No. 12-30005

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGAR J. STEELE.

Defendant-Appellant.

Appeal From The Idaho District Court
No. CR 10-00148 BLW

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal aims at ensuring that a demonstrably unreliable fact-finding process at trial does not doom a citizen to spend the remainder of his life in prison based on a flawed conviction.

The government charged defendant Edgar Steele, a renowned Idaho defense attorney known for taking on controversial and unpopular causes, with hiring Larry Fairfax, a handyman, to carry out the murder of Steele's wife by using and possessing an explosive and a destructive device. Fairfax at some point came to authorities with a story that implicated Steele and falsely exonerated himself. The accusation could not be reconciled with Steele's past actions or character, but the government was able to build a persuasive case against him by relying on recordings of conversations between Steele and Fairfax, purportedly made by the latter at law enforcement's direction.

The single most important defense challenge to the prosecution's case rested on the contention that these recordings were, in their most damning passages, fabricated. Robert McAllister, defendant's trial counsel, retained a distinguished and qualified forensic expert who was prepared to testify to precisely this effect. The defense thereafter laid the foundation required by the trial judge to introduce this expert evidence, but, as a result of his patent incompetence, McAllister failed to secure the expert's presence at trial. The district court both recognized the critical nature of the expert testimony of which defendant had been deprived and chastised defense counsel for his deficient performance in failing to gain its

admission.

After Steele's conviction, substitute defense counsel timely moved for a new trial alleging, among other things, ineffective assistance of counsel ("IAC") based on McAllister's egregious failures. The district court, however, misconstrued governing procedural law, thereby abusing its discretion, in concluding that a viable claim of IAC made in a new trial motion filed *prior* to judgment could not be considered until *after* Steele's appeal.

In the meantime, and following the judgment below, a host of other facts surfaced bearing on trial counsel's deficient performance, all of which would have been subject to exploration had the IAC claim been developed and heard by the district court. These facts were shocking: throughout the time that he represented Steele before, during, and after trial, Steele's trial counsel had been under investigation and/or indictment for serious federal crimes and the subject of state disbarment proceedings. The government concealed all such matters for the duration of the district court proceedings at Steele's trial. Immediately after the judgment against Steele was entered, however, the government announced its case against McAllister, unsealing and trumpeting the indictment against him. McAllister has since been convicted and disbarred.

In light of the above, including the district court's abuse of discretion, defendant is entitled to an order remanding the matter for an evidentiary hearing on his claim of trial counsel's IAC which, if established, will invalidate *all* counts of conviction encompassed by the judgment below. There is simply no plausible

reason why such a hearing, timely and properly requested prior to that judgment, should be deferred any longer.

Furthermore, and putting aside its post-judgment error as to defendant's claim of IAC, the district court committed other serious errors in its final instructions to the jury, which errors likewise undermine the reliability of Steele's convictions. Specifically, the lower court committed plain error when it failed to require juror unanimity as to (1) the factual basis for the allegation, set forth in three counts, that Steele caused another to engage in interstate travel to complete the alleged plot, and (2) the factual basis for the allegation, alleged in one count, that Steele used an explosive device to accomplish this end.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The judgment below was appealable pursuant to 28 U.S.C. § 1291. The district court's judgment was entered on November 14, 2011. A notice of appeal was filed on November 16, 2011. The appeal is timely.

BAIL STATUS

Appellant-defendant Steele is incarcerated in the Victorville Federal Correctional Complex in Adelanto, California. His estimated release date is January 1, 2054.

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ISSUES PRESENTED

I. **DID THE DISTRICT COURT ERR IN DENYING THE DEFENDANT AN EVIDENTIARY HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHICH HAD BEEN TIMELY PRESENTED IN A MOTION FOR A NEW TRIAL?**

II. **DID THE DISTRICT COURT COMMIT PLAIN ERROR WHEN IT FAILED TO REQUIRE THE JURY TO UNANIMOUSLY AGREE ON THE FACTUAL BASIS FOR THE "INTERSTATE TRAVEL" ELEMENT OF THE CRIMES CHARGED IN COUNTS ONE, TWO, AND THREE?**

III. **DID THE DISTRICT COURT COMMIT PLAIN ERROR WHEN IT FAILED TO REQUIRE A UNANIMOUS VERDICT AS TO THE OBJECT OF THE ALLEGATIONS CONTAINED IN COUNT TWO?**

STATEMENT OF THE CASE

On June 15, 2010, the United States filed an indictment against defendant Steele in connection with an alleged plot to murder his wife and mother-in-law. (Dkt. 6)

On July 20, 2010, based on the same alleged events, the United States filed a superseding indictment charging as follows:

Count One: use of interstate commerce facilities in the commission of murder for hire (18 U.S.C. § 1958);

Count Two: aiding and abetting use of explosive materials to commit a federal felony (18 U.S.C. § 844(h));

Count Three: possession of a destructive device in relation to a crime of violence (18 U.S.C. § 924(c)(1)(B)(ii)); and

Count Four: tampering with a victim (18 U.S.C. § 1512(b)(3)). (Dkt. 25)[1]

The evidentiary phase of trial began on April 27, 2011, and concluded on May 4th, when counsel presented their closing arguments and deliberations commenced. (Dkt. 213, 224.) On May 5th, the jury returned verdicts finding Mr. Steele guilty on all counts. (Dkt. 505.)

On November 8, 2011, the district court denied Mr. Steele's motion for a new trial. (Dkt. 312.) The following day, the court announced its judgment sentencing Mr. Steele to a total term of 50 years in prison: 120 months on Count One; 120 months on Count Two to be served consecutively; 360 months on Count Three, also to be served consecutively; and a final 60 months on Count Four, concurrent to the sentence on Count One. (Dkt. 314.) The district court issued its written judgment on November 14, 2011 (ER 104-112; Dkt. 316) and an amended judgment on November 16, 2011 (ER 96-103; Dkt. 318). Defendant filed a timely notice of appeal on November 16, 2011. (ER 64-65; Dkt. 317, 321)

On April 5, 2012, Mr. Steele moved this Court for an order summarily reversing the district court's judgment and remanding the matter for an evidentiary hearing to develop the factual record supporting his motion for a new trial based on ineffective assistance of trial counsel. (Ninth Cir. Dkt. No. 6.)

On July 9, 2012, after the conclusion of briefing on the summary reversal motion, the Court issued its ruling, stating in relevant part, "Appellant's opposed

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[1] The specific allegations contained in Counts One, Two, and Three of the Superseding Indictment are discussed in further detail in Arguments II and III, *infra*.

motion for summary reversal of this appeal is denied because the issues raised are sufficiently substantial to warrant further consideration by a merits panel. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard)." (ER 1; Ninth Cir. Dkt. No. 13.)

STATEMENT OF FACTS

A. Background

At the end of 2009 and through the spring of 2010, Larry Fairfax was living and working as a handyman in Sagle, Idaho. (RT 426-27) Fairfax was experiencing financial troubles, having recently undergone bankruptcy and endured foreclosure proceedings on his home. (RT 426-27, 435, 536-37) During this period, Fairfax did tasks around the home of defendant Edgar Steele and his wife, Cyndi, including caring for their horses. (RT 432-33, 479, 481) The Steeles' home was located on Talache Road in Sagle. (RT 450)

Edgar Steele is an attorney with no criminal history but a record of advocating for unpopular clients and causes. (RT 395, 862)[2] As of spring, 2010, Steele had been married to Cyndi for about 25 years. (RT 717) For many months preceding the disputed incident, Cyndi was periodically traveling to Oregon City, Oregon, to care for her mother, Jacquanette Kunzman. (RT 434, 450, 736)

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[2] For convenience, this brief generally refers to the principals by their last name, except that Cyndi Steele is identified by her first name to distinguish her from appellant.

B. The Prosecution Case

1. Events Preceding Fairfax's Contact with Authorities

Virtually the only direct evidence concerning the conception and initiation of the alleged criminal plan was elicited in the form of testimony from Steele's alleged confederate, Larry Fairfax. Fairfax testified that sometime around September or October of 2009, he had spoken to Steele about his ongoing financial troubles. Steele purportedly responded by stating that Fairfax could make some money by killing Steele's wife, his mother in law, and several others. (RT 434-35, 438)

In February or March, 2010, Steele again spoke about having his wife and mother in law killed. (RT 436-37) Fairfax said he led Steele to believe he had experience in the area of killing for hire and agreed to target Cyndi and her mother so he could make some money. (RT 436, 438-39) Steele purportedly said he would give Fairfax $10,000 for each killing and an additional $5,000 for carrying out the plan where Cyndi and her mother were staying in Oregon. (RT 439) Steele gave Fairfax half of the first $10,000 in silver coins by leaving them for Fairfax to recover from a desk in the Steeles' garage. Fairfax obtained the remaining half of the $10,000 initial payment from the same location about two weeks later. (RT 439-40) Fairfax described cashing about $9,700 worth of silver coins in April and May, 2010, at various locations in Spokane and Coeur D'Alene. (RT 440-48)

According to Fairfax, he and Steele had discussed several ways in which

Cyndi could be killed (RT 450). At some point they talked about a potential insurance payment of $100,000 if Cyndi were killed in an accident. (RT 527-28) In May, 2010, Steele said that a bomb would be a good way to proceed. (RT 451) Fairfax described the bomb he agreed to construct as a "North Idaho firecracker." (RT 452) He said that Steele wanted him to make two such devices and place one under Cyndi's car and one under Steele's to make it appear that people whom Steele had offended were targeting both he and his wife. (RT 452)

Fairfax testified that on May 27, 2010, he built two bombs by taking two pieces of pipe; inserting gunpowder; screwing the ends on; drilling holes in the ends; and inserting fuses. (RT 454) He attached one device to Cyndi's car, a black Mitsubishi SUV, with a magnet and some wire, placing the fuse next to the exhaust pipe for purposes of ignition by a heat source. (RT 460, 610-11) He attached the other device to Steele's car. (RT 456-61, 534) Fairfax claimed he did not want Cyndi to be hurt but put the device on her car and used explosives because he was afraid of Steele and thought he might check the device. (RT 463-64) He stated he had broken the fuse on the device attached to Cyndi's car so if ignited, it would not go all the way through. (RT 454)

Cyndi left for her mother's house in Oregon on May 28th, as she had been expected to do. (RT 461-62, 846)

Fairfax testified that on Saturday, May 29th, he went out of town. He returned the next day (Sunday, May 30th) and found he had received several messages from Steele. Fairfax then saw Steele at Steele's home at about 10 p.m.

(RT 463-65) Steele purportedly looked frazzled, wanted to know why the device had not gone off, and what Fairfax was going to do. (RT 465)

On the evening of the 30th, Fairfax drove to Portland with his cousin, Jim Maher. The following morning Fairfax rented a car in Portland. The two then drove to the home of Cyndi's mother, Mrs. Kunzman, in Oregon City to see if the device was still present on Cyndi's car. (RT 470-74) When they arrived at Mrs. Kunzman's on the morning of the 31st, Maher approached Cyndi's car and tried to look underneath it but, afraid of being seen, did not get too close. He did not see the device. (RT 475, 547) Fairfax concluded that it had fallen off. (RT 470, 476)

Afterwards, Fairfax returned the rental car and drove with Maher back to Sagle. (RT 476-77, 1158) Fairfax saw Steele the next day. (RT 477) When told that the device had fallen off Cyndi's car, Steele told Fairfax to remove the one from Steele's car as well, and Fairfax did so, placing it in a locker in Steel's garage. (RT 477-78)

2. Fairfax's Contact With Authorities and Help with Recordings

Fairfax testified that over the next several days, Steele became increasingly agitated and said that if Fairfax did not take care of the job, he would get someone else to "do the job and [Fairfax]." (RT 487) Fairfax thereafter decided to tell the police what was going on. (RT 486)

Around June 7th, Fairfax contacted attorney Jim Michaud, who also lived in Sagle. (RT 487, 348) On Wednesday, June 9th, Fairfax went to Michaud's residence, where he met with FBI agent Mike Sotka. (RT 339-40, 418, 488)

Sotka was in charge of the North Idaho Violent Crime Task Force, which consists of federal, state, and county law enforcement agents. (RT 338)[3] Fairfax told Sotka he had been hired to commit a murder and that, in that connection, he had traveled to Oregon for "reconnaissance." (RT 488) Fairfax, however, failed to disclose his placement of a device on Cyndi's vehicle until it was discovered approximately a week later. (RT 419, 421, 1430)[4]

In the late afternoon of June 9th, Fairfax and Sotka met again at Michaud's residence. (RT 489) The task force thereafter placed surveillance on the Steele residence and provided Fairfax with a digital recording device that was placed on Fairfax's key ring so that he could surreptitiously record a conversation with Steele. (RT 343-44, 347, 489, 502) Task force agents also searched Fairfax and his vehicle but did not find any other recording devices, although they did recover some money from his person. (RT 345, 489)

Sotka activated the digital recorder when he gave it to Fairfax. (RT 344, 346) Fairfax then drove to Steele's home with the digital recorder. (RT 348) He

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[3] For convenience, appellant hereafter refers to the task force members as "agents."

[4] Fairfax was obviously accorded leniency insofar as he was never charged with defendant for involvement in the alleged murder plot. Nevertheless, due to his dishonesty in describing his role in the offenses charged against Steele, he did not receive immunity from the government in connection with his placement of the device on Cyndi's car. (RT 533) He was ultimately prosecuted for possession of an unregistered firearm and making an unregistered firearm, offenses to which he had entered a plea at the time and was awaiting sentence at the time of Steele's trial. (RT 424-25) Approximately two weeks after the verdicts were returned in Steele's case, Fairfax was sentenced to concurrent terms of 27 months on the offenses charged against him. *See United States v. Fairfax*, Idaho Dist. Ct. No. 2:10-cr-00183- BLW, Dkt. No. 85 (May 23, 2011).

testified that, while there, he recorded a conversation with Steele. (RT 490-91; Gov't Exh. 21) As discussed further below, at trial Steele strenuously disputed, and continues to dispute, the authenticity of this recording and one made the following day (June 10th). This summary attributes one of the voices on these recordings to Steele and reports the apparent substance of the conversations simply for purposes of presenting the prosecution's view of the evidence.

In the recorded conversation, as played for the jury, Steele discussed when Fairfax would be "heading out," with Fairfax testifying that this was a reference to his going to Portland to kill Cyndi Steele. (RT 499; Exh. 21 [copy of recording]) Also in the record of the conversation played at trial, Fairfax asked Steele for $400, money needed, he testified, to pay for gas and a rental car. (RT 500) Steele thereafter purported to give Fairfax the $400, a sum he at one point described as an "advance" and at another as reimbursement for Fairfax's two truck tires. (Exh. 21) Among other things, Steele also urged Fairfax to get the job done; discussed the likelihood that a bomb or a car bomb would or would not trigger an insurance payment under an automobile policy; predicted that his wife and another would be together the next day; and referred to an "alibi" for Friday (June 11th). (*Id.*; RT 497, et seq.)

After his conversation with Steele, Fairfax went back to Michaud's house, where he gave Sotka the recording device as well as the $400 he had received from Steele. (RT 349, 502-03; Exh. 77). Agents again searched Fairfax and his vehicle. (RT 350) Sotka testified that he later downloaded the contents of the

recording device onto a computer. (RT 353)

The following day, i.e, Thursday, June 10th, Fairfax fed Steele's horses and used his truck to transport and sell some scrap metal. (RT 503) Later he met with Sotka again for the ostensible purpose of recording another conversation with Steele. (RT 358) A little before 6 p.m., agents met on the road near the Steeles' residence, where Fairfax arrived with Steele's truck. (RT 359) Sotka again supplied Fairfax with the digital recorder and searched the truck and Fairfax himself, taking $487 in cash from him but finding no other recording devices. (RT 359-60) After agents again set up surveillance, Fairfax drove the truck and trailer back to Steele's house. (RT 359-60)

While there, Fairfax again had a conversation with Steele. (RT 505; Exh. 22 [copy of recording]) In that conversation, also played for the jury, Steele, among other things, appeared to: (1) discuss a trip to Spokane the following day, including his plan to pick up a friend, go to a restaurant or bank and get a time stamp, and make himself "memorable;" (2) discuss his intention to call Cyndi that evening to confirm her appointments the following day; (3) inform Fairfax that he (Steele) was counting on him, urge Fairfax not to get caught, and predict that the two would be sharing a cell if the trail came back to Steele; (4) tell Fairfax that he (Steele) would have some silver for Fairfax as soon as Steele got "confirmation" and was sure he was not a suspect; (5) tell Fairfax he should have done a "throw mama from the train;" (6) discuss a story of a car accident that left a man's wife a paraplegic and tell Fairfax not to leave Steele with that; (7) tell Fairfax that if a

black and white pulled into Steele's driveway, Steele would act normal because he would not know if they had come to notify him or to take him away; (8) suggest the presence of an affair between Fairfax and Cyndi if told that Fairfax had killed Cyndi and was in custody; and (9) tell Fairfax to make it look like an accident to trigger the uninsured motorist coverage. (Exh. 22; RT 511, et seq.)

After his conversation at the Steele residence, Fairfax drove away in his own vehicle before meeting again with Sotka. (RT 361-62) Sotka found nothing after searching Fairfax and his vehicle and once again recovered the recording device. (RT 362, 508) He later took the recorder back to the FBI office in Coeur D'Alene and again downloaded its contents into a computer. (RT 363)

3. Interview and Arrest of Steele

After listening to the recording, Sotka and other agents decided to set up surveillance on Cyndi Steele in Oregon and make sure she did not travel in her car. (RT 366) They also told Fairfax to travel to Portland, purportedly so his call could originate from an Oregon number in the event that Steele asked him to call from there. (RT 366) Agents gave Fairfax a GPS device, a recording device, and $500 to cover expenses. (RT 367, 529-31) Fairfax drove to Portland with Maher but never received a call from Steele. (RT 366-68, 531) After Fairfax made contact with a federal marshal in Portland, he and Maher drove back to Idaho. (RT 1173-74)

Agents began their surveillance of Cyndi at her mother's home in Oregon City early on the morning of June 11th. (RT 368, 608) They contacted her at about

7 a.m. and informed her of the plot as alleged by Fairfax. (RT 615, 847-49) Cyndi reacted with disbelief. (RT 658)

Agents had also set up surveillance on Steele's home on June 11th. (RT 368, 377) At about 9 a.m., Steele drove away from the home towards Spokane in his truck and trailer. (RT 370) After the contact with Cyndi earlier that day, agents decided to contact Steele. (RT 370) While Steele was on the road, agents called his cell phone and directed him back to his home, where, to gauge his reaction, Idaho officer Spike falsely notified him that Cyndi had been killed in a car crash. (RT 371, 632) Steele choked up before asking for details about what had happened. (RT 373, 634-35)

Sotka thereafter told Steele that Cyndi had been run off the road and that the driver of the other car "was somewhat conscious." (RT 637) When told that the driver was Larry Fairfax, Steele recognized the name and described his role at the Steele residence. (RT 380, 638) Sotka then falsely told Steele that his mother in law had been shot and killed at her residence, to which Steele responded "almost ... [with] surprise and disbelief," and saying, "what the fuck!" (RT 410, 640) He wanted to contact family members to ensure their safety and, responding to Sotka's inquiry, told agents of his enemies and threatening e-mails he had received. (RT 401, 641) Sotka then told Steele that Fairfax had gained consciousness and had told agents that Steele could answer their questions. (RT 642-43)

Spike said that Steele had no verbal response to the news of Fairfax's

regaining consciousness. (RT 643) At no point did Steele ever confess or admit involvement in any plan to murder Cyndi. (RT 398, 411, 417) After his session with the agents had concluded, he was arrested and taken into custody. (RT 381, 643) Defense witness Allen Banks, with whom Steele had planned to drive to Spokane that day and who had come to Steele's home, said that Steele's face looked puffy as he came out of the house in handcuffs. (RT 1188)

Later on June 11th, agents executed a search warrant on the Steele residence. (RT 651-52) In the course of that search, they recovered approximately $124,000 in silver coins and bars located in the master bedroom closet. (RT 655, 661) No silver was found anywhere else, including in safe-like containers in the garage wall. (RT 656-57)

4. Steele's Post-Arrest Conversation with Cyndi

On June 13, 2010, Steele spoke by phone from the jail with his son, Rex. In the recording of that conversation, played for the jury, Steele essentially told Rex that he needed her to talk to Cyndi; that the government had a supposed recording of conversations between Steele and Fairfax and would play them for Cyndi; and that the recording, in fact, was fabricated. (Exh. 3 [recording])

Later on June 13th, Steele spoke with Cyndi Steele by phone from the jail.[5] In the recording of that conversation, and among other things, Steele said that the government would try to use her to authenticate a purported recording of Steele

[5] This June 13th recording of Steele's conversation with Cyndi formed the basis for Count Four, which charged Steele with tampering with a victim.

and Fairfax the government would play for Cyndi; that the recording was not authentic but would be a "Mission Impossible, world class production;" and that while others had fabricated the recording, the government would use it against Steele to try to convict him. Steele also stated:

> After you hear this tape tomorrow, no matter what you hear, no matter what you think, no matter what you feel, you have to say the following, "No, that is not my husband's voice." And then like a rhinoceros in the road, you have to stand your ground and refuse to say anything but that.

(Exh.1) Also on the recording, Steele repeatedly insisted he had never and would never try to harm Cyndi. He told her that the government would nevertheless rely on her to say the purported recording was authentic and that they could not use Fairfax for this purpose because Fairfax was an established liar. Steele also said that if Cyndi did not question the recording's authenticity, she would be "deal[ing] with our kids and explaining to them how your testimony put me in prison. That's the only way they're gonna get me, 'cause they've got nothing else." (Exh. 1 [recording])

For her part, Cyndi denied that in this conversation Steele had tried to put "significant pressure" on her to tell law enforcement something he wanted her to say. (RT 755). She did not believe that her husband had been intimidating her in the phone call. (RT 841-42)

5. Discovery of the Pipe Bomb under Cyndi's Car

Also on June 13th, Cyndi drove with a friend from Oregon back to Sagle, Idaho, in her Mitsubishi before returning to Coeur D'Alene and checking into a

hotel near where Steele was set to appear in court. (RT 857) On June 15th, she checked out and decided to have her oil changed in town. While at the shop, one of the mechanics found a pipe bomb device attached to the underside of Cyndi's car and showed it to her. (RT 859-60; 916-17) Cyndi was shocked and "petrified" because of Steele's previous involvement in unpopular causes and previous threats made on her life. (RT 860-61)

The shop mechanic notified authorities, who arrived and removed the bomb from the car. (RT 932-42) They used a robot to place the bomb in a containment vessel, following which it was rendered safe. (RT 943-45, 982-85) A member of the Spokane County bomb squad who attended the scene described the configuration of the device and how it had been attached to the car. (RT 947-1002) He estimated that it had been approximately 3/4 full of black powder before being removed. (RT 987)

An ATF bomb technician described the bomb as "fairly good sized." (RT 1008) He noted that two fuses had run from the exhaust pipe—the heat and ignition source—to one end of the device, rendering it a redundant or "dual ignition" system. (RT 1013, 1017) He opined that while the fuses had been nicked or damaged in spots, this would not keep them from burning if ignited. (RT 1015) Based upon the redundancy of the fuses, the quantity of explosive powder, and other features of the device, he opined that it was a well constructed and very lethal pipe bomb and that it was meant to work effectively. (RT 1019-20, 1026) On the other hand, he testified that using an exhaust pipe as an ignition source was

"unique" and that if the exhaust had gotten hot enough, the fuses "could have" ignited. (RT 1058-59) He conceded that in this instance, that had not happened, and the device "did not function." (RT 1059, 1067)[6]

On June 15, 2010, following the discovery of the pipe bomb on Cyndi's car, an officer contacted Fairfax. (RT 414, 424-25) Fairfax was asked about the bomb on Cyndi's car, which Fairfax described as the "first attempt." (RT 534) When asked whether there were any other devices, he falsely answered that there were not. He then conceded that he had made another and gave authorities the components of the disassembled device he had taken from Steele's car. (RT 534-35) At some point on the 15th, Fairfax was placed under arrest. (RT 414)

6. Motive

In an effort to show that Steele would rather plan the murder of his wife than divorce her, the prosecution elicited testimony from Cyndi concerning her marital difficulties with Steele in 2000, i.e., some ten years prior to the offenses at issue. In this connection, Cyndi testified that she and Steele had married in 1985 and had two children together but that, in 2000, she had filed for divorce because of problems in the relationship after their move to Idaho from the west coast. (RT 717, 722-23; Exh. 91 [divorce petition]) Nevertheless, Cyndi and Steele reconciled and divorce proceedings were halted. (RT 735) Cyndi denied that she had concerns about their marriage or that in 2010 Steele had ever seriously said he

[6] No fingerprint analysis was ever conducted on the device. (RT 707, 1062)

wanted a divorce. (RT 758-59) Kelsie, one of the Steeles' two daughters, likewise opined that in 2010, her parents had resolved any problems from a decade before and that their relationship was stronger than ever. (RT 1246)

In a further attempt to establish a motive for Steele's alleged conduct, the prosecution introduced extensive evidence of Steele's use of an internet dating website linking users with women in Russia and the Ukraine. Cyndi Steele explained that she knew of and took an interest in Steele's communications with other women on the website, characterizing Steele's activity as part of an investigation into a Russian bride scam. (RT 749-54, 823-25). Other family and friends defense witnesses likewise testified to their knowledge of Steele's work on the bride scam investigation. (RT 1146-47, 1203-05, 1256.)

C. The Defense Case[7]

1. Character

The defense also introduced evidence of Steele's character to challenge the prosecution's claims. Cyndi testified that never in the past had Steele threatened or harmed her or her mother. (RT 875, 877) Both Robert Stoll, a veterinarian and long-time friend of both the Steeles, and Cyndi's friend, Billie Cochran, gave testimony to the same effect. (RT 1214-15, 1236-37) Stoll as well as Jeff Miller and Allen Banks, other long-time friends of the Steeles, were surprised and shocked by the allegations, which they described as completely out of character.

[7] Much of the testimony supporting the defense case, as summarized below, was elicited during the prosecution's case in chief, and particularly during the cross examination of the prosecution's witnesses.

(RT 1143-44, 1190-91, 1214-15)

Cyndi also sought to challenge the allegation of Steele's malign intent by recounting how, just before the alleged incident, Steele had provided money to Cyndi's mother, Jacquanette, to help stave off a foreclosure of Jacquanette's home. To this end, Steele had written a check for approximately $2,800 to Wachovia on May 19, 2010 on Jacquanette's behalf. (RT 1268-69; Exh. 2003) Steele, moreover, had given this assistance to Jacquanette on his own and without any request from Cyndi. (RT 1291)

2. Larry Fairfax

Much of the defense case was aimed at attacking the credibility and motives of key prosecution witness Larry Fairfax. This effort was founded on a number of related points.

First, the defense emphasized the instances in which Fairfax had concealed material facts and/or been demonstrably untruthful, including the following:

- Fairfax did not tell Sotka or anyone else in law enforcement about the fact that he had placed a bomb on Cyndi Steele's car on June 9th, June 10th, or at any time until after the bomb was found on Cyndi's car on June 15th (see below). (RT 419, 1430);[8]
- In response to a direct question on June 9th, Fairfax affirmatively and

[8] Fairfax said he did not do so because, among other things, he "didn't have [his] immunity yet," "didn't want to get in trouble," thought the device had fallen off, and that "thought he could get away with it." (RT 488, 505; *see also* RT 476, 531);

falsely told Sotka on June 9th that he had never done anything to hurt anyone. (RT 421);

- On June 15th, after the bomb was located on Cyndi's car, Fairfax initially and falsely told an officer that there were no more devices before disclosing the presence of a bomb on Steele's vehicle. (RT 534)
- Fairfax admitted "making up a big lie" in deceiving his wife about the purpose in initially driving to Oregon. (RT 566-67)
- Fairfax initially disclaimed any experience in making such a device before describing how he had constructed and used similar explosives in connection with his construction work. (RT 452-53)
- Fairfax testified that when he placed the bomb on Cyndi's car, he broke the fuse in several spots so it would not go off. He further testified he believed the fuse would not get hot enough to ignite and that he had not put enough powder in the pipe because he did not want it to explode. (RT 543-44) He repeatedly testified that he did not think the bomb would work. (RT 440, 551-52) As noted above, bomb experts who testified for the prosecution flatly contradicted these assertions regarding the effectiveness of the bomb.

Second, in support of the theory that Steele had been framed, defense witness James Hollingsworth, who was a cellmate of Fairfax after the latter's June 15, 2010, arrest, testified that Fairfax asked him to do an illustration for the cover

of a book that Fairfax was writing about the case. (RT 1217-21) Hollingsworth stated that Fairfax told him the FBI had approached him and offered him a deal if he would set up Edgar Steele. (RT 1219-20) The government sought to impeach Hollingsworth with evidence of his prior felony convictions, including one that involved the use of a racial epithet. (RT 1229-32, 1442)

Third, the defense sought to establish other acts of dishonesty by Fairfax and a motive to lie based on evidence relating to an alleged theft of silver from the Steeles. Specifically, Fairfax admitted that on June 2nd, about a month before the alleged incidents, Steele confronted him about Fairfax's having been in Steele's house, noting that some things were "wrong" inside. (RT 479-80) Later, on September 10, 2010, Cyndi reported to police that approximately $45,000 in silver had been taken from the Steele residence. (RT 745, 786-788)[9]

Fourth, the defense presented evidence of Fairfax's distorted and self-serving view of his own role in events. Fairfax's cousin, James Maher, who had twice driven with Fairfax to Oregon, testified that on the way back to Idaho during the second trip, Fairfax discussed a possible appearance on the "Oprah" show. (RT 1161-62) From the way Fairfax spoke, Maher concluded he wanted to be viewed as the hero in the entire affair. (RT 1169) Fairfax conceded that he had begun to write a "fictional" book about the case. He planned to entitle it, "An Act of Defiance," and hoped it would be made into an action movie. (RT 1413, 1426,

[9] Fairfax acknowledged that he had built some "safe areas" for Steele where silver could be stored and that dry wall had been used to cover certain such areas. (RT 538-39, 575)

1435, 1439)

3. Threats by Others

The defense also sought to suggest that persons and entities other than Fairfax had been involved in fabricating evidence against Steele. Cyndi noted that Steele, as a lawyer, had represented several unpopular causes in the past, including Richard Butler, the Aryan Nation, and the "Christines" (RT 862). She recalled that both she and Steele had received many threats over the prior 10 years. (RT 850) Prior to the incidents at issue, Steele had also stated his belief that he would be set up by the government in some manner. (RT 784)

4. The Recordings

As was clear from the time of the opening statements through closing argument, the purportedly authentic recordings of the conversations between Fairfax and Steele supplied the crucial evidence in support of the prosecution's case. The defense directed part of its authenticity challenge at the recording process itself. The device that he supplied to Fairfax was a digital recorder made by a company called "ADS." (RT 343-44, 354) But each time Fairfax returned the recorder to Sotka, he used a computer to download the recording itself onto a disk. 353-55, 360. The computer uses ADS's "proprietary software" and is the only computer that can be used to effect the download. (RT 386-87) After completing the download, Sotka "cleared" the recording itself from the device. (RT 360, 390-91, 420) As a result, the original recording was thereby deleted or erased. (RT

390, 420)[10]

Cyndi testified that she wanted to listen to the purported recordings of her husband's voice as soon as she learned of them but the FBI did not permit her to do so until June 21st. (RT 843-45) Listening to the tapes, she said, confirmed her belief that Steele was innocent. (RT 845, 854-55) She testified that the way Steele purportedly spoke on the tape was not consistent with the way he actually spoke. (RT 1278-79; see also discussion in Argument I, below). Furthermore, she stated, certain noises on the recordings, including birds and trains, did not match what she had heard from the barn, where the recordings allegedly were made. (RT 1275)

Steele's daughter, Kelsie, had also listened to the June 9th and June 10th recordings. She testified that most parts of the recording sounded like her father's voice but other parts did not. (RT 1243-44; see also discussion in Argument I, below; RT 1248 ("The main thing that I noticed throughout it is it's just not the way that he talks.") As to the sound of a train whistle on one recording, she, too, stated while a train regularly passed the Steele residence from miles away, it could not be heard from inside the barn. (RT 1245, 1250-51, 1295-96)[11]

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[10] Sotka testified that he was not able to simultaneously monitor the recording as it was purportedly being made. (RT 396)

[11] At various points in the June 10th recording, as presented during the prosecution's case, intermittent clicks are audible. (Exh. 22) The prosecution sought to explain the sound by relying on Fairfax's testimony that he had Tic-Tacs in his pocket while the recording was being made and that they had made the clicking sound heard on it. (RT 512)

SUMMARY OF ARGUMENT

1. Defendant made a timely claim of ineffective assistance of counsel prior to judgment based on trial counsel's failure to present critical evidence from an available expert witness. The district court misconstrued the law and thereby abused its discretion in concluding that such a claim could not be developed and heard until after the conclusion of the present appeal. Accordingly, defendant is entitled to an order remanding the matter for an evidentiary hearing on his facially viable and timely presented claim alleging IAC by trial counsel.

2. Counts One, Two, and Three are all founded on an elementary allegation that defendant caused another to travel in interstate travel in connection with an alleged murder plot. The evidence, however, disclosed three potential incidents on which the travel allegation could be founded, each of which was subject to reasonable dispute. The district court committed plain error when it failed to read a specific unanimity instruction as to the factual basis for the travel element affecting these three counts.

3. Count Two is founded on an allegation that defendant used an explosive device in an attempt to carry out the alleged plot. Nothing about the indictment, instructions, or evidence informed jurors that this count was founded on the "Edgar" explosive device as opposed to the "Cyndi" device that was implicated by a separate count (Count Three). Here again, the district court committed plain error when it failed to read a specific unanimity instruction as to the factual basis for Count Two.

ARGUMENT

I. THIS COURT SHOULD REMAND THE MATTER FOR AN EVIDENTIARY HEARING TO PERMIT DEFENDANT TO DEVELOP AND PRESENT HIS CLAIM, RAISED BEFORE SENTENCING BY A TIMELY NEW TRIAL MOTION, ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL

A. Introduction

In compliance with the Court's July 9th order, appellant hereby renews his request for an order reversing the judgment below and remanding for an evidentiary hearing on the IAC issue. The merits panel should issue such an order because it can readily determine that (1) the IAC claim was facially viable and properly raised in the district court in Steele's pre-judgment motion for a new trial (Fed.R.Crim.P. 33), and (2) the claim was denied on the clearly erroneous ground that IAC claims can only be decided in post-appellate section 2255 proceedings. The lower court's procedural ruling would divide Mr. Steele's IAC claim between two proceedings when it plainly can and should be decided in one.

At the time of the trial below, and unknown to appellant Steele, McAllister, his lead trial counsel, was in the midst of disbarment proceedings and had filed for bankruptcy. In a timely post-trial motion for a new trial brought by successor counsel, Mr. Steele alleged that McAllister, affected by these extraordinary pressures, had rendered constitutionally ineffective assistance on a host of grounds. Chief among these was the failure to present available expert evidence bearing on what the parties recognized was the critical issue in the case—the authenticity of the purported June 9th and June 10th recordings between Fairfax and

appellant—a failure for which the trial court expressly and unambiguously had held McAllister responsible. The district court, however, denied Mr. Steel's pre-judgment IAC claim in the erroneous belief that it was not cognizable under Rule 33.

Furthermore, remarkable developments bearing further on the nature and quality of trial counsel's representation—and the government's undisclosed knowledge of relevant facts—surfaced immediately following Steele's judgment and sentencing. Well *before* the ruling on the new trial motion, Steele's trial counsel had been indicted for a host of federal crimes, including conspiracy and the commission of bankruptcy fraud during the very time that he had represented Mr. Steele. Related discovery in the McAllister prosecution indicated that a confidential informant had been secretly and regularly recording his conversations with McAllister in the midst of his representation of Steele. And McAllister has since entered a plea to the indictment's serious conspiracy charges, and judgment has been entered against him. Had the district court inquired into the matter prior to judgment, the additional developments bearing on McAllister's crimes and professional misconduct would surely have come to light.

The validity of Mr. Steele's conviction can only be fairly considered after his IAC claim is fully developed at an evidentiary hearing in the district court. This matter should now be remanded to the district court to hold that hearing which it erroneously denied Mr. Steele prior to imposition of sentence.

B. Statement of Facts[12]

1. Evidentiary Facts and Trial Counsel's Key Omission

As previously discussed, at the trial below, the credibility of prosecution witness Larry Fairfax was in serious question. Accordingly, the most critical evidence for purposes of the prosecution's case consisted of the digital recordings of the supposed "corroborating" conversations between Fairfax and defendant Steele on June 9 and June 10, 2011, surreptitiously recorded by Fairfax, in which discussion of matters apparently relating to a murder plot could be heard. (*See*, e.g., Dkt. 305 (government's new trial response), at 43 (prosecution describes recordings as the "critical pieces of evidence."); *see also* RT 303-04 (in opening statement, prosecutor states, "[Y]ou're going to have to listen carefully to those recordings, because they are the key to this case"); RT 300, et seq. (prosecutor's opening statement repeatedly characterizes recordings as corroboration of Fairfax's claims; ER 208-16, 223-26 (in both phases of closing argument,

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[12] Most of the facts presented in the following discussion may be located in the present record on appeal. This Court may take judicial notice of the remaining facts and developments involving proceedings in other courts, both within and without the federal judicial system, where, as here, such proceedings are related to matters at issue. *United States v. Black,* 482 F.3d 1035, 1041 (9th Cir. 2007); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc*., 971 F.2d 244, 248 (9th Cir. 1992), and citations therein; *Lopez v. Swope*, 205 F.2d 8, 11 n.2 (9th Cir. 1953). *See also* Fed.R.Evid. 201(b) (describing conditions under which court may judicially notice a fact as not subject to reasonable dispute). Furthermore, virtually all of the facts relating to Mr. McAllister and involving proceedings in other state and federal courts were presented to this Court in appellant's April 5th motion for summary reversal. This Court's July 9th order expressly authorized renewal of the motion's underlying claim, implicitly including the facts on which it is founded.

prosecution repeatedly plays recording excerpts and urges jury to accept them as authentic and reliable).

Given this context, Steele's chief interest at trial was to discredit the authenticity and reliability of the June 9 and 10 recordings, the originals of which had not been preserved in the first instance. (*See* RT 360, 386, 390-91) In this connection, the district court ruled in a pre-trial *Daubert*[13] hearing that should the authenticity of the recordings be placed in dispute during trial, proposed defense expert George Papcun, who had a Ph.D. in Acoustic Phonetics in the Linguistics Department at UCLA, would be permitted to provide corroborative opinion testimony challenging the authenticity and reliability of the recordings. (ER 271-72)

During the *Daubert* hearing, Papcun had repeatedly identified defects and anomalies on the recordings that would have supplied the basis for a very compelling expert challenge on these grounds. (ER 283 [4-20-11 RT 45, locating "defect[s]" in recordings]; ER 284 [4-20-11 RT 49, stating that roughly 50 "events" on recordings could indicate editing of recordings]; ER 287-88 [4-20-11 RT 60-63, stating conclusion, *inter alia*, that "there are serious questions with respect to the authenticity of the recordings" and that there are apparent "defects in the recordings that would render them inauthentic"]; ER 289 [4-20-11 RT 67, stating that the recordings "don't accurately and completely reflect whatever happened when it was being recorded;"] ER 292 [4-20-11 RT 80, affirming

[13] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

statement that recordings are not a true and valid representation of reality and are unreliable]. *See also* ER 305-06 [Papcun report, introduced as gov't Exhibit A during *Daubert* hearing and again stating, at p. 2, that the June 9th and June 10th recordings "do not represent a true and valid representation of reality and . . . are unreliable."]; ER 307-13 [Papcun's curriculum vitae, introduced as defense Exhibit 1 during *Daubert* hearing])[14]

As noted, in their testimony during the defense case, both Cyndi and the Steeles' daughter, Kelsie, questioned the veracity of the audio recordings based on their knowledge of defendant Steele's voice, manner of speaking, and related factors. (ER 247-49 [RT 1240-45, 1247-48 [Kelsie Steele]; ER 255-57 [RT 1274-82][Cyndi Steele]) On May 2nd, 2011, near the close of the evidentiary phase of trial, the district court ruled the defense had established the foundation that would permit expert Papcun to challenge the veracity of the recordings as a "key defense witness." (ER 258-59 [RT 1304-09]; ER 261-62 [RT 1318-21]; ER 236 [RT 1360]: district court describes Papcun as a "key defense witness."])

The stage was accordingly set for the defense to present vital evidence in support of the central and necessary defense theory. But on May 3rd, the prosecution argued (ER 234-36 [RT 1354-60]) and the trial court found (ER 236-37 [RT 1360-65]) that McAllister inexcusably failed to take the steps needed to

[14] On the other hand, lead counsel McAllister failed to qualify audio engineer Dennis Walsh, who had extensive experience with assessing the reliability of audio recordings as an officer with the New York police department and elsewhere, and who concluded that the disputed recordings were inauthentic. (4-21-11 RT at 316-22)

produce Papcun at trial. As the court observed, Papcun's unavailability

> is a problem of the defense's own making. I think it was very clear from my decision that the door was open to Dr. Papcun's testimony. And I think it was, therefore, the defense's responsibility to make sure that Dr. Papcun was available to walk through that door.

(ER 236 [RT 1361]. *See also id.* [RT at 1360-61] [Court states, "Well, of course, I – there is a wall sign with something to the effect 'Your procrastination does not create my emergency.'"); ER 238 [RT 1367] [Court states, "[A]s I've indicated, this is a problem of the defense's making, not the court's."])

The trial court thereafter refused to permit Papcun's appearance by video-conference. (ER 237-38 [RT 1365-67]) As a result, McAllister presented *no* expert testimony in support of the defense theory. During closing argument on May 4th, the prosecution took full advantage of the egregious omission, relentlessly citing and quoting the recordings, playing portions thereof, in urging the jury to convict. (R 208-16 [RT 1468-1501], ER 223-26 [RT 1530-1540])

2. Trial Counsel's Post-Verdict Withdrawal and Disbarment

Mr. McAllister had once been the chief criminal trial deputy of the Colorado United States Attorney's Office. On February 11, 2011, the district court in this matter entered an order approving Mr. McAllister's February 7, 2011 motion for a *pro hac vice* appearance as lead counsel for Mr. Steele, based on McAllister's representation that he was a member in good standing of the Colorado bar. (Dkt. 75 [order]; ER 314-18, Dkt. 89 [motion]) Idaho attorney Gary Amendola was retained as defendant's local counsel. (*Id.*)

McAllister represented Mr. Steele during all pretrial proceedings after February 7th and throughout the trial itself. However, on June 6, 2011—about a month after the jury's May 5th verdict—McAllister executed a "Stipulation, Agreement and Affidavit Containing the Respondent's Conditional Admission of Misconduct" ("Stipulation") in connection with an investigation and disciplinary proceeding initiated against him in the Colorado Supreme Court. (ER 178-95) In the Stipulation, McAllister acknowledged taking $105,255 of client funds without permission or while the money was restricted by court order. (ER 180 [describing receipt and personal use in October, 2010 of $100,000 provided by client Vickery but frozen by court order]): ER 179-80 [(describing receipt and personal use of $5,255 paid by insurer to client MNT Enterprises but taken by McAllister])

The Stipulation described McAllister's misconduct as "knowing," and cited the presence of prior disciplinary offenses, a dishonest motive, and a pattern of misconduct. (ER 182) The Stipulation attached the Supreme Court's previous (2004) order of McAllister's public censure arising from his misrepresentations concerning promised payment to a consultant who provided services to McAllister's firm. (ER 186-88) The Supreme Court's concluding order, entered June 6, 2011, directed that Mr. McAllister be disbarred effective July 8, 2011. (ER 194)

On June 13, 2011, Idaho attorney Wesley Hoyt was substituted as Mr. Steel's counsel for purposes of further proceedings. (Dkt. 244) Mr. McAllister's and Mr. Amendola's representation of Mr. Steele was then terminated. (Dkt. 244,

245)

3. Defendant's Motion for a New Trial and Claim of Ineffective Assistance Based on Trial Counsel's Pending Disbarment and Deficient Performance During Trial

On May 12, 2011, prior to their replacement as counsel for Mr. Steele, Mr. McAllister and Mr. Amendola filed a motion for a new trial. (Dkt. 234) So filed within 14 days of the jury's May 3rd verdict, the motion was timely under Fed.R.Crim.P. 33. The district court thereafter granted defense counsel additional extensions of time to file a supplement to the new trial motion. (Dkt. 239, 261)

Upon Mr. Hoyt's substitution as defendant's counsel, the court granted the defense additional time to supplement the original new trial motion. (Dkt. 263 and ER 177 [order]; Dkt. 269) Mr. Hoyt filed a 50-page supplemental motion on August 9, 2011, a filing that the Court expressly found timely in its order issued on that date. (Dkt. 291, ER 113-154 [motion excerpt]; Dkt. 294 and ER 155 [order]) The motion raised a host of challenges to the convictions alleging, among other things, jurisdictional defects, insufficiency of the evidence, erroneous instructions, prosecutorial misconduct, and ineffective assistance of counsel. (Dkt. 294) As to the IAC claim, the motion relied in part on the acts and omissions of Mr. McAllister and Mr. Amendola. (*Id.*; ER 114-124, 126-32)

In a supporting affidavit, Mr. McAllister conceded that he had been under a disbarment investigation during his representation of Mr. Steele. (ER 136-37) McAllister further revealed that he had been engaged in bankruptcy proceedings throughout this period. (*Id.*) He conceded that he had been wrong in failing to

disclose it. He further averred that, as the motion alleged, the disbarment and bankruptcy so affected his mental and emotional state that he had failed to competently represent Mr. Steele. (*Id*.) Mr. Amendola supplied an affidavit attesting to McAllister's failures and his own. (ER 133-41)

As to the failure to present the testimony of expert Papcun, McAllister thereafter supplied a second affidavit explaining that Papcun had had a Polynesian vacation scheduled for the time he would be needed at trial; that he failed to serve Papcun with a subpoena beforehand in the belief that Papcun would be "hostile" had he done so; but that he believed the trial court would permit Papcun to testify by video-conference. (ER 142-43) This affidavit also attached a note from Steele to McAllister at the end of the *Daubert* hearing in which Steele emphatically expressed the need to subpoena Papcun for trial and further stated, "We must bring Papcun back to trial whatever the cost!" (ER 144 [note attached to affidavit] [emphasis in original])

Additional affidavits, including one submitted by Dr. Papcun himself, indicated that Papcun had been entirely willing to appear for trial so long as he was compensated for the cost involved in cancelling his vacation; that McAllister had erroneously told Papcun such compensation would not be forthcoming; and that McAllister wrongly told Cyndi Steele that Mr. Steele did not wish Papcun subpoenaed and not to compensate him for lost vacation. (ER 146 [Papcun aff., at 2]; ER 150-51 [Cyndi Steele aff., at 12-13]; ER 139-40 [Amendola aff., at 2-3]; ER 153-54 [Edgar Steele aff., at 28-29])

On November 8, 2011, the district court issued its Memorandum Decision and Order denying defendant's motion for a new trial. Dkt. 312. Addressing the allegation of McAllister's ineffective assistance, the trial court ruled:

> Finally, Steele argues that his counsel was ineffective. The proper procedure for challenging the effectiveness of counsel is by a collateral attack on the conviction under 28 U.S.C. § 2255, after a full record can be developed. See *U.S. v. Ross*, 2011 WL 2678832 (9th Cir. 2011)(unpublished)(affirming denial of motion for new trial based on ineffective assistance). Therefore, the Court will not consider this argument.

Dkt. 312, at 17-18; ER 18-19 [excerpt from decision])

4. Subsequent Revelations

a. The Original Federal Indictment of Defendant's Trial Counsel, Sealed at the Government's Request

As only became known *after* entry of the *Steele* judgment, on July 25, 2011—well before Steele's new trial motion was decided in November, 2011—the United States filed a 19 count-Indictment in the district of Colorado against four individuals, including McAllister, alleging one count of Conspiracy (18 U.S.C. § 371), three of Wire Fraud (§ 1343), three counts of Interstate Transportation of Stolen Property (§ 2314), and twelve counts of money laundering (§ 1957). (ER 20-29 [docket in *United States v. McAllister*, *et al.*, D.Col. No. 11-cr- 00283-PAB ("McAllister Dkt")], at 1; ER 159-76 [indictment]) McAllister was a named defendant in all counts of the indictment. The other three defendants—Richard C. Neiswonger, Shannon Neiswonger, and Elizabeth Whitney—were named in some, but not all, counts. All charged offenses allegedly occurred in 2006. (*Id.*)

Also on July 25, 2011, the trial court issued arrest warrants for all named defendants, including Mr. McAllister. (McAllister Dkt., nos. 2, 3, 4, and 5) Again on the same date, the United States moved to seal the case, including the indictment and individual arrest warrants, until the warrants had been executed and the defendants brought to court. (ER 157-58 [motion]; McAllister Dkt. 6) Yet again on July 25th, the district court granted the government's motion to seal. ER 156 [court's sealing order]; McAllister Dkt. 7)

b. The Government's Post-Judgment Disclosure of McAllister's Indictment

As noted, the district court in the case below, *United States v. Steele*, denied defendant's motion for a new trial on November 8, 2011. (Dkt. 312) The court announced its judgment and imposed sentence upon Mr. Steele on November 9, 2011. (Dkt. 313) The court filed its written judgment against Steele on November 14, 2011. (Dkt. 316)

On the *same* day, i.e., November 14, 2011, a federal agent arrested McAllister pursuant to the warrant issued in the wake of the original sealed indictment that had been returned against him in July, 2011 in the district of Colorado. (ER 104 [copy of warrant with return]; McAllister Dkt. 19) Also on November 14, 2011, Mr. McAllister made his initial appearance in the district court of Colorado and posted a $20,000 release bond. (ER 21 [*McAllister* Dkt.], nos. 10, 13, 14)

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c. The Government's Superseding Indictment Alleging Trial Counsel's Federal Crimes While Defendant's Trial Was in Progress

Two days later, on November 16, 2011, the government filed a First Superseding Indictment against Mr. McAllister and the other previously-indicted defendants. (ER 68-95; *McAllister* Dkt. 23) On this occasion, however, the government did *not* seek an order sealing the contents of the indictment, as it had successfully done before. To the contrary, the government permitted the filing of the new indictment as a public record and publicly trumpeted its contents in a statement issued by the United States Attorney's Office for the District of Kansas "for immediate release" on November 16, 2011. (ER 66-67)

The superseding indictment essentially duplicated the counts alleged in the original indictment and added others. As to the duplicated counts, the indictment alleged that McAllister represented Richard Neiswonger when in 1996 the Federal Trade Commission brought an action against Neiswonger to obtain preliminary and permanent injunctive and other relief from Neiswonger's deceptive business acts. In 2006, the FTC filed a civil contempt action against Neiswonger alleging he violated the injunction by marketing training and business opportunities through misrepresentations. A federal judge in the Eastern District of Missouri ordered Neiswonger's assets frozen. (ER 68-78)

Shortly after the assets were frozen, McAllister and the Neiswongers allegedly began to circumvent the restraining order by transferring money to McAllister from accounts over which Shannon Neiswonger had control for the

purpose of concealing from the FTC and the court that the restraining order was being violated. McAllister and Whitney allegedly laundered the funds. (*Id*.)

The new counts in the superseding indictment alleged that McAllister and Whitney entered into a second conspiracy "from 2006 and continuing into 2011" to embezzle more than $1 million that McAllister received from the Neiswongers and to conceal the theft. (ER 78-81) Five related counts against McAllister and Whitney alleged wire fraud between 2007 and 2010. (ER 81-82) Another count against both alleged interstate transportation of stolen property in October, 2010, as to funds derived from McAllister client Vickery (see discussion of disbarment proceedings, above). (ER 83-84) Another new count alleged bankruptcy fraud (18 U.S.C. § 157 and 2) and the final count the concealment of assets in bankruptcy (§ 152(1) and 2) against both McAllister and Whitney "on or about March 11, 2011,"—i.e., *after* McAllister had commenced his representation of Mr. Steele—and again in connection with the Vickery funds. (ER 84-87)

d. Evidence That a Government Informant Was Secretly Taping Trial Counsel's Communications During Defendant's Trial

Finally, in the course of the McAllister prosecution, his defense counsel filed a motion for a pre-trial continuance in which, among other things, he described the voluminous and complex discovery that had been produced to date. ER 57-63) The motion stated that such discovery included "at least 23 surreptitiously recorded conversations of Mr. McAllister, only one of which has been transcribed to date." (ER 59) The motion thereafter stated that:

> The primary government informant who deceived Mr. McAllister to obtain information in the recorded conversations is Gerald Small, a convicted felon and former client of Mr. McAllister. The scope of his relationship with the government is unclear but his work as an informant implicates complex legal and factual issues. *His business relationship with Mr. McAllister during the relevant time period may have allowed him access to confidential attorney-client material regarding clients not related to this case*. . .

(*Id*. [Emphasis added]) Observing that the informant's recordings might contain exculpatory evidence and stressing the need for transcription, McAllister's discovery motion went on to describe a purported conversation between Small and McAllister recorded on *April 5, 2011*—during the very period that McAllister was representing Mr. Steele and only three weeks before the commencement of Steele's trial. (*Id*.)

e. McAllister's Guilty Plea, Conviction, and Sentencing

On May 24, 2012, McAllister executed a plea agreement with the United States wherein he admitted guilt on the superseding indictment's two conspiracy counts—counts 1 and 20—as well as to the bankruptcy fraud charged in count 28 of that indictment. (ER 46-56; *McAllister* Dkt. 108) McAllister entered his plea to these counts on the same day. (*McAllister* Dkt. 107) On September 14, 2012, the district court, having accepted his plea, sentenced McAllister to a term of 78 months on all counts of conviction. (ER 41-45 [sentencing order]; *McAllister* Dkt. 145) The court filed its judgment four days later. (ER 30-40; *McAllister* Dkt. 156)

Again, all of the "subsequent revelations" discussed in this subsection (5),

including Mr. McAllister's alleged and proven commission of federal crimes as well as the surreptitious recording of his conversations by a government informant during McAllister's representation of Mr. Steele, would have come to light had the district court in this matter not erred in declining to inquire into Steele's allegations that McAllister had been constitutionally ineffective.

C. The District Court Erred in Declining to Consider Defendant's Ineffective Assistance Claim, and the Matter Should Be Remanded for a Hearing on It

Pursuant to Fed.R.Crim.P. 33 (b)(2), when a defendant brings a timely motion for new trial prior to sentencing, he is entitled to raise an ineffective assistance of counsel [IAC] claim in the district court and develop the record in support of that claim. "[W]hen a claim of ineffective assistance of counsel is first raised in the district court prior to the judgment of conviction, the district court may, and at times should, consider the claim at that point in the proceeding." *United States v. Brown,* 623 F.3d 104, 113 (2nd Cir. 2010). *See also United States v. Cobas*, 415 Fed. Appx. 555 (5th Cir. 2011); *United States v. Woods*, 812 F.2d 1483 (4th Cir.1987); *United States v. Jensen*, 2010 WL 380998, (9th Cir. 2010); *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984); *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996); *United States v. Howard*, 2010 WL 276236 (9th Cir. 2010); *United States v. Moses*, 2006 WL 1459836 (9th Cir. 2006).

In response to Mr. Steele's Rule 33 motion, the district court, citing *United States v. Ross*, 2011 WL2678832 (9th Cir. 2011)(unpublished), erroneously refused to consider his argument, ruling that the sole procedure for challenging the

effectiveness of counsel is by a post-sentencing collateral attack on the conviction under 28 U.S.C. § 2255, after a full record can be developed. *Ross*, however, is an unpublished decision and thus has no precedential effect. *Banuelos-Ayon v. Holder,* 611 F.3d 1080, 1085 (9th Cir. 2010); Ninth Cir. Rule 36-3. Furthermore, the ruling in *Ross* relied on *United States v. Hanoum*, 33 F.3d 1128, 1129 (9th Cir.1994), in which the defendant did not bring a timely pre-sentencing Rule 33(b)(2) motion, as here, but rather moved post-sentencing under Rule 33(b)(1),[15] claiming on the basis of newly discovered evidence that he had been deprived of his Sixth Amendment right to counsel. In *Hanoum*, the defendant alleged that counsel had a conflict of interest which only became known after sentencing, in response to which this Court ruled the defendant's use of Rule 33(b)(1) was improper, stating that the "newly discovered evidence" referred to in Rule 33(b)(1) must relate to elements of the crime charged, not to Sixth amendment claims of ineffective assistance of counsel. It was in this wholly distinct context that *Hanoum* relegated the defendant's IAC claim to his post-appellate remedies under section 2255.

Likewise, appellate courts generally refuse to consider claims for a new trial based on ineffective assistance of counsel which have not been timely raised first in the district court. *United States v. Smith*, 62 F.3d 641, 651 (4th Cir. 1995). In such circumstances, the proper procedure for bringing an ineffective assistance of

[15] A defendant has three years after the verdict or a finding of guilty to raise a Rule 33(b)(1) claim on the basis of newly discovered evidence.

counsel claim again is to file for relief under 28 U.S.C. § 2255. See *United States v. Pinkney*, 542 F.2d 908, 915 (D.C. Cir. 1976); *Johnson v. United States*, 838 F.2d 201, 206 (7th Cir. 1988); *United States v. Taglia*, 922 F.2d 413 (7th Cir. 1991), *United States v. Sanchez*, 917 F.Supp. 29 (D.C. Cir. 1996); *United States v. Sanders*. 108 F.3d 1374 (4th Cir. 1997).

But these two lines of authority have no application to IAC claims brought via a timely, pre-sentencing new trial motion under Rule 33 (b)(2). Indeed, it would make no sense to require IAC claims to be brought in a separate, post-appellate proceeding when they permissibly can be heard prior to sentencing and, if denied, be reviewed on direct appeal with all other claims of trial error. As the court stated in *United States v. Jensen,* 2010 WL 3809988 (E.D.Wash. Sep. 27, 2010):

> The Government suggests that Jensen has the remedy of filing a petition for habeas corpus after sentencing and conclusion of appeal. While it is true that ineffective assistance of counsel is often raised in collateral proceedings ... it promotes judicial efficiency for this court to address the issue. Also, it would violate the Sixth Amendment and the teachings of *Gideon v. Wainwright,* 372 U.S. 335 (1963), to proceed to sentence a Defendant who was convicted in violation of the right to effective assistance of counsel.

Id. at *9. *See also Brown*, 623 F.3d at 113 ("We are perplexed by the assertion that a trial court must invoke an appellate court's rubric and require a defendant to use his one § 2255 motion to raise an ineffective assistance claim post-judgment, particularly when the district court is in a position to take evidence, if required, and to decide the issue pre-judgment.")

In the instant case, the claim of ineffective assistance of counsel was timely brought under Rule 33(b)(2)'s "other grounds" prong, and was not based on Rule 33(b)(1)'s "newly discovered evidence" prong. Accordingly, the district court in fact retained the discretion to consider defendant's ineffective assistance claim, to conduct an evidentiary hearing to explore its allegations, and to dispose of the claim on the merits. Therefore, the court's belief that the "proper procedure" *required* it to deny the motion without reaching the merits was clear legal error, and for that reason, its related procedural ruling a patent abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."); *see also Ray v. Robinson*, 640 F.2d 474, 478 (3d Cir. 1981) ("A failure to recognize the existence of authority to exercise discretion does not amount to its exercise. ... If a district court fails to exercise its discretion, that is itself an abuse of discretion." (Internal citations omitted))

Indeed, given the timely, pre-judgment filing of the new trial motion and the serious nature of the allegations concerning McAllister's deficient performance, even if the district court *had* recognized and exercised its discretion—which it did not—there could be no valid reason for the court's refusal to further develop the record at an evidentiary hearing instead of postponing the issues for post-appeal proceedings under Rule 2355.

Furthermore, trial counsel's failure to present expert witness testimony itself constitutes constitutionally deficient performance where, as here, it is needed to

support the defense theory. See, e.g., *Duncan v. Ornoski*, 528 F.3d 1222, 1236 (9th Cir. 2008). And the failure to present the available evidence from Dr. Papcun was demonstrably prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984), particularly given the recognition by both the court and the parties that the validity of the June 9 and 10 recordings constituted the critical issue in the case.

Mr. Steele's new trial motion thus contained allegations of Mr. McAllister's ineffective assistance which, if true, would entitle him to relief, which entitled him to an evidentiary hearing in the first instance. *United States v. Howard* 381 F.3d 873, 877 (9th Cir. 2004) This Court, therefore, should reverse and remand the matter to the district court for a hearing on the timely raised claim of IAC, which challenges all four counts of conviction.[16]

II. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO REQUIRE A UNANIMOUS VERDICT AS TO THE FACTUAL BASIS FOR THE "INTERSTATE TRAVEL" ELEMENT ALLEGED IN AND/OR INCORPORATED INTO COUNTS ONE, TWO, AND THREE

A. Standard of Review

Where, as here, defense counsel did not request a specific unanimity instruction with request to the offense element at issue, this Court reviews the

[16] Counts One to Three obviously rest on the evidence of the disputed recordings. As noted in the Statement of the Case and Statement of Facts, *supra*, Count Four alleges that defendant tampered with a witness, and specifically that he sought to "corruptly" persuade Cyndi Steele to engage in misleading conduct as to the identity of a voice on a disputed recording. (ER 320) Steele cannot have harbored such a "corrupt" intent unless the purported June 9th and June 10th recordings of his voice were, in fact, authentic—the very conclusion that, but for counsel's IAC, the defense expert would have placed in serious doubt.

failure to so instruct for plain error. *United States v. Payseno*, 782 F.2d 832, 834 (9th Cir. 1985).[17] An error is "plain" within the meaning of this rule where Ninth Circuit precedent establishes it as such. *United States v. Alferahin*, 433 F.3d 1148, 1157 (9th Cir. 2006).

B. Statement of Facts

1. The Superseding Indictment

Count One of the superseding indictment (Use of Interstate Commerce Facilities in the Commission of Murder for Hire) alleges, in relevant part, that

> *"beginning in approximately December, 2009 and continuing to June 11, 2010*," defendant Steele "attempted and caused *another* to travel in interstate commerce from Idaho to Oregon" with the intent that his wife and mother in law be murdered in violation of Idaho and Oregon law and as consideration for money and items of pecuniary value, all in violation of Title 18, United States Code, Section 1958.

(ER 319 [emphasis added])

Count Two (Use of Explosive Material to Commit Federal Felony) alleges that "[b]etween on or about the 27th and 31st of May, 2010," Steele aided and abetted the use of an explosive device in an attempt to commit a federal felony, "Use of Interstate Commerce Facilities for Murder-for-Hire"—i.e, the specific offense charged in Count One—"in violation of Title 18 United States Code

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[17] If absence of a specific unanimity instruction in connection with the Counts discussed in this Argument (II) and in Argument III, *infra*, does not directly result in reversal on appeal, then the failure of Steele's trial counsel to request such an instruction supplies yet another factual and legal basis for Steele's claim of ineffective assistance of counsel.

Sections 2 and 844(h).” (ER 319)

Count Three alleges that “[b]etween on or about the 27th and 31st of May, 2010,” Steele aided and abetted the knowing possession of a destructive device in furtherance of a federal crime of violence, “Use of Interstate Commerce Facilities for Murder-for-Hire”—again, the i.e, the specific offense charged in Count One—“in violation of Title 18 United States Code Sections 2 and 924(c)(1)(B)(ii). (ER 320)

Thus, as the district court later recognized and as set forth in the final instructions (see below), commission of the specific murder for hire offense alleged in Count One was incorporated into, and served as the factual predicate for, the offenses charged in Counts Two and Three.

2. The Evidence at Trial

Viewing the evidence in support of the government’s case, there were three occasions on which Steele arguably “caused another” to cross state lines in connection with the alleged murder plot:

First, Cyndi testified that Steele had encouraged her to travel to Oregon to care for her mother before and at the time he had a hernia operation on April 22, 2010. (RT 738-39) That encouragement, moreover, continued to May 28, 2010, when Cyndi drove to Oregon with the device on her car. (RT 877-878 [Cyndi testifies that she always went to see her mother with Steele’s “blessings”])

Second, Fairfax testified that on May 30th, and after the pipe bomb failed to function during Cyndi’s drive to Oregon on May 28th, he discussed the matter with

Steele and thereafter drove to Oregon City to check on the device. (RT 470-71)

Third, Sotka and Fairfax testified that Fairfax, upon being so directed by government agents, had driven to Oregon on June 10, 2010, purportedly to maintain Steele's belief that the plan was still in progress. (RT 366-38, 531)

3. Rule 29 Issues and Ruling

On the day before the prosecution concluded its case-in-chief, the district court judge stated that he wanted "guidance from counsel, perhaps from the government" concerning an issue it "need[ed] to resolve" in connection with an anticipated defense motion pursuant to Fed.R.Crim.P. 29. (ER 265 [RT 1030-31]) Specifically, the judge wished to know:

> . . . [w]hat is the felony offense, the underlying felony offense, for Counts 2 and 3? Is it – the offense charged in Count 1 deals with a time period – I'm looking at the indictment, in fact, as we speak – extending from December 2009 through June 11th, 2010.
>
> And I'm going to want counsel to explain whether your position is that there is an ongoing criminal act that included – incorporates both what Mr. Fairfax testified to as the attaching of the pipe bomb and then the travel to Oregon to determine whether it had fallen off, whether it then also incorporates the second trip to Oregon to presumably involve Ms. Steel in a fatal car accident.

(ER 266 [RT 1031]) Reiterating that "there has to be a predicate federal felony," the judge expressed uncertainty about "how it all hangs together, whether or not it is one overall criminal act, whether there are discrete criminal acts; one related to the pipe bomb, the second to the second trip to Oregon that's been testified to." (ER 266 [RT 1031-32]) The judge specifically expressed concern as to "what the

evidence is for the jury to deal with" and noted that he was "scratching his head" over the matter. (ER 266 [RT 1032])

The following day, the parties presented oral argument in connection with defendant's claim that the evidence on all counts was insufficient under Rule 29. (ER 241-44 [RT 1110-21]) In his argument, the prosecutor asserted that the evidence relating to Count One was sufficient to support the "interstate" element based on evidence of two events occurring during alleged time period, i.e., that Steele, with the requisite intent, (1) caused Cyndi Steele to travel from Idaho to Oregon on May 28, 2010, and (2) caused Larry Fairfax to travel from Idaho to Oregon on May 31, 2010 to check on the bomb. (ER 243 [RT 1116-18]) The prosecutor also noted that the Court previously had "requested some briefing" concerning Counts Two and Three, but stated he would not address the issue since it "had[n't] been raised." (ER 243 [RT 1118-19]) He then added:

> . . . Count 2 and Count 3 specifically apply to simply the 27th through the 31st of May. That is the bomb part.
>
> But the murder part, as I said, in Count 1 continues until – into June, but the pipe bomb part applying to just manufacture of the bombs, that was done – the use and possession of the bombs was done in (sic) the 27th through the 31st of May.

(ER 243 [RT 1119])

After hearing further argument from the prosecutor, the district court issued its ruling. (ER 244 [RT 1121-24]) As to Count One, and applying Rule 29's forgiving standard, the court deemed the evidence sufficient to find that through

the spring and "into June, 2010" intended (sic) to cause Fairfax to travel in interstate commerce "with the intent that a murder be committed." (ER 244 [RT 1121-22]) Like the prosecutor, the Court identified one of the qualifying "travel" events as Fairfax's May 31st trip from Idaho to Oregon to check on the pipe bomb. (ER 244 [RT 1122]) Unlike the prosecutor, however, the trial court identified the second such event not as Cyndi Steel's travel to Oregon on May 28th but rather Fairfax's second trip from Idaho to Oregon on June 10, 2010. (*Id*.)

The court thereafter noted its previous "concerns" about Counts Two and Three, but concluded that the evidence was sufficient to find that Steele had aided and abetted Fairfax in "using" the explosive device to "us[e] interstate commerce in the commission of a murder for hire." (ER 244 [RT 1123]) The court made no specific mention of the event or events constituting the factual travel "predicate" for Counts Two or Three, as it had done the previous day.

4. Instructions

At the close of evidence, the trial court instructed on the elements of Count One in relevant part as follows:

> In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: First, beginning on or about December 7, 2009 and continuing to on or about June 11th, 2010, the defendant, with intent that a murder be committed, caused another to travel in interstate commerce; and, second, the defendant intended that the murder be committed as consideration for receipt of or promise to pay anything of pecuniary value.

(ER 206 [RT 1459])

Furthermore, consistent with the Superseding Indictment, the court identified the offense alleged in Count One—Use of Interstate Commerce Facilities for Murder-for-Hire—as the target or predicate 'federal felony" or "crime of violence" underlying Counts Two (aiding and abetting use of explosive materials to commit a federal felony) and Three (use of a destructive device in relation to a crime of violence), respectively. (ER 206-07 [RT 1460-64])[18]

Finally, neither party requested a specific unanimity instruction as to the factual basis for the "interstate commerce" element contained in, or incorporated into, Counts One, Two and Three. (ER 202-04 [RT 1446-52] [instructional conference]) Accordingly, the district court provided the jury only with a general unanimity instruction as to all alleged counts. (ER 226 [RT 1540-41])[19]

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[18] As to Count Two, the Court required jurors to find that: "First, the defendant committed the crime of use of interstate commerce facilities in the commission of murder for hire as described in Count 1; and, second, the defendant knowingly and intentionally counseled, commanded, induced or procured Larry Fairfax to knowingly use an explosive between on or about May 27th, 2010, and May 31st, 2010, to commit that felony." (ER 206 [RT 1460])

As to Count Three, the Court required a finding that: "First, the defendant committed the crime of use of interstate commerce facilities in the commission of murder for hire as described in Count 1; and, second, the defendant knowingly and intentionally counseled, commanded, induced, or procured Larry Fairfax to possess a destructive device between on or about May 27th, 2010, and May 31st, 2010, in relation to the crime of use of interstate commerce facilities in the commission of murder for hire." (ER 206 [RT 1462])

[19] "Your verdict, whether guilty or not guilty, must be unanimous. . . It is important that you attempt to reach a unanimous verdict." (*See also* ER 227 [RT 1543] ["After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations . . ."])

5. Closing Argument

In his closing argument, and departing in part from his argument in response to defendant's earlier motion under Rule 29, the prosecutor appeared to argue that defendant, with the requisite intent, had "caused" another to travel in interstate commerce on the two occasions identified by the trial court and involving only Larry Fairfax, i.e., Fairfax to Oregon on May 31st (to check on the bomb) and Fairfax to Oregon on June 10th (to commit murder by any means). (ER 212 [RT 1484-85]; *see also* ER 209 [RT 1471], ER 211 [RT 1480-82]; and ER 225 [RT 1537-38] [rebuttal])

6. The Jury Note

On the second day of deliberations (May 7, 2011), the foreperson of the jury sent the court a note stating:

> Can we please have the word, "caused," defined further as written and used in Count 1 of the charges, "beginning on or about" . . . "caused another to travel in interstate commerce . . ."?

(ER 197 [RT 1572]) Over defense counsel's objection, the district court responded to the note by instructing, "As to Count 1, the defendant 'caused another to travel in interstate commerce' if the other individual traveled in interstate commerce and would not have done so but for the defendant's conduct." (*Id*.)

C. The Trial Court Should Read a Specific Unanimity Instruction Where the Jury Might Otherwise Convict by Finding Different Essential Facts

As the Supreme Court stated in *Richardson v. United States*, 526 U.S. 813 (1999),

> Federal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime. A (hypothetical) robbery statute, for example, that makes it a crime (1) to take (2) from a person (3) through force or the threat of force (4) property (5) belonging to a bank would have defined the crime of robbery in terms of the five elements just mentioned. Cf. 18 U.S.C. § 2113(a). Calling a particular kind of fact an "element" carries certain legal consequences. [. . . .] The consequence that matters for this case is that a jury in *a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element*. [. . .]

Richardson, 526 U.S. at 817 (emphasis added). Cf. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (observing that, under long standing Supreme Court precedent, a criminal defendant is entitled to "'a jury determination that [he] is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt.") (citations omitted; emphasis added); *In re Winship*, 397 U.S. 358, 364 (1970) holding that, "T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged") (emphasis added).

This Court has unequivocally recognized that "causing another to travel in interstate commerce" is an independent factual element of the offense charged in Count One (Use of Interstate Commerce Facilities in the Commission of Murder for Hire). *United States v. Driggers*, 559 F.3d 1021, 1023 (9th Cir. 2009) (citing *United States v. Ritter*, 989 F.2d 318, 321 (9th Cir.1993); *see also Richardson*, *supra* (jury in CCE case must unanimously agree not only that defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series.")

Established Circuit precedent also requires the reading of a specific unanimity instruction—i.e., one which requires jurors to agree on a specific fact or event underlying an element—where there is a "genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *United States v. Anguiano*, 873 F.2d 1314, 1318 (9th Cir. 1989) (quoting *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir.1983))

In *Anguiano*, the Court identified a number of situations in which this Circuit has identified there is a "genuine possibility of juror confusion" necessitating a specific unanimity instruction:

> First, the instruction is required in cases, such as *Echeverry* itself, where the jury actually indicates, by note to the court, that it is confused about the nature of the conspiracy charged. 719 F.2d at 975 ("The jury's written questions indicated their confusion concerning multiple conspiracies and should have alerted the trial judge to the potential for a nonunanimous verdict."); *see also United States v. Gordon,* 844 F.2d 1397, 1401-02 (9th Cir.1988).
> . . .
> Second, the instruction may be required in cases where the indictment is sufficiently broad and ambiguous so as to present a danger of jury confusion. *See, e.g., Gordon,* 844 F.2d at 1401; [*United States v.*] *Payseno*, 782 F.2d [832,] 836-37 [(9th Cir.1986)].
> . . .
>
> Third, a specific unanimity instruction is required in cases where the evidence is sufficiently factually complex to indicate that jury confusion may occur. *See United States v. Gilley,* 836 F.2d 1206, 1211-12 (9th Cir.1988); *Payseno,* 782 F.2d at 837; *United States v. Frazin,* 780 F.2d 1461, 1468 (9th Cir.), *cert. denied,* 479 U.S. 844, 107 S.Ct. 158, 93 L.Ed.2d 98 (1986).

Anguiano, 873 F.2d at 1319-21.

As discussed below, a specific unanimity was required in this matter because the possibility of juror confusion concerning the identity of a factual element arose for *all* of the stated reasons in *Anguiano*.

D. The District Court Committed Plain Error When it Failed to Read a Specific Unanimity Instruction as to the Travel Element

In order to secure reversal of a conviction under the plain error doctrine, a defendant must establish (1) that the proceedings below involved error; (2) that the error was plain; and (3) that the error affected the substantial rights of the aggrieved party. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). In addition, the defendant must show that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" before the Court will exercise its discretion pursuant to Fed.R.Crim.Pro. 52(b) to correct it. *Id*., at 736; *see also Alferahin, supra,* 433 F.3d at 1154. This Court has not hesitated to find "plain error" in connection with the failure to read a specific unanimity instruction where, as here, such a finding is warranted by the circumstances. See, e.g., *Payseno*, *supra*; *Gilley*, *supra*; *Echeverry, supra*.

1. The Error was "Plain" as to Count One

An error is plain when it is "clear" or "obvious" under the law, including governing Ninth Circuit precedent. *Olano*, 507 U.S. at 734; *Alferahin*, 433 F.3d at 1157.

Again, in Count One, the relevant portion of the indictment alleged that

Steele attempted and caused another to travel in interstate commerce from Idaho to Oregon "beginning in approximately December, 2009 and continuing to June 11, 2010." (ER 319) The trial court's instructions on Count One were to similar effect. (ER 206 [RT 1459]) But those instructions, coupled with only a general unanimity instruction, raised a potential for serious jury confusion for all three of the reasons identified in *Anguiano* and the precedent discussed therein.

First, the jury's note about what constituted "causation" reflected confusion as to the occasions, if any, on *which* Steele had "caused" another to travel from Oregon to Idaho. Given the instructions, including the district court's response to the jury's note, the jurors could have selected from any of three different occasions on which Steele had "caused" another to cross state lines: Cyndi on May 28th, Fairfax on May 31st, and Fairfax again on June 10th. The absence of a specific unanimity instruction thus raises the unacceptable possibility that jurors never reached unanimity as to a single "causation" event in support of the "interstate travel" element contained in the charge. To state it otherwise, a majority of jurors could have found insufficient evidence to establish causation as to each of the three dates, yet the jury could still have cobbled the affirmative votes as to each date together to reach a total of twelve votes for conviction.

Second, Count One of the superseding indictment was sufficiently broad and ambiguous so as to present a danger of jury confusion. The temporal span identified in that Count encompassed all three of the potential state line crossings identified above, and nothing about the charging language in any way directed

jurors to consider one crossing in preference to any other.

In fact, because Count One thereby "joined two or more distinct and separate offenses" in a single count, it must be deemed duplicitous. *United States v. Ramirez–Martinez*, 273 F.3d 903, 913 (9th Cir.2001), overruled on other grounds by *United States v. Lopez*, 484 F.3d 1186 (9th Cir.2007). "The vices of duplicity arise from breaches of the defendant's Sixth Amendment right to knowledge of the charges against him, since conviction on a duplicitous count could be obtained without a unanimous verdict as to each of the offenses contained in the count." *United States v. Aguilar*, 756 F.2d 1418, 1420 n. 2 (9th Cir.1985). As this Court has held, in the absence of an election by the prosecution of the specific offense on which it will rely, the defect inhering in a duplicitous indictment "is remediable by the court's instruction to the jury particularizing the distinct offense charged in each count in the indictment.' " *Ramirez–Martinez*, 273 F.3d at 915) (quoting *United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir.1981)). That is the precise instruction needed but not given here.

Third, the evidence was sufficiently factually complex to indicate that jury confusion might occur. There were different reasons for jurors to accept or reject the proposition that Steele had "caused" another—either Cyndi or Fairfax—to travel from Idaho to Oregon on each of the three occasions discussed. As to the first—Cyndi's May 28th trip to visit her mother—the evidence was undisputed that prior to the May trip, Cyndi was traveling to Oregon on a regular basis to care for her mother, rendering it unlikely that twelve jurors would agree that on the 28th she

"would not have done so but for the defendant's conduct." As to Fairfax's trip to Oregon on May 31st, Fairfax testified that the agreed-upon purpose of the trip was to determine why the device had not exploded, but never suggested that he was to attempt to kill anyone during the trip. Some, if not most, jurors thus could have reasonably doubted that Steele "*with intent that a murder be committed*, caused [Fairfax] to travel in interstate commerce" on May 31st. Finally, some or all jurors could have had a reasonable doubt whether Steele caused Fairfax to travel to Oregon on June 10th, at a time when Fairfax was entirely under the control of the investigating agents.

Nothing about the evidence or the court's instructions simplified the jury's task on the issue. Indeed, as noted, the prosecution itself argued during the Rule 29 hearing that *both* Cyndi's May 28th travel and Fairfax's May 31st travel established the element, and then argued to the jury that *both* Fairfax's May 31st travel and his June 10th travel established it. This evolving argument reflects the government's own conceptual confusion in identifying a single and specific factual basis for Count One's interstate travel element.

Given the extraordinary potential for jury confusion and the attendant possibility that jurors never reached a unanimous agreement as to the Count One elements, the failure to read a specific unanimity instruction as to Count One was "error" that was "plain."

2. The Error was "Plain" as to Counts Two and Three

The failure to read a specific unanimity instruction with respect to Counts

Two and Three was likewise "error" that was "plain" under governing Circuit precedent.

As set forth above, Count Two essentially alleges that between May 27 and May 31, 2010, Steele aided and abetted Fairfax in using an explosive to commit murder for hire "as described in Count One." Similarly, Count Three essentially alleges that between the same dates, Steele aided and abetted Fairfax in possessing a destructive device in relating to the crime of murder for hire "as described in Count One." Because instructional error precluded a reliable finding of guilt on the Count One offense, and because commission of that offense served as an element of, and factual predicate for, Counts Two and Three, the Count One plain error necessarily affects both of the latter counts and renders them invalid.

Nor do the temporal limitations contained in Counts Two and Three alter this conclusion. Specifically, both Counts Two and Three allege that Steele aided and abetted a criminal use (Count Two) or possession (Count Three) between May 27, 2012 and May 31, 2012 to commit murder for hire. This is a more confined period than the one alleged in Count One (December, 2009 through June 11, 2010). Nevertheless, jurors could well have considered that the predicate commission of murder for hire underlying Counts Two and Three was effected by either Cyndi's travel to Oregon on May 28, 2010 *or* by Fairfax's travel to Oregon on May 31, 2010. For this reason, too, all three of the potential bases for jury confusion discussed in connection with Count One apply to the "causing interstate travel" element of the murder for hire offense referenced in Counts Two and

Three. The instructional error was therefore "plain" as to these counts as well.

3. The Remaining Criteria of the "Plain Error" Doctrine are Satisfied

As to the question whether the district court's plain error affected appellant's substantial rights, such an impact appears here because there can be no demonstrable assurance that jurors did, in fact, unanimously agree as to a single factual basis for the "causing travel" element of the murder for hire charge. See *Alferahin*, 433 F.3d at 1157 (substantial rights to due process affected where defendant was not convicted of charged crime but only certain elements thereof).

Indeed, the assurance of such a unanimous verdict is particularly questionable where, as here, the prosecutor argued in closing that two instances of causing interstate travel by Fairfax satisfied the element as to Count One, essentially giving one group of jurors the option of choosing one such instance and a second group the other. Nor can any assurance of a unanimous finding as to a single instance of causing interstate travel be inferred from anything else in the record. Indeed, the district court judge's own comment that he was "scratching his head" about the factual predicate for Counts Two and Three speaks volumes about the likelihood that jurors would be confused.

Finally, this Court should exercise its discretion to grant relief under the plain error doctrine if the cited instructional error "seriously affected the fairness, integrity or public reputation of judicial proceedings." Such an effect appears where the evidence on a given charge is less than overwhelming and there is reason to doubt whether a properly instructed jury would have returned a

conviction. *Alferahin*, 433 F.3d at 1159. In turn, such doubt appears here because there is no sound basis for determining that *all* jurors would have found that Steele had "caused" any single instance of interstate travel within the time periods alleged in each of the counts, a conclusion bolstered by the question in the jury's note.

Furthermore, this was a high profile prosecution that generated extensive public interest. To affirm Steele's conviction where there is strong reason to question whether jurors ever agreed as to the presence of a critical element of the primary counts against him would plainly undermine the public reputation of the proceedings below. For that reason as well, the Court should find that the plain error doctrine, as set forth in *Olano*, applies here.

III. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO REQUIRE A UNANIMOUS VERDICT AS TO THE OBJECT OF THE ALLEGATIONS CONTAINED IN COUNT TWO

A. Standard of Review

Defense counsel did not request a specific unanimity instruction as to the factual bases for the allegations made in Count Two and discussed in the present claim. Accordingly, this Court again reviews for plain error the present argument that the district court committed plain error when it failed to read such an instruction. *Payseno*, 782 F.2d at 834.

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B. Statement of Facts[20]

1. The Superseding Indictment

Again, *Count Two* of the superseding indictment essentially alleges aiding and abetting the *use* of *explosive materials* to commit a federal felony, i.e., murder for hire, "[b]etween on or about the 27th and 31st of May, 2010," in violation of 18 U.S.C. §§ 2 and 844(h).

Count Three essentially alleges aiding and abetting the *possession* of a *destructive device* in relation to a crime of violence, i.e, murder for hire, again "between on or about the 27th and 31st of May, 2010, in the District of Idaho," in violation of 18 U.S.C. §§ 2 and 924(c)(1)(B)(ii).

2. The Evidence at Trial

With respect to the "explosive materials" and "destructive device" placed in issue by Counts Two and Three, respectively, the evidence at trial included:

Fairfax described building *two* pipe bombs. (RT 454 [referencing use of "two" pieces of pipe and related additional steps]). He testified he put one of these bombs on Cyndi's Mitsubishi and one on Steele's Cadillac. (RT 456-58). On June 15, 2010, Fairfax gave authorities the pipe he had used to construct the bomb he had placed on Steele's Cadillac. (RT 534) Fairfax had previously disassembled it, dumped out the powder, and burned it. (RT 534-35)

An ATF agent thereafter received "two pipe looking devices" for analysis,

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[20] Many of the facts relating to the present claim are set forth in section B of Argument II, *supra*.

one with an end cap and one without. (RT 634-35) The agent described the one removed from Cyndi's car, including the bomb components, at length. (RT 635, et seq.) He briefly described the second bomb as the "one disassembled by the individual." (RT 704; Exh. 85). As received by the agent, it consisted of a large pipe with a coupler and a plug. (RT 700-04) The pipe contained a residue double-base smokeless powder, the same material that had been used in the pipe attached to Cyndi's car. (RT 700, 702, 1027-28)

3. Rule 29 Issues and Ruling

In ruling on the sufficiency of the evidence as to Counts Two and Three, the district court clearly understood both of them as placing in issue only the pipe bomb removed by authorities from Cyndi's car, rather than the one Fairfax had purportedly placed on, and later removed from, Steele's. Thus, as to the object of *both* counts, the court observed:

> Even if Mr. Fairfax believed he had constructed *the device* in such a way that it would not actually go off, I think it was still clearly an explosive device ...

(ER 244 [RT 1123]) Again, Fairfax had only testified that he constructed the bomb on Cyndi's car so that it would not function; he gave no such testimony as to the bomb he had purportedly placed on Steele's car. (RT 454, 543-44, 551-52)

4. Instructions

As noted (see footnote 18, *supra*), the relevant portion of the Count Two instruction required a finding that Steele aided and abetted Fairfax in the knowing "use" of an "explosive" between May 27th, 2010, and May 31st, 2010, to use of

commerce in committing murder for hire. (ER 206 [RT 1460]) An additional instruction further defined the term "explosive." (ER 206 [RT 1461)

The relevant portion of the Count Three instruction, meanwhile, required a finding that Steele aided and abetted Fairfax in the "possess[ion]" of a destructive device between the same dates, i.e., May 27th, 2010, and May 31st, 2010, in relation to using commerce in committing murder for hire. (ER 206 [RT 1462]) An additional instruction further defined the term "destructive device." (ER 207 [RT 1463])

5. Closing Argument

In closing, the prosecutor argued, contrary to the inference made by the trial court, that the "use of an explosive" alleged in Count Two involved the bomb Fairfax claimed to have placed on Steele's car rather than the one authorities had seen and removed from Cyndi's. (ER 212 [RT 1485-1489]) As the prosecutor explained:

> This is a lesser count than Count 3. And why has it been charged that way? Because we don't know much about this bomb. We got it after it was disassembled. We never saw the end cap. We never saw the fuses.

(ER 212 [RT 1485])

C. The Trial Court Committed Plain Error by Failing to Read a Specific Unanimity Instruction as to Count Two Because the Instructions, as Given, Created a Substantial Risk of a Non-unanimous Verdict on a Theory That Was Not Actually Charged in Count Two

The governing law relating to the doctrine of "plain error" and the nature of the circumstances that required a district court to read a specific unanimity

instruction are set forth in section C of argument II, *supra*. As applied here, the law required an additional specific unanimity instruction as to the factual basis for Count Two for two of the three reasons stated in *Anguiano* and related precedent.

First, the superseding indictment is sufficiently broad and ambiguous as to the objects of Counts Two and Three that it again raises a very substantial danger of jury confusion. The same time period (May 27th to May 31st, 2010) is alleged in each of those counts. Nothing in their remaining language indicates that the use of an explosive device alleged in Count Two applied to the bomb placed on Steele's car as opposed to that placed on Cyndi's. Nor did the district court's instructions do anything to relate each count to a specific device.

Second, the evidence was sufficiently factually complex to indicate that jury confusion might occur. Again, there was nothing about the way such evidence was presented that would lead jurors to conclude that the allegations in Count Two applied to the explosive in the pipe bomb Fairfax claimed to have placed on Steele's car. Indeed, defendant's alleged aiding and abetting the use of an explosive as to his own car was supported only by the Fairfax testimony, the veracity of which was drawn into question by repeated lies. And even the prosecutor conceded that less was known about this bomb.

Accordingly, at least some of the jurors likely applied Count Two's allegations to the bomb that was observed by authorities and others actually attached to Cyndi's car and that was the subject of the vast majority of the prosecution's forensic testimony— just as the district court apparently did when

ruling the evidence sufficient to support Count Two in his Rule 29 ruling. To be sure, the prosecutor *argued* that Count Two applied to the bomb on Steele's car, but this Court must presume that the jury was guided by the trial court's *instructions,* which would permit jurors to consider the bomb on Cyndi's car an equally viable candidate as the object of the Count Two allegations. *See Francis v. Franklin,* 471 U.S. 307, 324 n. 9 (1985) (holding that instructions hold sway over counsel's arguments in determining jury's assessment of evidence); *see also Boyde v. California*, 494 U.S. 370, 384 (1990) ("Arguments of counsel generally carry less weight with a jury than do instructions from the court.")

As a result of the court's failure to read a unanimity instruction on Count Two, there is a grave danger that the jury failed to reach a unanimous agreement as to its factual basis, instead splitting their vote between the Cyndi bomb and the Steele bomb in finding Steele guilty on that charge. *See Echeverry*, 719 F.2d at 975. Given the high potential for confusion arising from the remaining instructions, the district court's omission again constituted "error" that was "plain."

Furthermore, the district court's error in this regard satisfied the remaining criteria of the "plain error" doctrine under *Olano* for the same reasons stated in support of Argument II, *supra*. The error affected Steele's substantial rights to due process because there is a significant probability that he was deprived of his right to a unanimous verdict as to the precise factual basis for Count Two.

Indeed, the effect on Steele's substantial rights goes even further than this.

As noted, the prosecutor's argument is not a reliable basis for determining what the jury actually considered as Count Two's object. On the other hand, that argument does reliably indicate that the prosecutor secured the superseding indictment on Count Two on the basis of the bomb purportedly placed on Steele's car. As a result, to the extent that the district court's instructions, as given, permitted Steele's Count Two conviction on a different factual basis— i.e, the bomb on Cyndi's car— they effected a constructive amendment of the indictment, in violation of his Fifth Amendment right to be tried only on the basis of an accusation made by the grand jury. *Stirone v. United States*, 361 U.S. 212, 217 (1960) (A defendant has a constitutional right "to be tried only on charges presented in an indictment returned by a grand jury."); *see also United States v. Navarro-Vargas*, 408 F.3d 1184, 1190-92 (9th Cir. 2005) (en banc); *United States v. Shipsey*, 190 F.3d 1081, 1086 (9th Cir. 1999) (The petit jury may only convict a defendant of the essential crime alleged by the grand jury, and a district court "may not substantially amend the indictment through its instructions to the jury." [internal quotation marks omitted])

Finally, and again, this instructional error seriously affected the fairness, integrity and public reputation of judicial proceedings because the public can hardly regard the verdicts as just in this controversial case where the jury may have been so profoundly confused as to what they were deciding on the Count in dispute. This Court should accordingly find plain error within the meaning of *Olano* and reverse Steele's conviction on Count Two.

CONCLUSION

For the foregoing reasons, the Court should remand this case for an evidentiary hearing on appellant's claim of ineffective assistance of trial counsel, which places in issue all counts of conviction. Alternatively, should appellant's remand request be declined, the Court should reverse appellant's convictions on Counts One, Two, and Three of the superseding indictment.

Dated: October 1, 2012

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Appellant is aware of no related cases pending in this Court.

CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 17,739 words.

Dated: October 1, 2012

/s/ Donald M. Horgan
DONALD M. HORGAN

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