IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO 1 2 - - - - - - - X 3 : Case No. 10-00148-N-BLW UNITED STATES OF AMERICA, 4 Plaintiff, : JURY TRIAL 5 vs. 6 : EDGAR J. STEELE, : 7 Defendant. : 8 - - - - - - - - - - - X 9 10 11 12 13 REPORTER'S TRANSCRIPT OF PROCEEDINGS 14 before B. Lynn Winmill, Chief District Judge 15 16 Volume 6 17 May 3, 2011 18 19 Pages 1322 to 1381 20 21 22 Tamara I. Hohenleitner 23 Idaho Certified Shorthand Reporter No. 619 Registered Professional Reporter 24 Certified Realtime Reporter Federal Certified Realtime Reporter 25 United States Courts, District of Idaho 550 West Fort Street, Boise, Idaho 83724 (208) 334-1500

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12	2002	mortgage company re: check
13	2005	\$2,779.37 V5/1270
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1	PROCEEDINGS	1	direction, reviewed them. However, that, I don't
2	Tuesday, May 3, 2011	2	think, makes them <u>Brady</u> material. I think it is
3	(Jury absent.)	3	now a question of whether the defense is entitled
4	THE CLERK: The court will now hear day six	4	to, by subpoena, access these documents for
5	of jury trial in Criminal Case 10-148-N-BLW,	5	further examination potential further
6	United States of America versus Edgar J. Steele.	6	examination of Mr. Fairfax.
7	THE COURT: Good morning, Counsel. We're	7	Mr. Miller, with the court's
8	convening outside the presence of the jury to take	8	appreciation, arranged to procure, I guess, the
9	up the matter concerning Mr. Fairfax's notes. I	9	original, which was then FedExed to the U.S.
10	don't know quite how else to describe them.	10	Attorney's Office. I think the U.S. Attorney has
11	Obviously, since I haven't seen them, that makes	11	still kept that set in their possession. And
12	it additionally problematic.	12	we're here this morning to resolve any objections
13	Just to set the stage for the	13	to the defendant's request that he be allowed to
14	discussion, we learned of the existence of these	14	have access to those notes.
15	notes during Mr. Fairfax's cross-examination by	15	And what I've indicated is that we'll
16	Mr. McAllister. And at that time, the court	16	treat this as if the defense has, in essence,
17	now, on reflection, in error thinking that they	17	subpoenaed the documents. And it's whether
18	were or potentially could be <u>Brady</u> material,	18	they're entitled to it, not whether the government
19	directed that they be turned over to the	19	has some obligation to turn them over, but whether
20	government. I guess I was of the mind at the time	20	the defense would be entitled to subpoen them and
21	that perhaps the government was aware of their	21	have them available.
22	existence, but I should have inquired more closely	22	So, Ms. Whelan?
23	on that issue.	23	MS. WHELAN: Your Honor, I think that what
24	But, in any event, what's done is done.	24	the court needs to consider as well is that the
25	The government did receive them and, at my	25	defense now, though, has put another spin on it.
	1333		1334
1		1	
1	On May 3rd, now, they filed something that says	1	documents. And I think it's Mr. Miller's
2	On May 3rd, now, they filed something that says we're required to turn it over as Jencks Act	2	documents. And I think it's Mr. Miller's objection that really needs to be considered here
2 3	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	2 3	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.
2 3 4	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	2 3 4	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
2 3 4 5	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	2 3 4 5	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.
2 3 4 5 6	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.	2 3 4 5 6	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
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2 3 4 5 6 7 8 9 10 11 12 13 14	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	2 3 4 5 6 7 8 9 10 11 12	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 <u>Brady</u> , <u>Giglio</u> , 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
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1335 1336 2 court's direction. So 1 at the table now. But they did interview 3 MS. WHELAN: I'm happy to let Mr. Miller 1 at the table now. But they did interview 4 morent. THE COURT: All right. Mr. Miller? Just at more cased by the traid date 1 would assume before the triad date 7 MR. MILLER: I'll take the podium, a more cased by the traid date - 1 would assume before the triad date 8 morent. 1 did file an objection without having tree count star entities the rest. 9 more did the more star. 9 Court. Nor Have review dhe material that was requested by the tree court that neither my office, my time court than entite my office, my times worth and the my office. 1 would assume to subpoena despite having interviewed 10 Mr. Hollingsworth will our ever a subpeena despite having interviewed in the serve a subpeena despite having interviewed in the serve a subpeena despite having read it, was the dorum taf for a face because I'm not stiting at that would for a face because I'm not stiting at the subpeena. This would be, in my time in the Shoshone County 1 and the would change reviewed it. 1 server a subpeena despite having interviewed it. 1 server as the defrase decision not to the server as the defrase decision to this stidy rating and the would the my the defrase decision to the server as the defrase decision to this duty rating reviewed ith the stosthave more thave a serentate until.				
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9THE COURT: All right, Yes, Mr. Miller, MR. MILLER: Thank you, Your Honor.9But this fire drill that we're going through is not something that we're going to not something that we're going through is not something that we're going to not something that we're going 	7	MR. MILLER: I'll take the podium,	7	the trial date. I think it was March 7th, I would
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 a ravings from the time he was arrested until, I think, sometime in the Shoshone County Jail. There are some notes from the Shoshone County Jail. But most of the book is nothing more than his day-to-day life in jail. There is certainly portions that are addressed to this certainly portions that are addressed to this certainly portions that are addressed to this certainly notions that are addressed to this certainly portions that are addressed to this certainly portions that are addressed to this case. But, in my review of the book, I don't see any material that would change his testimony or attack his testimony in any way. If I were sitting at that table, however, I think I would want the book. But the fact of the matter is it should never have been reviewed by anyone. THE COURT: It should what? mR. MILLER: There is comments about me. reviewed by anyone. It's private work by him, his thoughts. There is prayers in this. There is comments to his wife. There is comments about the prosecution. There is a few things about the judge. But none of it is something that I'm concerned with as far as his sentencing. I have 	3	•	3	
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24But none of it is something that I'm24Mr. McAllister had issued a subpoena, subpoena25concerned with as far as his sentencing. I have24Mr. McAllister had issued a subpoena, subpoena25duces tecum, perhaps, on your client a month ago,	22	-	22	•
25 concerned with as far as his sentencing. I have 25 duces tecum, perhaps, on your client a month ago,	23		23	-
	24		24	
	25			

1220	1240
1339	1340
1what objections would you have to turning that1about and with his wife.2what the balance of the bala	I believe both of those
2 over to the defendant at that time? 2 are privileged.	· · · · · · · · · · · ·
	sprinkled within the
4 whether there are privileged materials, whether 4 confines of the 258 pages	
5there you know, again, I'm not sure what the5sprinklings of every other	•••
6 standard is when a nonparty, someone who obviously 6 of a person who is incarce	• •
7has a direct involvement in the case but is not a7basis with guards, with vi	
8co-defendant in this same case, seeks to has8recollections of what has	
9 been subpoenaed to provide documents in the form 9 experiences within the co	
10 of a diary which they have maintained, based upon10 there are privileged items	
	er your question
12Hollingsworth? I think by Mr. Hollingsworth,12directly: Would I have of	-
· · · · ·	inds? Those I would have
14that this is a book he is writing about the events14brought up.	
15in question that give rise to this criminal case.15The fact of the	
16As you indicated, if I were in16documents were not prov	e
17Mr. McAllister's shoes, I would want to know what17These documents were pr	
18 was in that, because there may be inconsistent 18 are not writings as one we	
19 statements with his testimony. Given that, what 19 Rule 26, I believe it's (f),	-
20 objections would there have been at that time, two	•
21 months ago? 21 mailed out of the facility.	•
22MR. MILLER: Within the notes and22never reviewed them. So	he can't approve what is
23 memorandums, there are privileged communications, 23 there at this point.	
	e raised those objections
25 about me and with me. There is communications 25 then. We would have had	** *
1341	1342
1fully brief the court and have this hearing,1a few factual statements hearing,2rather than on a first drill matter, on a hearing,2	
 2 rather than on a fire-drill matter, on a basis of 3 some further review of the facts and the law. I 3 here about what has happ 	
11	ened and why a subpoena
	seems to ignore is the
5THE COURT: All right. Okay. Anything5What everyone6else?6fact that the witness testif	e
oo	
7WIRL MILLER. No, Four Honor.7Cross-examination that he8THE COURT: All right.8didn't say a diary. He did	e
 9 MR. MILLER: Yes, there is one other thing. 9 notes. He said he was wr 	
10THE COURT: Yes?10610 <th>•</th>	•
101111111110 <th>•</th>	•
	idola did interview
13 that's been provided to the government and a copy, 13 Mr. Hollingsworth back b	
	wledge was that he had a
15 concerned, it is common law copyright-privileged 15 cover he asked Holling	6
16contention, it is contained in a copyright privileged16cover inclusive right16material.16for the book. Hollingswork	-
17And I would like the court to consider17Ior the optimization17And I would like the court to consider17book or the writing or known	
e	vas a tactical decision
19not to copy, disseminate, et cetera; and, once19on our part is improper an	
20 done with the use in this trial, return their 20 state of the record as I un	
21 copies to my office.21 our knowledge on the def	
	. McAllister, you did know,
23MR. MILLER: Thank you.23based on what Mr. Hollin	•
24THE COURT: Mr. McAllister.24Mr. Fairfax was in the pro-	-
25 MR. McALLISTER: Your Honor, I want to make 25 writing a book?	6

		1	
	1343		1344
1	MR. McALLISTER: I think we didn't believe	1	the Jencks Act which Congress enacted in relation
2	it, quite frankly, Judge.	2	to the Supreme Court's decision, and it's very
3	THE COURT: All right.	3	clear that it doesn't matter how the government
4	MR. McALLISTER: All we knew was that	4	got it.
5	Mr. Hollingsworth had artistic ability and that	5	And, Judge, I know you can look at it
6	Mr. Fairfax asked him to design a cover for a	6	yourself, but the Jencks Act says that if the
7	book. I thought the testimony was that he was	7	government doesn't produce it to the defense, then
8	going to write at some point in the future. But,	8	it should be reviewed by the court.
9	certainly, we did not know that, during his	9	And they define a statement by the
	incarceration for the last ten or so months, he	10	defendant as, in section 1, "a written statement
10			
11	was making these writings.	11	by said witness, signed or otherwise adopted and
12	Now, it's been described here as a	12	approved by him."
13	"fire drill." And it's been described by Ms.	13	Now, the Jencks Act seems to be right
14	Whelan that it's "a spin."	14	on point, but I continued to research it. And I
15	And yesterday the court asked me for	15	filed the memorandum with the court this
16	authority. So I went last night and I will be	16	morning and I have a copy here, as well, if the
17	the first to admit, I don't think I have read the	17	court would like it with the Ninth Circuit
18	Jencks Act in about 20 years, because I've never	18	cases, indicating following up since the Jencks
19	had this situation where there is a defendant's	19	Act, indicating that this statement is required to
20	statement, written statement, that the government	20	be produced. And if the government objects, then
21	has. Whether it was by court order, whether it	21	the court is supposed to review it, and the court
22	was by mistake, the Jencks Act does not	22	is then supposed to make it part of the record if
23	differentiate in any way.	23	the court decides not to produce it to defense
24	And I went back, and I read the actual	24	counsel.
25	Supreme Court decision in the Jencks case and then	25	Now, if Mr. Miller is right and I
	1345		1346
1	don't doubt that he is right about privileged	1	I can't think of better material for
2	materials being in these writings, that privilege	2	impeachment than that, especially if there is
3	is waived.	3	discussion in any way that the, quote, "immunity"
4	You know, in this case, Judge, one of	4	he was seeking that was his word was
5	the counts and certain pieces of the evidence	5	somehow, he believes, unfairly denied him, which
6	relate to my client's writings in the jail. And	6	apparently it was.
7	in this case, there is no privilege to them. They	7	And if there is any comments that
8	have been admitted into evidence.	8	relate to a plea bargain in this case and
9	And everyone incarcerated is told in	9	representations that were made to him by the
10	real life that his statements in writing that are	10	government, I'm absolutely, I believe as defense
11	sent out of the jail can be reviewed, are	11	counsel, entitled to that.
12	reviewed. And I don't think any privilege applies	12	Bringing up 18 U.S.C. 3500 is not a
13	here in any fashion.	13	"spin," according to Ms. Whelan; it's the law,
14	It's ironic that the government is	14	which I admit I haven't reviewed in years because
15	using the writings of my client while in jail to	15	I have never had this situation where the
16	attempt to convict him and then refusing to	16	government has a written statement by the
	provide to me the writings of the main witness		defendant, reads it, has it in their possession.
17		17	*
18	against him in this case.	18	And, by the way, 18 U.S.C. 3500 does
19	Now, Ms. Whelan has reviewed them, and	19	not distinguish in terms of how the government
20	she stated in open court that it dealt with his	20	gets it in their possession, rightfully or
21	case, that it dealt with his sentencing, it dealt	21	wrongfully.
22	with his complaints about the system.	22	It seems to me that the Jencks Act
23	And Mr. Miller then said there are	23	controls this situation and that the only way to
		~	
24 25	comments in there about himself, about her, about the judge.	24 25	really resolve it is to allow defense counsel to review it. Or it goes to the court, and a

	10.15	1	1010
	1347		1348
1	decision is made whether or not it should be	1	criminal chief, but I think this is not a bell
2	disclosed.	2	that can be unrung. I think that the Jencks Act
3	And if the court decides that it's not,	3	doesn't distinguish as to how it came into our
4	according to the Jencks Act, the entire text of	4	possession, and I think that that's unfortunate.
5	such statement which is a written document by	5	But I think that it is in our
6	the witness in this case shall be preserved and	6	possession because the court ordered it to be, and
7	made available to the appellate court for purposes	7	I think that the court likely does have to review
8	of determining the correctness of the ruling of	8	this. I don't think it should be given to the
9	the trial judge.	9	defense.
10	Judge, this is not a fire drill. This	10	But I think what he says is, if an
11	is not gamesmanship. This is not we talked	11	appellate looks at it, it's going to be it
12	about issuing a subpoena to Mr. Miller, and we	12	doesn't matter how it came into their possession.
13	would have done that tomorrow. But, instead, we	13	The result is it is in their possession. And
14	just contacted him and tried to arrange for this	14	we it's not something I want to see, but it's
15	hearing pursuant to the court's direction.	15	not something that we can undo.
16	But it's not about whether or not we	16	So, to that matter, you know, I think
17	issued a subpoena. It's not about whether or not	17	it's in our possession now.
18	there is some privilege here. It's about whether	18	THE COURT: Okay. Mr. Miller?
19	the government has to produce it, at least for us	19	MR. MILLER: May I have just a final say,
20	to review or the court to review.	20	Your Honor, very briefly?
21	And for those reasons, Judge, I	21	I respectfully disagree with defense
22	continue to ask for its production.	22	counsel that this is a statement, and I think I
23	THE COURT: Ms. Whelan?	23	brought that up in my argument.
24	MS. WHELAN: Judge Judge, I think that	24	This if you look directly at Rule
25	and I conferred with the first assistant and	25	26(2), it defines what a statement is. I don't
	1349		1350
1	believe this is a statement.	1	relate and could not in any way be relevant to
2	Thank you, Your Honor.	2	these proceedings, either by way of impeachment or
3	THE COURT: All right. Well, first of all,	3	by way of bearing upon the events in question,
4	I appreciate the government's it doesn't take	4	would not need to be produced.
5	me off the hook, but I appreciate the government's	5	But I think I at least want, since it's
6	candor in their approach.	6	your client, to give you an opportunity to assert
7	What I'm going to do is require that it	7	the privilege and those objections as part of the
8	be provided to the court for my review.	8	record.
9	Mr. Miller, I wanted to give you the	9	After I've reviewed it, then I'll make
10	opportunity to go through, though and, again,	10	a determination as to what portions must be turned
11	it's 250-some-odd pages. I don't know what your	11	over to the defense and so order.
12	schedule would be but to actually go through	12	I'll also enter a protective order
13	and provide the court with a copy which indicates	13	along the lines that you've suggested, requiring
14	those portions which you feel are privileged or	14	that all copies in counsel's possession be
15	otherwise should not be produced.	15	returned to the court or destroyed at the
16	What I would do is review that. I'll	16	conclusion of the proceedings and that they not be
17	seal that, as well, so that your position is part	17	disseminated, and that only a single copy be
18	of the record. I'll then go through, make my own	18	maintained for use by the defense during the
19	independent determination of what matters I think	19	trial.
20	are relevant. And relevance would be including	20	I understand and I had already made
21	any discussion concerning Mr. Steele, concerning	21	my notes as to what my ruling was going to be
22	the events in question, or concerning or that	22	before Ms. Whelan spoke, but I think her comments
23	could be used for impeachment in some way.	23	probably seal the deal to some extent. Because of
24	But I think getting into other comments	24	the government's concern, since they're the ones
25	about the court, about the prosecutor that do not	25	that would have to assert the issue on appeal,

	1251		1252
	1351		1352
1	then I think I need to listen to that. But that	1	that, Your Honor.
2	would have been my decision, regardless.	2	THE COURT: All right. We will then assist
3	Even apart from the Jencks Act, I'm not	3	you, Mr. Miller, in getting a copy made. Either
4	convinced that it's a Jencks Act issue. But just	4	the copy you have, we can reproduce another copy,
5	in my preliminary review of the Jencks Act, it's	5	or as soon as we have that from Mr. Lucoff, we'll
6	very consistent with what I'm suggesting here	6	produce a copy that you can then and everything
7	anyway, including court review and a determination	7	will be filed under seal but still filed and made
8	as to what is relevant and what is privileged.	8	part of the record.
9	Mr. Miller?	9	MR. MILLER: Would you like my notes in
10	MR. MILLER: Your Honor, I have gone through	10	handwritten form on the margins? Would you
11	the entire material. However, I have not made the	11	like
12	notes that the court is suggesting. I think	12	THE COURT: That's what I had in mind, was
13	that's a good idea.	13	either using a highlighter as to those portions
14	It will take me probably two to three	14	you think are privileged or should not be produced
15	hours of time to go back into what I have, make	15	and then just a brief indication as to why.
16	those side notes, if you will, make an additional	16	MR. MILLER: Now, I do have in my briefcase
17	copy. I'm going to have to go out to a copying	17	a highlighted version of these notes and memoranda
18	office somewhere.	18	of what I thought would be his thoughts within the
19	THE COURT: Well, I think perhaps the court	19	context of this case and his testimony, et cetera.
20	can help you with that.	20	However, I do not have the comments where I would
21	First of all, we need to get the copy	21	think things should be privileged.
22	from Ms. Whelan. There is no reason for the	22	THE COURT: I'll leave it up to you, as long
23	government to maintain that. That now will become	23	as it's clear what you're asserting. And if what
24	in the court's possession.	24	you have already done is sufficient, then you can
25	MS. WHELAN: Mr. Lucoff is going to get	25	just produce that.
	1353		1354
1	MR. MILLER: It's not sufficient in light of	1	to be made aware of what is being turned over so
2	what you've indicated. However, those yellow	2	that I can review that with my client prior to his
3	markings won't copy I don't think they copy	3	continued cross-examination.
4	unless you've got a color copier.	4	THE COURT: I will provide you with a copy,
5	MS. WHELAN: We have a color copier	5	as well, of those portions that will be turned
6	downstairs.	6	over to the defense.
7	MR. MILLER: So we can do it that way. And	7	MR. MILLER: Thank you, Your Honor.
8	then you see my review and also my comments.	8	THE COURT: All right. Counsel
9	THE COURT: All right. And then the court	9	Ms. Whelan?
10	will make a determination and have turned over to	10	MS. WHELAN: Your Honor, there is another
11	the defense anything that appears to be relevant	11	matter I wish to bring up before the court.
12	or and "relevant" will be defined broadly as	12	Judge, after leaving here yesterday and
13	meaning any discussion concerning Mr. Steele, any	13	after briefing the United States Attorney, she has
14	discussion concerning the events in question, and	14	directed me to respectfully move this court to
15	anything that could reasonably be used for	15	reconsider its ruling last night that Dr. Papcun
16	impeachment purposes.	16	be allowed to testify remotely from Bora Bora.
17	So but that, obviously, is the	17	Yesterday, Judge, and with all due
18	court's determination. Then I, of course, will	18	respect, the court summed up its decision by
19	not order released anything that would fall within	19	saying, "What's good for the goose is good for the
20	the attorney-client privilege.	20	gander." But, in reality, these situations are as
21	MR. MILLER: One further request I would	21	different from night to day.
22	make of the court: Once I've done that, turned it	22	Ms. Loginova's testimony was taken
23	over to the court, the court makes a determination	23	pursuant to rule and case law that supported that.
24	about what is going to be turned over to the	24	She is not a U.S. citizen. She was never on U.S.
25	defense. In the event that happened, I would like	25	soil where we could serve her. There was no way

	1055	1	1050
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1	for the U.S. to compel her to come to court.	1	court. There were no technical issues; and if
2	And that is not the case with	2	there were, we either would have had to have
3	Dr. Papcun. Dr. Papcun was here in this courtroom	3	redone it, or we wouldn't have been allowed to
4	just a few weeks ago. The court issued its ruling	4	present it.
5	and left the door open for his testimony.	5	That is not the case today. You're
6	There are three lawyers working on this	6	being asked to be in an awkward position. What
7	case, and any of them could have subpoenaed him	7	happens if the if something breaks, if the
8	pursuant to Rule 17. For whatever reason, they	8	transition breaks and you can't hear? Is the
9	didn't. They made a tactical decision not to.	9	court going to declare a mistrial because the
10	They haven't shown an exceptional circumstance as	10	defense failed to subpoena somebody and we're not
11	to why they didn't. And it's not for the court or	11	able to finish our cross or they can't finish
12	the U.S. to speculate why they didn't, but the	12	their direct?
13	reality is, they didn't.	13	Your Honor, the United States is being
14	Your Honor, the defense indicated that	14	placed at a disadvantage. Rule 26 says that in
15	it's because he is on a prepaid vacation. And	15	every case, the trial testimony of a witness must
16	I'll represent to the court that there are many	16	be taken in open court unless provided otherwise
17	witnesses who have appeared in this case who would	17	by statute or rule. And the defense has cited to
18	prefer to be elsewhere but came because the	18	no such rule or statute because it doesn't exist.
19	United States subpoenaed them. This is not the	19	The United States has the burden of
20	same situation at all as a Ukrainian citizen	20	proof and is entitled to cross-examine the witness
21	residing in the Ukraine, far from the subpoena	21	in open court with him here. We're entitled to
22	power of the United States.	22	have him in the courtroom to go over exhibits, to
23	Additionally, the deposition taken in	23	use the document display or camera or other
24	this case pursuant to Rule 16 which is a	24	presentation software as we choose to do it.
25	recognized exception was taken in advance of	25	Judge, this court knows that even kids
	1357		1358
1	who are victims of abuse have to appear in court.	1	that, in fact, he would be allowed to testify if
1 2	who are victims of abuse have to appear in court. They're subpoenaed. And it should be no different	1 2	that, in fact, he would be allowed to testify if his testimony was made relevant by some suggestion
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	1359	<u> </u>	1360
1	the moment that if there was a document, we could	4	
1		1	Either it was not a critical witness, there was no
2	fax it to him. And he could have an opportunity	2	serious issue about cross-examination, and it was
3	to look at it and respond to questions about it, if that was needed. I don't see that as a real	3	essentially just done by consent of the parties to
4		4	avoid delay, because the result might have been
5	obstacle in this case.	5	I think it was an authentication witness who was
6	THE COURT: Well, Mr. McAllister, the other	6	literally on the video or on the stand for less
7	point that Ms. Whelan points out and, again,	7	than ten minutes.
8	I I won't say honestly that I rarely make	8	But to have a key defense witness,
9	mistakes that I of this sort during a trial.	9	expert witness, testify from a remote location in
10	Now this may be, too. But I'm getting a little	10	a criminal proceeding, what is the authority?
11	red-faced because I try to be very careful in my	11	I was somewhat hoping that the
12	rulings and my approach. But Ms. Whelan points	12	government might consent, but I can understand why
13	out that, from her view, there is no rule or	13	they would not, given the issues and concerns
14	statute authorizing the presentation of testimony	14	expressed by Ms. Whelan.
15	in this fashion.	15	So what's my authority?
16	Now, just to give you background, we do	16	MR. McALLISTER: The authority is the
17	it routinely in civil cases. But there is a	17	discretion of the court to ensure a fair trial.
18	rule I want to say Rule 37, but I could be	18	The court has heard this witness's
19	wrong on the rule number which specifically	19	testimony in the past. The court has heard all
20	allows the court in a civil proceeding, upon a	20	the testimony in the trial. And the court made a
21	finding of extraordinary circumstances, to allow	21	decision that it would be fair to allow Dr. Papcun
22	testimony be presented from a remote location.	22	to testify. And that is fundamental fairness
23	Now, we have used that in the criminal	23	and due process is the basis upon which the
24	process or in criminal trials at the request of a	24	request was made, Judge, in this case.
25	defendant but where the government did not object.	25	THE COURT: Okay. Well, of course, I
	1361		1362
1	there is a wall sign with something to the effect	1	perhaps Mr. Hoyt may be with them; I'm not sure.
2	that "Your procrastination does not create my	2	But I think that if, in fact, that is true, that
3	emergency."	3	the that we're not going to have a smooth,
4	You made a choice not to subpoena or	4	almost videotape-like presentation, then it's not
5	ensure Dr. Papcun's presence here, and now the	5	going to happen. I'm not going to allow it.
6	court is expected to exercise discretion and	6	Then your option would be to get him
7	ignore the rules to allow the witness to testify.	7	here by tomorrow or whatever else you need to do.
8	That's troublesome.	8	But I just think that puts what Ms. Whelan has
9	Now, I might point out that and I	9	said becomes paramount because then we do have the
10	had made the determination this morning, when I	10	technical problems, and how the jury is to assess
11	was advised by our staff that they have serious	11	a witness' testimony when it's done by a bunch of
12	reservations about the ability to make the	12	herky-jerky freeze frames and a voice that is not
13	connection in a way that will not have a	13	connected to what is being seen by the jury, I
14	tremendous number of freeze frames. They indicate	14	think, becomes paramount.
15	that it's an IP connection from Valley, and I	15	I'm going to await that report before I
16	assume that's "Internet protocol," like voice over	16	make a ruling. But, as I've indicated, it is the
17	Internet protocol. But if there are any number of	17	problem of the defense's own making. I think it
18	freeze frames, then I think the government's	18	was very clear from my decision that the door was
19	concern is well taken, and that we simply cannot	19	open to Dr. Papcun's testimony. And I think it
20	allow a witness to testify under those	20	was, therefore, the defense's responsibility to
21	circumstances where the jury does not have the	21	make sure that Dr. Papcun was available to walk
22	ability to see at least comparable to what we saw	22	through that door.
23	in terms of the videotape.	23	I'm willing to use technology.
24	Now, I'm going to have them report	24	Typically, it's been only with the consent of both
25	that the report from our staff and I think	25	parties in a criminal proceeding as a way of on

	1262	1	1264
	1363		1364
1	minor witnesses. But on an expert witness, I may	1	request. You will need to couple that with a
2	have to reconsider. And certainly, if the	2	representation by Dr. Papcun. And I'm not saying
3	technology is not going to permit something very	3	how I'll rule, whether I'll permit the continuance
4	comparable to live testimony here in the	4	or not. But at least we'd need to know when he
5	courtroom, I'm just simply not going to permit it.	5	can be here and what's going to happen in the
6	So let's leave it at that. I don't	6	meantime. Does the defense have other witnesses?
7	think any further argument is really necessary.	7	You know, the additional problem I've
8	Let's see what the technical people report. I	8	got is that I'm scheduled to be out of the
9	think they're actually testing the equipment as we	9	district starting next week, and if the trial
10	speak, and there may be some report on that	10	cannot be completed this week, that's a very
11	momentarily.	11	serious problem. I have got obligations, based
12	MR. McALLISTER: Judge, in light of your	12	upon assurances of counsel that this case would be
13	decision in regards to checking the technical	13	concluded by the middle of this week or certainly
14	capability, I agree. I hope that it will work.	14	no later than the end of this week. That creates
15	But if, in fact, the court decides it's	15	some additional problems.
16	not proper, I'm going to ask for a two-day	16	So all right. Let's well, let me
17	continuance to see if I can get Dr. Papcun here.	17	just inquire. Mr. McAllister, where are we, then?
18	It is you know, when you say "it's	18	Are you ready to call another witness, or how are
19	of the defense's own making," Judge, this is a	19	we going to proceed?
20	trip, quote, "of his wife's lifetime," and she is	20	MR. McALLISTER: Judge, I have asked that
21	there with him. But I understand that if he can't	21	Mr. Hollingsworth and Mr. Fairfax remain here in
22	do this, he will leave her, despite the fact that	22	the courthouse subject to recall, but I don't
23	this was really her trip, and try to make it back	23	believe, besides Dr. Papcun, that there will be
24	to the United States in time to testify.	24	any additional witnesses. But I do need to confer
25	THE COURT: Well, I'll consider that	25	with my client before that decision is made.
	1365		1366
1	THE COURT: Well, the first thing that I	1	that all that testimony is to be presented live in
2	need to do is probably review Mr. Fairfax's notes	2	court unless there is some rule or statute
3	and make a very quick decision about that so that	3	providing otherwise nothing has been pointed
4	the defense can make an equally quick decision	4	out to the court, by way of rule or statute, that
5	about whether they're going to recall Mr. Fairfax.	5	would otherwise provide. And I think, therefore,
6	There may be other reasons you're going to recall	6	my authority to do so is on very thin ice.
7	him; but if that's one of the reasons, then I need	7	
8	,		In addition, we were endeavoring to
	to get that in your possession.	8	In addition, we were endeavoring to test the equipment this morning. Mr. Hoyt was
9			
9 10	to get that in your possession.	8	test the equipment this morning. Mr. Hoyt was
	to get that in your possession. So let's take a recess. I may advise	8 9	test the equipment this morning. Mr. Hoyt was advised last night we needed an IP address so we
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10 11	to get that in your possession. So let's take a recess. I may advise the jury that we may be delayed this morning, and	8 9 10 11	test the equipment this morning. Mr. Hoyt was advised last night we needed an IP address so we could make the connection. It was not provided. It is now something like 4:00 in the morning, and
10 11 12	to get that in your possession. So let's take a recess. I may advise the jury that we may be delayed this morning, and they may just have to remain in the jury room until we have a sense of where we're going from	8 9 10 11 12	test the equipment this morning. Mr. Hoyt was advised last night we needed an IP address so we could make the connection. It was not provided. It is now something like 4:00 in the morning, and so no one is available to provide it. So it was
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	10/7		10/0
4	to dony the request	4	1368
1	to deny the request.	1	before I start reviewing it. It's just simply too
2	Second, I'm not going to grant any	2	voluminous.
3	continuance other than if Dr. Papcun can be here	3	Now, assuming, then, that it may be
4	tomorrow morning. If that can be arranged, then	4	noon before we can provide that to the defense,
5	we'll proceed, and he can testify. I know, since my daughter lived in Singapore, there are flights	5	then that will give them time to look at that, and
6 7	that might possibly get him here by then. So I'll	6 7	I'm assuming that they will not be in a position to utilize that material in examination of
	just leave that up to the defense.	8	Mr. Fairfax until tomorrow morning.
8 9	But, as I've indicated, this is a	9	I think that's where we are. I just
10	problem of the defense's making, not the court's.	10	think it's unavoidable.
11	And I think that if they made a tactical or	11	Now, the question is: Does the defense
12	otherwise made a decision to not keep Dr. Papcun	12	have other evidence not tied to the Fairfax notes
13	available, then that's the choice they made.	13	that they could put on at this time? If you have
14	The additional issue, then, is: Where	14	other testimony, then I think we need to present
15	do we go from here? We are in the process of	15	it to the jury. If you do not, then we'll
16	reviewing Mr. Fairfax's notes, but they are very	16	probably send the jury home and have them come
17	voluminous. It is going to take us some time to	17	back tomorrow morning at 8:30. I just don't know
18	get through them. My hope would be by noon to	18	how we can avoid that, but I'm willing to hear
19	have that process completed, but I don't know if I	19	from counsel.
20	can do that.	20	First, I guess, Mr. McAllister, do we
21	We're not going to wait for Mr. Miller.	21	have other witnesses or other evidence that we
22	We're going to as soon as he has them, we'll	22	could use the jury's time with?
23	look at that in conjunction with what we're	23	MR. McALLISTER: No, Your Honor.
24	looking at, but I certainly will not wait until I	24	THE COURT: All right. So it's all
25	have his copy which has his specific objections	25	right. I assume, then, all we would have tomorrow
	1369		1370
1	morning would be matters tied to the Mr. Fairfax	1	handwritten, single-spaced, very-hard-to-read
2	notes, which would include perhaps Mr. Fairfax	2	notes.
_	haing recolled and Dr. Dangun if Dr. Dangun con	•	
3	being recalled, and Dr. Papcun, if Dr. Papcun can	3	We'll do the best we can. And I agree,
3 4	be if his attendance can be procured in that	3 4	We'll do the best we can. And I agree, I don't want to delay this. I'm hopeful that we
	• • •	-	
4	be if his attendance can be procured in that short period of time. Ms. Whelan, do you disagree with the	4	I don't want to delay this. I'm hopeful that we can still maybe submit the case to the jury tomorrow and certainly no later than Thursday
4 5	be if his attendance can be procured in that short period of time. Ms. Whelan, do you disagree with the court's suggestion that we just recess until 8:30	4 5	I don't want to delay this. I'm hopeful that we can still maybe submit the case to the jury tomorrow and certainly no later than Thursday morning, but that requires that we have those
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1 14/1 14/2 2 But if he does make that decision, 1 would like 1 We, unfortunately, are not going to be 2 But if he does make that decision, 1 would like 2 able to hear further testimony today. Were going 4 THE COURT: Well, you know, that much I 5 anyone's fault. You are not to, again, hold this 5 can't control, but that's - I think typically are is what edsenses testify, they typically are 7 the last witness. 7 You can blame me. It's a decision 1 made. Just 9 inquire, Ms, Whelan: IF Dr, Papeun does not 9 canters arise during the course of a trial that 1 10 testify - and that's still meertain - do you 10 matters arise during the course of a trial that 1 11 have much, if any, by way of rebutal? 10 Those of you who have traveled here 12 othy the papers, but 1 don't have anything off 14 the top of my head. 15 THE COURT: Okay. Well, then, I think we 16 Those of you who live here within the 16 to bring the pary in and instruct them 16 Those of you who live here within the 17 dury ore sot		1071	r	1070
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<u> </u>	1275		1076
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1	reconsideration. Counsel, don't worry about the	1	made the prior arguments. I also would
2	fact that you're in street clothes. I wish I was,	2	incorporate the fact that we know this case has to
3	too, but I won't hold that against you.	3	be submitted this week because the court is
4	MR. McALLISTER: Thank you, Judge.	4	unavailable.
5	We have spent the time since the recess	5	If we're going to have Dr. Papcun
6	contacting Dr. Papcun and trying to figure a way	6	testify, we're going to have cross-examination. I
7	to get him to court here by 8:30 tomorrow morning	7	am concerned that we will not finish up the case.
8	consistent with the court's order. And,	8	And for the reasons I stated previously, we object
9	unfortunately, no matter how we try, the earliest	9	to the continued another day's delay.
10	we can get him to the Boise area is approximately	10	THE COURT: All right. Well, I'm going
11	5:00 tomorrow. And even that, I have to tell the	11	to first of all, if it were another
12	court, is optimistic.	12	circumstance I'm not suggesting that I will not
13	But it appears to us, based on three	13	be here Monday, regardless. I mean, I am
14	lawyers working full time on it, the soonest we	14	scheduled to be in a meeting on Monday in which
15	could have Dr. Papcun present in person would be	15	it's unfortunately, it's a meeting of a
16	Thursday morning.	16	committee that I chair, so it's very difficult for
17	And I have discussed it with the	17	me not to be present.
	government prosecutor; and, obviously, they		1
18		18	But, you know, as I am somewhat fond of
19	object. But I thought I would make a motion to	19	telling people, "This is my day job." Although
20	reconsider the court's previous ruling to allow	20	these are court obligations, court committees, and
21	Dr. Papcun to testify Thursday morning.	21	I take them very seriously, I in fact, last
22	THE COURT: All right.	22	Friday, I was supposed to be in San Francisco for
23	Ms. Whelan, do you want to respond or	23	a similar committee meeting, which I just simply
24	just stand on your prior arguments?	24	said I could not be there because of this trial.
25	MS. WHELAN: Judge, just briefly. I have	25	And the same thing would be true on Monday.
	1377		1378
1	I think that is not the point. The	1	continuance, and we will proceed tomorrow morning
1 2	I think that is not the point. The point is that it is just simply and even as I	1 2	continuance, and we will proceed tomorrow morning at 8:30.
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	I think that is not the point. The point is that it is just simply and even as I think Mr. McAllister has indicated, you know, you think, of course, that you could have him here by tomorrow at 5:00 p.m.; but even that's not certain. But the point is that, again, this was a problem of the defense's making, and I'm just simply not willing to continue the trial realizing that that would not be the end of the trial. There would still need to be time for rebuttal testimony from the government, which I'm sure would expand considerably if Dr. Papcun testifies. That would not trouble me in the least if he were here to testify tomorrow, because then we could have the government's rebuttal witnesses testify tomorrow afternoon. I, in essence, granted a 24-hour continuance to at least see if we could get Dr. Papcun here, which apparently we're not able to. But, of course, it was not just for that reason, but also to give us time to review the documents produced by Mr. Miller on	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	continuance, and we will proceed tomorrow morning at 8:30. I do want to put on the record something I neglected to, and that is that we gave counsel the option of waiting until Mr. Steele was present for this argument, and counsel indicated you're willing to waive his presence. Is that correct? MR. McALLISTER: It is, Your Honor. We appreciated that, but we we really felt that we needed to bring this to the court's attention, get a decision before the funds were spent. And, obviously, if it went the other way, we would have to act right now. So I appreciate the court taking the time to hear us this afternoon, and we waive his presence. THE COURT: All right. Thank you. Let me deal, then, with the second matter. And this is a note I received from a juror. It's Juror No. 37. I think she is on the back row, second or third from the end, I think. The question is well, I could be

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1	It's just a note. I'm going to read the note and	1	whether I need to visit with her, what the
2	indicate how I intend to respond.	2	circumstances would be of that visit, whether it
3	It's dated today. "Judge Winmill, my	3	would need to be in open court or not or whether I
4	juror number is 37. To put your mind at ease, I	4	can just respond in writing.
5	have followed the rules and directions exactly	5	Once I have seen that further note,
6	that you advised us to keep, nor has anyone tried	6	then I would know I would probably share that
7	to speak to me or communicate with me in any way.	7	with counsel and decide how to approach it. I'm
8	However, due to some of the exhibits that have	8	confident that, as indicated by the juror, that we
9	been admitted, I find myself in a situation where	9	don't have a problem, but I think we need to find
10	I feel it is wise to ask your advice. Judge	10	out what it is that this juror is concerned about.
11	Winmill, I do not feel this is critical timewise.	11	I assume neither of you have any
			• •
12	So whenever you are available to talk to me for	12	objection to that method of proceeding?
13	about one or two minutes would be fine with me.	13	MR. McALLISTER: None, Your Honor.
14	Sincerely," and then it's signed.	14	MS. WHELAN: No, Your Honor.
15	I don't communicate with jurors like	15	THE COURT: All right. That's how we'll
16	this except in writing or in open court. There	16	handle it.
17	may be occasions where, with the agreement of	17	Mr. Haws, you're here just soon enough
18	counsel, that I will interview a witness excuse	18	that I can kick you out of the courtroom because
19	me a juror on the record but without counsel	19	I'm going to visit
20	present, but even that would be somewhat	20	MR. HAWS: I apologize, Your Honor.
21	extraordinary.	21	THE COURT: No. I need to visit with
22	My intent is to simply send this juror	22	ex parte now with but I want you to stay maybe
23	a note signed by me indicating just that. If it's	23	even out in the hallway. Likewise, everyone
24	a concern she has, she needs to reduce it to	24	else that would include you Mr. Miller,
25	writing. Then I can decide how to address it,	25	Mr. Gonzales, and anybody associated with the
	1381		
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.		
L _	THE COURT: I don't think I said it quite		
5 6	-		
_	that way. MS. WHELAN: Nobody likes us.		
7			
8	(Government attorneys absent.)		
9	(Ex parte colloquy between court and		
10	defense counsel.)		
11	(Court recessed at 2:13 p.m.)		
12			
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1	<u>R E P O R T E R'S C E R T I F I C A T E</u>
2	
3	
4	
5	I, Tamara I. Hohenleitner, Official
6	Court Reporter, State of Idaho, does hereby
7	certify:
8	That I am the reporter who transcribed
9	the proceedings had in the above-entitled action
10	in machine shorthand and thereafter the same was
11	reduced into typew riting under my direct
12	supervision; and
13	That the foregoing transcript contains a
14	full, true, and accurate record of the proceedings
15	had in the above and foregoing cause.
16	IN W IT N E S S W H E R E O F , I have hereunto set
17	my hand June 24, 2011.
18	
19	
20	
21	- 8 -
	Tam ara I. Hohenleitner
22	O fficial C ourt R eporter
	C S R N o . 6 1 9
23	
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