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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
-VS-	)	DOCKET NO. 1:20-CR-00296-JPB
	)	VOLUME 1
TELDRIN FOSTER, ET AL,	)	
	)	
DEFENDANT.	)	

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE J.P. BOULEE
UNITED STATES DISTRICT JUDGE
FEBRUARY 5, 2024

APPEARANCES:

ON BEHALF OF THE GOVERNMENT:
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SAMIR KAUSHAL, ESQ.
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ASSISTANT UNITED STATES ATTORNEYS

ON BEHALF OF THE DEFENDANT - TELDRIN FOSTER:
LEIGH ANN WEBSTER, ESQ.
SARALIENE DURRETT, ESQ.

ON BEHALF OF THE DEFENDANT - CARLA JACKSON:
DAVID D. MARSHALL, ESQ.

ON BEHALF OF THE DEFENDANT - JERRY BAPTIST (NOT PRESENT)
DOUGLAS W. GILFILLAN, ESQ.
ADITYA SHRIVASTAVA, ESQ.

STENOGRAPHICALLY RECORDED BY:

PENNY PRITTY COUDRIET, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

(PROCEEDINGS HELD IN OPEN COURT AT 9:08 AM, ATLANTA, GEORGIA)

COURTROOM DEPUTY CLERK: The Court has set aside time for a jury trial in Case Number 120-CR-296, the United States v. Jackson, et al.

Counsel, will you please make your appearances for the record.

MS. CHAIKEN: Good morning, Your Honor. Tal Chaiken for the United States. I'm joined by my trial counsel, Samir Kaushal and Siji Moore. Behind us is our Alisha Holland from our office, as well as Special Agents Joe Stites and Stefan Bublitz from the FBI.

THE COURT: Good to see all of you.

MS. WEBSTER: Good morning, Your Honor. Leigh Ann Webster on behalf of Teldrin Foster, who is here. And then Saraliene Durrett is downstairs.

THE COURT: All right. Thank you very much.

MR. MARSHALL: Good morning, Judge. David Marshall on behalf of Defendant Carla Jackson. And with us at the table is our paralegal, Ms. Sophia Ryan.

MR. GILFILLAN: Good morning, Your Honor. Doug Gilfillan, standby counsel for Mr. Baptiste. I am here today.

THE COURT: All right. Good to see all of you.

All right. We have a couple unexpected issues that have arisen over the last 24, 48 hours or so. Let me take the

one that's just arisen in the last ten minutes or so.

Mr. Baptiste is not here. He's been duly notified of this trial date and he's not here. And I understand that we've made attempts to reach out to him to no avail. Is that correct, Ms. Lee?

COURTROOM DEPUTY CLERK: Yes.

THE COURT: Is that correct, Mr. Gilfillan?

MR. GILFILLAN: Yes, Your Honor.

THE COURT: It's my intent, therefore, to issue a warrant to have Mr. Baptiste brought to court.

Ms. Lee, if you could coordinate that with Ms. Chaiken and with the US Marshal Service, I would appreciate it.

The second issue is -- one moment.

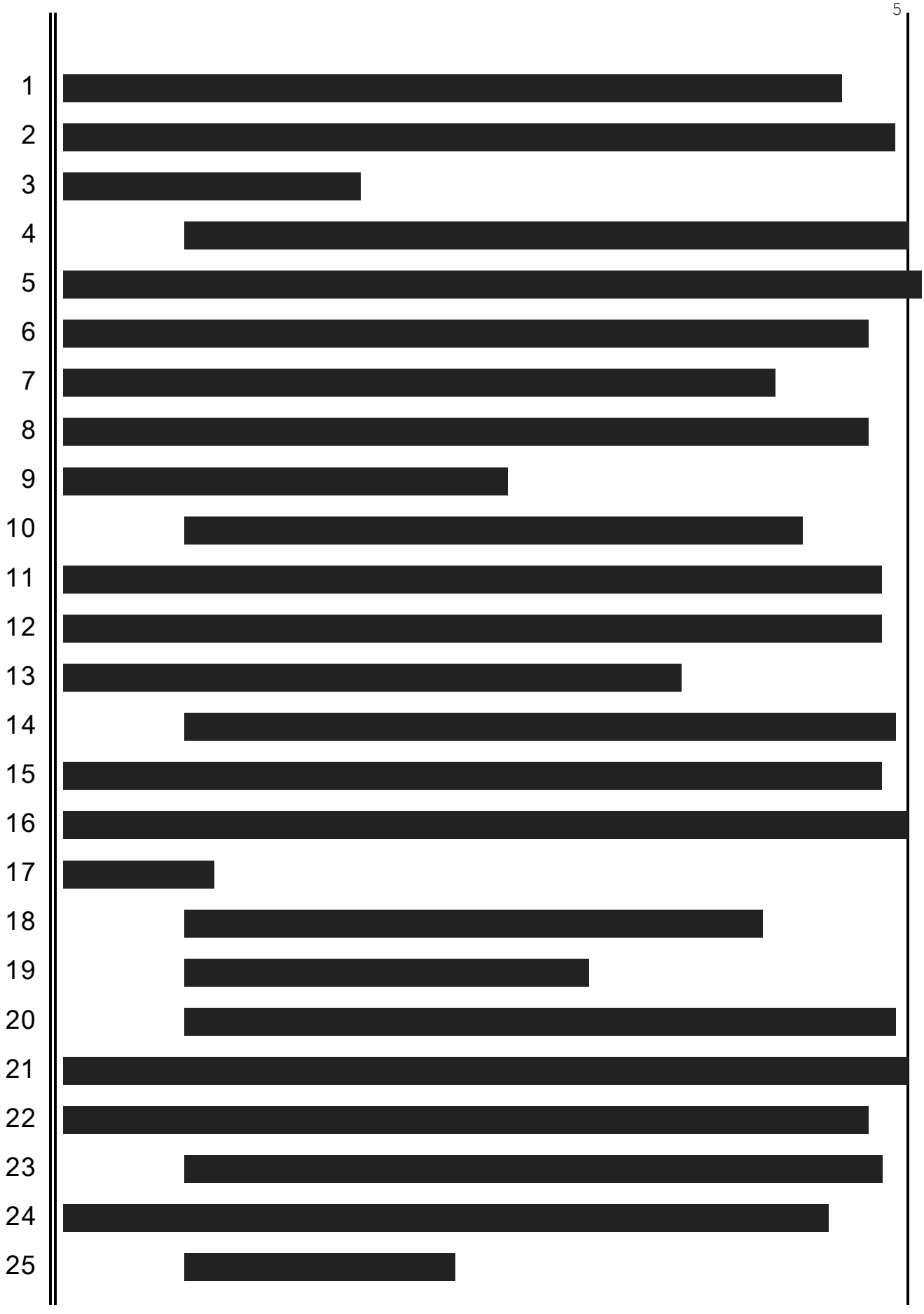
Ms. Durrett, I'll ask you on this second issue. Would you like me to go under seal for this discussion? I know that you'd e-mailed the Court and the -- all the counsel as to the issue, but I'd be happy to go under seal for this if you'd like.

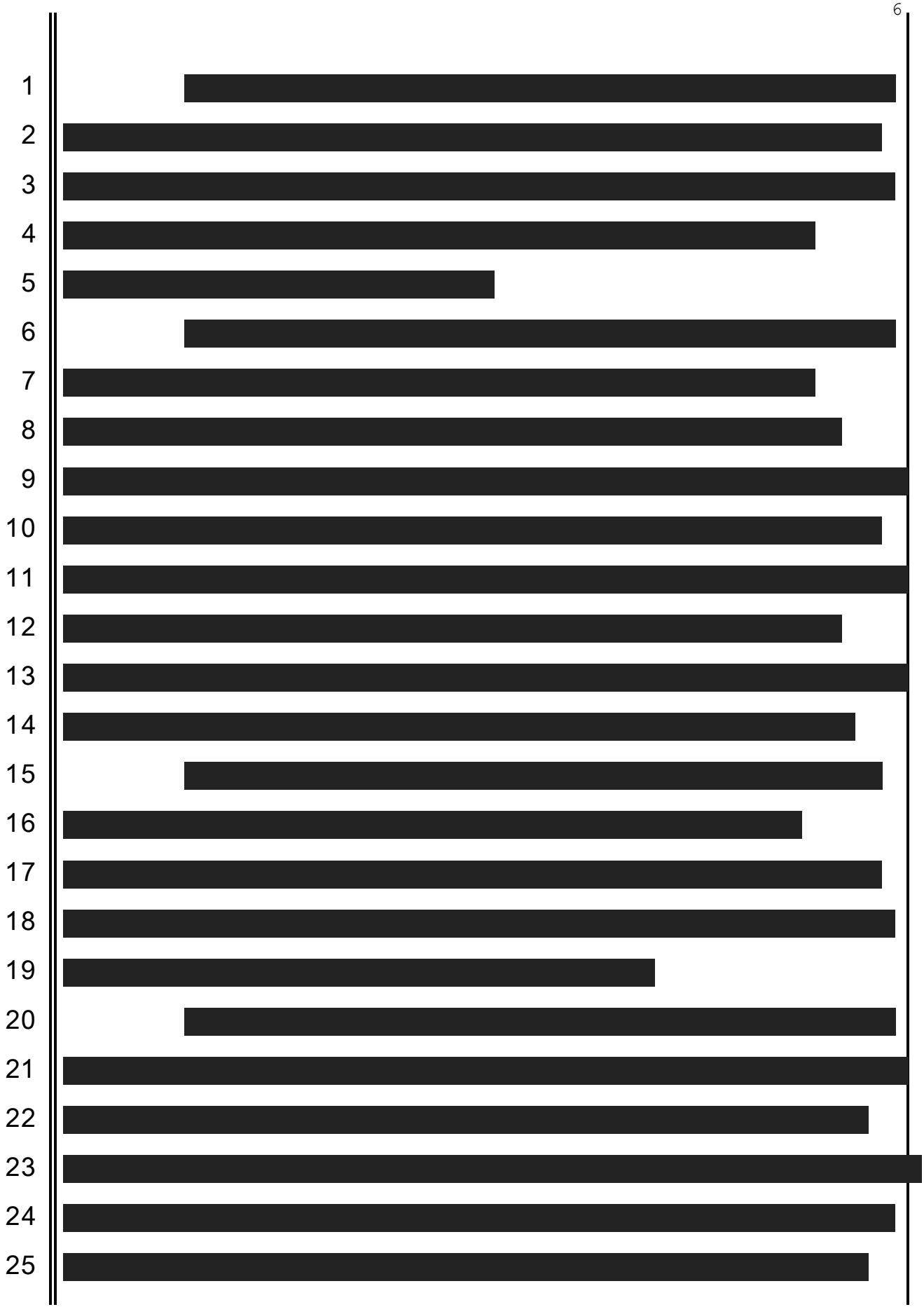
I think she can hear us, but we can't hear her perhaps. So, yeah, she'll just call in.

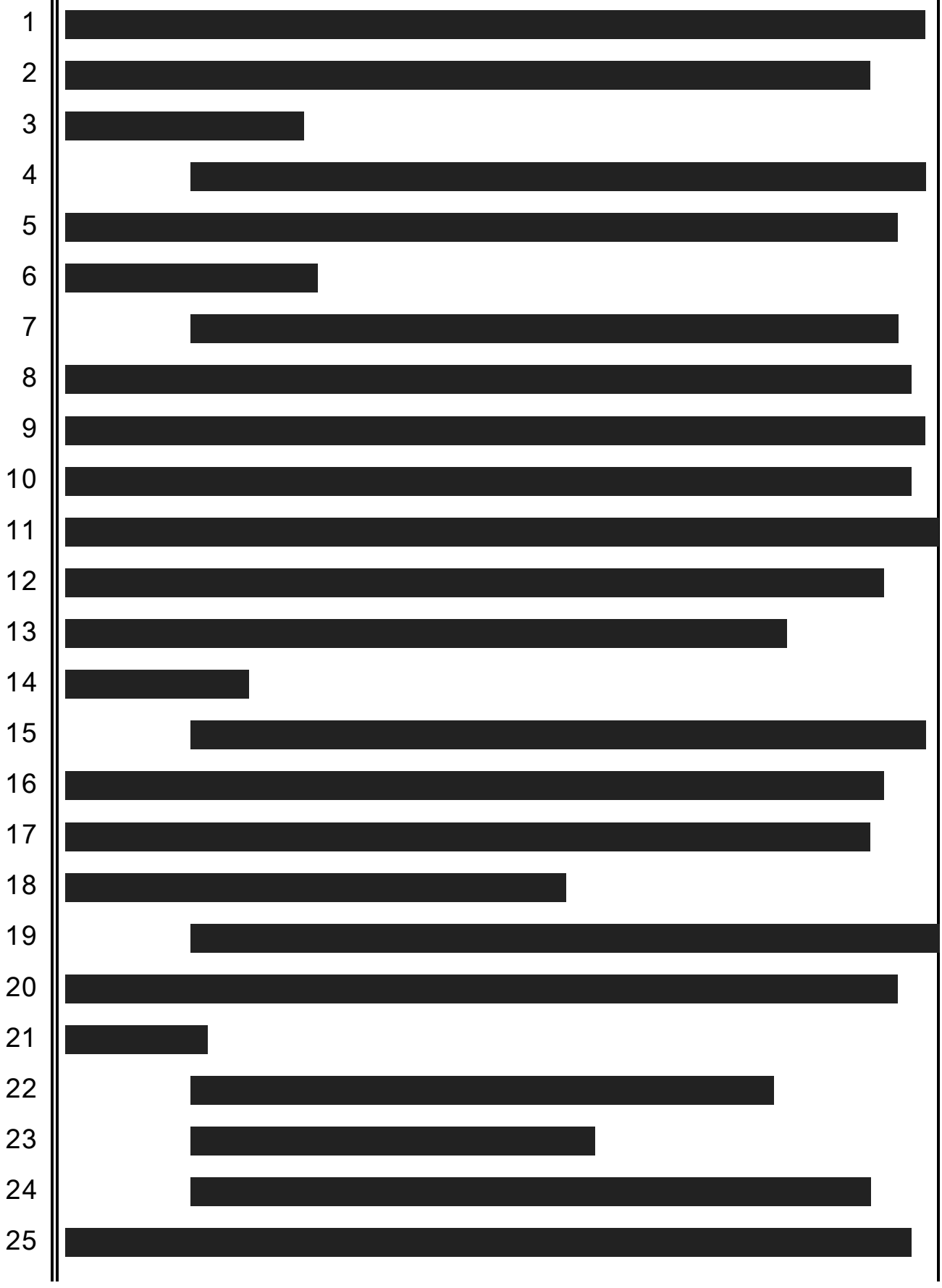
(The following proceedings are under seal:)

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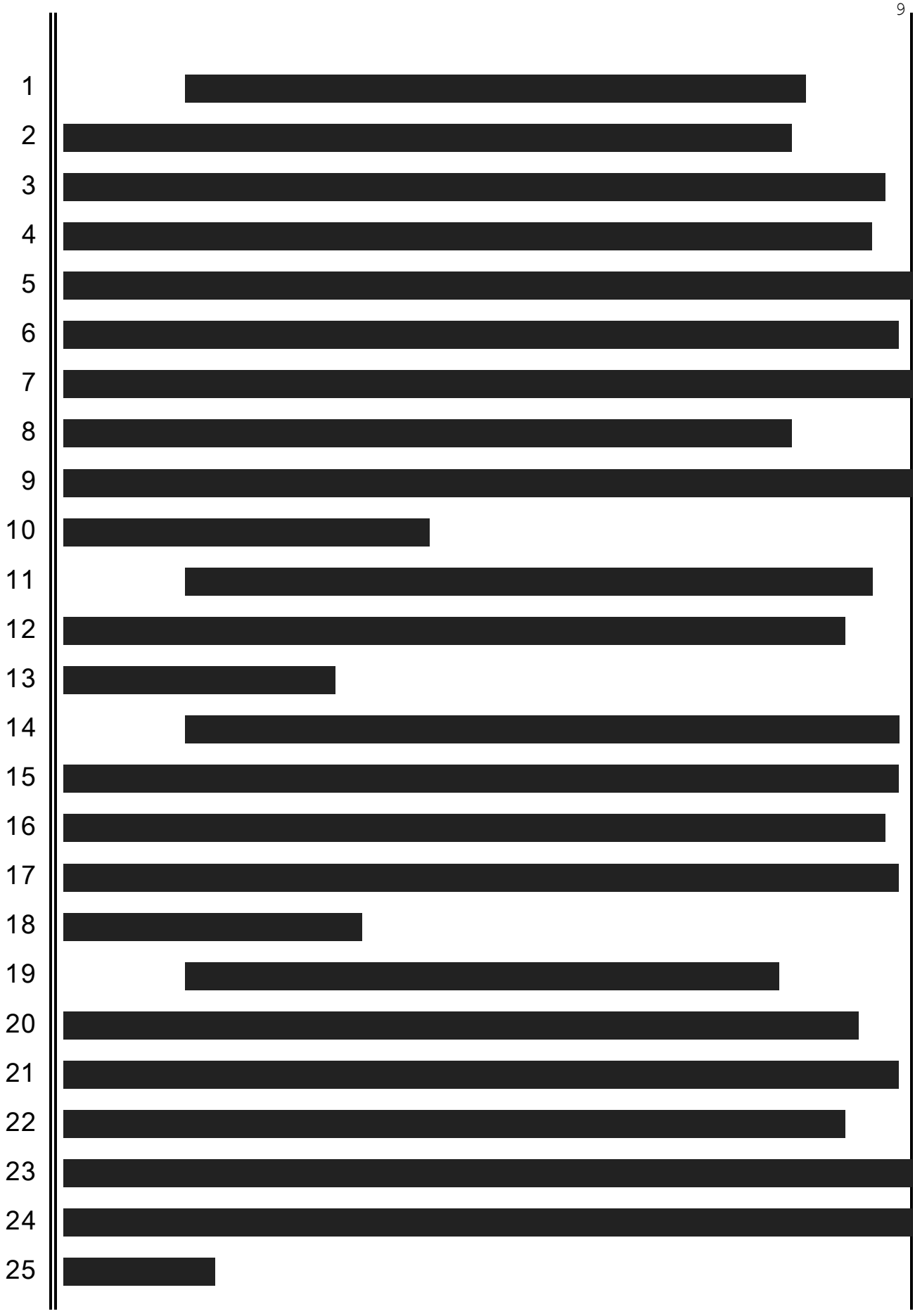












[redacted]

(The record is unsealed)

(Off-the-record discussion.)

(After a recess, the proceedings continued at 9:44 a.m. as follows:)

THE COURT: The record will reflect that I just signed a warrant for the arrest of Jerry Baptiste. Thank you.

We're off the record.

(Off-the-record discussion.)

(After a recess, the proceedings continued at 10:02 a.m. as follows:)

THE COURT: All right. Before we begin the trial, I wanted to just follow up with some orders that I issued via docket entry just in summary form last week. I wanted to follow up and give more detail on my rulings of those.

I think it was January 31st I entered an order denying Mr. Foster's motion to exclude expert testimony and also his motion to sever.

As far as the motion to exclude the expert testimony, it was 830. In short, the parties dispute what deadline for expert disclosure applied to the government in this case. In any event, the government's disclosure of its intent to call Special Agent Jay Berni to testify as to cell site data on January 19th, 2024, may have been untimely. And for the purposes of this motion and my ruling, I'm going to assume it was, but I recognize the government's arguments to the contrary. And it's a little confusing.

On December 1st, 2022, the Federal Rule of Criminal Procedure was amended to require that the Court, by order or local rule, must set a time for the government to make its disclosures. Under the rule, the time must be sufficiently before trial to provide a fair opportunity for the defendant

to meet the government's evidence.

After the rule was amended, this district implemented a pretrial scheduling order that requires the government to disclose its expert, if requested by the defendant, no later than 14 days after the case is certified ready for trial, but that scheduling order wasn't entered in this case because it was before that.

Defendant argues for this case, the Court's local rules provide that the deadline was, in fact, earlier, at the time of the arrangement.

But, anyway, I'm going to assume it was untimely for the purposes of my ruling.

If a party fails to comply with the requirements of Rule 16, a trial court may, A, order that the party permit the discovery or inspection, specify its time, place and manner and prescribe other just terms and conditions; B, grant a continuance; C, prohibit that party from introducing the undisclosed evidence or enter any other order that is just under the circumstances. And this Court has wide discretion in deciding whether to admit the testimony. And also the discretion to fashion other appropriate relief. That's the *US v. Perez* case, 960 F.2d 1569 at 1572 from the Eleventh Circuit.

In exercising its discretion, the district court must weigh several factors, and if it decides a sanction is in

order, should fashion the least severe sanction that will accomplish the desired result, prompting full compliance with the Court's discovery orders. That's *US v. Euceda*, E-U-C-E-D-A, *Hernandez*, 768 F.2d 1307 at 1312, Eleventh Circuit, 1985.

Among the factors the Court must weigh are the reasons for the government's delay in affording the required discovery, the extent of prejudice, if any, the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance or, if the jury's been sworn and trial has begun, a recess.

The presence of a clear violation of a discovery order does not excuse a trial from weighing these -- trial judge from weighing these factors and imposing the least severe but effective sanction.

Here, Defendant Foster has requested the government be prohibited from introducing Special Agent Jay Berni's expert testimony at trial. Exclusion of the evidence is an extreme sanction. That's from *Perez* at 1573, quoting *US v. Turner,* 871 F.2d 1574 at 1580, also the Eleventh Circuit. And that was a cert denied case at 493 US 997 from 1989.

I'll also note that the purpose for requiring the government to disclose evidence is to promote the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision

as to a plea by minimizing the undesirable effect of surprise at trial and by otherwise contributing to an accurate determination of the issue of guilt or innocence.

That's also from *Euceda-Hernandez*. And that's quoting a Federal Rule of Criminal Procedure, 16 Advisory Committee Note.

By suppressing the government's evidence rather than granting a continuance or recess, a trial judge may achieve a speedier resolution to a criminal case and reduce his docket, but he does so at the expense of sacrificing the fair administration of justice and the accurate determination of guilt and innocence. That's at 1312.

Weighing the circumstance surrounding the government's arguably late disclosure here, the Court finds that the extreme sanction of excluding evidence is unwarranted in this instance. The Court is not convinced that the January 19th, 2024, disclosure will unfairly prejudice Foster such that the agent's testimony need to be admitted.

The record demonstrates that Foster possessed the underlying evidence, the cell site location data, to which the agent will be testifying for two-and-a-half years. The government's offered -- and the government has represented that the testimony is needed to rebut the proffered testimony of Foster's own expert, who was disclosed on January 12th, 2024.

Moreover, there's no allegation that the government's late disclosure was done in bad faith.

However, to alleviate any potential prejudice in accordance with Rule 16(d)(2)(D), which allows the Court to enter any other order that is just under the circumstances, on February 2nd, the Court ordered that the government make Special Agent Berni available to defense counsel prior to trial so that defense counsel had an opportunity to consult with the expert before the testimony is elicited. And that was docket entry 854.

And that's in part in response to, in the reply brief, the defendant argued that the government's late disclosure deprived Mr. Foster of the ability to meaningfully consult with the expert to challenge the witness's testimony.

Moreover, the government (sic) is now going to direct the government not to call Agent Berni before Thursday of this week to give defense a little extra time to digest those issues.

The Court finds that this is the least severe remedy necessary to ensure -- these remedies are the least severe necessary to ensure that Foster has adequate time to assess the opinions that will be elicited at trial and to prepare Mr. Foster's defense.

The motion to exclude, again, is denied.

Additionally, the Court is not persuaded that a

pretrial Daubert hearing is necessary for the agent's testimony. This type of expert testimony is routine for cases involving cell site location information and its reliability for determining the general location of a cell phone is well established. *United States v. Crumpton*, 3:22-CR-12-TES-1, 2023 WL 6323792 at 4, Middle District of Georgia, from September 28th, 2023, noting that district courts largely agree on the reliability of historical cell site analysis.

While *Daubert* requires the district court to serve as a gatekeeper, it need not conduct a formal hearing where the reliability of an expert's methods is properly taken for granted, *US v. Rodriguez*, 591 F.App'x 897 and 899, it's the Eleventh Circuit from 2015, quoting *Kumho Tire*, 526 US 152.

However, if at the time of the testimony, defense counsel believes Agent Berni's testimony doesn't meet the requirements of 702, they may object at the time of trial.

Again, the request is denied.

And I will add, in deciding this, I noted that late disclosure of evidence required to be turned over under Rule 16 or a standing discovery order necessitates reversal only when -- my decision would be reversed only if it violates a defendant's substantial rights. So I thought about whether or not this would violate substantial rights. And that's from the *Camargo-Vergara* case, 57 F.3d at 993 at 998, Eleventh Circuit, in 1995.

And the factors there are substantial prejudicial results if a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense.

And, again, I don't know that there is any undue surprise here, especially given the extra time that's been given and the opportunity to consult with the expert and, frankly, the reason the government came in with the expert in response to the defense expert. And I believe the defendant has now had adequate opportunity to prepare the defense and will have additional time to do so.

As far as the motion to sever, Docket 866, in the Eleventh Circuit, the general rule is that defendants who are jointly indicted should usually be tried together, *US v. Lopez*, 648 F.3d at 1222, pinpoint's 1234, Eleventh Circuit, from 2011.

This is especially true where defendants are charged in a common conspiracy. This general rule reduces the risk of inconsistent verdicts and the unfairness inherent in serial trials, lightens the burden on victims and witnesses, increases efficiency and conserves scarce judicial resources.

However, Federal Rule of Criminal Procedure 14(a) provides if the joinder of offenses or defendants in an indictment and information or consolidation for trial appears to prejudice the defendant or the government, the Court may order separate trials of counts, sever the defendants' trials,

or provide any other relief that justice requires.

Thus, if a defendant is able to demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his defense, a Rule 14 severance may be granted. That's the *US v. Blasingame* case, 219 F.App'x 934 at 948, Eleventh Circuit, 2007. To determine whether a defendant has demonstrated compelling prejudice, the Court must assess whether under all the circumstances of a particular case, as a practical matter, it is within the capacity of the jury to follow the instructions and, accordingly, appraise the independent evidence against each defendant's own acts, statements or conduct.

A defendant can show compelling prejudice by showing that the jury would be unable to sift through the evidence and make an individualized determination as to each defendant, *United States v. Cassano*, 132 F.3d 646 at 651, Eleventh Circuit, 1998.

Moreover, to show compelling prejudice warranting severance, a defendant must show that the other remedies, such as jury instructions, are not sufficient.

Here, the Court is not persuaded that the jury will be unable to sift through the evidence and make an individualized determination as to Mr. Foster, merely because evidence introduced at trial makes reference to auto loans. The government has previously represented that it will not

introduce any affirmative evidence of auto loan fraud, and the Court finds that, if needed, an appropriate limiting instruction to the jury should guard against any prejudice that would arise from the introduction of such evidence and/or focus on it during potential cross-examination.

Thus, the motion to sever is denied.

And I'd be happy if -- whether it's this motion to sever or the other motion to sever, again, if anyone wants a jury instruction at any point, I'd be happy to review your proposed instruction and entertain giving that at the appropriate time. Just let me know and please present to me whatever you might like and we can discuss it.

All right. That is all I needed to handle before we got started this morning. But before we get started, before we start this trial, I want to discuss the issue of Mr. Baptiste's absence.

Again, at 9:00 he was not here. We attempted to contact him. His standby counsel attempted to contact him. All to no avail.

Waited a little while and then issued a warrant at about 9:45 or so. It is now 10:15. So we have a few options -- well, at least a couple.

One is we can start the trial without Mr. Baptiste, which obviously would require us to try Mr. Baptiste at some later date. And I'm aware of the fact that this is set to be

probably about a two-week trial. That's option 1.

Option 2 is we could wait a little while to see if the US Marshals are able to find Mr. Baptiste and bring him here for trial. And I said a few, but I think it's just a couple, unless, Ms. Chaiken, you can think of any other options. And as far as how long we wait, that can be until after lunch, that could be until tomorrow morning.

I've spoken with jury management and they have jurors available for us now. Those jurors can wait and have a nice long lunch and be here after lunch, or those jurors could come back in the morning.

So happy to open the floor and hear from anyone as to your thoughts on what we should do. I think it's probably most relevant to hear from the government, but to the extent that anyone else wants to be heard, I'd be happy to hear from them as well.

MS. CHAIKEN: Could we have one moment, Your Honor?

THE COURT: Sure.

(Pause in the proceedings.)

MS. CHAIKEN: Your Honor, we'd like to give agents a couple of hours to try to locate him and start after lunch, if possible. We have several witnesses who we anticipate testifying whose testimony will no longer be needed if Mr. Baptiste is not part of the trial. And so if he's not located, the trial will be shorter anyway. So we're not, you

know -- we don't think we really lose much by waiting a couple of hours.

But, obviously, if we do find him during that time, that would eliminate the need for a whole second trial. So while we don't want to wait too long, we do have some potential addresses and potential things we can try to track down that we think it's at least worth just waiting a couple of hours to find.

THE COURT: Okay.

MS. CHAIKEN: Or to pursue.

THE COURT: Give me a better feel for -- and I know -- I think your last estimate was probably about two weeks, might go a little into the third week for this trial. Tell me how the length of this trial is affected if he were not here and how long you think it would take to try him separately.

MS. CHAIKEN: I think if he were -- if he were not here, this trial would probably be shortened by approximately two days.

THE COURT: And I'm not going to hold you --

MS. CHAIKEN: Two to three days.

THE COURT: I'm just trying to get an estimate.

MS. CHAIKEN: Two days, I think. If we were to try him alone, I think the trial would probably be three to five days.

THE COURT: Okay. Thank you.

Although I know perhaps there's not a dog in the hunt exactly, but I'd be happy to hear from counsel for Ms. Jackson or counsel for Mr. Foster, if you have any thoughts on this issue.

MS. WEBSTER: I don't think that we have strong feelings on how to move forward with this.

THE COURT: Very well.

MR. MARSHALL: Judge, I have no objection to the government's recommendation. I had to do that in another case of mine, we had to wait a few hours, so that's fine.

THE COURT: Okay. Let's do this, let's see where we are at 1:00. And we'll decide then -- I'll let you know. I mean, there's a possibility, obviously, at 1:00 Mr. Baptiste will be here and hunky-dory and we'll start jury selection.

And if he's not, we may either move forward with jury selection without him or I may decide to wait until tomorrow morning to start jury selection.

I would like -- you know, I think as -- I mean, coincidentally, I was just reading some of the materials on the severance motion and some of the reasons you don't want to sever, including judicial efficiency and whatnot. And I'd like to, and I think it would serve justice, to try everyone together here, if possible. So it may be that I decide to wait until tomorrow morning anyway, but let's just at least

see where we are at 1:00.

All right. So we will --

MR. MARSHALL: Your Honor?

THE COURT: Yes.

MR. MARSHALL: Can I address one matter before we adjourn?

THE COURT: Yes.

MR. MARSHALL: I filed yesterday on ECF a motion in limine. And I e-mailed a copy of that to chambers. And I wanted --

THE COURT: I've got it right here in front of me.

MR. MARSHALL: Thank you, Judge.

And I know the government hasn't had a chance to obviously file a written response, but I wanted to address it before we started with opening statements for sure, Judge.

THE COURT: Okay. Thank you. Yes.

I was aware of it. Frankly, had it on the back burner relative to some concerns we addressed under seal earlier this morning involving some health issues and then Mr. Baptiste's absence and the motions I wanted to get on the record.

But, yes, I'm aware of that. Thank you.

And while we're at it, let me hear from the government as to when might be a good time to respond. Obviously, I'd like to decide that if I can before opening

statements.

MS. CHAIKEN: I'm happy to respond now, Your Honor, if that would be appropriate.

THE COURT: Well, it would had I read the motion yet. And I have to confess that I haven't. So it probably would be a more worthwhile response after I've read the motion, so --

MS. CHAIKEN: I can narrow the issues.

THE COURT: If you want to narrow the part of the motion that's going to be relevant after you say something, I'm happy to have you do that.

MS. CHAIKEN: Yes. So, Your Honor, we had been preparing for a trial with four defendants, including John Gaines, as to whom we had filed a 404(b) notice. He pled guilty, I think, on Wednesday. We did not remove the exhibits that we were planning to introduce. We had not, at the time we shared our exhibits with the defense, sorted through what we were and were not going to introduce now that he was no longer part of the case.

So there were materials that Mr. Marshall had identified in his motion that related to a Paycheck Protection Program loan filed by a -- or prepared in connection with a business called Roadrunner Automotive Group. We are not going to be seeking to admit those materials at trial.

The only thing that we are seeking to admit at trial related to Roadrunner Automotive Group is bank records that

show that in June of 2020 Ms. Jackson and John Gaines were signers together on that account and that money from the Gaines Reservation & Travel PPP loan went from Gaines Reservation & Travel to Darrell Thomas's company, Bellator Phront Group, and then to Roadrunner. And that those were proceeds of the same loan with which Ms. Jackson is charged with laundering money that went to a separate account that she was a signer on. And, actually, at the time it went to that account she was the only signer on the account. John Gaines was added to that account a little bit after that.

And so the -- you know, I understand the Court may want to read the motion and then hear my argument about why it's intrinsic evidence in our view, but everything other than that that's addressed in the motion we're not planning to introduce.

THE COURT: All right. Well, so since we're so far down the road already, why don't you go ahead and make your argument. And then I'll adjust your argument from the written record after I've read the motion.

So go ahead.

MS. CHAIKEN: Our view is that it's intrinsic evidence because it's necessary to understand the crime charged. It's necessary to understand the Gaines Reservation & Travel loan and where those proceeds went. And we have to prove that the Gaines Reservation & Travel loan was

fraudulent.

We have to -- even though Ms. Jackson is not charged with the fraud itself, we have to prove as a third element of money laundering that the money did come from an unlawful activity, which is wire fraud. The fact that that money was used to go to the account of Darrell Thomas, who was involved in the submission and preparation of the Gaines Reservation & Travel loan and then went back to John Gaines and Carla Jackson is relevant to proving that that loan was fraudulent. And it's also part of the same series of transactions that Ms. Jackson is charged with, the movement of the money from the Gaines Reservation & Travel loan.

THE COURT: All right. Thank you.

Mr. Marshall, anything in reply?

MR. MARSHALL: Judge, I just think it -- that reference, if they introduce the signature card, that makes the jurors think that somehow she's involved some way with Darrell Thomas and John Gaines involved in those moneys. She's not charged in a conspiracy count, Judge. She's charged with two counts related to Management Resource Services, which is her company.

So one thing I could suggest, if the government's fine, I don't mind this stuff coming in if we could redact Ms. Jackson's name on the signature card. You know, it doesn't need to be there to show that she was a signer on the

account. Mr. Gaines was a signer on the account, and I think that's what they're trying to aim for, is the movement of money and the activities of John Gaines and Darrell Thomas, not my client.

I think it improperly puts my client's character at issue for a charge that she's not -- she hasn't been charged with any of these, the conspiracy count, or any of the other charges, Judge.

MS. CHAIKEN: Your Honor, Mr. Gaines was not a signer on the account at the time that the money came in. And so to redact her name from the signature card would leave the jury with having no idea who the signer was on the account at the time the money went into it.

And it's also highly relevant evidence to the jury's understanding of Ms. Jackson's relationship and connection to John Gaines, who we understand is going to be a defense witness at trial. And she is charged with Mr. Gaines in money laundering -- in the money laundering counts related to Management Resource Services. And this is part of their understanding of what John Gaines' and Carla Jackson's financial entanglements were at that point in time.

It's the exact same time period, June 2020, in which she's charged with money laundering proceeds of the same loan that went into another account. It shows the jury that there's two separate accounts that went in there.

THE COURT: Thank you, Ms. Chaiken.

Mr. Marshall, your motion, so I'll give you the last word.

MR. MARSHALL: Again, I think it would have been more appropriate if, for instance, the government had filed a 404(b) notice at the start against my client to give an indication that they were going to introduce any records related to Roadrunner. And she's just not charged with any of the conspiracy counts, what expands it, and it gives the jury a thought to think that she's involved in another company, in other activities, and I just think it broadens it, Judge, and it's not permissible. It's not intrinsic evidence.

THE COURT: All right. Thank you.

I will review the motion and then I'll look back over the court reporter's record of this conversation and I'll circle back and let you know what my ruling is, or I may have some follow-up questions at that time when I'm a little bit better informed.

All right. It is 10:28. Can anyone else think of any productive use of our time or should we just recess till 1:00?

MS. CHAIKEN: Your Honor, Mr. Kaushal has a couple more things.

MR. KAUSHAL: Your Honor, just one issue that we are now -- since we've talked about the potential of John Gaines

being called, I just want to flag for Your Honor that there may be a question as to whether witnesses that are called by the defense need to be advised of their Fifth Amendment rights to remain silent when they testify.

For example, Mr. Gaines has a pending sentencing before Your Honor. I've -- we've loosely discussed the matter with defense counsel, but I think -- we don't need a final answer right now. I just wanted to flag it for your Honor's consideration as we move through the trial and reach that point. We can have the discussion at that time, but I just wanted to raise it for Your Honor, that that may be an issue that comes up.

MR. MARSHALL: Judge, can I address that too?

THE COURT: Yes.

MR. MARSHALL: Judge, while I would hope that the government also provided that same type of cautionary instruction or discussion with Darrell Thomas, who is expected to testify for the government, I don't know if they've done that.

I've had communications with Mr. John Gaines' counsel, Ms. Wiley, and she indicated that there were discussions with the government -- I'm summarizing, Judge, I'm not -- as I understood it, was that there was some indication, some kind of -- I don't want to call it a threat -- an implied threat would be the worst I would say, Judge, of a possible

obstruction charge. If not an obstruction charge, that Mr. John Gaines would face an elevated sentencing guideline if he testified.

And if that wasn't enough, I think there was a suggestion that he could take the Fifth, invoke his Fifth Amendment right on the stand. I consider that interfering with the witness, Judge. I think if I were doing that to a witness that the government was intending to call, I think there would be a lot of concern for me.

So I think Ms. Wiley is the one who needs to have that communicated to by the government, and Ms. Wiley can decide if she wants to discuss that with him or not.

MR. KAUSHAL: Your Honor, this is a serious accusation from the defense, and I don't think that they're thinking through what actually occurred. The defense counsel was not involved in the conversation that we had with the defendant, Mr. Gaines' counsel. Mr. Gaines was not on that phone call, to our knowledge.

We were discussing, in the context of a plea negotiation, the possibility that there could be something that occurs when the defendant testifies and that that could raise a risk of something occurring with the guidelines. We did not threaten the witness. We did not suggest that the defendant would be charged with obstruction. We merely noted that there is a possibility that somebody who testifies and

has exposure could potentially receive an enhancement under the guidelines.

So if defense wants to level this accusation, I think they shouldn't be allowed to do it in this way. They should formalize their accusation if they are serious about it. But that is not what occurred. And that is not what the government was doing when it had a discussion with defense counsel about a possible risk in the context of a plea negotiation.

There is a distinguishing factor between these particular -- for example, Mr. Gaines, who has a pending sentencing, and any potential cooperator in this case, and, you know, the government has not -- the individuals who may testify in this case have entered into plea agreements with the government. They -- those plea agreements formalize their cooperation.

And, again, that's an issue. If the defense has a concern, we can talk about whether there's a necessity to advise those individuals as well, if they really believe that's necessary. This is not an attempt to intimidate any witness. I was just raising the issue so that the Court would be aware that there's a potential that this may occur.

And there is at least one other witness that the government is aware of that may be called by a defense party, not Mr. Marshall, but the government learned that counsel for

Mr. Foster may be having a witness appear, Ricky Dixon, which is another individual who may testify on behalf of the defense. And if he testifies, the same issue comes up. According to the docket, he is pro se at this time and he has a pending 2255.

So this is an issue that there just needs to be a frank discussion about. This is not an effort to influence any particular witness's testimony. It is simply a way to protect those defendants' rights. That is all the government has proposed and tossed out there for the Court to consider as we approach these -- as we move towards that part of the case.

THE COURT: All right. Thanks, everyone.

Please just remind me when we get to -- if and when Mr. Gaines is called and if and when Mr. Dixon is called, we can address that issue then. It may be that they have counsel with them when they appear or may not --

MS. WEBSTER: I'm sorry, Your Honor, I can't hear you.

THE COURT: Sure. It may be that they have counsel with them when they appear and that might affect how we handle the issue. But I'm always happy to read somebody their constitutional rights when necessary. Just let me know.

All right?

MR. KAUSHAL: Thank you, Your Honor.

THE COURT: Okay. What else, if anything, can we do

to occupy our time or have we completed the list?

MS. WEBSTER: Your Honor, we were going to address this ex parte, but I think that for Mr. Dixon and any other witness, I think it's appropriate for counsel to be appointed at some point to advise them as to their rights. I think it's a little different with Mr. Gaines, because he currently has counsel, but for Mr. Dixon, I think it would be appropriate for the Court to appoint counsel to advise him before he testifies.

THE COURT: He's currently pro se?

MS. CHAIKEN: That's our understanding, Your Honor. He filed a pro se 2255 challenging his conviction on the basis that his attorney was ineffective. And so unless a new attorney has in some way been appointed for him that we're not aware of, he's pro se.

THE COURT: I'm happy to let him talk to an attorney and do that, if we can get those documents drawn up, and if he wants to speak with someone, he can. Okay.

Ms. Mueller, if you can perhaps assist with that. Thank you.

All right. Anything else?

MS. CHAIKEN: Your Honor, I just want to preview for the Court that if Mr. Baptiste ultimately does not show up, we -- with the way we've scheduled our witnesses and with the Court's order now that Mr. Berni -- or Agent Berni cannot

testify until Thursday, we may end up having some dead time on Wednesday. We are working --

THE COURT: Let's do it -- I just want to give the defense a little extra time. And, frankly, we've now got a few hours here with nothing to do. So would noon Wednesday be workable for the government? I don't want to inconvenience the government too much, but at the same time, I want to make sure Defendant Foster has a little extra time.

Would noon Wednesday be better?

MS. CHAIKEN: It's fine with us. We --

THE COURT: I would like to avoid dead time, and you're telling me that there's dead time if it's not until Thursday?

MS. CHAIKEN: Well, we're calling -- we have several witnesses who are not scheduled to arrive until late Wednesday, and we've asked our witness coordinators to get in touch with all of them and see if they can come earlier. And so we're working on it as we speak. I just wanted to preview that we don't -- we're not 100 percent sure we can fill all that time because we're going to lose several witnesses if Mr. Baptiste is not here.

THE COURT: All right. If you make efforts to fill time and you can wait until Thursday to call him, let's do that.

MS. CHAIKEN: Okay.

THE COURT: But if there's going to be dead time and you tell me you've made efforts to fill it and otherwise he's who we've got here and ready, I'd be inclined to let you call him on Wednesday afternoon.

And if at that point, Ms. Webster, you need an additional half day to prepare for that testimony, let me know as they call him and I'll cross that bridge when we come to it. Okay?

MS. WEBSTER: Thank you, Your Honor.

MS. CHAIKEN: Thank you, Your Honor.

MR. MARSHALL: Has the government provided -- have you provided a full witness list yet?

MS. CHAIKEN: No. We're planning on providing our witnesses the evening before each --

MR. MARSHALL: Day before each one?

MS. CHAIKEN: Yeah. We have provided last night our witnesses for today.

THE COURT: All right. Thanks, everyone. We'll see you at 1:00. Thanks for everyone's patience. Take care.

(After a recess, proceedings were continued as follows:)

THE COURT: It is about 1:00. Back on the record.

Do we have any report from the marshals?

MS. CHAIKEN: Your Honor, we have a -- some updated information we would like to provide to the Court but not in

open court.

THE COURT: Okay. If I could ask everyone to step out except Ms. Chaiken and government counsel for a moment.

Is it something that not even the other counsel could hear?

MS. CHAIKEN: That would be our preference, Your Honor. It relates to ongoing investigative --

THE COURT: Can you give me just like subject matter so I can make a record of that.

MS. CHAIKEN: Just ongoing investigative efforts to locate Mr. Baptiste.

THE COURT: All right.

Counsel, any objection to stepping out for a moment just while I discuss that issue with the government?

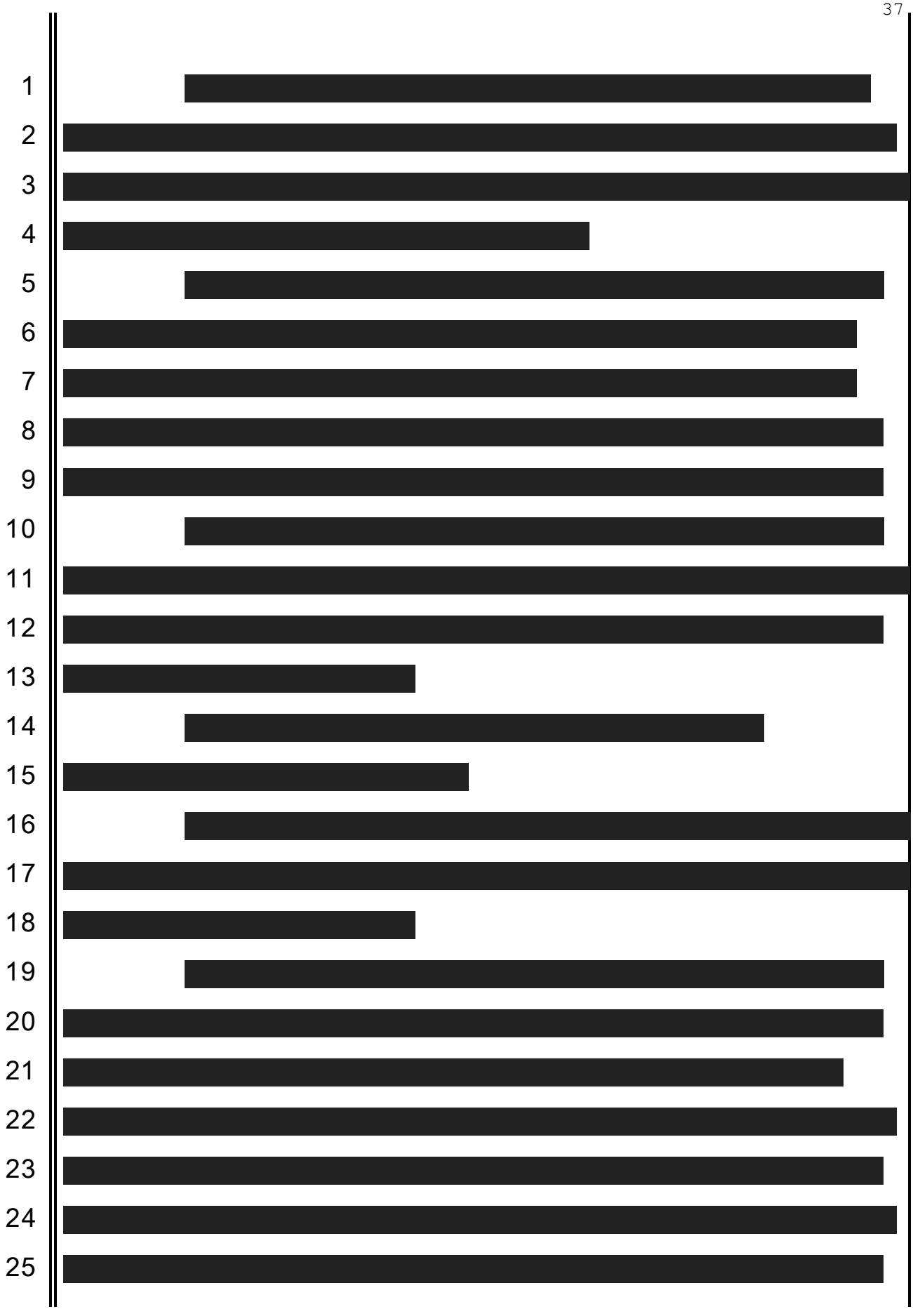
MS. WEBSTER: I don't think so, Your Honor.

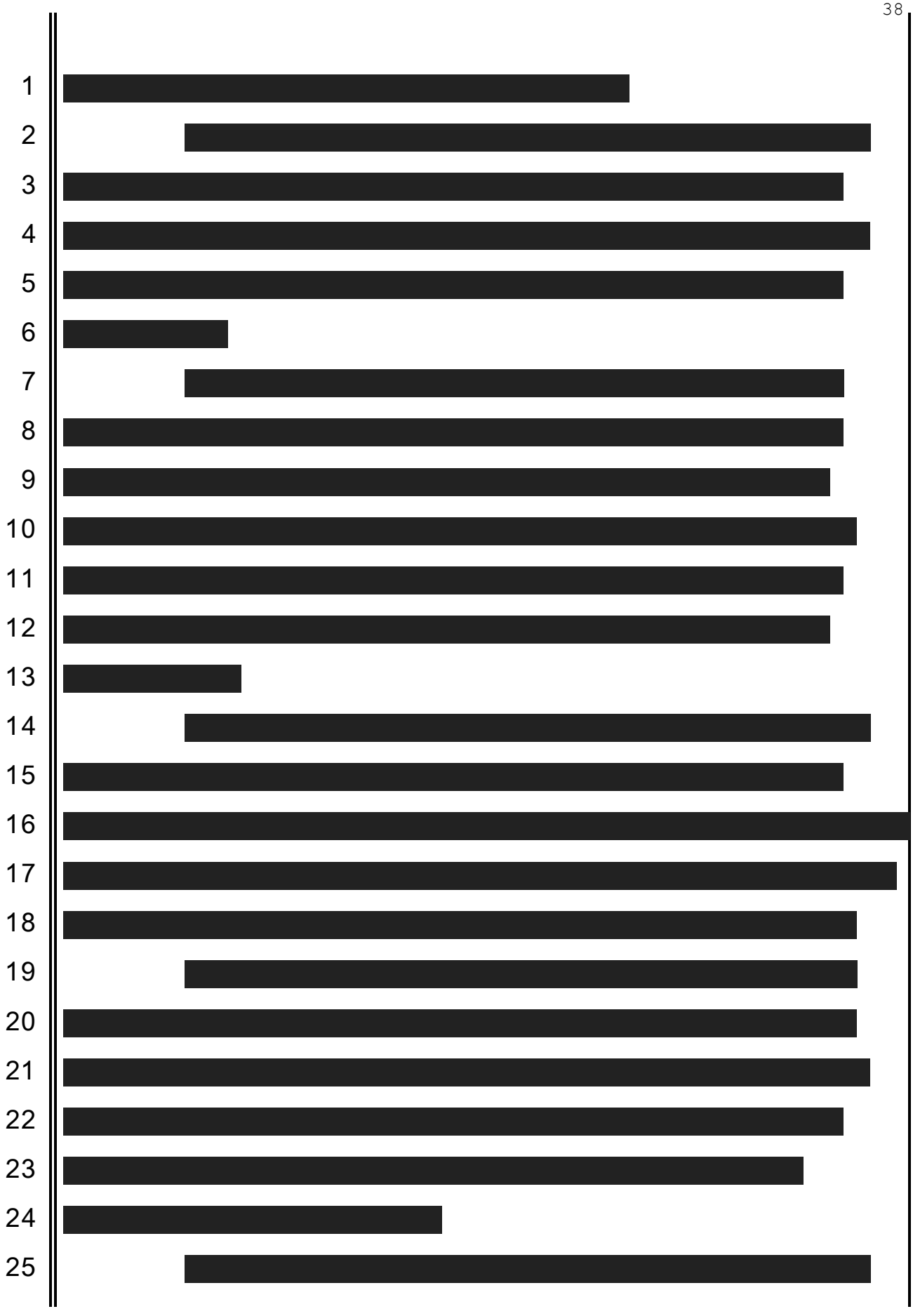
THE COURT: Thanks, everyone. If you'll step out just for a moment.

(Courtroom cleared of all but United States Attorney's Office personnel.)

(The following proceedings are under seal.)

[redacted]





[redacted]

(Record is unsealed and the courtroom open.)

(Parties entered the courtroom.)

THE COURT: We are back out under seal and back on the record with other counsel back in the courtroom now that I've had a conversation with the government about their

efforts to locate Mr. Baptiste, the sum and substance of which is that they have not located Mr. Baptiste, but they think there's a possibility they might be able to locate him this afternoon.

I'm an optimist and I'm hopeful that we will be able to have Mr. Baptiste here tomorrow morning so that we can have this trial with the three remaining defendants all at one time. And I think it's worthwhile to give it the afternoon to see if that is possible or not.

Also, I'm cognitive of the fact it's 1:15 almost already, and it would probably be another 15 minutes before all the jurors are shuffled in if we went forward without him this afternoon. And who knows what we have for juror conflicts and et cetera, the 5:00 hour with childcare. So I don't know how much we would get through of voir dire today anyway.

Therefore, I would like everyone to report tomorrow at 9:00 at which time it will be my intent to bring the jury up, whether we have Mr. Baptiste or whether we don't have Mr. Baptiste.

And at that time if we don't have Mr. Baptiste, Mr. Gilfillan, I'll release you and your co-counsel. I know that you've already spent a lot of time here waiting to see what happens. And I thank you for your service to the Court.

All right. Would anyone like to be heard before we

recess for the day?

MS. WEBSTER: I just have one issue, Your Honor.

Specifically we had filed the request for -- about Ricky Dixon and the writ, for him to be produced ex parte and under seal.

THE COURT: Sorry, I couldn't hear you.

MS. WEBSTER: We had filed our request for Ricky Dixon to be produced, the petition for writ under seal and ex parte. And to my knowledge, no one knew about it but us and the Court and the judge that signed it. So it's concerning to us that things that were filed ex parte and that relate to our defense strategy have been disclosed without our knowledge to the government. So I would like to address that.

THE COURT: Okay. You're addressing it now. Go ahead. You would like to address it, so go ahead and make your record.

MS. WEBSTER: I would like to know how that happened. We are filing and have filed a number of things ex parte and under seal, and I want to have some indication that that is -- those are going to be ex parte and under seal and not disclosed to the government.

THE COURT: All right. And I don't -- I still don't know what happened. Can you fill me in? I would expect that if you filed something under seal, it would have been handled under seal. Was there a mistake or did something go wrong?

MS. WEBSTER: I don't know what happened, Your Honor. Sorry. That's what I'm trying to say. When Mr. Kaushal said earlier today that they are aware that we have tried to get -- or are trying to get Mr. Dixon here, that's the first time I had any indication that anyone other than us knew about that. So that's what I'm concerned about.

THE COURT: I guess I'm in the dark, too, but I would be happy to hear from the government.

MS. CHAIKEN: Your Honor, we have not seen any ex parte filings that the defense has made. We were contacted by a BOP administrative person at the facility where Mr. Dixon is being held because she had not seen a writ that looked the way his writ looked and she called us to see if we needed him. And we told her it was not our writ and it was probably issued by one of the defense attorneys and she should look for a name on the documentation. And that's how that was brought to our attention. We have not seen any ex parte filings on that or on anything else that the defense has made.

THE COURT: Okay. I don't know what we can do differently on that front if somebody calls up and asks them a question.

MS. WEBSTER: Sure. I understand. I just wanted to sort of just note it was concerning to us, but I understand how it happened. And we just wanted some assurance that that was not coming from anyone in the courthouse, I guess. So I

think we have that now. Thank you.

THE COURT: Okay. Very well. Okay. I hope everyone has an unexpectedly relaxing afternoon, and we'll see you in the morning right after I hear from Mr. Marshall.

MR. MARSHALL: Sorry, Judge.

Can I ask you to possibly revisit one of your orders. It was a small administrative motion that I filed. And I didn't know what the Court's position was on this. I filed a motion to try to see if my client would be able to have access to her phone during the trial.

That's just more logistics, like I've had this happen where I've had somebody in the cafeteria and I can't find them and I need to get them to court and all that. That's really it, Your Honor. I wouldn't need anything else, but it would be -- it would help quite a bit. But if the Court doesn't normally do that for defendants during trials, I understand, but I wanted to ask.

THE COURT: All right. Motion to reconsider denied, I'm sorry.

MR. MARSHALL: Thank you, Judge.

THE COURT: I understand how that would in some ways make things logistically perhaps a bit easier. There's some downsides there, too, to opening the floodgates to letting defendants come on in with their cell phones unfortunately.

And, you know, I think it's probably an instance in

which a few bad apples have spoiled the barrel for everyone. I don't doubt perhaps it wouldn't be an issue here, but I'm worried about setting a precedent that's going to cause me trouble down the line.

MR. MARSHALL: Yes, Your Honor. Thank you.

THE COURT: I'll certainly understand if there's ever a slight delay getting somebody back into the courtroom after a break or something for that reason. And I'll try to be really clear how long our breaks will be for comfort breaks, lunch breaks, et cetera.

All right. Anything else?

MS. CHAIKEN: No, Your Honor.

THE COURT: Hearing nothing, enjoy that relaxing afternoon. See y'all in the morning.

(After a recess taken at 1:15 PM, proceedings were continued as follows on February 6, 2024:)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 5th Day of February, 2024.

PENNY PRITTY COUDRIET, RMR, CRR
OFFICIAL COURT REPORTER

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