

1 **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO**

2 - - - - - x
3 : :
4 UNITED STATES OF AMERICA, : Case No. 10-00148-N-BLW
5 : :
6 Plaintiff, : **JURY TRIAL**
7 : :
8 vs. : :
9 EDGAR J. STEELE, : :
10 : :
11 Defendant. : :
12 : :
13 - - - - - x

13 **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

14 before B. Lynn Winmill, Chief District Judge

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Tuesday, May 3, 2011

(Jury absent.)

THE CLERK: The court will now hear day six of jury trial in Criminal Case 10-148-N-BLW, United States of America versus Edgar J. Steele.

THE COURT: Good morning, Counsel. We're convening outside the presence of the jury to take up the matter concerning Mr. Fairfax's notes. I don't know quite how else to describe them. Obviously, since I haven't seen them, that makes it additionally problematic.

Just to set the stage for the discussion, we learned of the existence of these notes during Mr. Fairfax's cross-examination by Mr. McAllister. And at that time, the court -- now, on reflection, in error -- thinking that they were or potentially could be Brady material, directed that they be turned over to the government. I guess I was of the mind at the time that perhaps the government was aware of their existence, but I should have inquired more closely on that issue.

But, in any event, what's done is done. The government did receive them and, at my

On May 3rd, now, they filed something that says we're required to turn it over as Jencks Act material, even though the court said that -- because we have it. And they're citing to that and making it, once again, the government's burden. I want this to be addressed, too.

THE COURT: All right. I don't know how that furthers, you know, the discussion. The Jencks Act require -- again, I'm going from memory. We don't run into that issue very often. I mean, very rarely. If there is essentially verbatim statements, such as recorded statements and whatnot, grand jury testimony in the government's possession, they're obligated, I think, to turn that over after a witness has testified.

These matters were not, as I understand it, in the government's possession. They came into the government's possession at the court's directive, and the court has now conceded that I was in error in directing that. I don't think that somehow converts these into Jencks Act material.

But it's -- really, it's more just now a question of whether the defense is entitled to

direction, reviewed them. However, that, I don't think, makes them Brady material. I think it is now a question of whether the defense is entitled to, by subpoena, access these documents for further examination -- potential further examination of Mr. Fairfax.

Mr. Miller, with the court's appreciation, arranged to procure, I guess, the original, which was then FedExed to the U.S. Attorney's Office. I think the U.S. Attorney has still kept that set in their possession. And we're here this morning to resolve any objections to the defendant's request that he be allowed to have access to those notes.

And what I've indicated is that we'll treat this as if the defense has, in essence, subpoenaed the documents. And it's whether they're entitled to it, not whether the government has some obligation to turn them over, but whether the defense would be entitled to subpoena them and have them available.

So, Ms. Whelan?

MS. WHELAN: Your Honor, I think that what the court needs to consider as well is that the defense now, though, has put another spin on it.

documents. And I think it's Mr. Miller's objection that really needs to be considered here as to why they shouldn't be turned over.

Now, Ms. Whelan, I'm suggesting you don't have a dog in the fight at this point. You're simply a custodian at the court's direction of the documents and, presumably, willing to do whatever the court orders and don't take a position beyond that. Is that fair to say? And perhaps opposing any suggestion that these were either Brady, Giglio, or Jencks Act materials?

MS. WHELAN: Judge, I think that's fair to say. But my concern is it's a bootstrap attempt, saying, "Well, government, now, because you did what the court ordered, you do have possession of this, so now it is Jencks Act."

And I don't know how we can unring that bell. That's my concern.

THE COURT: What I'm saying -- I guess I'm saying now it is not Jencks Act, it is not Brady, it is not Giglio material, because the documents only came into the government's possession at the court's direction after the defense was already aware of its existence and after the defense knew as much about the items as the government did

1 except for your review, which was done at the
 2 court's direction. So --
 3 MS. WHELAN: I'm happy to let Mr. Miller
 4 have my seat.
 5 THE COURT: All right. Mr. Miller? Just a
 6 moment.
 7 MR. MILLER: I'll take the podium,
 8 Your Honor, rather than her seat.
 9 THE COURT: All right. Yes, Mr. Miller.
 10 MR. MILLER: Thank you, Your Honor.
 11 I did file an objection without having
 12 reviewed the material that was requested by the
 13 court. Now I have reviewed the material.
 14 I think, first and foremost, I need to
 15 inform the court that neither my office, my
 16 client, nor my client's family has ever been
 17 served with a subpoena. This would be, in my
 18 estimation, a tactical defense decision not to
 19 serve a subpoena despite having interviewed
 20 Mr. Hollingsworth well over 30 days ago, a
 21 tactical decision to bring this book up in
 22 cross-examination without ever having reviewed it.
 23 Mr. Hollingsworth is the individual who
 24 informed, apparently, the defense -- although I
 25 don't know that for a fact because I'm not sitting

1 especially now, after having read it, was the
 2 document really is almost a diary. It's not a
 3 book, by any means. It's his daily ranting and
 4 ravings from the time he was arrested until, I
 5 think, sometime in the Shoshone County Jail.
 6 There are some notes from the Shoshone County
 7 Jail.
 8 But most of the book is nothing more
 9 than his day-to-day life in jail. There is
 10 certainly portions that are addressed to this
 11 case. But, in my review of the book, I don't see
 12 any material that would change his testimony or
 13 attack his testimony in any way. If I were
 14 sitting at that table, however, I think I would
 15 want the book. But the fact of the matter is it
 16 should never have been reviewed by anyone.
 17 THE COURT: It should what?
 18 MR. MILLER: It should not have been
 19 reviewed by anyone. It's private work by him, his
 20 thoughts. There is prayers in this. There is
 21 comments to his wife. There is comments about me.
 22 There is comments about the prosecution. There is
 23 a few things about the judge.
 24 But none of it is something that I'm
 25 concerned with as far as his sentencing. I have

1 at the table now. But they did interview
 2 Mr. Hollingsworth. I'm not sure exactly when, but
 3 I would assume before the trial date --
 4 THE COURT: Mr. Hollingsworth testified
 5 yesterday.
 6 MR. MILLER: But they interviewed him before
 7 the trial date. I think it was March 7th, I would
 8 assume. I don't know that for a fact.
 9 But this fire drill that we're going
 10 through is not something that was caused by the
 11 prosecution. It's not something that was caused
 12 by my office. I think it was a tactical decision
 13 by the defense to bring this up -- this book up,
 14 on cross-examination without ever having
 15 subpoenaed it.
 16 So I think the first strike is there.
 17 I have not a subpoena in my hand. I do
 18 have a copy that I sent to the prosecution at the
 19 court's direction. I did that in the spirit of
 20 cooperation that my client has shown since before
 21 his arrest, before Mr. Steele's arrest, and during
 22 his entire period of incarceration.
 23 As I told the court in the objection --
 24 and I've provided now a copy to both sides of the
 25 podium here -- my concern was more with --

1 worked with Ms. Whelan --
 2 THE COURT: You say there is nothing that
 3 you're concerned with?
 4 MR. MILLER: There is nothing that I am
 5 concerned with for purposes of his sentencing.
 6 Yes, there is some embarrassing
 7 material in there. But I'm confident in the
 8 court's professionalism. I'm confident in
 9 Ms. Whelan's professionalism.
 10 So it is what it is, to use the phrase
 11 that's been coined, I think, in this courtroom.
 12 But I think the biggest problem that I
 13 have is what I would call a "waiver" by the
 14 defense. They knew about this thing. They didn't
 15 bring it to my attention by subpoena. They
 16 certainly didn't bring it to the attention of the
 17 prosecution. They brought it to the attention of
 18 everyone on cross-examination.
 19 Again, I don't know how long they knew
 20 that. I don't know when they interviewed
 21 Mr. Hollingsworth.
 22 THE COURT: Mr. Miller, let me ask you:
 23 If -- let's change the scenario. If
 24 Mr. McAllister had issued a subpoena, subpoena
 25 duces tecum, perhaps, on your client a month ago,

1 what objections would you have to turning that
 2 over to the defendant at that time?
 3 What I'm trying to tease out of this is
 4 whether there are privileged materials, whether
 5 there -- you know, again, I'm not sure what the
 6 standard is when a nonparty, someone who obviously
 7 has a direct involvement in the case but is not a
 8 co-defendant in this same case, seeks to -- has
 9 been subpoenaed to provide documents in the form
 10 of a diary which they have maintained, based upon
 11 a suggestion, presumably, by -- is it
 12 Hollingsworth? I think -- by Mr. Hollingsworth,
 13 to the effect that this individual has represented
 14 that this is a book he is writing about the events
 15 in question that give rise to this criminal case.
 16 As you indicated, if I were in
 17 Mr. McAllister's shoes, I would want to know what
 18 was in that, because there may be inconsistent
 19 statements with his testimony. Given that, what
 20 objections would there have been at that time, two
 21 months ago?
 22 MR. MILLER: Within the notes and
 23 memorandums, there are privileged communications,
 24 as far as I'm concerned. There is communications
 25 about me and with me. There is communications

1 fully brief the court and have this hearing,
 2 rather than on a fire-drill matter, on a basis of
 3 some further review of the facts and the law. I
 4 haven't had that opportunity.
 5 THE COURT: All right. Okay. Anything
 6 else?
 7 MR. MILLER: No, Your Honor.
 8 THE COURT: All right.
 9 MR. MILLER: Yes, there is one other thing.
 10 THE COURT: Yes?
 11 MR. MILLER: Protective order: To the
 12 extent that the court determines that the copy
 13 that's been provided to the government and a copy,
 14 if ordered, provided to the defense, as far as I'm
 15 concerned, it is common law copyright-privileged
 16 material.
 17 And I would like the court to consider
 18 a protective order that would require both sides
 19 not to copy, disseminate, et cetera; and, once
 20 done with the use in this trial, return their
 21 copies to my office.
 22 THE COURT: All right.
 23 MR. MILLER: Thank you.
 24 THE COURT: Mr. McAllister.
 25 MR. McALLISTER: Your Honor, I want to make

1 about and with his wife. I believe both of those
 2 are privileged.
 3 Now, those are sprinkled within the
 4 confines of the 258 pages, as there are
 5 sprinklings of every other thing you could think
 6 of a person who is incarcerated on his day-to-day
 7 basis with guards, with visits, with his
 8 recollections of what has happened in his
 9 experiences within the confines of this case. So
 10 there are privileged items within it.
 11 Judge, to answer your question
 12 directly: Would I have objected then, or what
 13 would have been the grounds? Those I would have
 14 brought up.
 15 The fact of the matter is these
 16 documents were not provided to the government.
 17 These documents were private writings, and they
 18 are not writings as one would define them under
 19 Rule 26, I believe it's (f), nor are they -- have
 20 they been reviewed. Once written, they have been
 21 mailed out of the facility. So my client has
 22 never reviewed them. So he can't approve what is
 23 there at this point.
 24 So I would have raised those objections
 25 then. We would have had the opportunity then to

1 a few factual statements here as an officer of the
 2 court because I think there is some misconception
 3 here about what has happened and why a subpoena
 4 was not issued.
 5 What everyone seems to ignore is the
 6 fact that the witness testified on
 7 cross-examination that he was writing a book. He
 8 didn't say a diary. He didn't say he was making
 9 notes. He said he was writing a book and then,
 10 for the first time, disclosed to everyone that, in
 11 fact, he had written a good deal of it.
 12 And Mr. Amendola did interview
 13 Mr. Hollingsworth back before the first trial.
 14 And the extent of our knowledge was that he had a
 15 cover -- he asked Hollingsworth to design a cover
 16 for the book. Hollingsworth had never seen the
 17 book or the writing or knew nothing about it.
 18 So to say this was a tactical decision
 19 on our part is improper and wrong. That is the
 20 state of the record as I understand it in terms of
 21 our knowledge on the defense side.
 22 THE COURT: Mr. McAllister, you did know,
 23 based on what Mr. Hollingsworth indicated, that
 24 Mr. Fairfax was in the process of or thinking of
 25 writing a book?

1 MR. McALLISTER: I think we didn't believe
2 it, quite frankly, Judge.

3 THE COURT: All right.

4 MR. McALLISTER: All we knew was that
5 Mr. Hollingsworth had artistic ability and that
6 Mr. Fairfax asked him to design a cover for a
7 book. I thought the testimony was that he was
8 going to write at some point in the future. But,
9 certainly, we did not know that, during his
10 incarceration for the last ten or so months, he
11 was making these writings.

12 Now, it's been described here as a
13 "fire drill." And it's been described by Ms.
14 Whelan that it's "a spin."

15 And yesterday the court asked me for
16 authority. So I went last night -- and I will be
17 the first to admit, I don't think I have read the
18 Jencks Act in about 20 years, because I've never
19 had this situation where there is a defendant's
20 statement, written statement, that the government
21 has. Whether it was by court order, whether it
22 was by mistake, the Jencks Act does not
23 differentiate in any way.

24 And I went back, and I read the actual
25 Supreme Court decision in the Jencks case and then

1 don't doubt that he is right -- about privileged
2 materials being in these writings, that privilege
3 is waived.

4 You know, in this case, Judge, one of
5 the counts and certain pieces of the evidence
6 relate to my client's writings in the jail. And
7 in this case, there is no privilege to them. They
8 have been admitted into evidence.

9 And everyone incarcerated is told in
10 real life that his statements in writing that are
11 sent out of the jail can be reviewed, are
12 reviewed. And I don't think any privilege applies
13 here in any fashion.

14 It's ironic that the government is
15 using the writings of my client while in jail to
16 attempt to convict him and then refusing to
17 provide to me the writings of the main witness
18 against him in this case.

19 Now, Ms. Whelan has reviewed them, and
20 she stated in open court that it dealt with his
21 case, that it dealt with his sentencing, it dealt
22 with his complaints about the system.

23 And Mr. Miller then said there are
24 comments in there about himself, about her, about
25 the judge.

1 the Jencks Act which Congress enacted in relation
2 to the Supreme Court's decision, and it's very
3 clear that it doesn't matter how the government
4 got it.

5 And, Judge, I know you can look at it
6 yourself, but the Jencks Act says that if the
7 government doesn't produce it to the defense, then
8 it should be reviewed by the court.

9 And they define a statement by the
10 defendant as, in section 1, "a written statement
11 by said witness, signed or otherwise adopted and
12 approved by him."

13 Now, the Jencks Act seems to be right
14 on point, but I continued to research it. And I
15 filed the memorandum with the court this
16 morning -- and I have a copy here, as well, if the
17 court would like it -- with the Ninth Circuit
18 cases, indicating -- following up since the Jencks
19 Act, indicating that this statement is required to
20 be produced. And if the government objects, then
21 the court is supposed to review it, and the court
22 is then supposed to make it part of the record if
23 the court decides not to produce it to defense
24 counsel.

25 Now, if Mr. Miller is right -- and I

1 I can't think of better material for
2 impeachment than that, especially if there is
3 discussion in any way that the, quote, "immunity"
4 he was seeking -- that was his word -- was
5 somehow, he believes, unfairly denied him, which
6 apparently it was.

7 And if there is any comments that
8 relate to a plea bargain in this case and
9 representations that were made to him by the
10 government, I'm absolutely, I believe as defense
11 counsel, entitled to that.

12 Bringing up 18 U.S.C. 3500 is not a
13 "spin," according to Ms. Whelan; it's the law,
14 which I admit I haven't reviewed in years because
15 I have never had this situation where the
16 government has a written statement by the
17 defendant, reads it, has it in their possession.

18 And, by the way, 18 U.S.C. 3500 does
19 not distinguish in terms of how the government
20 gets it in their possession, rightfully or
21 wrongfully.

22 It seems to me that the Jencks Act
23 controls this situation and that the only way to
24 really resolve it is to allow defense counsel to
25 review it. Or it goes to the court, and a

1 decision is made whether or not it should be
2 disclosed.

3 And if the court decides that it's not,
4 according to the Jencks Act, the entire text of
5 such statement -- which is a written document by
6 the witness in this case -- shall be preserved and
7 made available to the appellate court for purposes
8 of determining the correctness of the ruling of
9 the trial judge.

10 Judge, this is not a fire drill. This
11 is not gamesmanship. This is not -- we talked
12 about issuing a subpoena to Mr. Miller, and we
13 would have done that tomorrow. But, instead, we
14 just contacted him and tried to arrange for this
15 hearing pursuant to the court's direction.

16 But it's not about whether or not we
17 issued a subpoena. It's not about whether or not
18 there is some privilege here. It's about whether
19 the government has to produce it, at least for us
20 to review or the court to review.

21 And for those reasons, Judge, I
22 continue to ask for its production.

23 THE COURT: Ms. Whelan?

24 MS. WHELAN: Judge -- Judge, I think that --
25 and I conferred with the first assistant and

1 believe this is a statement.

2 Thank you, Your Honor.

3 THE COURT: All right. Well, first of all,
4 I appreciate the government's -- it doesn't take
5 me off the hook, but I appreciate the government's
6 candor in their approach.

7 What I'm going to do is require that it
8 be provided to the court for my review.

9 Mr. Miller, I wanted to give you the
10 opportunity to go through, though -- and, again,
11 it's 250-some-odd pages. I don't know what your
12 schedule would be -- but to actually go through
13 and provide the court with a copy which indicates
14 those portions which you feel are privileged or
15 otherwise should not be produced.

16 What I would do is review that. I'll
17 seal that, as well, so that your position is part
18 of the record. I'll then go through, make my own
19 independent determination of what matters I think
20 are relevant. And relevance would be including
21 any discussion concerning Mr. Steele, concerning
22 the events in question, or concerning -- or that
23 could be used for impeachment in some way.

24 But I think getting into other comments
25 about the court, about the prosecutor that do not

1 criminal chief, but I think this is not a bell
2 that can be unrung. I think that the Jencks Act
3 doesn't distinguish as to how it came into our
4 possession, and I think that that's unfortunate.

5 But I think that it is in our
6 possession because the court ordered it to be, and
7 I think that the court likely does have to review
8 this. I don't think it should be given to the
9 defense.

10 But I think what he says is, if an
11 appellate looks at it, it's going to be -- it
12 doesn't matter how it came into their possession.
13 The result is it is in their possession. And
14 we -- it's not something I want to see, but it's
15 not something that we can undo.

16 So, to that matter, you know, I think
17 it's in our possession now.

18 THE COURT: Okay. Mr. Miller?

19 MR. MILLER: May I have just a final say,
20 Your Honor, very briefly?

21 I respectfully disagree with defense
22 counsel that this is a statement, and I think I
23 brought that up in my argument.

24 This -- if you look directly at Rule
25 26(2), it defines what a statement is. I don't

1 relate and could not in any way be relevant to
2 these proceedings, either by way of impeachment or
3 by way of bearing upon the events in question,
4 would not need to be produced.

5 But I think I at least want, since it's
6 your client, to give you an opportunity to assert
7 the privilege and those objections as part of the
8 record.

9 After I've reviewed it, then I'll make
10 a determination as to what portions must be turned
11 over to the defense and so order.

12 I'll also enter a protective order
13 along the lines that you've suggested, requiring
14 that all copies in counsel's possession be
15 returned to the court or destroyed at the
16 conclusion of the proceedings and that they not be
17 disseminated, and that only a single copy be
18 maintained for use by the defense during the
19 trial.

20 I understand -- and I had already made
21 my notes as to what my ruling was going to be
22 before Ms. Whelan spoke, but I think her comments
23 probably seal the deal to some extent. Because of
24 the government's concern, since they're the ones
25 that would have to assert the issue on appeal,

1 then I think I need to listen to that. But that
2 would have been my decision, regardless.
3 Even apart from the Jencks Act, I'm not
4 convinced that it's a Jencks Act issue. But just
5 in my preliminary review of the Jencks Act, it's
6 very consistent with what I'm suggesting here
7 anyway, including court review and a determination
8 as to what is relevant and what is privileged.

9 Mr. Miller?

10 MR. MILLER: Your Honor, I have gone through
11 the entire material. However, I have not made the
12 notes that the court is suggesting. I think
13 that's a good idea.

14 It will take me probably two to three
15 hours of time to go back into what I have, make
16 those side notes, if you will, make an additional
17 copy. I'm going to have to go out to a copying
18 office somewhere.

19 THE COURT: Well, I think perhaps the court
20 can help you with that.

21 First of all, we need to get the copy
22 from Ms. Whelan. There is no reason for the
23 government to maintain that. That now will become
24 in the court's possession.

25 MS. WHELAN: Mr. Lucoff is going to get

1 MR. MILLER: It's not sufficient in light of
2 what you've indicated. However, those yellow
3 markings won't copy -- I don't think they copy
4 unless you've got a color copier.

5 MS. WHELAN: We have a color copier
6 downstairs.

7 MR. MILLER: So we can do it that way. And
8 then you see my review and also my comments.

9 THE COURT: All right. And then the court
10 will make a determination and have turned over to
11 the defense anything that appears to be relevant
12 or -- and "relevant" will be defined broadly as
13 meaning any discussion concerning Mr. Steele, any
14 discussion concerning the events in question, and
15 anything that could reasonably be used for
16 impeachment purposes.

17 So -- but that, obviously, is the
18 court's determination. Then I, of course, will
19 not order released anything that would fall within
20 the attorney-client privilege.

21 MR. MILLER: One further request I would
22 make of the court: Once I've done that, turned it
23 over to the court, the court makes a determination
24 about what is going to be turned over to the
25 defense. In the event that happened, I would like

1 that, Your Honor.

2 THE COURT: All right. We will then assist
3 you, Mr. Miller, in getting a copy made. Either
4 the copy you have, we can reproduce another copy,
5 or as soon as we have that from Mr. Lucoff, we'll
6 produce a copy that you can then -- and everything
7 will be filed under seal but still filed and made
8 part of the record.

9 MR. MILLER: Would you like my notes in
10 handwritten form on the margins? Would you
11 like --

12 THE COURT: That's what I had in mind, was
13 either using a highlighter as to those portions
14 you think are privileged or should not be produced
15 and then just a brief indication as to why.

16 MR. MILLER: Now, I do have in my briefcase
17 a highlighted version of these notes and memoranda
18 of what I thought would be his thoughts within the
19 context of this case and his testimony, et cetera.
20 However, I do not have the comments where I would
21 think things should be privileged.

22 THE COURT: I'll leave it up to you, as long
23 as it's clear what you're asserting. And if what
24 you have already done is sufficient, then you can
25 just produce that.

1 to be made aware of what is being turned over so
2 that I can review that with my client prior to his
3 continued cross-examination.

4 THE COURT: I will provide you with a copy,
5 as well, of those portions that will be turned
6 over to the defense.

7 MR. MILLER: Thank you, Your Honor.

8 THE COURT: All right. Counsel --
9 Ms. Whelan?

10 MS. WHELAN: Your Honor, there is another
11 matter I wish to bring up before the court.

12 Judge, after leaving here yesterday and
13 after briefing the United States Attorney, she has
14 directed me to respectfully move this court to
15 reconsider its ruling last night that Dr. Papcun
16 be allowed to testify remotely from Bora Bora.

17 Yesterday, Judge, and with all due
18 respect, the court summed up its decision by
19 saying, "What's good for the goose is good for the
20 gander." But, in reality, these situations are as
21 different from night to day.

22 Ms. Loginova's testimony was taken
23 pursuant to rule and case law that supported that.
24 She is not a U.S. citizen. She was never on U.S.
25 soil where we could serve her. There was no way

<p style="text-align: right;">1355</p> <p>1 for the U.S. to compel her to come to court. 2 And that is not the case with 3 Dr. Papcun. Dr. Papcun was here in this courtroom 4 just a few weeks ago. The court issued its ruling 5 and left the door open for his testimony. 6 There are three lawyers working on this 7 case, and any of them could have subpoenaed him 8 pursuant to Rule 17. For whatever reason, they 9 didn't. They made a tactical decision not to. 10 They haven't shown an exceptional circumstance as 11 to why they didn't. And it's not for the court or 12 the U.S. to speculate why they didn't, but the 13 reality is, they didn't. 14 Your Honor, the defense indicated that 15 it's because he is on a prepaid vacation. And 16 I'll represent to the court that there are many 17 witnesses who have appeared in this case who would 18 prefer to be elsewhere but came because the 19 United States subpoenaed them. This is not the 20 same situation at all as a Ukrainian citizen 21 residing in the Ukraine, far from the subpoena 22 power of the United States. 23 Additionally, the deposition taken in 24 this case pursuant to Rule 16 -- which is a 25 recognized exception -- was taken in advance of</p>	<p style="text-align: right;">1356</p> <p>1 court. There were no technical issues; and if 2 there were, we either would have had to have 3 redone it, or we wouldn't have been allowed to 4 present it. 5 That is not the case today. You're 6 being asked to be in an awkward position. What 7 happens if the -- if something breaks, if the 8 transition breaks and you can't hear? Is the 9 court going to declare a mistrial because the 10 defense failed to subpoena somebody and we're not 11 able to finish our cross or they can't finish 12 their direct? 13 Your Honor, the United States is being 14 placed at a disadvantage. Rule 26 says that in 15 every case, the trial testimony of a witness must 16 be taken in open court unless provided otherwise 17 by statute or rule. And the defense has cited to 18 no such rule or statute because it doesn't exist. 19 The United States has the burden of 20 proof and is entitled to cross-examine the witness 21 in open court with him here. We're entitled to 22 have him in the courtroom to go over exhibits, to 23 use the document display or camera or other 24 presentation software as we choose to do it. 25 Judge, this court knows that even kids</p>
<p style="text-align: right;">1357</p> <p>1 who are victims of abuse have to appear in court. 2 They're subpoenaed. And it should be no different 3 for an expert that they intend to call and that 4 they could have subpoenaed. 5 This is the second time in this trial 6 that the defense has failed to use its subpoena 7 power, for whatever reason. And it's the second 8 time that they're not being held to the same 9 standard and that the United States is being 10 placed in an unfair position: We have Jencks 11 material which we wouldn't have had; we can't 12 cross-examine the witness in person because a 13 subpoena wasn't issued. 14 There is no authority, there is no 15 statute, there is no exception. And respectfully, 16 Judge, we're asking the court to reconsider. It 17 is not at all the same situation. 18 THE COURT: Mr. McAllister? 19 MR. McALLISTER: Ms. Whelan is correct about 20 the defense not issuing or compelling this witness 21 by use of a subpoena. However, we did not know 22 what the court's ruling would be until yesterday. 23 THE COURT: Well, Counsel, you knew, did you 24 not, that I clearly left the door open with the 25 understanding that, with the proper predicate,</p>	<p style="text-align: right;">1358</p> <p>1 that, in fact, he would be allowed to testify if 2 his testimony was made relevant by some suggestion 3 that there was something on the tape suggesting 4 that it had been modified in some fashion. 5 MR. McALLISTER: You're correct, Your Honor. 6 I did hope and believe that the court would permit 7 him to testify. 8 But the reality of the situation is he 9 is unable to be here, but he is able to be -- to 10 testify using modern technology. And, you know, 11 Ms. Whelan's suggestion that there is going to be 12 a breakdown and that there is going to be a 13 mistrial somehow, I think, is far-fetched at this 14 point. 15 THE COURT: What about counsel's suggestion, 16 though, that there won't be any ability to 17 effectively cross-examine using documents because 18 he will be in a remote location? 19 MR. McALLISTER: Well, they have 20 cross-examined him, as the court knows, in an 21 earlier hearing in this case. And I don't believe 22 that the documents mattered at all in their 23 cross-examination. I don't think they were even 24 used. 25 I think that is, you know, something at</p>

1 the moment that if there was a document, we could
2 fax it to him. And he could have an opportunity
3 to look at it and respond to questions about it,
4 if that was needed. I don't see that as a real
5 obstacle in this case.

6 THE COURT: Well, Mr. McAllister, the other
7 point that Ms. Whelan points out -- and, again,
8 I -- I won't say honestly that I rarely make
9 mistakes that I -- of this sort during a trial.
10 Now this may be, too. But I'm getting a little
11 red-faced because I try to be very careful in my
12 rulings and my approach. But Ms. Whelan points
13 out that, from her view, there is no rule or
14 statute authorizing the presentation of testimony
15 in this fashion.

16 Now, just to give you background, we do
17 it routinely in civil cases. But there is a
18 rule -- I want to say Rule 37, but I could be
19 wrong on the rule number -- which specifically
20 allows the court in a civil proceeding, upon a
21 finding of extraordinary circumstances, to allow
22 testimony be presented from a remote location.

23 Now, we have used that in the criminal
24 process or in criminal trials at the request of a
25 defendant but where the government did not object.

1 there is a wall sign with something to the effect
2 that "Your procrastination does not create my
3 emergency."

4 You made a choice not to subpoena or
5 ensure Dr. Papcun's presence here, and now the
6 court is expected to exercise discretion and
7 ignore the rules to allow the witness to testify.
8 That's troublesome.

9 Now, I might point out that -- and I
10 had made the determination this morning, when I
11 was advised by our staff that they have serious
12 reservations about the ability to make the
13 connection in a way that will not have a
14 tremendous number of freeze frames. They indicate
15 that it's an IP connection from Valley, and I
16 assume that's "Internet protocol," like voice over
17 Internet protocol. But if there are any number of
18 freeze frames, then I think the government's
19 concern is well taken, and that we simply cannot
20 allow a witness to testify under those
21 circumstances where the jury does not have the
22 ability to see at least comparable to what we saw
23 in terms of the videotape.

24 Now, I'm going to have them report --
25 that the report from our staff -- and I think

1 Either it was not a critical witness, there was no
2 serious issue about cross-examination, and it was
3 essentially just done by consent of the parties to
4 avoid delay, because the result might have been --
5 I think it was an authentication witness who was
6 literally on the video or on the stand for less
7 than ten minutes.

8 But to have a key defense witness,
9 expert witness, testify from a remote location in
10 a criminal proceeding, what is the authority?

11 I was somewhat hoping that the
12 government might consent, but I can understand why
13 they would not, given the issues and concerns
14 expressed by Ms. Whelan.

15 So what's my authority?

16 MR. McALLISTER: The authority is the
17 discretion of the court to ensure a fair trial.

18 The court has heard this witness's
19 testimony in the past. The court has heard all
20 the testimony in the trial. And the court made a
21 decision that it would be fair to allow Dr. Papcun
22 to testify. And that is -- fundamental fairness
23 and due process is the basis upon which the
24 request was made, Judge, in this case.

25 THE COURT: Okay. Well, of course, I --

1 perhaps Mr. Hoyt may be with them; I'm not sure.
2 But I think that if, in fact, that is true, that
3 the -- that we're not going to have a smooth,
4 almost videotape-like presentation, then it's not
5 going to happen. I'm not going to allow it.

6 Then your option would be to get him
7 here by tomorrow or whatever else you need to do.
8 But I just think that puts -- what Ms. Whelan has
9 said becomes paramount because then we do have the
10 technical problems, and how the jury is to assess
11 a witness' testimony when it's done by a bunch of
12 herky-jerky freeze frames and a voice that is not
13 connected to what is being seen by the jury, I
14 think, becomes paramount.

15 I'm going to await that report before I
16 make a ruling. But, as I've indicated, it is the
17 problem of the defense's own making. I think it
18 was very clear from my decision that the door was
19 open to Dr. Papcun's testimony. And I think it
20 was, therefore, the defense's responsibility to
21 make sure that Dr. Papcun was available to walk
22 through that door.

23 I'm willing to use technology.

24 Typically, it's been only with the consent of both
25 parties in a criminal proceeding as a way of -- on

1 minor witnesses. But on an expert witness, I may
2 have to reconsider. And certainly, if the
3 technology is not going to permit something very
4 comparable to live testimony here in the
5 courtroom, I'm just simply not going to permit it.

6 So let's leave it at that. I don't
7 think any further argument is really necessary.
8 Let's see what the technical people report. I
9 think they're actually testing the equipment as we
10 speak, and there may be some report on that
11 momentarily.

12 MR. McALLISTER: Judge, in light of your
13 decision in regards to checking the technical
14 capability, I agree. I hope that it will work.

15 But if, in fact, the court decides it's
16 not proper, I'm going to ask for a two-day
17 continuance to see if I can get Dr. Papcun here.

18 It is -- you know, when you say "it's
19 of the defense's own making," Judge, this is a
20 trip, quote, "of his wife's lifetime," and she is
21 there with him. But I understand that if he can't
22 do this, he will leave her, despite the fact that
23 this was really her trip, and try to make it back
24 to the United States in time to testify.

25 THE COURT: Well, I'll consider that

1 THE COURT: Well, the first thing that I
2 need to do is probably review Mr. Fairfax's notes
3 and make a very quick decision about that so that
4 the defense can make an equally quick decision
5 about whether they're going to recall Mr. Fairfax.
6 There may be other reasons you're going to recall
7 him; but if that's one of the reasons, then I need
8 to get that in your possession.

9 So let's take a recess. I may advise
10 the jury that we may be delayed this morning, and
11 they may just have to remain in the jury room
12 until we have a sense of where we're going from
13 here.

14 All right. We'll be in recess.

15 (Recess.)

16 (Jury absent.)

17 THE COURT: Counsel, I've had a chance to
18 review this further, and here is where we are:

19 I'm going to deny the request for -- to
20 have Dr. Papcun appear by video connection. My
21 reasons are, I suppose, first and foremost, as
22 Ms. Whelan pointed out, there is simply no
23 authority to do so in a criminal matter.

24 And at least nothing has been pointed
25 to the court that the presumption in Rule 26 --

1 request. You will need to couple that with a
2 representation by Dr. Papcun. And I'm not saying
3 how I'll rule, whether I'll permit the continuance
4 or not. But at least we'd need to know when he
5 can be here and what's going to happen in the
6 meantime. Does the defense have other witnesses?

7 You know, the additional problem I've
8 got is that I'm scheduled to be out of the
9 district starting next week, and if the trial
10 cannot be completed this week, that's a very
11 serious problem. I have got obligations, based
12 upon assurances of counsel that this case would be
13 concluded by the middle of this week or certainly
14 no later than the end of this week. That creates
15 some additional problems.

16 So -- all right. Let's -- well, let me
17 just inquire. Mr. McAllister, where are we, then?
18 Are you ready to call another witness, or how are
19 we going to proceed?

20 MR. McALLISTER: Judge, I have asked that
21 Mr. Hollingsworth and Mr. Fairfax remain here in
22 the courthouse subject to recall, but I don't
23 believe, besides Dr. Papcun, that there will be
24 any additional witnesses. But I do need to confer
25 with my client before that decision is made.

1 that all that testimony is to be presented live in
2 court unless there is some rule or statute
3 providing otherwise -- nothing has been pointed
4 out to the court, by way of rule or statute, that
5 would otherwise provide. And I think, therefore,
6 my authority to do so is on very thin ice.

7 In addition, we were endeavoring to
8 test the equipment this morning. Mr. Hoyt was
9 advised last night we needed an IP address so we
10 could make the connection. It was not provided.
11 It is now something like 4:00 in the morning, and
12 so no one is available to provide it. So it was
13 going to be 10:30 or 11:00 before we could even be
14 in a position to test it.

15 And then, in addition, we're advised by
16 our staff that these type connections using an IP
17 connection, even within the United States, results
18 in unacceptable freeze frames and makes it so
19 jerky as to be very, very difficult.

20 And I think that, then, truly
21 jeopardizes the government's ability to
22 cross-examine a witness and even the jury's
23 ability to comprehend what is going on in the
24 cross-examination.

25 So, for all of those reasons, I'm going

1 to deny the request.

2 Second, I'm not going to grant any
3 continuance other than if Dr. Papcun can be here
4 tomorrow morning. If that can be arranged, then
5 we'll proceed, and he can testify. I know, since
6 my daughter lived in Singapore, there are flights
7 that might possibly get him here by then. So I'll
8 just leave that up to the defense.

9 But, as I've indicated, this is a
10 problem of the defense's making, not the court's.
11 And I think that if they made a tactical or
12 otherwise made a decision to not keep Dr. Papcun
13 available, then that's the choice they made.

14 The additional issue, then, is: Where
15 do we go from here? We are in the process of
16 reviewing Mr. Fairfax's notes, but they are very
17 voluminous. It is going to take us some time to
18 get through them. My hope would be by noon to
19 have that process completed, but I don't know if I
20 can do that.

21 We're not going to wait for Mr. Miller.
22 We're going to -- as soon as he has them, we'll
23 look at that in conjunction with what we're
24 looking at, but I certainly will not wait until I
25 have his copy which has his specific objections

1 morning would be matters tied to the Mr. Fairfax
2 notes, which would include perhaps Mr. Fairfax
3 being recalled, and Dr. Papcun, if Dr. Papcun can
4 be -- if his attendance can be procured in that
5 short period of time.

6 Ms. Whelan, do you disagree with the
7 court's suggestion that we just recess until 8:30
8 tomorrow morning?

9 MS. WHELAN: No, we don't, Judge.

10 THE COURT: All right. I think what I'm
11 going to do is bring the jury in, explain to them
12 that, because of matters beyond our control, we're
13 going to have to recess until 8:30 tomorrow
14 morning, allow them to go home or to their hotel
15 room, and then reconvene tomorrow morning.

16 Ms. Whelan?

17 MS. WHELAN: Judge, just one thing I would
18 ask is -- I know your staff has a lot to do, you
19 have a lot to do on this; but, if possible, if
20 there is a set of jury instructions that I could
21 be working on today, that would give me something
22 to prepare today.

23 THE COURT: All right. I may -- there is a
24 set that I'm just starting to review myself, but
25 my problem is I have to review almost 300 pages of

1 before I start reviewing it. It's just simply too
2 voluminous.

3 Now, assuming, then, that it may be
4 noon before we can provide that to the defense,
5 then that will give them time to look at that, and
6 I'm assuming that they will not be in a position
7 to utilize that material in examination of
8 Mr. Fairfax until tomorrow morning.

9 I think that's where we are. I just
10 think it's unavoidable.

11 Now, the question is: Does the defense
12 have other evidence not tied to the Fairfax notes
13 that they could put on at this time? If you have
14 other testimony, then I think we need to present
15 it to the jury. If you do not, then we'll
16 probably send the jury home and have them come
17 back tomorrow morning at 8:30. I just don't know
18 how we can avoid that, but I'm willing to hear
19 from counsel.

20 First, I guess, Mr. McAllister, do we
21 have other witnesses or other evidence that we
22 could use the jury's time with?

23 MR. McALLISTER: No, Your Honor.

24 THE COURT: All right. So it's -- all
25 right. I assume, then, all we would have tomorrow

1 handwritten, single-spaced, very-hard-to-read
2 notes.

3 We'll do the best we can. And I agree,
4 I don't want to delay this. I'm hopeful that we
5 can still maybe submit the case to the jury
6 tomorrow and certainly no later than Thursday
7 morning, but that requires that we have those
8 instructions for you.

9 And the additional problem is these are
10 not your typical Ninth Circuit model instruction
11 case where you simply can refer to that. These
12 have to be crafted rather uniquely for the case,
13 and so we have spent a lot more time working
14 through instructions than we normally would.

15 MS. WHELAN: Understood.

16 THE COURT: Anything else? Mr. McAllister?

17 MR. McALLISTER: Judge, I don't want to
18 mislead the government or the court. It's always
19 been my practice, and what I wanted to do in this
20 case is, after all of the evidence is presented,
21 give my client the option to decide whether or not
22 he wants to testify. That decision has not been
23 made at this point.

24 THE COURT: All right.

25 MR. McALLISTER: So I understand how the

1 court is trying to decide to utilize the jury.
 2 But if he does make that decision, I would like
 3 him to be the last witness in our case.

4 THE COURT: Well, you know, that much I
 5 can't control, but that's -- I think typically,
 6 when a defendant does testify, they typically are
 7 the last witness.

8 Whether there is going -- let me just
 9 inquire, Ms. Whelan: If Dr. Papcun does not
 10 testify -- and that's still uncertain -- do you
 11 have much, if any, by way of rebuttal?

12 MS. WHELAN: Not much. It would depend on
 13 what else happens, but I don't have anything off
 14 the top of my head.

15 THE COURT: Okay. Well, then, I think we
 16 ought to just bring the jury in and instruct them
 17 that we're going to have to recess until 8:30
 18 tomorrow morning and proceed in that way.

19 All right. Mr. Severson, if you want
 20 to bring the jury in.

21 (Jury present.)

22 THE COURT: Ladies and gentlemen, I was
 23 trying to decide whether to describe this as good
 24 news or bad news. I guess it's a little bit of
 25 both.

1 again, admonish you not to discuss the case among
 2 yourselves or with anyone else, not to form or
 3 express any opinions about the case, and to follow
 4 all of the court's extended admonition concerning
 5 juror conduct while we're on this break during the
 6 course of the trial.

7 Again, I just -- the high points:
 8 You're not to go on the Internet or visit any
 9 websites or have any discussions with anyone on
 10 any blogs or chat rooms or emails. Anything you
 11 cannot do in person you also cannot do
 12 electronically. So it's critical that you follow
 13 the court's admonition in that regard.

14 Likewise, I'll direct you to proceed
 15 directly to your car today and then -- directly,
 16 and then return tomorrow morning directly to the
 17 jury room.

18 I think the other thing that you may be
 19 wondering is how are we progressing. I think
 20 there is still a reasonably good chance we'll have
 21 the case submitted to you Thursday morning. There
 22 are things I can't control, but I think there is
 23 at least that -- a good chance of that. And I
 24 think, certainly, we'll have it presented to you
 25 before the end of the week. But, again, things I

1 We, unfortunately, are not going to be
 2 able to hear further testimony today. We're going
 3 to have to recess until 8:30 tomorrow morning.

4 I want to point out this is not
 5 anyone's fault. You are not to, again, hold this
 6 against the government or against the defense.
 7 You can blame me. It's a decision I made. Just
 8 matters arise during the course of a trial that I
 9 can't control, and it just requires sometimes that
 10 these things occur. I'll just leave it at that.

11 Those of you who have traveled here
 12 from your home and it's some distance away, you,
 13 obviously, have the choice whether to return home
 14 and come back to your hotel tonight or come back
 15 tomorrow morning.

16 Those of you who live here within the
 17 Treasure Valley, obviously, can just do what you
 18 want to do.

19 I would indicate, though, that it is
 20 still critical that you follow the court's
 21 admonition, and perhaps even more so now, because
 22 you will be, from now and through the balance of
 23 the day, out and about and may be exposed to news
 24 accounts of the trial or other matters.

25 So it's for that reason I'm going to,

1 cannot control completely, but that's certainly
 2 our goal, and I think that is what will occur.

3 So, for future planning, I think you
 4 can assume that we're pretty much on course for
 5 what we thought as far as the length of the trial.

6 All right. Counsel, is there anything
 7 else?

8 MR. HAWS: No, Your Honor.

9 MR. McALLISTER: No, Your Honor.

10 THE COURT: Ladies and gentlemen, we'll be
 11 in recess until 8:30 tomorrow morning.

12 (Recess.)

13 (Jury absent.)

14 THE COURT: Counsel, at the request, I
 15 guess, of the defense, we're going to convene
 16 court to, I guess, put on the record a motion for
 17 reconsideration of my earlier decision.

18 There's also two other matters that I
 19 need to take up with counsel after we conclude
 20 that, one of which, Ms. Whelan, I'm going to take
 21 up ex parte, but I'd like you to stay in the
 22 courthouse in the event that we need to broaden
 23 that, but that will be the last matter we'll take
 24 up.

25 So let's first take up the motion for

1 reconsideration. Counsel, don't worry about the
2 fact that you're in street clothes. I wish I was,
3 too, but I won't hold that against you.

4 MR. McALLISTER: Thank you, Judge.

5 We have spent the time since the recess
6 contacting Dr. Papcun and trying to figure a way
7 to get him to court here by 8:30 tomorrow morning
8 consistent with the court's order. And,
9 unfortunately, no matter how we try, the earliest
10 we can get him to the Boise area is approximately
11 5:00 tomorrow. And even that, I have to tell the
12 court, is optimistic.

13 But it appears to us, based on three
14 lawyers working full time on it, the soonest we
15 could have Dr. Papcun present in person would be
16 Thursday morning.

17 And I have discussed it with the
18 government prosecutor; and, obviously, they
19 object. But I thought I would make a motion to
20 reconsider the court's previous ruling to allow
21 Dr. Papcun to testify Thursday morning.

22 THE COURT: All right.

23 Ms. Whelan, do you want to respond or
24 just stand on your prior arguments?

25 MS. WHELAN: Judge, just briefly. I have

1 I think that is not the point. The
2 point is that it is just simply -- and even as I
3 think Mr. McAllister has indicated, you know, you
4 think, of course, that you could have him here by
5 tomorrow at 5:00 p.m.; but even that's not
6 certain.

7 But the point is that, again, this was
8 a problem of the defense's making, and I'm just
9 simply not willing to continue the trial realizing
10 that that would not be the end of the trial.
11 There would still need to be time for rebuttal
12 testimony from the government, which I'm sure
13 would expand considerably if Dr. Papcun testifies.

14 That would not trouble me in the least
15 if he were here to testify tomorrow, because then
16 we could have the government's rebuttal witnesses
17 testify tomorrow afternoon. I, in essence,
18 granted a 24-hour continuance to at least see if
19 we could get Dr. Papcun here, which apparently
20 we're not able to. But, of course, it was not
21 just for that reason, but also to give us time to
22 review the documents produced by Mr. Miller on
23 behalf Mr. Fairfax.

24 So, for those reasons, I'm going to
25 stay the course, and I will deny the motion for a

1 made the prior arguments. I also would
2 incorporate the fact that we know this case has to
3 be submitted this week because the court is
4 unavailable.

5 If we're going to have Dr. Papcun
6 testify, we're going to have cross-examination. I
7 am concerned that we will not finish up the case.
8 And for the reasons I stated previously, we object
9 to the continued -- another day's delay.

10 THE COURT: All right. Well, I'm going
11 to -- first of all, if it were another
12 circumstance -- I'm not suggesting that I will not
13 be here Monday, regardless. I mean, I am
14 scheduled to be in a meeting on Monday in which
15 it's -- unfortunately, it's a meeting of a
16 committee that I chair, so it's very difficult for
17 me not to be present.

18 But, you know, as I am somewhat fond of
19 telling people, "This is my day job." Although
20 these are court obligations, court committees, and
21 I take them very seriously, I -- in fact, last
22 Friday, I was supposed to be in San Francisco for
23 a similar committee meeting, which I just simply
24 said I could not be there because of this trial.
25 And the same thing would be true on Monday.

1 continuance, and we will proceed tomorrow morning
2 at 8:30.

3 I do want to put on the record
4 something I neglected to, and that is that we gave
5 counsel the option of waiting until Mr. Steele was
6 present for this argument, and counsel indicated
7 you're willing to waive his presence. Is that
8 correct?

9 MR. McALLISTER: It is, Your Honor. We
10 appreciated that, but we -- we really felt that we
11 needed to bring this to the court's attention, get
12 a decision before the funds were spent. And,
13 obviously, if it went the other way, we would have
14 to act right now. So I appreciate the court
15 taking the time to hear us this afternoon, and we
16 waive his presence.

17 THE COURT: All right. Thank you.

18 Let me deal, then, with the second
19 matter. And this is a note I received from a
20 juror. It's Juror No. 37. I think she is on the
21 back row, second or third from the end, I think.

22 The question is -- well, I could be
23 mistaken, but -- actually, I don't know. Looking
24 at my jury seating chart, I may have this wrong.

25 It does not matter who it is from.

1 It's just a note. I'm going to read the note and
2 indicate how I intend to respond.

3 It's dated today. "Judge Winmill, my
4 juror number is 37. To put your mind at ease, I
5 have followed the rules and directions exactly
6 that you advised us to keep, nor has anyone tried
7 to speak to me or communicate with me in any way.
8 However, due to some of the exhibits that have
9 been admitted, I find myself in a situation where
10 I feel it is wise to ask your advice. Judge
11 Winmill, I do not feel this is critical timewise.
12 So whenever you are available to talk to me for
13 about one or two minutes would be fine with me.
14 Sincerely," and then it's signed.

15 I don't communicate with jurors like
16 this except in writing or in open court. There
17 may be occasions where, with the agreement of
18 counsel, that I will interview a witness -- excuse
19 me -- a juror on the record but without counsel
20 present, but even that would be somewhat
21 extraordinary.

22 My intent is to simply send this juror
23 a note signed by me indicating just that. If it's
24 a concern she has, she needs to reduce it to
25 writing. Then I can decide how to address it,

1 government will need to be out in the hallway
2 while I address this with counsel.

3 MR. MILLER: I take exception that I'm
4 associated with the government.

5 THE COURT: I don't think I said it quite
6 that way.

7 MS. WHELAN: Nobody likes us.

8 (Government attorneys absent.)

9 (Ex parte colloquy between court and
10 defense counsel.)

11 (Court recessed at 2:13 p.m.)
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1 whether I need to visit with her, what the
2 circumstances would be of that visit, whether it
3 would need to be in open court or not or whether I
4 can just respond in writing.

5 Once I have seen that further note,
6 then I would know -- I would probably share that
7 with counsel and decide how to approach it. I'm
8 confident that, as indicated by the juror, that we
9 don't have a problem, but I think we need to find
10 out what it is that this juror is concerned about.

11 I assume neither of you have any
12 objection to that method of proceeding?

13 MR. McALLISTER: None, Your Honor.

14 MS. WHELAN: No, Your Honor.

15 THE COURT: All right. That's how we'll
16 handle it.

17 Mr. Haws, you're here just soon enough
18 that I can kick you out of the courtroom because
19 I'm going to visit --

20 MR. HAWS: I apologize, Your Honor.

21 THE COURT: No. I need to visit with --
22 ex parte now with -- but I want you to stay maybe
23 even out in the hallway. Likewise, everyone
24 else -- that would include you Mr. Miller,
25 Mr. Gonzales, and anybody associated with the

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T a m a r a I. H o h e n l e i t n e r
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