D.C. in.

10 Q. And where in this vehicle did you put your AR-15?

11 A. Back in this back cargo area, you know. They're long. So
12 we just kind of put them in on kind of the left side in the
13 back.

14 Q. And you said you brought ammunition for that firearm?

15 A. Yes.

16 Q. Where did you put the ammunition?

17 A. The ammunition was under lock and key, and it was put on
18 the right side of the vehicle.

19 Q. Did you also bring radios?

20 A. Yes.

21 Q. Why did you bring radios?

22 A. So that we could remain in communication as we got
23 separated.

24 Q. And how many radios did you bring?

25 A. I brought two.

1 Q. Now let's talk about some of the items that Mr. Reffitt
2 brought. What did you see him pack into the car?

3 A. Well, I saw that he had an AR, and he had his various gear,
4 various, you know, gear. He had -- well, when he actually
5 packed the car, I didn't pay that close of attention, you know.

6 Q. Well, you mentioned an AR. Did you see him put his AR into
7 the vehicle?

8 A. I saw him put his AR in the case in the vehicle, yes.

9 Q. Did you see at that time what was inside the case?

10 A. I don't recall what was in the case. I don't think that he
11 actually opened the case.

12 Q. At a later time, did he open the case, when you were in
13 D.C.?

14 A. Hang on a second. Let me think about that statement. I
15 remember we had to make sure that they were broken down. And so
16 we might have opened the cases and broken them down. There's a
17 pivot pin. You have to pull some pins and take the uppers and
18 lowers apart and set them aside. We might have done that at
19 that location, but I don't recall specifically.

20 Q. Did you know how to break yours down?

21 A. I did, but it had been like 25 years. I kind of forgot.

22 Q. So how did you break yours down that day?

23 A. Well, I had some assistance. I asked, How do you do this?
24 I forgot. It's kind of embarrassing. So basically, you've
25 got -- an AR has a pivot pin here and another pin here, and you

1 pop the pin, and it can cause the rifle to break apart. Then
2 you pull the other pin out, and you can separate the two halves.

3 Q. And you said you asked someone a question about how to
4 break it down. Who did you ask?

5 A. I asked Mr. Reffitt.

6 Q. And did he assist you?

7 A. Yes.

8 Q. Now, did Mr. Reffitt have any other weapons with him when
9 you were packing the car?

10 A. Yes.

11 Q. What other weapons?

12 A. He had a handgun.

13 Q. What kind of handgun?

14 A. I'm not sure about the make and model, but I just know --
15 it was probably like a 9mm or something like that, I guess.

16 Q. Well, did you examine it yourself?

17 A. No, no, I didn't.

18 Q. So 9mm is just a guess?

19 A. Yeah, okay. So I wouldn't know if it's 9 millimeters or
20 .45.

21 Q. Now, where did you see this handgun?

22 A. Well, in my course of knowing him --

23 Q. Let's focus on the day you were packing the car.

24 A. Okay.

25 Q. Where did you see the handgun?

1 A. Okay. I don't know that I actually saw the handgun,
2 because it would have been concealed. Mine is concealed. So I
3 don't recall seeing it at that particular moment.

4 Q. Did you later see it in D.C.?

5 A. Yes.

6 Q. And you said you had a handgun. Could you explain where
7 you had your handgun?

8 A. Yes. I had a shoulder holster, and I kept my -- I have a
9 .45 caliber, and I kept it under my left armpit, and I had two
10 magazines under my right armpit.

11 Q. I see you're gesturing under your jacket. Do you have it
12 with you today?

13 A. No, I don't.

14 Q. Now, did you stay long at Mr. Reffitt's house before you
15 started the drive?

16 A. Not terribly long, just long enough to transfer things over
17 and just kind of get everything organized.

18 Q. Who drove?

19 A. He did.

20 Q. And did you talk along the way?

21 A. Yes, we did.

22 Q. About how many hours does it take to drive from that part
23 of Texas to Washington, D.C.?

24 A. It's about 24 hours when you include your overnights.

25 Q. And what did you talk about as you drove?

1 A. We talked about family, and we talked about what's the
2 purpose of the trip and politics and things like that.

3 Q. When you say "what's the purpose of the trip," what
4 specifically were you talking about?

5 A. Talking about, again, you know, the condition of the
6 government and that people need to be -- people need to be taken
7 out of government and, you know, replaced with people who are
8 going to follow the Constitution.

9 Q. Were there specific phrases that Mr. Reffitt used when he
10 was discussing removing people in government?

11 A. Do you have like an example or --

12 MR. WELCH: Objection.

13 MS. BERKOWER: I can rephrase the question.

14 THE COURT: Yes, please be more specific so he can
15 answer the question.

16 BY MS. BERKOWER:

17 Q. Were there specific words Mr. Reffitt used when he talked
18 about removing people from the government?

19 A. Let me think. Specific words. Well, we talked about we
20 gotta get the bastards out of there, and we talked about --
21 well, we kind of made a joke about Nancy Pelosi.

22 Q. What joke did you make?

23 A. Well, someone -- and I'm kind of going from a picture in my
24 mind, but we said something about she needs to be dragged out by
25 her ankles or by her feet or something. And I made a joke,

1 because I could just imagine as she's going down, her head is
2 going boomp, boomp, boomp down the stairs, and I made a joke
3 about that.

4 Q. When you talked about removing legislators, did you take
5 him serious at that point in time, as you're driving to D.C.?

6 A. I didn't think he or anybody was going to get close to the
7 Capitol. I thought that was impossible.

8 Q. Why?

9 A. You watch the news media and you always -- once in a while,
10 there's a news report about someone tries to jump the fence and
11 get close to the Capitol and he gets shot. And I thought
12 nobody's going to get very close to the Capitol. So I just
13 never took it seriously.

14 Q. Did you also talk about TTP in the car?

15 A. Yes.

16 Q. What did you talk about with regard to TTP?

17 A. Let me think. I don't know specifically. We talked --

18 Q. I can ask a more specific question.

19 A. Yeah.

20 Q. Did you talk about whether people in TTP had joined you in
21 D.C.?

22 A. Yeah, we did. Basically, we were the only two that I know
23 that went up there, and we were kind of complaining about our
24 leader, because he was back there, I call, sorting his sock
25 drawer while he's telling everybody they need to go to D.C., and

1 he sits back at home with his family where it's nice and
2 comfortable. And then that, you know, we made the commitment to
3 go stand and be counted.

4 Q. When you say we made the decision to stand and be counted,
5 is that a reason that Mr. Reffitt gave you, or is that your
6 reason, or both?

7 A. Let me think about that. It was definitely my reason to be
8 counted. He also wanted to be counted.

9 Do you have another --

10 Q. I can ask you another question. As you were driving, did
11 you stop anywhere overnight?

12 A. Yes, we did.

13 Q. Where did you stop?

14 A. We stopped in Nashville, Tennessee.

15 Q. And why did you stop there?

16 A. To spend the night, sleep, get rested.

17 Q. Is that about halfway between -- halfway point in the trip?

18 A. Pretty much.

19 Q. When you resumed the drive, in Virginia, did you do
20 something with your firearms before you arrived in D.C.?

21 A. Yes, we did.

22 Q. Could you explain what you did?

23 A. Well, we already had broken down the ARs, because that's
24 what we thought was a legal way to transport them. And we had
25 our handguns. And so in Virginia, I believe that's where we

1 stopped, is right outside of D.C., then we took our handguns and
2 put them under lock and key. We removed the ammunition from the
3 handguns, handguns in one case under lock and key, ammunition in
4 another case under lock and key.

5 Q. And when you did that, did you see Mr. Reffitt's handgun?

6 A. I didn't look at it specifically, because I was focused on
7 my own, but I know he had one, and he put it in a case.

8 Q. And who was driving at the time that you stopped to put
9 these guns in a case?

10 A. He was.

11 Q. So did he pull over the car?

12 A. Yes, he did.

13 Q. Now, let's talk about what you did when you got to D.C.

14 A. Okay.

15 Q. Did you arrive on the night of January 5?

16 A. Yes.

17 Q. Did you go straight to the hotel?

18 A. Yes.

19 Q. And what hotel did you stay at?

20 A. I always have a hard time remembering the name of the
21 hotel. It was -- if you know the name -- I can't remember it,
22 but if you say it, I will remember yes or no if that was
23 correct.

24 Q. Was it the Melrose Hotel?

25 A. Yes.

1 THE COURT: Ms. Berkower, sorry to interrupt, but can
2 you estimate how much more direct you have?

3 MS. BERKOWER: I think we're about halfway done with
4 this witness, Your Honor.

5 THE COURT: All right. Ladies and gentlemen, I think
6 it's probably a good time to take a break. So we will come back
7 in ten minutes, at approximately 11:35. I will remind you all,
8 no talking, reading, or research.

9 (Jury exited courtroom.)

10 THE COURT: All right. You all good? Any issues?

11 MR. WELCH: May I be excused for a few minutes,
12 please?

13 THE COURT: Of course. You all take a break.

14 (Recess taken from 11:23 a.m. to 11:33 a.m.)

15 (Bench conference.)

16 THE COURT: Just quickly while the jury is out, I
17 thought I would ask you, Mr. Welch, you've made a reference
18 several times to a witness having a Fifth Amendment issue. Is
19 there anything we should be addressing now that you expect to
20 spring on cross that would require us to send the jury out?

21 MR. WELCH: No, I don't imagine, because there's an
22 immunity letter on this witness. So there wouldn't be a Fifth
23 Amendment privilege.

24 THE COURT: You said someone might invoke the Fifth.
25 If that's going to happen with this witness -- maybe that's

1 coming with another witness, but I thought this might be the
2 witness.

3 MR. WELCH: I had thought this might be the witness,
4 too, but if there's an immunity letter, he's probably not going
5 to do that. And Jackson has already testified.

6 THE COURT: All right. I just wanted to check so that
7 we wouldn't keep them waiting.

8 Does the government have another witness on call after
9 Kennedy?

10 MS. BERKOWER: We do. We have several, actually, two
11 more.

12 THE COURT: Great. Thank you.

13 (End of bench conference.)

14 (Jury entered courtroom.)

15 MS. BERKOWER: Your Honor, may we bring the witness
16 back in?

17 THE COURT: Yes, of course.

18 (Witness resumed stand.)

19 THE COURT: Sir, let me remind you that you're still under
20 oath.

21 BY MS. BERKOWER:

22 Q. Good morning, again.

23 A. Good morning.

24 Q. Mr. Hardie, we were talking when we took a break about your
25 arrival at the hotel in D.C.

1 Do you remember being asked questions about that?

2 A. Yes.

3 Q. So let's pick back up there.

4 When you got to the hotel, what did you do?

5 A. I was pretty tired. I took a few -- I think maybe I took a
6 bag or something and was in the hotel lobby.

7 Q. And what happened with the car?

8 A. Mr. Reffitt parked the car.

9 Q. Did you remove your firearms from the car at that time?

10 A. No.

11 Q. So where were the firearms being kept?

12 A. They were still under lock and key in the compartment --
13 the cargo area of the vehicle.

14 Q. And you didn't bring them inside, any of the guns that
15 evening, to your hotel room?

16 A. No.

17 Q. After you checked in, what did you do?

18 A. Went upstairs and relaxed a little bit.

19 Q. And Ms. Rohde, if we could, please, put up on the screen --
20 and this is admitted into evidence -- Government's Exhibit
21 1B20.1.1.

22 Mr. Hardie, do you recognize this exhibit?

23 A. Yes, I do.

24 Q. What is it?

25 A. It's a selfie that I took of he and I together in the hotel

1 room.

2 Q. And --

3 A. Go ahead.

4 Q. Could you explain who the person is on the left in this
5 photo?

6 A. On the left is Mr. Reffitt. On the right --

7 Q. Who is on the right?

8 A. Myself.

9 Q. What do you have on your shoulders?

10 A. That's my shoulder holster.

11 Q. We can take that down, Ms. Rohde. Thank you.

12 So let's go on now to what happened on January 6. That
13 morning, did you and Mr. Reffitt prepare for the day's events at
14 the hotel?

15 A. I'm sorry? Say again, please.

16 Q. Did you and Mr. Reffitt prepare for the day at your hotel
17 that morning on the 6th?

18 A. Yes.

19 Q. And in the room -- I should have asked you, when you stayed
20 at the hotel, did you have separate rooms or share a room with
21 Mr. Reffitt?

22 A. We had a room with two separate beds.

23 Q. So a shared room with two beds?

24 A. Yes, uh-huh.

25 Q. In the hotel room, what did you do to prepare for the day?

1 A. I had an armored plate, but I didn't have the carrier vest.
2 And so I needed a way of securing it. So I put newspaper and
3 Gorilla tape and made kind of a thing over my shoulders and
4 around my chest.

5 Q. And who made the Gorilla tape -- who dealt with the Gorilla
6 tape?

7 A. Well, I was assisted by Mr. Reffitt.

8 Q. What else did you do to prepare for the day in your hotel
9 room?

10 A. Let's see. What did we do? Let's see. We organized --
11 what did we organize?

12 Q. Well, I can ask you a more specific question.

13 A. Okay.

14 Q. Did Mr. Reffitt give you anything for the day?

15 A. Yes.

16 Q. What did he give you?

17 A. He gave me some zip ties.

18 Q. And what do you mean by -- what are these zip ties? Why --

19 A. These are like the real big heavy ones you use as
20 handcuffs.

21 Q. And did you ask him about those items?

22 A. Yes. I said, What are these for?

23 Q. What did he say?

24 A. He said, well, in case we need to detain anybody or, you
25 know, something to that effect.

1 Q. Ms. Rohde, if we could please have Government's Exhibit 11
2 in evidence.

3 Mr. Hardie, do you see any items that you recognize in this
4 exhibit?

5 A. Yes.

6 Q. Could you explain what they are?

7 A. On the right is a helmet, and then in the middle is -- are
8 the zip ties. And then I see --

9 Q. Let me stop you there.

10 A. Okay.

11 Q. So the middle, could you describe what you're referring to
12 as zip ties?

13 A. Well, they look like -- well, they're folded through and --
14 well, I don't know how you describe it. It looks like a set of
15 eyeglasses turned sideways.

16 Q. In this section of the photograph that Ms. Rohde just
17 expanded, are those the zip ties you're referring to?

18 A. Yes.

19 Q. Thank you, Ms. Rohde.

20 How many zip ties did the defendant give to you in the
21 hotel room?

22 A. To the best of my recollection, it was two.

23 Q. And what did you do with them?

24 A. Put them on my -- somewhere on my belt or somewhere on my
25 side here.

1 Q. Did he have any zip ties?

2 A. Yes.

3 Q. Where did he have zip ties?

4 A. In a similar location, on his body.

5 Q. Now, did you also -- you said that you had packed radios
6 for this trip.

7 A. Yes.

8 Q. What did you do with the radios on the morning of the 6th?

9 A. I believe the radios were still in the vehicle, and then
10 when we left the hotel room, we went down to the vehicle, and we
11 started preparing for our walk to the Capitol.

12 Q. Okay. So let's talk about that now. When you were down at
13 Mr. Reffitt's vehicle, did you take additional preparations for
14 the day?

15 A. Yes.

16 Q. Could you explain what you did?

17 A. Okay. We opened our cases for our ARs, and we reassembled
18 the ARs, you know, put the pivot pins back in so it's just one
19 long rifle. We put it back in the case and locked the case.

20 We took out --

21 Q. Well, let me stop you there and ask you a few more
22 questions about that.

23 A. Okay.

24 Q. Who assembled -- who reassembled your AR?

25 A. I assembled my AR.

1 Q. And did you see what the defendant was doing with his?

2 A. I didn't specifically. I was so focused on what I was
3 doing. I was kind of in a hurry, nervous, and things like that.

4 Q. And were you aware of whether he was doing anything with
5 his AR while you were doing that with yours?

6 A. Well, he was doing the same thing. He was reassembling his
7 and putting it back in the case.

8 Q. And where was he standing in relation to you?

9 A. He would be on my left side. I'm on the right side.

10 Q. And how much distance was between you?

11 A. I don't know, three or four feet.

12 Q. You're gesturing with your arm. Fair to say an arm's
13 length between you?

14 A. Something like that. Pretty close.

15 Q. So why were you reassembling your ARs?

16 A. Because we were being prepared for like what if we needed
17 them, like what if something bad happened and we needed to get
18 them quickly; we don't have time to put everything together.

19 Q. So what were you anticipating doing with them?

20 A. Well, we were concerned for our safety, and we were
21 concerned for the safety of the people in general. That's based
22 on the things that I saw on -- we saw on YouTube videos like
23 where police were being fire bombed, people were in precincts,
24 boarded up, and antifa is trying to burn them out alive, all
25 kinds of stuff like that.

1 We just said, well, we don't know what's going to happen,
2 but we may need to protect other people as well as ourselves.

3 Q. Did your plan for the ARs relate to using them in the event
4 of violent action on the streets?

5 A. By "violent action," you mean -- okay. The concept that I
6 had, and I believe -- I'm going to speak for my own self. The
7 concept that I had was there could be violence on the street
8 from these violent groups like antifa.

9 Q. And what were you going to do with regard to your ARs if
10 there was violence that day?

11 A. I didn't have a specific plan, but the idea was if these
12 people were hurting other human beings, then we would use the
13 ARs against them.

14 Q. Mr. Hardie, didn't you previously say that your plan was to
15 come back and get your ARs if you needed them?

16 A. Yes.

17 Q. Is that true?

18 A. Yes.

19 Q. And did you discuss that with Mr. Reffitt --

20 A. Yes.

21 Q. -- prior to the 6th?

22 A. Yes.

23 Q. Now let's talk about other preparations that you made while
24 you were down at the car.

25 Did you see Mr. Reffitt put on any items of clothing?

1 A. Yes.

2 Q. What items did he put on?

3 A. A plate carrier vest, I believe it was green, and there was
4 the helmet that you saw in that last picture, and a GoPro camera
5 on the helmet.

6 Q. And what kind of vest was it?

7 A. Well, it kind of looked like an armored vest like you would
8 use in the Army or something.

9 Q. Did you pick it up?

10 A. I didn't, no.

11 Q. Do you know if it had plates in it?

12 A. I didn't see the plates go in the vest, but I believe there
13 were plates in the vest.

14 Q. Was that based on things he was saying?

15 A. Well, it's based on the fact that over the course of time
16 people talked about the plates -- on the messaging, people
17 compared what they were buying: I bought these plates, and I
18 bought those plates, and I got mine, did you get yours, you
19 know.

20 Q. Now, did you -- you mentioned that you had left the radios
21 in the car. So did you do anything with the radios when you got
22 down to the car?

23 A. Yes. I just quickly, you know, checked to make sure the
24 batteries were good and that they were on the proper channel and
25 the proper squelch numbers.

1 Q. And did you take one of the radios for yourself?

2 A. Yes.

3 Q. What did do you with the other radio?

4 A. Gave it to Mr. Reffitt.

5 Q. Did Mr. Reffitt have a coat on?

6 A. A coat?

7 Q. Yeah.

8 A. Yes.

9 Q. What color?

10 A. Blue.

11 Q. And was there anything on top of Mr. Reffitt's helmet?

12 A. Yes.

13 Q. What was on top?

14 A. A GoPro camera.

15 Q. Did he bring any items -- well, let me rephrase that.

16 Did he give you any items to carry throughout the day?

17 A. Yes.

18 Q. What did he give you?

19 A. Two American flags.

20 Q. And did he have anything in his hands as you were walking?

21 A. Yes.

22 Q. What?

23 A. He had a megaphone.

24 Q. Now let's talk about the handguns.

25 You said that before you got to D.C. you had pulled over to

1 the side of the road and put them in a locked case; is that
2 right?

3 A. Yes.

4 Q. What did you do with the handgun you brought on the morning
5 of the 6th?

6 A. I recovered my handgun from its case, and I loaded it with
7 a magazine, put the handgun in my shoulder holster, and I put
8 two additional magazines also in my shoulder holster.

9 Q. What did Mr. Reffitt do with his handgun?

10 A. I didn't see specifically, but he would have it on his hip.

11 Q. And after that, what did you do next?

12 A. We locked the car and began walking toward the Capitol.

13 Q. And to be clear, where were the ARs when you locked the car
14 and walked off?

15 A. Okay. The ARs were in their respective carry cases under
16 lock and key in the cargo area, the rear cargo area of the car.

17 Q. Were they assembled or disassembled?

18 A. They were assembled.

19 Q. So after you assembled them, you left them assembled?

20 A. That's correct.

21 Q. Court's brief indulgence.

22 Now, after this, where did you go?

23 A. We walked on the street, kind of like in the front of the
24 hotel. I don't remember the name of the street, but we were
25 walking in the general direction of the Capitol.

1 Q. Did you go to the National Mall and the Ellipse area?

2 A. Yes.

3 Q. And were you with Mr. Reffitt at that time?

4 A. Yes.

5 Q. What did you find when you got to the Mall?

6 A. A lot of people.

7 Q. And what did you do at the Mall?

8 A. I was there, I was watching -- well, let's see. What did

9 we do at the Mall? I took pictures. Myself, I took pictures.

10 Mr. Reffitt was in the crowd as well.

11 Q. Was Mr. Reffitt speaking with people?

12 A. Yes.

13 Q. Could you hear the content of what he was saying?

14 A. No. I wasn't really paying attention.

15 Q. Now, Ms. Rohde, if we could, please, pull up -- and this is

16 already admitted into evidence, so we can have the jury screen

17 on as well -- Government Exhibit 1B20.2.1.

18 Mr. Hardie, do you see them on the screen in front of you?

19 A. Yes.

20 Q. Prior to coming to court, did you review this exhibit?

21 A. Yes.

22 Q. And can you tell us what you see on the screen in front of
23 you?

24 A. It looks like a wide-angle view of Mr. Reffitt looking
25 upward from about the waist.

1 Q. Do you see a black box in the center of the screen?

2 A. A black box?

3 Q. Well, a square item, rectangular item.

4 A. Yes. It looks like the radio that I provided.

5 Q. Now, Ms. Rohde, if you could just play the video from the
6 start to 12 seconds.

7 (Video played.)

8 Q. You can stop it there at 13 seconds. Thank you.

9 Mr. Hardie, did you see yourself in those few seconds of
10 video?

11 A. Yes, I did.

12 Q. Where were you standing?

13 A. I was standing in close proximity to Mr. Reffitt.

14 Q. And did you hear him say "all right, Rocky," or "okay,
15 Rocky, gotta push forward"?

16 A. I would have, but I turned my body to turn in another
17 direction, but yes.

18 Q. Was he referring to you?

19 A. If he said Rocky, he was referring to me.

20 Q. While you were on the Mall, did you listen to the
21 president's speech?

22 A. I listened to it on and off. I wasn't really -- I couldn't
23 hear very well. My attention was more on the people at the
24 crowd.

25 Q. After the speech, what did you do next?

1 A. After the speech, the whole crowd started just -- like a
2 herd of cattle started moving in one direction, and I just
3 followed along with them.

4 Q. And where was Mr. Reffitt at this point?

5 A. Well, just before that, somebody called and said oh, we
6 need help, somebody needs medical attention, or something to
7 that effect. And I think he might have raised his voice and
8 said, I can help, or something like that.

9 Anyway, he was following through, and people were kind of
10 opening up, and he was going through, and I was trying to follow
11 behind him.

12 Q. As far as you know, does Mr. Reffitt have any medical
13 training?

14 A. I don't know that he does.

15 Q. Okay. And at that point, after he left through the crowd,
16 were you still with him, or were you separated?

17 A. I lost track of him.

18 Q. So did you continue to communicate with him after that
19 point?

20 A. Yeah, at various times, yes, I would make radio contact.

21 Q. Was that through the radios you had provided?

22 A. Yes.

23 Q. And so when -- after that point when he went through the
24 crowd, when did you next see him? Not talk to him but actually
25 see him.

1 A. Oh, back at the hotel that evening.

2 Q. In the interim time, while you were still at the Mall and
3 walking to the Capitol, did you communicate with him on the
4 radio?

5 A. Yes.

6 Q. And what information did you get from him over the radio?

7 A. His location. He was well ahead of me. And he said, "I'm
8 at the Capitol," and I said, "I'll be there soon."

9 Q. And were you still heading in that direction?

10 A. Yes.

11 Q. Now, let's put a pin in what Mr. Reffitt was telling you
12 and talk about what you did at this point. Okay?

13 A. Okay.

14 Q. Did you actually walk all the way down to the Capitol area
15 or the area of the Capitol building?

16 A. Yes, I did.

17 Q. What did you do when you got there?

18 A. I was taking pictures and making videos and commentary and
19 just looking at people.

20 Q. Did you go inside the building?

21 A. No.

22 Q. Did you go up the stairs, up to where the -- to the outside
23 of the building?

24 A. Okay. When I first got there, it was kind of what I call
25 the back of the building. That's the place where people were

1 climbing up scaffolds and things like that.

2 Q. What went through your mind when you saw people climbing up
3 scaffolds and things like that?

4 A. Well, I first noticed it at a distance, and they looked
5 like spiders climbing up walls, and I said wow, these people are
6 really doing it, these guys are, like, climbing the walls of the
7 Capitol.

8 Q. And when you got closer, what did you do?

9 A. I continued taking pictures. I got closer, and I got to
10 the point where there was a police barricade.

11 Q. And what happened when you got to the police barricade?

12 A. There were -- I could hear agitators around me, and then
13 there were people, you know, shouting, and then at one point,
14 police came out, and they just kind of did like this
15 (indicating). And the police went back, and people started
16 shaking the barricades and pushed the barricades over. And then
17 they started fighting with police and things like that.

18 Q. Now, let's be clear about something. Did you yourself have
19 any encounters with police that day?

20 A. When you say "encounters," what do you mean?

21 Q. Did you have any physical fights with police that day?

22 A. No.

23 Q. Did you have any verbal exchanges with police that day?

24 A. I had a one-way. When I was at the barricade, I said to
25 one of the -- there was a Capitol Police in riot gear in front

1 of me, and I said, "You know, we're all people." I said, "Your
2 family is the same as my family. It doesn't matter what color
3 we are or where we come from. Those assholes up there are
4 making laws that affect us." And I said, "I support law
5 enforcement. I've got friends and family in law enforcement."

6 And that was the gist of what I said.

7 Q. Did the police officer respond to you?

8 A. No.

9 Q. Did you engage in any other fights or physical
10 confrontations with people that day?

11 A. No.

12 Q. And how close did you get to the Capitol building?

13 A. On the back wall, I actually got close enough to touch it.

14 Q. Were you still on the ground, or had you climbed up?

15 A. I never climbed. I was always on the ground.

16 Q. And how long did you stay in the area of the Capitol
17 building?

18 A. I'm going to estimate about 30, 40 minutes on the back
19 side.

20 Q. Why did you leave?

21 A. I had a radio communication from Mr. Reffitt saying he was
22 going around to the other side. At some point, I said, "Okay,
23 I'm going to go around there and meet you."

24 Q. Let's talk more about the radio communications you were
25 getting from Mr. Reffitt.

1 A. Okay.

2 Q. What do you remember him telling you over the radio about
3 what he was doing at the Capitol?

4 A. Well, at some point, he said he was trying to go inside the
5 building.

6 Q. And could you see him at that point?

7 A. No.

8 Q. Did he mention whether or not he had gotten sprayed with
9 pepper spray?

10 A. At some point, he did.

11 Q. What did he say about that?

12 A. He said, "I can't continue any farther. This" -- I don't
13 remember specifically, but basically that he had gotten sprayed,
14 and he was in some pretty bad shape, and he was going to go back
15 to the hotel.

16 Q. And did he -- did he tell you whether or not he was
17 continuing to try to advance toward the building?

18 A. During the time we're at the Capitol, I don't recall
19 specifically that he said he did, but I know that we had a
20 conversation back at the hotel.

21 Q. So while he was -- while you were at the Capitol building,
22 did you see Mr. Reffitt at all?

23 A. No.

24 Q. And the communications -- the information that you had
25 about him, where was that coming from?

1 A. From my radios.

2 Q. And about how many radio transmissions did you have with
3 him?

4 A. Over the course of the day?

5 Q. Just while you were at the Capitol building and you were
6 separated from each other.

7 A. It could have been six, seven, something likes that.

8 Q. Were they brief or long?

9 A. Fairly brief. The communication was broken because the
10 Capitol building blocked the signal.

11 Q. So what did you do after that?

12 A. Well, I -- are you asking what did I do after I left the
13 Capitol building?

14 Q. Sorry. I can ask a more specific question.

15 Let's go now to the next time you saw Mr. Reffitt. Okay?

16 A. Okay.

17 Q. You said earlier that was when you were back at the hotel?

18 A. Right, yeah.

19 Q. So what happened when you saw Mr. Reffitt back at the
20 hotel?

21 A. I walked in. I was pretty tired. And he said, "Man, this
22 bear spray or whatever," he said, "Man, this is kicking my ass."
23 He said, "My lips feel like they're on fire."

24 Q. Did he give you details about his day?

25 A. Over the course of time, yeah.

1 Q. So what did he tell you about his day?

2 A. Well, he said that he tried to get in, and he said there
3 was a lady Capitol Police and that she had been shooting him
4 with the rubber -- round rubber balls and shot him in the breast
5 plate. And he said that she was really surprised that they
6 didn't phase him. He said her eyes got big. And then he said,
7 "Hmm, I thought for a moment she was going to shoot me in my
8 nuts, and she considered that and shot me in the legs instead."

9 Q. What did he say about how far he got toward the building?

10 A. Well, I remember him saying he didn't get inside, but he
11 was attempting to go inside, and then he was being shot. And
12 this Capitol police officer was a female, and he said she just
13 looked oh, my God, you know. And he said, "Lady, I don't want
14 to hurt you, but every time you shoot me, I'm going to keep
15 going forward." He said at one point, "Would you just stop
16 doing that? It hurts, you know."

17 Q. And what else did he tell you about going -- his
18 interaction with the police?

19 A. Let me think. I don't know if it was that female officer
20 or if it was somebody else, but they had used a smaller canister
21 of --

22 Q. Let me stop you there. Did he tell you what you're
23 describing now?

24 A. Yes. I didn't see it.

25 Q. So what did he tell you about the other officers?

1 A. Basically, that one person tried to -- sprayed him with
2 some kind of pepper spray. Then they brought out kind of like
3 bear spray, and he said it was all over after that. He said, "I
4 just couldn't go any further."

5 Q. And did he express to you whether or not he wanted to go
6 further but for this pepper spray?

7 A. Yes.

8 Q. What did he say?

9 A. He said, "Well, I couldn't continue on, but I made it
10 possible for other people to continue."

11 Q. What else did he tell you about the other people that
12 continued?

13 A. Nothing specific comes to mind right now. I mean, there's
14 one person, a female, who offered him water and assistance, and
15 he felt like that she was his angel, you know. That's the only
16 thing I can think of.

17 Q. And as he told you this, what, if any, emotion was he
18 expressing?

19 A. Could you give me an example of emotion?

20 MR. WELCH: Objection.

21 THE COURT: Just answer the question. If you can't
22 answer the question, just say that.

23 THE WITNESS: All right. Emotion.

24 Back at the hotel, well, there was pain, obviously, and
25 then there was -- we talked about what we did, and we were kind

1 of bragging a little bit.

2 BY MS. BERKOWER:

3 Q. Was he proud?

4 A. Yeah.

5 Q. And how did he look physically?

6 A. He looked in pretty bad shape. His face was red --

7 Q. Okay. Sorry. Describe what you mean by that.

8 A. I'm sorry?

9 Q. I'm sorry I interrupted you. What did you mean by he
10 looked like he was in pretty bad shape?

11 A. I guess it was bear spray or something, pretty strong
12 stuff. He was red all over his body. And then I took a picture
13 of his legs, where he had been shot with the little rubber
14 balls.

15 Q. And Ms. Rohde, if we could please have Government's
16 Exhibit 163 in evidence.

17 Is this the photo you took?

18 A. Yes.

19 Q. And could you explain what's significant about this photo
20 to you?

21 A. Well, he had told me that he got shot in the legs. Of
22 course, this is where he got shot.

23 Q. What are you referring to when you say "this is where he
24 got shot"?

25 A. On each leg, there are round regular circles or disks. On

1 the right side, you see one; on the left side, you see two.

2 Q. And what did you understand those to be?

3 A. The welts -- the welt marks from being shot by the Capitol
4 Police in the legs with the rubber balls.

5 Q. You can take that down, Ms. Rohde. Thank you.

6 When you got back to the hotel that day, how did you feel
7 about what you had done?

8 A. I was kind of excited and a little fascinated.

9 Q. What were you excited about?

10 A. I think just having -- well, I had this experience that's
11 like a once-in-a-lifetime experience, and I felt like it was
12 kind of historically significant. I actually showed up, and I
13 saw a lot of different things that I don't normally see.

14 Q. Were you proud of what you had done?

15 A. I would say yeah. I wasn't ashamed. I was proud, yeah.

16 Q. And when Mr. Reffitt told you about what he had done, how
17 did you feel about what he had done?

18 A. Well, I was pretty impressed that he did what he did.

19 Q. Why were you impressed?

20 A. Well, I felt like he had more courage than I did. I wasn't
21 going to go up there.

22 Q. Now, that night, did you stay again in that same hotel room
23 you had been in the night before in D.C.?

24 A. Yes, we did.

25 Q. And did you see Mr. Reffitt's handgun that evening?

1 A. I did.

2 Q. Where did you see it?

3 A. It was on the nightstand between the two beds.

4 Q. Was it in a holster or not?

5 A. I'm not sure. I'm trying to see a picture in my mind, and
6 I don't see a clear picture of whether it was in a holster. I
7 just remember seeing from the back. I remember kind of seeing
8 it from the back side.

9 Q. And where did you have your handgun that night?

10 A. I would have had it in my shoulder holster.

11 Q. That night while you were sleeping?

12 A. Okay. So we're talking about when we came back from the
13 Capitol --

14 Q. Yes.

15 A. Well, I wasn't sleeping with it like a teddy bear, but I
16 had it somewhere in my room.

17 Q. Court's brief indulgence.

18 All right. Let's talk now about your trip back to Texas.

19 A. Okay.

20 Q. When did you leave?

21 A. The morning of the 7th.

22 Q. And what did you do to prepare for your trip home?

23 A. We packed our bags and took -- of course, we wore our
24 handguns going down to the parking garage, and we took our bags
25 down and put them in the car.

1 Q. So coming in to D.C., you had disassembled and locked up
2 your handguns; is that right?

3 A. That's correct.

4 Q. Returning to Texas, did you follow that same procedure?

5 A. Yes. We returned our handguns to their case and the
6 ammunition to its case. We opened the cases for the ARs, and we
7 disassembled them and relocked the cases and left them basically
8 in the rear area of the vehicle.

9 Q. And did you do that for your AR?

10 A. Yes.

11 Q. Did you see Mr. Reffitt do that for his AR?

12 A. Yes. I know that he also disassembled his.

13 Q. And what about the handguns? Did you see Mr. Reffitt
14 disassemble his?

15 A. I don't recall specifically seeing him, but -- I don't have
16 a specific visual memory of him doing that.

17 Q. And did you disassemble yours, or did you just bring it on
18 your person for the drive home?

19 A. I disassembled mine and -- I disassembled -- I've got to
20 stop and think for a moment. I'm trying to remember specifics.

21 Q. Take your time.

22 A. Okay. Yeah, we -- so we took our handguns and put them
23 back in the cases and the ammunition as we're preparing to
24 drive.

25 Q. When did you reassemble the handguns?

1 A. I don't recall specifically.

2 Q. While you were driving back, did you make another overnight
3 stop?

4 A. Yes.

5 Q. Where did you stop?

6 A. We stopped in Nashville.

7 Q. Again?

8 A. Yes, uh-huh.

9 Q. Did you have your handguns on your persons while you were
10 in Nashville?

11 A. I want to say we did, and I don't recall -- I don't recall
12 specifically what happened, but I think we did.

13 Q. When you got back to Texas, did you have your handgun on
14 your person?

15 A. Yes.

16 Q. So at some point after leaving D.C., did you return your
17 handgun to your shoulder holster?

18 A. Yes.

19 Q. And what about Mr. Reffitt? When he got back to Texas, did
20 he have his handgun out again?

21 A. I -- well, okay. I don't have a visual recollection of
22 seeing his handgun on him, but I believe that he did, because it
23 was our habit to carry them.

24 Q. So -- hold on a second.

25 THE COURT: Ms. Berkower, can you pick up?

1 (Bench conference.)

2 THE COURT: How much longer are you going to go on the
3 handguns back in Texas? Why is this so relevant?

4 MS. BERKOWER: I believe Jackson Reffitt testified
5 that when Mr. Reffitt walked in the door his handgun was on his
6 hip.

7 THE COURT: But the whole trip to Texas?

8 MS. BERKOWER: Understood, Your Honor. I'm trying to
9 see --

10 (End of bench conference.)

11 BY MS. BERKOWER:

12 Q. During your trip home, did you speak with Mr. Reffitt about
13 the events of January 6?

14 A. Yes.

15 Q. And what was the conversation on the way home?

16 A. We talked about -- kind of rehashed some of the things that
17 happened there.

18 Q. And did you view that conversation differently than you had
19 viewed the conversation on the way up to D.C.?

20 A. How do you mean?

21 Q. Well, did you talk about similar topics that you talked
22 about on your way to D.C.?

23 A. Similar, yes.

24 Q. And you said previously when you drove up to D.C., you
25 didn't take it very seriously; right?

1 A. Yeah.

2 Q. Did you view this conversation differently on your way home
3 to Texas?

4 A. Yes.

5 Q. Why?

6 A. Because when we were going up, everything was hypothetical,
7 and then the actual events happened. Then people were climbing
8 the walls and trying to get into the Capitol building, and so
9 that was something I didn't anticipate whatever happened, and I
10 saw it happen. So I said wow, people are serious.

11 Q. And what about specifically with regard to Mr. Reffitt?

12 A. Well, I guess he was serious.

13 Q. And was that based on what he told you about the events of
14 January 6?

15 A. It was based on my knowing from conversation that he had
16 attempted to go into the building, yes.

17 Q. When you got back to Mr. Reffitt's house, what did you do?

18 A. I transferred my equipment from his car to mine, and then I
19 went inside their home.

20 Q. What did you do inside his home?

21 A. I met his wife and his son and daughter.

22 Q. How long did you stay there?

23 A. I'm going to guess maybe it was 45 minutes. I'm guessing.

24 Q. What did you do while you were there?

25 A. Talked to his wife, and we just kind of in general talked

1 about the trip.

2 Q. After that, did you return to your home?

3 A. I did.

4 Q. Now, when you got back to D.C., did you continue to
5 communicate with members of TTP?

6 A. I'm sorry. Could you repeat that, please.

7 Q. I'm sorry. Mr. Nestler pointed out I misspoke.

8 After you left Mr. Reffitt's house, did you return to your
9 home?

10 A. Yes.

11 Q. When you got back to D.C. -- sorry.

12 When you got back to Austin or home --

13 A. Yes.

14 Q. -- did you continue to communicate with members of TTP?

15 A. Yes.

16 Q. What platform did you use?

17 A. Primarily Telegram.

18 Q. Did you also have -- participate in a Zoom meeting with two
19 other people from TTP?

20 A. I did.

21 Q. Who were those other two people?

22 A. The other two that I remember were Mr. Russ Teer and then
23 Mr. Reffitt and myself.

24 Q. Were you there for the very start of the conversation?

25 A. I was a little bit late, I think, and I was trying to

1 get -- they had already started, and I entered into the meeting.

2 Q. Ms. Rohde, if you can pull up what's already been admitted
3 into evidence as Government Exhibit 1B.20.2.3.2. If we could
4 publish to the jury. If you could, please, play that exhibit
5 now.

6 Actually, before you push play, Mr. Hardie, do you
7 recognize the person on the screen?

8 A. Yes.

9 Q. Who is that?

10 A. That's Mr. Reffitt.

11 Q. Please play the exhibit.

12 (Video played.)

13 Q. Mr. Hardie, do you recognize who that person is?

14 A. Yes.

15 Q. Who is it?

16 A. That's Russ Teer.

17 (Video played.)

18 Q. So in that clip that you just watched, was that you joining
19 that Zoom meeting?

20 A. Yes, yes, it was.

21 Q. Did you stay for the rest of the meeting?

22 A. I believe I did.

23 Q. Did you hear Mr. Reffitt refer to you as Oracle?

24 A. Yes.

25 Q. What is that a reference to?

1 A. People have different handles. Like Mr. Reffitt had Call
2 to Arms, and Mr. Teer had Dead Shot, and somebody else had
3 something else. And I asked Mr. Teer -- I said, "Well, what
4 kind of handle would you give me?" And he thought, and he said,
5 "Oracle."

6 Q. Did you hear Mr. Reffitt reference Oscar and Tango in that
7 clip?

8 A. Yes.

9 Q. What was he talking about?

10 A. When we used the radios, it was an abbreviation. So Oscar
11 is the phonetic phrase for the letter O of the alphabet, because
12 O for Oracle. And Call to Arms, Tango would be for the T in the
13 Call to Arms, so Tango and Oscar.

14 Q. And when you said you were communicating with Oscar and
15 Tango, when were you using those names?

16 A. That would be during the time we're -- of January the 6th
17 in the area of the Capitol.

18 Q. Is that when you were separated and communicating by radio?

19 A. Right.

20 Q. Now, after this meeting, did someone learn that the leader
21 of TTP had been taken in for questioning?

22 A. Yes.

23 Q. Questioning by who?

24 A. Law enforcement. I don't know exactly who.

25 Q. And did you learn that from a Telegram message?

1 A. Yes.

2 Q. Ms. Rohde, if we could, please, have what's been already
3 admitted into evidence as Government's Exhibit 1B4 and go to
4 PowerPoint slide 34.

5 Mr. Hardie, do you recognize this message?

6 A. Yes.

7 Q. Could you read it, please.

8 A. "Everyone be aware. As of this very minute, our state
9 leader is being escorted by three state officers for questioning
10 of things said on an app. This is not a drill. This is not a
11 drill. He has just called me to spread the word. Be prepared,
12 the shit is now hitting the fan."

13 Q. What date was that?

14 A. January the 10th, 2021.

15 Q. And who sent that message to the group?

16 A. That was -- it says Call to Arms. That would be
17 Mr. Reffitt.

18 Q. When you saw this message, what went through your mind?

19 A. Huh-oh. That's what came to my mind, is --

20 Q. Why huh-oh?

21 A. I know that we had gone to D.C., and it seems like for
22 some -- for whatever reason, things were coming back to us.

23 Q. And Ms. Rohde, if we could go on to slide 39, please. I
24 think we're one before that -- two before that, actually, 39.

25 Oh, I'm sorry. The one before that.

1 Did Mr. Reffitt also send this message to the group?

2 A. Yes.

3 Q. Could you read it, please.

4 A. "Start purge of all previous conversations."

5 Q. What did you understand this to be a reference to?

6 A. To delete any of the Telegram conversations or any kind of
7 conversation on your mobile phone.

8 Q. Did you do that?

9 A. I did delete some things, yes.

10 Q. And what things did you delete?

11 A. I had -- there was like the main Telegram, and then also I
12 had -- at one point, I had different sub-Telegrams for different
13 topics. I don't remember specifics, but I did delete messages.

14 Q. What were those messages about that you deleted?

15 A. They would have been messages leading up to and following
16 January 6th.

17 MS. BERKOWER: No further questions, Your Honor.

18 THE COURT: All right. Mr. Welch?

19 MR. WELCH: Yes, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. WELCH:

22 Q. Good afternoon, Mr. Hardie.

23 A. Hello.

24 Q. My name is Bill Welch. I'm also going to ask you some
25 questions.

1 A. Okay.

2 Q. Around the 16th of January, 2020, some agents came to your
3 house, didn't they?

4 A. Yes.

5 Q. And they wanted to speak with you; correct?

6 A. Yes.

7 Q. And you agreed to do so?

8 A. Yes.

9 Q. They asked you about where you had been; correct?

10 A. Yes.

11 Q. They asked you what you had been doing there; correct?

12 A. They asked several questions, but in general, yes.

13 Q. They asked to take a look at your phone; correct?

14 A. At that particular meeting? There was two visits. There
15 was -- the first visit was on a Saturday morning, and then there
16 was a subsequent, you might say, raid on my home and my business
17 a few days afterwards.

18 So which one are you referring to?

19 Q. I'm referring to the first one.

20 A. Okay.

21 Q. Do you remember that, the one at your home?

22 A. Yeah. When they went to my home, I don't recall them
23 asking to see anything on my phone, and I didn't offer it.

24 Q. So you didn't share anything with -- you didn't give your
25 phone to the agents when they came to your house?

1 A. No.

2 Q. In fact, you didn't give them anything when they came to
3 your house; correct?

4 A. Right. They had asked if they could come inside, and I
5 declined.

6 Q. And you answered some of their questions, but you didn't
7 answer all of their questions that day, did you?

8 A. I probably -- well, I don't know what it means, all of
9 them. I believe I answered the questions that they asked me.

10 Q. Well, isn't it true that they asked you about whether you
11 had a firearm with you in D.C., and you didn't answer that?

12 A. Probably not, not at that time.

13 Q. And you did agree to send them some items by e-mail; is
14 that right?

15 A. I don't remember that discussion.

16 Q. Okay. Well, then, several days after that, they show up at
17 your place of business with a warrant; correct?

18 A. Yes, uh-huh.

19 Q. And they ultimately seized a lot of stuff from your
20 business; correct?

21 A. Yes.

22 Q. They seized your computers?

23 A. Yeah -- well, my laptop. Not every computer in the office,
24 but my laptop specifically.

25 Q. They seized your firearms; correct?

1 A. They seized my AR-15, related ammunition, and they seized
2 my .45-caliber handgun and related ammunition.

3 Q. And they showed you a copy of the search warrant on which
4 they were relying; correct?

5 A. Yes.

6 Q. And did you look at it?

7 A. I was pretty nervous. I looked at it, but I wasn't really
8 focused on everything that it said.

9 Q. Eventually, did you sit down and read it?

10 A. I looked at it again. I don't remember how closely I
11 looked at it.

12 Q. Do you recall seeing whether it indicated that you were
13 under investigation for crimes involving restricted buildings or
14 grounds?

15 A. I don't remember that.

16 Q. Do you recall whether it indicated that you were under
17 investigation for interstate travel with intent to riot?

18 A. I remember reading that somewhere. I don't remember if I
19 read it from a warrant. But something to that effect, I did see
20 something like that.

21 Q. Do you recall reading whether you were under investigation
22 for obstruction of Congress?

23 A. These types of questions, I don't specifically recall
24 reading. I mean, I got a search warrant, yes. I was pretty
25 nervous that day.

1 Q. And then eventually things progress, and a few months
2 later, you enter into the immunity agreement with the
3 government, which is Government's Exhibit 405.

4 You remember that; right?

5 A. Yes. That's the one we saw earlier.

6 Q. Now, do you recall who has discretion under that agreement
7 about whether you have honored it or not?

8 A. Who has discretion?

9 Q. Yes.

10 A. On whether I've honored it or not?

11 Q. Yes.

12 A. I think what you mean is who is deciding if I've honored it
13 or not?

14 Q. Yes.

15 A. Is that what you mean? Okay. I think that would be the
16 government.

17 Q. Correct. And who represents the government in this case?

18 A. Well, it would be the attorney -- I'm sorry. Nestler and
19 Berkower.

20 Q. So for instance, it's not up to Judge Friedrich whether
21 you've honored that agreement or not; right?

22 A. Well, that's a good question. I never thought about it in
23 that detail. Somebody in the government is going to decide did
24 I lie or did I not lie.

25 Q. And it is your understanding that it is they, Mr. Nestler

1 and Ms. Berkower, who would decide whether you've lied or not;
2 correct?

3 A. I would assume that would be the case.

4 Q. Ms. Berkower, when she was asking you about the agreement,
5 said that there's no guarantee that you wouldn't be charged with
6 a crime; correct?

7 A. Right.

8 Q. But as of now, you have not been charged with a crime as a
9 result of your conduct on January 6; correct?

10 A. That's correct.

11 Q. And you would agree that you have testified here today that
12 you went on restricted grounds; correct?

13 A. That I went on restricted grounds? Yes.

14 Q. You would agree that you have testified here today you
15 carried a firearm onto restricted grounds; correct?

16 A. Correct.

17 Q. But you still haven't been charged with a crime; correct?

18 A. That's true.

19 Q. And you've been allowed in the meantime to go about your
20 business; isn't that right?

21 A. That's true.

22 Q. You've been able to travel to Mexico on business?

23 A. Yes.

24 Q. Florida on business?

25 A. Yes.

1 Q. And you have another trip for business planned for next
2 month; isn't that right?

3 A. I have another trip, yes.

4 Q. And where is that?

5 A. That's going to be to Thailand.

6 Q. Court's indulgence, please.

7 You would agree that Mr. Reffitt brags, doesn't he?

8 A. Yes.

9 Q. You would agree that Mr. Reffitt uses hyperbole, doesn't
10 he?

11 A. Yes.

12 Q. A lot, doesn't he?

13 A. From time to time.

14 Q. You would also agree that things he says are embellished;
15 correct?

16 A. Yes.

17 Q. And that things he says are dramatized; correct?

18 A. Yes.

19 MR. WELCH: Court's indulgence, please.

20 I pass this witness.

21 THE COURT: Ms. Berkower?

22 REDIRECT EXAMINATION

23 BY MS. BERKOWER:

24 Q. Good afternoon.

25 A. Good afternoon.

1 Q. Mr. Hardie, did you meet Mr. Reffitt in person in 2020?

2 A. 2020? Yes.

3 Q. And I think you testified earlier about a meeting in a
4 park --

5 A. Yes.

6 Q. -- with Mr. Reffitt. That was the first time you met him
7 in person?

8 A. Yes.

9 Q. How many times after that did you see him in person before
10 you took this trip with him?

11 A. The time that comes to mind was when I drove up to his home
12 for a meeting.

13 Q. Did you have any other one-on-one hangouts?

14 A. Hangouts?

15 Q. Or social occasions with him.

16 A. Let me think. There was a time when, you know, people were
17 tearing down statues, like it was related to the BLM things.
18 And so in Temple, there was an event there where people were
19 going to go and just kind of help just kind of keep the peace,
20 so to speak, and I was there.

21 Q. Was he there as well?

22 A. I believe so.

23 Q. Were other members of TTP there?

24 A. Well, there were other members of TTP. I'm trying to
25 remember if I saw him specifically there. That's a fuzzy part

1 of my memory.

2 Q. Sitting here today --

3 THE COURT: Wait. Let him finish his answer.

4 THE WITNESS: I can't say -- I just brought this up.
5 I mentioned this thing in Temple, but right now, I'm trying to
6 visualize if I saw him. I don't recall a picture in my mind
7 where I saw him. But I was there.

8 Let me think.

9 THE COURT: It's all right, sir, if you can't
10 remember.

11 THE WITNESS: I want to be accurate, but -- okay.

12 BY MS. BERKOWER:

13 Q. Sitting here today, how many times do you remember seeing
14 Mr. Reffitt in person after that initial meeting you described
15 in the park before you went to D.C. with him?

16 A. Okay. I saw him at his home at that meeting. I can't
17 think of a specific event other than that. I believe we --
18 wait, wait. Before or after -- oh, before. Let me think.

19 Okay. I had a meeting in my office warehouse.

20 Q. Was that another TTP meeting?

21 A. Yes. I volunteered to host it.

22 Q. So did he come to that?

23 A. Yes.

24 Q. So we have the meeting in the park; is that right?

25 A. Uh-huh.

1 Q. The TTP meeting at his house, is that what you were
2 referring to?

3 A. Yes, and then my location.

4 Q. And then the other meeting of TTP members at your business?

5 A. Right, right. So right now, we're discussing three; right?

6 Q. Yes.

7 A. Okay. Yeah.

8 Q. Now I'm going to ask you, do you remember seeing him in
9 person any other time before you met up with him to travel to
10 D.C.?

11 A. I can't recall anything specifically. These three main
12 events I can recall.

13 Q. And about how far away is Austin from Wylie, drivewise?

14 A. Probably close to 200 miles.

15 Q. And was your contact with Mr. Reffitt primarily in
16 TTP-related messaging?

17 A. Yes. We would send messages through Telegram, or we would
18 make telephone calls to each other through Telegram.

19 Q. One last question. Mr. Welch mentioned the FBI coming to
20 your home. Did you leave TTP of your own free will or because
21 of something that the FBI did?

22 A. After the FBI came to visit me, I said oh, crap, this is
23 getting really weird. I didn't really want any part of what
24 was -- well, I left of my own choice, basically. Nobody
25 suggested it. Nobody twisted my arm or anything like that.

1 MS. BERKOWER: Nothing further, Your Honor. Thank
2 you.

3 THE COURT: May this witness be excused?

4 MR. WELCH: Yes.

5 THE COURT: All right. Thank you, sir.

6 Ladies and gentlemen, I think this is a good time to take a
7 break for lunch. So if you could, please, come back at 1:35,
8 and we will resume with the rest of the government's case.

9 Again, another reminder, no talking about the case or
10 reading or doing any research, please.

11 (Jury exited courtroom.)

12 THE COURT: All right. So we will see you back at
13 1:35.

14 And counsel, I'm going to warn you, I'm going to start
15 cutting you off in front of the jury. You're asking a lot of
16 cumulative questions. There's jurors who, you know, are getting
17 frustrated. You guys can move this more quickly. I don't
18 understand why you're asking the same point ten different ways.

19 All right. Anything we need to address?

20 MR. WELCH: No, Your Honor.

21 (Recess taken at 12:38 p.m.)

22 (Afternoon session of this proceeding was reported by
23 Lorraine Herman and is bound under separate cover.)

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF OFFICIAL COURT REPORTER

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

/s/ Sara A. Wick

March 5, 2022

SIGNATURE OF COURT REPORTER

DATE