U.S.C.A. No. 12-30005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff/Appellee,	)
	)
vs.	)
	)
EDGAR J. STEELE,	)
	)
Defendant/Appellant.	)
	)

GOVERNMENT'S ANSWERING BRIEF

On Appeal from the United States District Court
for the District of Idaho
District Court No. CR 10-00148-N-BLW

The Honorable B. Lynn Winmill, Chief District Court Judge

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JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The district court entered judgment on November 14, 2011. (Excerpts of Record (ER) 342 at ECF No. 316.) Two days later, Defendant timely filed a notice of appeal. (ER 343 at ECF No. 317); FED. R. APP. P. 4(b). Defendant is incarcerated in the Victorville Federal Correctional Facility in Adelanto, California. His estimated release date is in January 2054.

ISSUES PRESENTED

1. **Did the district court abuse its discretion by deferring full consideration of Steele's ineffective assistance of counsel claim to collateral proceedings?**

2. **Did the different interstate trips introduced into evidence in the murder for hire count support different crimes making the indictment duplicitous and the jury instructions plainly erroneous?**

3. **Did the district court plainly err by failing to specify one of two bombs involved in the plot when it instructed the jury on Count Two?**

STATEMENT OF THE CASE

In this criminal case, the Defendant challenges his conviction. He argues that the district court was required immediately to consider one of his ineffective assistance of counsel claims instead of deferring full consideration to § 2255 proceedings. He also asserts two plain errors in the jury instructions.

STATEMENT OF FACTS

On a monitored call from jail the night he was arrested, the Defendant, Edgar Steele, called his wife. (SER 95-103.) He assured her that he did not wish to kill her. He told her that authorities would play a tape for her. When they did, he told her, "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." (SER 95.) If she did identify his voice, he told her, she would be responsible for sending him to jail and would have to answer to their children for the rest of her life. (SER 97.)

Despite recordings of her husband and their hired hand, Larry Fairfax, plotting to kill her, (SER 132-39, 141-51), the corroborated testimony of Fairfax and his cousin, (SER 132-39, 141-51), an unexploded pipe bomb found on her car, (SER 152), a similar device and explosive material stored in their garage, (SER 330 (Exh. 85)), evidence that her husband had an on-line girlfriend abroad with whom he had planned to elope, (SER 155, 156, 104-30), and evidence that he believed divorce to be too costly, (SER 157-60), Mrs. Steele stood by her husband. She testified on his behalf. (SER 203-14.)

Based on the jailhouse call to Mrs. Steele, a jury convicted Edgar Steele of tampering with a victim. *See* (ER 336 at ECF No. 230.) It also convicted him of

murder for hire in connection with a plot to have Mrs. Steele and her mother murdered. Finally, it convicted him of possessing and using two pipe bombs in the plot. (*Id.*) The four counts of conviction were as follows:

(1) Use of interstate commerce facilities in the commission of murder for hire, in violation of 18 U.S.C. § 1958, during the period of December 2009 to June 11, 2010.

(2) Aiding and abetting the use of explosive material, a pipe bomb, to commit a federal felony, in violation of 18 U.S.C. § 844(h) between May 27-31, 2010.

(3) Aiding and abetting possession of a destructive device in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(B)(ii) between May 27-31, 2010.

(4) Tampering with a victim, in violation of 18 U.S.C. § 1512(b)(3), on or about June 11 and 16, 2010.

See (ER 319-20.)

At trial, the evidence showed that Steele paid Fairfax $10,000 in silver coins to kill Mrs. Steele, and that he had agreed to pay another $10,000 to kill her mother, with a bonus $5,000 if he committed the killings in Oregon instead of in Idaho. (SER 303-05.) Fairfax traded the coins for money. (SER 304.)

Fairfax initially built two pipe bombs. At Steele's suggestion, he planted one on Mr. Steele's car as a decoy, to make it look as though someone was trying to kill both of the Steeles, not merely Mrs. Steele. (SER 306.) He planted the other on Mrs. Steele's car before she drove to Oregon to visit her mother. (SER 307-08.) Luckily, it failed to detonate.

At Steele's direction, Fairfax traveled from Idaho to Oregon on May 30, 2010, to see if the bomb on Mrs. Steele's car, which had not exploded but had not been discovered, was still there. (SER 309-12.) Fairfax brought his cousin with him. His cousin was unable to get very close to Mrs. Steele's car, for fear of being seen. From a distance, he saw no bomb. (SER 312.) Fairfax concluded that the bomb must have fallen off. (*Id.*)

When Fairfax returned to Idaho with the news that the bomb had fallen off, Steele told him to remove the bomb from Steele's own car. Fairfax did so, partially dismantled it, and stored it in the Steeles' garage. (Supplemental Excerpts of Record (SER) 312-13.) It was ultimately recovered by the FBI and introduced at trial. *See* (SER 330 (Exh. 85).) Steele became increasingly agitated after the bombing failed. (SER 315.) He urged Fairfax to "get the job done." (*Id.*) He also accused Fairfax of entering his house without permission and threatened to kill him if he did so again. (SER 313.)

Fairfax testified that at this point, he was scared. (*Id.*) Through an attorney, he contacted the FBI and became an informant. He described the arrangements Steele had made with him, to pay him in silver coin to murder Mrs. Steele and her mother. (SER 315, 278-79.) He did not, however, tell the FBI about the bomb he had planted on Mrs. Steele's car or the bomb he had planted and then removed from Mr. Steele's car. (SER 315.) He still believed that the bomb on Mrs. Steele's

car had fallen off, so he told the FBI that his trip to Oregon on May 30th had merely been for "reconnaissance." (*Id.*)

Working with the FBI, Fairfax recorded two conversations with Steele. He used a special, digital recording device provided by the FBI that attached to his key chain. (SER 316-19, 279-82.) Only the FBI agent knew the proprietary code on the device necessary to turn it on and off. (SER 316, 280-81.) Both times Fairfax returned from a recorded meeting with Steele, the agent noted how much time should be on the recording device. He followed the procedure he was taught to download the device so the recording could be reviewed. He then verified that the length of the recording was precisely the length expected, based on when the agent had turned the recorder on and given it Fairfax, and when he had turned it off upon Fairfax's return. (SER 282, 284.)

The first recording occurred on June 9th. While Fairfax and Steele worked in the barn and fed the Steeles' horses, the two men talked. Steele noted that a car bomb probably would not trigger any auto insurance coverage. (SER 133.) He told Fairfax that if he succeeded in making the murder look like an accident such that insurance could be collected, he would pay him a significant bonus in addition to the $10,000 already promised. (SER 135-39.) Steele also discussed creating an alibi for the time Fairfax would be in Oregon killing his wife. (SER 137.)

The next day, June 10th, Fairfax recorded a second conversation. In that

conversation, Fairfax asked Steele if he had any second thoughts. Steele responded with an emphatic no, a sentiment he reiterated at the end of the conversation. (SER 142-43, 150.) He repeatedly urged Fairfax to "get the f***ing job done." (SER 148.) Steele also spoke in more detail regarding his own plans to create an alibi. *See* (SER 146-47.) He expressed his hope that he could "seem normal" when the police car came to his door, given that he would not know whether "they're here to notify me or they're here to take me away, because you f***ed up and got yourself f***ing caught, and then it got pinned on me." (SER 147.) He also explained that, if Fairfax got caught, he would suggest that Fairfax was having an affair with Mrs. Steele or that he wanted to. (SER 148.) Finally, he expressed confidence that he could "lie myself out of it." (*Id.*)

To determine whether Steele would follow the plan he had outlined in the June 10th conversation, police and FBI agents went to his house on the day he thought Fairfax was killing his wife. (SER 286-88.) They told him that his wife and mother-in-law had, in fact, been killed and that Fairfax was unconscious in the hospital. Steele did not succeed in seeming normal. The agent and officer testified that Steele's demeanor was very odd. *See* (SER 267-69, 288, 295-96.) When he heard Fairfax was in custody, however, he did suggest that his wife was having an affair with Fairfax, just as he had told Fairfax he would. (SER 286, 269.)

Steele was arrested and informed of the true facts. (SER 288-89, 270.)

That evening, he made the jailhouse call to his wife in which he told her to stand "like a rhinoceros in the road" and refuse to identify his voice. (SER 95-103.)

A few days later, when Mrs. Steele went to get her car's oil changed, Quicklube technicians discovered the bomb and called the police. (SER 240, 242.) A bomb squad retrieved the bomb and rendered it safe. (SER 248-50.) Remnants of this bomb were introduced at trial, as was a photo of the bomb attached to the car that the Quicklube technician took. (SER 242, 142-53.)

Evidence of motive

At trial, the Government introduced evidence that Steele believed divorce would be costly, after he and his wife had considered it previously. *See*, *e.g.*, (SER 157-60.) The Government also introduced Steele's on-line profile as well as the profile of a young woman from Eastern Europe, Tatyana Loginova, with whom he had corresponded extensively. *See* (SER 155-56.) Steele wrote long letters to Ms. Loginova while in jail, which were introduced as well. (SER 104-30.) In recorded deposition testimony also introduced at trial, Ms. Loginova described Steele and her plans to marry. (SER 154, 192.) Steele maintained that he was doing research on Russian bride scams, which is what he had told his family. (SER 203.)

Steele's defense

In the jailhouse call to his wife the night he was arrested, Steele outlined the

defense he has maintained in the two years since: He was framed. According to Steele, the June 9th and 10th recordings in which he and Fairfax plotted to kill Mrs. Steele were skillfully fabricated. (SER 3, 96, 98.) The FBI used the recordings and Fairfax to support false criminal charges against him. (*Id.*)

An attorney himself, Mr. Steele was represented by a total of five attorneys in the district court. Mr. Steele's first attorneys were federal public defenders. Shortly before the date scheduled for trial, however, he retained private counsel. *See* (ER 328 at ECF Nos. 74-75.) At that time, he told the court that he had no problems with his previous counsel, he simply preferred to have his own, hired counsel. (SER 348.) His new counsel, Robert McAllister, as well as a local defense attorney, Gary Amendola, then assumed his defense.

After trial, Steele asserted that both sets of attorneys – the federal public defenders and his private counsel – were ineffective because each lead counsel had serious personal and professional problems. (SER 35-44.) On appeal, he maintains this argument only against Mr. McAllister, the lead attorney during his trial. *See* Blue Br. at 26-40.

Before trial, McAllister filed ten motions and filed responses to seven Government motions. *See* (ER 328-34.) He also moved orally to disqualify the lead Assistant United States Attorney on the case on the ground that she had been told about the substance of recordings of phone conversations between Steele and

attorneys who were not representing him. The district court found no misconduct and no reason for disqualification. *See* (ER 11 (citing ECF No. 90).)

McAllister also appeared at six pre-trial hearings. *See* (ER 328-35.) One of the hearings was a two-day *Daubert* hearing in which McAllister argued for the qualification of two experts on sound recordings in order to support Steele's defense that he was framed and the June 9th and 10th recordings were fabricated. One of the witnesses was willing to testify that the tapes had been fabricated. He was, however, held to be unqualified. (SER 334-35.)

The other witness, Dr. Papcun, gave his conclusion that, due to a large number of clicking noises on the recording, which he described as "artifacts," "gaps," and "transients," "it's quite clear that whatever is on these recordings is not entirely whatever occurred in the real environment being recorded." (SER 276.) Papcun further opined, however, that no editing – specifically, no "splic[ing] or conjoin[ing]" – had been done on the tapes, and that nothing he found indicated that any intentionally-created changes had occurred. (*Id.*) Fairfax testified that the clicking noises came from a box of tic-tacs that he had in his pocket, along with his key chain and the recording device. (SER 321.)

At the *Daubert* hearing, the district court concluded that Papcun's testimony would likely be excluded because it was "of very limited probative value," but left open the possibility that it might be introduced "as corroboration of other

evidence." (SER 336.) Papcun was not present to testify at trial, which Steele cites as part of his ineffective assistance claim. *See* Blue Br. at 28-31.

During trial, defense counsel made 65 objections,[1] cross-examined eight witnesses, *see, e.g.*, (SER 293-95, 256-60, 270-74), and re-crossed four. *See* (SER 323-31.) Counsel presented nine witnesses for the defense, *see* (*id.*), thereby introducing evidence supportive of Steele's theory that the recordings were fabricated and the FBI had framed him.

McAllister elicited testimony from Mrs. Steele regarding previous threats to their lives due to Steele's legal representation of "unpopular causes." (SER 237, 240.) He elicited testimony from both Mrs. Steele and the Steeles' daughter that the voice in the recordings did not sound like Mr. Steele's at times, and that the sounds on the recordings were not ones you could hear in the Steeles' barn. (SER 207-09, 212-13, 199-200, 203.)

McAllister emphasized that Fairfax was the one who made both bombs. He established repeatedly that Fairfax lied. (SER 256-57, 262, 166.) He got the three Government witnesses who had handled the pipe bombs to acknowledge that the bombs had not been tested for fingerprints. *See* (SER 252, 189.) He tied this point

[1] The number of objections by day was as follows: Trial Day 2: 11; Trial Day 3: 14; Trial Day 4: 23; Trial Day 5: 12; Trial Day 7: 4; Trial Day 8: 1. The Government did not provide individual transcript pages for all of the objections in the SER. The Government is happy to provide them upon request, however.

into his closing argument, noting that Steele's fingerprints were not found. (SER 180.) He also supported the defense using evidence the Government had introduced. *See, e.g.*, (SER 217 (using Steele's jailhouse letters to his online girlfriend and the recording of the call to his wife in defense argument for admission of testimony).)

In a dramatic moment during Fairfax's cross-examination, McAllister elicited the fact that Fairfax had been writing a book about the murder plot while he was in jail. (SER 259.) This was a surprise to the Government. (SER 259.) Entitled "An Act of Defiance," with the subheading: "Built on the Lies and Deceit of the FBI," Fairfax was the main character. He was portrayed as the savior of Mrs. Steele, and as a victim himself. (SER 162-63,169.) The book included unflattering descriptions of the FBI as well as illustrations. (*Id*.) Fairfax told his cousin and his cellmate that he hoped to go on Oprah. (SER 196, 259.)

Closing argument and jury instructions

Although the Indictment did not specify the particular bombs to which Counts Two and Three referred, the prosecutor did so during closing argument. He argued that Count Two, the lesser count, referred to the decoy bomb, Trial Exhibit 85, that Fairfax had initially planted on Steele's car and then removed and partially dismantled. (SER 175, 330.) He argued that Count Three referred to the bomb attached to Mrs. Steele's car. (SER 176.) The jury instructions, to which the

Defendant did not object, mirrored the more general allegations of the Indictment and did not specify a bomb per count. (ER 206.)

Defense counsel did not request any specific unanimity instructions. The district court instructed the jury regarding the requirement of unanimity as follows:

> Your verdict, whether guilty or not guilty, must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with other jurors, and listened to the views of your fellow jurors. . . .
>
> It is important that you attempt to reach a unanimous verdict.

(ER 226.)

Motion for a new trial

After Steele's conviction, McAllister filed a timely motion for a new trial. *See* (ER 336 at ECF No. 234; SER 62-71.) When McAllister was to be disbarred, the attorney who had represented Mrs. Steele, Wesley Hoyt, assumed Edgar Steele's representation. *See* (ER 337 at ECF Nos. 243-45.) Mr. and Mrs. Steele waived any conflicts.

After several extensions, Steele filed a supplemental motion for a new trial. *See* (ER 341 at ECF No. 290; SER 7-56.) In this fifty-page motion, he reiterated and expanded upon the rejected assertions of prosecutorial misconduct raised in McAllister's oral, pre-trial motion. (SER 11-13.) He also asserted that the district court was biased. (SER 24-30.) Finally, he argued that both of his lead counsel –

the head of the federal public defender's office and McAllister – had been ineffective. He focused on the federal public defender. (SER 35-44.) With respect to McAllister, he incorporated by reference all the arguments he had made against the federal public defender. (SER 45.) He also argued that McAllister had been ineffective for failing to ensure that Papcun would be available to testify, (SER 45-46), and for other reasons. (SER 46-50.) He did not request an evidentiary hearing regarding either counsel's alleged ineffective assistance.

In an eighteen-page order, the district court systematically addressed and rejected each of Steele's seven grounds for a new trial. (ER 2-19.) The court noted that many of the allegations had been raised and rejected previously and held that others were meritless. *See*, *e.g.*, (ER 11 (phone calls), 13 (alleged *Brady* violation); 15 (alleged destruction of evidence); 17 (alleged witness tampering).) Finally, it determined that the ineffective assistance of counsel claims were best deferred to collateral proceedings because they required development of a record. (ER 19.) The court stated:

> The proper procedure for challenging the effectiveness of counsel is by a collateral attack on the conviction under § 2255, after a full record can be developed. Therefore, the Court will not consider this argument.

(ER 19 (internal citation omitted).)

Two days after the district court entered its final judgment, Steele filed this timely appeal. *See* (ER 343 at ECF No. 317.)

SUMMARY OF ARGUMENT

The district court's firsthand observations, the record, and Steele's arguments reveal no deficiency, much less any obvious deficiency, in McAllister's performance. The district court thus reasonably concluded that a full record regarding any deficiency would have to be developed and deferred the issue to collateral proceedings. This was not error, much less an abuse of discretion.

The Indictment correctly charged one count of murder for hire. Section 1958 does not define the unit of prosecution based on the number of times a defendant effects a crossing of state lines. It defines the offense more broadly, with interstate commerce as an element. Evidence of the interstate trips presented at trial were merely means of proving that element, they were not elements themselves. Thus, the jury did not have to find any one trip unanimously.

As with the interstate trips in the murder for hire count, the bombs in Count Two also did not have to be found unanimously. Section 844(h) does not define the unit of prosecution based on each device but on an underlying federal felony. The two bombs were merely proof of one element. The jury could thus permissibly consider evidence of both bombs in evaluating Count Two. The prosecutor's argument that the jury should limit its consideration to one bomb was unnecessary. If anything, however, it benefitted the Defendant by suggesting that the jury should consider less evidence than it was permitted to consider. This

Court should affirm.

STANDARDS OF REVIEW

The denial of a motion for a new trial is reviewed for an abuse of discretion. *See United States v. Mack*, 362 F.3d 597, 600 (9th Cir. 2004). Ordinarily, alleged errors in jury instructions are reviewed for an abuse of discretion as well. *See United States v. Shipsey*, 363 F.3d 962, 966 n.3 (9th Cir. 2004). When a defendant fails to object to a jury instruction before the district court, however, plain error review applies. *See Olano v. United States*, 507 U.S. 725, 730-36 (1993). Under that standard, relief is warranted only if: (a) there is error, (b) that is plain, (c) that affects substantial rights, and (d) that, if left uncorrected, would "seriously affect[] the fairness, integrity, or public reputation of the judicial proceedings." *See Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (internal quotation marks omitted).

ARGUMENT

I. The district court did not abuse its discretion by deferring full consideration of Steele's claim of ineffective assistance of counsel.

The district court was well within its discretion when it determined that this case fell within the mine run of cases in which claims of ineffective assistance can and should be considered in collateral proceedings. Nothing the district court witnessed in the extensive pre-trial proceedings or in the eight-day trial distinguished Steele's claim. Similarly, nothing raised in Steele's lengthy

supplemental motion for a new trial or in his appeal suggests that the court erred by failing to order an immediate evidentiary hearing *sua sponte*.

No governing precedent in this Circuit specifies when – or if – district courts are required to consider pre-judgment ineffective assistance of counsel claims. The usual course is to consider such claims in collateral proceedings. *See, e.g.*, *United States v. Hanoum*, 33 F.3d 1128, 1131 (9th Cir. 1994). Even the Second Circuit, on which the Defendant's brief relies, has suggested only that "the district court may, and at times should, consider [such a] claim" prior to judgment. *United States v. Brown*, 623 F.3d 104, 113 (2d Cir. 2010).

District courts in the Ninth Circuit have occasionally addressed ineffective assistance of counsel claims at the trial level. *See United States v. Moses*, 2006 WL 1459836, at *1 and *5 (D. Idaho May 25, 2006) (considering and rejecting ineffective assistance claim raised in Rule 33 motion); *United States v. Howard*, 2010 WL 276236, at *2-*3 (W.D. Wash. Jan. 20, 2010) (same); *see United States v. Del Muro*, 87 F.3d 1078, 1080-81 (9th Cir. 1996) (reviewing a district court's consideration of Rule 33 motion based on ineffective assistance without comment). Supreme Court precedent has suggested this is permissible. *See Massaro v. United States*, 538 U.S. 500, 508 (2003) (noting that the Supreme Court has never held "that ineffective assistance claims must be reserved for collateral review" and that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from

the record that appellate counsel will consider it advisable to raise the issue on direct appeal").

It is conceivable that, in a narrow class of cases, a district court could be required to consider such a claim at the trial level, and would lack the discretion to defer it to collateral review. *Cf. Massaro*, 538 U.S. 500 at 508 (noting that appellate counsel may "consider it advisable" to sometimes raise the issue on direct appeal); *c.f., e.g., United States v. Jensen*, 2010 WL 3809988, at *9 (E.D. Wash. Sept. 27, 2010) (questioning whether the court could ethically proceed to sentencing when the conviction had occurred in blatant violation of the defendant's Sixth Amendment right to counsel). No Circuit has ever held this, however. Presumably, the class of cases that would deprive a district court of discretion and require immediate consideration would involve – at a minimum – a blatant deprivation of effective assistance and something necessitating immediate inquiry.

Nothing about this case requires the Court to determine the boundaries of this potential, theoretical class. The district court's firsthand observations of McAllister's performance, an examination of the record, and an examination of Steele's arguments establish that this case falls well within the ordinary class of cases in which district courts have the discretion to consider, or to defer, ineffective assistance claims.

When, due to his disbarment, McAllister was no longer able to represent

Steele, the district court noted in open court that McAllister's problems were not reflected in his performance. In a colloquy with Mr. Amendola, McAllister's co-counsel, the district court said:

> nothing was brought to my attention during the trial that would have suggested that [McAllister and his problems] should have been a concern for the court. But again, I only see what I see here in the courtroom, but certainly nothing that occurred in the courtroom gave me any pause or concern in that regard.
>
> And likewise, Mr. Amendola, I think your representation was zealous and appropriate as it should have been, and what has led to this change [of counsel] is really not relevant to the court.

(SER 59-60.) Thus, the district court reported that it had observed nothing that suggested a Sixth Amendment violation.

The record supports the district court's conclusion. Nothing in McAllister's representation suggested that the adversarial process had broken down, much less broken down to the point where he could not function as an advocate. In pretrial proceedings, he filed seventeen written motions and responses and he appeared before the court at least six times. *See* (ER 328-34.) One such appearance was the lengthy *Daubert* hearing. *See* (ER 334-35.) During the trial, counsel cross-examined eight witnesses, (SER 326-27), presented nine defense witnesses, (SER 327-28), and made 65 objections. *See* n.1. In closing, McAllister argued forcefully for acquittal. *See* (SER 180-86.)

"When a true adversarial criminal trial has been conducted – even if defense

counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred." *United States v. Cronic*, 466 U.S. 648, 656 (1984). The record in this case provides every reason to believe that the "kind of testing envisioned by the Sixth Amendment" occurred. The district court presided over an adversarial criminal proceeding. Certainly, judicial integrity was not impugned by continuing to sentencing and deferring full development of Steele's ineffective assistance claims to collateral proceedings. *Cf. Jensen*, 2010 WL 3809988, at *3. The district court did not err, much less abuse its discretion, by doing so.

An examination of Steele's arguments regarding ineffective assistance also reveals no obvious Sixth Amendment violation. While Steele has continued to assert that he was framed by the FBI, the Assistant U.S. Attorneys on his case, the Anti-Defamation League or another non-Governmental organization, and Fairfax, *see* (SER 3), no evidence of such a plot has ever come to light. No further investigation by counsel would have unearthed such a plot, and defense counsel was thorough in his pursuit of Steele's theory and in his investigation. As defense counsel's surprise revelation of Fairfax's book revealed, counsel had investigated the case thoroughly. As his pursuit of misconduct claims against the Assistant United States Attorney and the FBI illustrate, he actively pursued Steele's theory. The district court simply found the allegations meritless. *See, e.g.*, (ER 11 (alleged

violations regarding phone calls), 13 (alleged *Brady* violation), 15 (alleged destruction of evidence); 17 (alleged witness tampering).) No evidence supports Steele's assertion that bad Government actors framed him.

Steele's two arguments regarding Papcun's testimony are flawed in several respects as well. First, Steele asserts that Papcun's testimony would have generated a reasonable doubt. But Papcun's testimony at the *Daubert* hearing regarding the clicks on the recordings suggests otherwise. Papcun opined that the tapes were not edited and that he had no basis to believe that the noises on the tapes were caused intentionally. (SER 352.) The essence of his testimony was that: "whatever is on these recordings is not entirely whatever occurred in the real environment being recorded." (*Id*.) Confusing statements like this would have contrasted sharply with the straightforward testimony of the FBI agent regarding the safeguards against tampering built into the recording device, his adherence to protocol, and his confirmation that the recording's length was precisely as expected based on when he turned the device on and off. *See* (SER 282, 284.)

Second, according to Steele, "the Government had no case without [the] recordings." (SER 21.) Thus, he "had no defense without Dr. Papcun's opinions." (SER 21); *see also* Blue Br. at 43-44. In his view, then, McAllister's failure to insure Papcun's presence was devastating.

In reality, however, far more than the recordings proved the Government's

case. There was the corroborated testimony of Fairfax, physical evidence of both bombs, strong evidence of motive, and Steele's own statements and actions. Thus, Steele's assertion fails. The Government had a strong case even absent the recordings. Papcun's testimony was of little value.

In short, nothing suggests that this case falls outside the long line of cases in which ineffective assistance of counsel claims can appropriately be considered in collateral proceedings. The district court observed no deficiency in McAllister's performance, much less any blatant one. The revelation of any hidden deficiencies would require the development of a complete record, which is typically done in collateral proceedings. *See* (ER 18-19 (noting that a full record would need to be developed to consider the ineffective assistance of counsel claims).)[2]

Finally, Steele did not request an evidentiary hearing with respect to either of his ineffective assistance of counsel claims. *See* (SER 7-56; SER 62-71.) For all the reasons set forth above, the district court did not abuse its discretion by failing to order one *sua sponte*.

In light of the district court's own observations and the record, the court was well within its discretion to defer to collateral proceedings the development of a

[2] The court's decision also does not establish a misapprehension of its discretion, as Defendant suggests. *See* Blue Br. at 40-41. The court is aware of its ability to consider a claim of ineffective assistance of counsel on a Rule 33 motion. It did so in another case. *See Moses*, 2006 WL 1459836.

full record and the consideration of Steele's claims.

II. The district court did not err, much less plainly err, by providing a general unanimity instruction regarding the interstate travel element. The indictment was not duplicitous. The multiple trips involved in Steele's plot were not themselves elements, but proof of one element.

Because the Defendant neither requested a specific unanimity instruction nor raised the issue in his motions for a new trial, this Court reviews for plain error. *See* Fed. R. Crim. P. 52(b); *Olano*, 507 U.S. at 730-36; *United States v. Hofus*, 598 F.3d 1171, 1175 (9th Cir. 2010). No error occurred, much less plain error. The indictment properly charged one count of murder for hire. The two trips Fairfax took were means of proving the interstate travel element, they did not define separate crimes and were not elements unto themselves. Thus, no unanimity was required regarding any one trip.

A. The indictment was not duplicitous.[3]

In this case, the Government charged only one count of murder for hire. This was proper. Section 1958's plain language does not make the unit of prosecution for interstate murder for hire turn on individual trips across state lines with the intent that a murder be committed. Similarly, it does not make each promise or discussion of pecuniary gain the unit of prosecution. *See United States v. Gibson*, 530 F.3d 606, 611-12 (7th Cir. 2008). It makes a murder plot that

[3] The term "duplicity" means "uniting . . . two or more offenses in the same count of an indictment." *BLACK'S LAW DICTIONARY* 503 (6th ed. 1990).

involves both elements the unit of prosecution. *See* 18 U.S.C. § 1958(a) (describing guilty party as someone who: "causes another (including the intended victim) to travel in interstate or foreign commerce, . . . with intent that a murder be committed . . . as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so"). The focus is on murder, not on individual interstate trips. *See United States v. Driggers*, 559 F.3d 1021, 1024 (9th Cir. 2009); *compare United States v. Taylor*, 13 F.3d 986, 993 (6th Cir. 1994) (examining what statute sought to criminalize to determine unit of prosecution); 1A WRIGHT & LEOPOLD, FEDERAL PRACTICE AND PROCEDURE § 142 (4th ed. 2012).

To the extent the statute is ambiguous, the rule of lenity requires the Government to interpret the statute as it did here: to provide one punishment for one plot. *See Bell v. United States*, 349 U.S. 81, 83 (1955) (explaining that, in the face of statutory ambiguity, "doubt will be resolved against turning a single transaction into multiple offenses"). Had the Government charged a separate count of murder for hire for each interstate trip involved, Steele could claim that the indictment was multiplicitous[4] and in violation of double jeopardy. *See, e.g.*, *United States v. Zalapa*, 509 F.3d 1060, 1062-63 (9th Cir. 2007). And he would be

[4] "Term 'multiplicity' refers to the practice of charging the commission of a single offense in several counts. This practice is prohibited because single wrongful act cannot furnish basis for more than one criminal prosecution." *BLACK'S LAW DICTIONARY* 1016 (6th ed. 1990).

right. The statute does not define the unit of prosecution based on an individual interstate trip. It defines the unit of prosecution in more holistic terms by pairing such travel with a murder plot. Artificially dividing one plot into separate counts would have unconstitutionally increased Steele's maximum punishment.

In this case, one plot was involved and one plot was charged. The indictment was not duplicitous. *Contra* Blue Br. at 56.

B. The multiple interstate trips were not elements themselves, but means of proving the interstate travel with intent element.

The first element of the murder for hire count was that Steele caused another to travel interstate with the intent that a murder be committed. *See Driggers*, 559 F.3d at 1024. The prosecutor argued that two different trips by Fairfax proved this element. *See* (SER 175); Blue Br. at 57 (acknowledging that, before the jury, the prosecutor argued the two trips).[5] The first was the trip on May 31st to see if the pipe bomb had fallen off Mrs. Steele's car. The second was the trip Steele urged Fairfax to take on June 11 to "get the job done."[6] (SER 175.) The Defendant requested no instruction requiring the jurors to agree unanimously on one trip. The

[5] Evidence was presented that Mrs. Steele, the victim, traveled to Oregon as well. *See, e.g.*, (SER 174.) Although the prosecutor did not focus on this trip before the jury, it, too, could conceivably have satisfied the second element. The jury would have had to conclude, however, that Steele caused the trip.

[6] In its decision on the motion for a new trial, the district court held that either trip could have satisfied the interstate travel with intent element. *See* (ER 9-10 (district court decision).) Steele does not challenge this conclusion.

district court should have declined to give such an instruction in any case. The trips were means of proving the element, they were not elements themselves.

A jury need not be unanimous regarding "the means by which a crime was committed." *Schad v. Arizona*, 501 U.S. 624, 631 (1991) (Souter, J., for the plurality in which a majority concurred)); *McCoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) (footnotes omitted) ("Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues [or means] which underlie the verdict."); *Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several means the defendant used to commit an element of the crime."). A jury must merely be unanimous that the evidence established each element. *Richardson*, 526 U.S. at 817.

Two examples illustrate this point. First, in an 1898 decision involving a murder case, the Supreme Court held that jurors need not have agreed whether death occurred by shooting or drowning. *Anderson v. United States*, 170 U.S. 481, 504 (1898). The means by which the death occurred were irrelevant. The jury simply had to agree on the element in question: that death occurred. *Id.*; *Schad*, 501 U.S. at 631-21.

Second, in a recent murder for hire case under § 1958, the Seventh Circuit

held that jury "unanimity was not required" as to the particular promise of pecuniary gain with which the defendant induced the would-be murderer to kill a fellow drug dealer. *Gibson*, 530 F.3d at 611-12. Jury unanimity was solely required on the element: that the Defendant promised pecuniary gain. *See id.* Jurors could permissibly disagree on which of the two promises introduced into evidence satisfied the element – the promise of half the future proceeds from the drug corner or the promise of cash – so long as all jurors agreed that the Defendant had made a promise. *Id.* The particular promises were merely means of proving the element, they were not elements unto themselves.

In this case, the different trips were merely means of proving the first element: that Steele had, with the intent that a murder be committed, caused another to travel in interstate commerce. Thus, the jurors were free to disagree regarding which particular interstate trip Steele caused so long as they unanimously agreed that he caused at least one or both interstate trips.

The danger of which the Defendant complains is therefore no danger at all. *See* Blue Br. at 55. It was not, as the Defendant argues, an "unacceptable possibility" that "jurors never reached unanimity as to a single 'causation event in support of the 'interstate travel' element." *Id.* It was a perfectly acceptable possibility. No unanimity was necessary regarding which trip Steele caused.

The cases the Defendant cites in support of the jury confusion/danger

argument do not apply here. *See* Blue Br. at 53-55 (citing, e.g., *United States v. Anguiano*, 873 F.2d 1314 (9th Cir. 1989) and *United States v. Echeverry*, 698 F.2d 375, *as modified by* 719 F.2d 974 (9th Cir. 1983)). The danger of jury confusion in those cases arose from the fact that, while one conspiracy was charged, evidence of two conspiracies was introduced. *See Anguiano*, 873 F.2d at 1317 (noting that, while one conspiracy was charged, "the evidence presented at trial indicates the existence of two conspiracies"); *Echeverry*, 698 F.2d at 377 ("We are not free to hypothesize whether the jury indeed agreed to and was clear on the duration of a single conspiracy or of multiple conspiracies."). Thus, the indictment had charged one crime when it could have charged two. The indictment was duplicitous.

A duplicitous indictment introduces the danger that some jurors might believe the Defendant guilty of one crime, but not the other, while others believe him guilty of the other crime, but not the one. *See Echeverry*, 698 F.2d at 377; *Anguiano*, 873 F.2d at 1320-21. This allows for conviction absent agreement on all the elements of any one crime. *Id.*

In this case, the danger of jury confusion present in *Anguiano* and determinative in *Echeverry* did not exist. The Indictment was not duplicitous. Only one count of murder for hire was charged, and only one count was proved. There were no multiple crimes to confuse the jury. Thus, the Defendant's various

arguments about jury confusion fail.[7] They simply do not apply here.

Richardson v. United States – the other major case on which the Defendant relies – also fails to support to his argument. *Contra* Blue Br. at 52. *Richardson* expressly acknowledged that unanimity is not required regarding "which of several possible means the defendant used to commit an element of the crime" but only regarding elements, just as the Government argues. *Richardson*, 526 U.S. at 817. *Richardson* involved a dispute over the definition of ill-defined elements in the complex Continuing Criminal Enterprise statute. *Id.* at 824; s*ee Hofus*, 598 F.3d at 1176-77. No similar statutory ambiguity regarding elements exists here, and no similar analysis is required. The element at issue in the murder for hire statute is clear. It is the causation of interstate travel with the intent that a murder be committed. *See Driggers*, 559 F.3d at 1024-25. The specific date on which travel occurs is not an element. Accordingly, *Richardson* has no application.

III. Tying Count Two to particular explosives was permissible but unnecessary. No specific unanimity was required with respect to the particular explosives to which Count Two referred.

For the same reasons discussed above, the district court did not err, much

[7] The Government believes that the jury's inquiry about the definition of causation establishes the jury's diligence, not any confusion on its part. *Contra* Blue Br. at 55 (arguing that the jury's note showed confusion). Because the danger of jury confusion present in *Anguiano* and *Echeverry* does not exist, however, *Anguiano*'s three-factor test governing when an instruction is required to cure confusion does not apply here. *See Anguiano*, 873 F.2d at 1319-21. Thus, the Defendant's argument on this point, and the Government's response to it, is moot.

less plainly err, by giving the jury a general unanimity instruction with respect to Count Two and by following the general language of the Indictment. No specific unanimity was required with respect to the two bombs. The unit of prosecution was defined by the underlying federal felony, not by individual bomb. The two bombs were simply the means by which an element of the count was proved.

The Grand Jury charged Steele with aiding and abetting the use of explosive material, a pipe bomb, in the commission of a federal felony (Count Two) in violation of 18 U.S.C. § 844. *See* (ER 319.) It also charged him with possessing a destructive device in relation to a crime of violence in violation of a related statute, 18 U.S.C. § 924(c) (Count Three). (ER 320.) The dates alleged, May 27-31, 2010, covered the period in which Fairfax attached bombs to both Steele's car and Steele's wife's car. And both counts were tied to the first count: murder for hire.

To understand why the Defendant's argument fails with respect to Count Two, the § 844 (h) count, it helps to examine Count Three, the very similar § 924(c) count. Section 924(c) is far more commonly charged and significantly more precedent exists regarding it.

Courts have long held that § 924(c) makes the unit of prosecution the underlying federal crime, not the particular devices or firearms possessed. *See United States v. Smith*, 924 F.2d 889, 894-95 (9th Cir. 1991); *United States v. Fontanilla*, 849 F.2d 1257, 1258-59 (9th Cir. 1988); *United States v. Cappas*, 29

F.3d 1187, 1189 (7th Cir. 1994) (same, collecting cases). Thus, if a defendant possessed five firearms but only one underlying crime of violence is charged, only one § 924(c) count can be charged. As to that one count, evidence of the five firearms would be means of proving the element of possession of a firearm. *See, e.g.*, *Smith*, 924 F.2d at 894-95.

As to Count Three, then, precedent clearly establishes that the Government could permissibly charge both bombs (or fail to specify any one bomb) and the jury could permissibly consider both bombs. Notably, the Defendant does not argue that a specific unanimity was required on Count Three, the § 924(c) count. He only argues with respect to Count Two.

No similar precedent exists governing the statute charged in Count Two, § 844 (h). But § 844(h) was modeled after § 924(c). *See United States v. Ressam*, 553 U.S. 272, 275-76 (2008); *United States v. Fiore*, 821 F.2d 127, 131-33 (2d Cir. 1987). Moreover, the language of the statutes is materially similar with respect to the unit of prosecution. Both statutes tie liability to an underlying crime: a federal felony, in the case of § 844(h), and a federal crime of violence, in the case of § 924(c). *See* 18 U.S.C. § 844(h); 18 U.S.C. § 924(c). And both provide an additional penalty when a dangerous weapon is possessed or used in conjunction with that underlying crime. *See id.* The statutes' similar construction weighs strongly in favor of similar interpretation. Just as evidence of multiple firearms

supports only one count under § 924(c), so, too, should evidence of multiple explosives support only one count under § 844(h).

Specific unanimity was not required with respect to the particular explosives or the particular device alleged in Count Three. Thus, the district court could reasonably expect that it was not required with respect to the very similar Count Two. The district court did not err by following the Indictment's language in its instructions. Even if this Court were to decide that § 844(h) should, for some reason, be interpreted differently than its sister statute, § 924(c), any resulting error could not be plain. Plain error requires clearly established law, and none exists here. *See United States v. Klinger*, 128 F.3d 705, 712 (9th Cir. 1997) (holding that, because the law "was unsettled at the time of trial," an erroneous instruction regarding that law could not be plain error).

Complicating matters somewhat is the fact that the prosecutor *did* tie a specific device to each count in his closing argument. He argued that Count Two referred to the pipe bomb Fairfax had attached to Steele's car and then disassembled and stored in Steele's garage. (SER 175.) The remainder of this bomb had been introduced into evidence. *See* (SER 330 (Exh. 85).) The prosecutor explained that this count was a lesser charge, noting that Fairfax had already disassembled the bomb before the FBI got ahold of it and that this bomb was merely used as a decoy as part of the plot. (SER 175-76.)

Correspondingly, the prosecutor argued that Count Three referred to the bomb Fairfax attached to Mrs. Steele's car, found when she went to get her oil changed, and detonated once retrieved by the bomb squad to render it safe. *See* (SER 176.) Thus, the prosecutor argued only one bomb per count.

If the jury credited the prosecutor's argument, it considered only evidence of the dismantled bomb attached to Steele's car when it considered Count Two, instead of both bombs. No error would come from this, much less plain error.

First, such a limitation creates no notice problem. The Indictment provided notice to Steele that both bombs were at issue. *See* (ER 319). Limiting Count Two to only one (and Count Three to only one as well) was thus permissible – the Defendant had notice of both. *See United States v. Miller*, 471 U.S. 130, 134-35 (1985). If anything, such a limitation favored the Defendant. By limiting the evidence considered on each count, the jury had less evidence on which to rely for its findings.

Second, the prosecutor's argument created no variance. Variances occur when the *proof* differs from the indictment. *See, e.g., Dunn v. U. S.*, 442 U.S. 100, 105 (1979) ("A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment."). In this case, the evidence and the instructions followed the Indictment perfectly. There was no error, much less plain error from the prosecutor's argument or the district court's instructions. *See*

Johnson, 520 U.S. at 466-67. This Court should affirm.

CONCLUSION

The Government respectfully requests that this Court affirm the Defendant's conviction.

Respectfully submitted this 30th day of November, 2012.

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STATEMENT OF RELATED CASES

In accordance with Circuit Rule 28-2.6, I hereby certify that counsel is unaware of any pending matter(s) that qualify as related cases to this appeal.

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s/ Syrena C. Hargrove
SYRENA C. HARGOVE
Assistant United States Attorney

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I HEREBY CERTIFY that I am an employee of the United States Attorney's Office for the District of Idaho, and that I electronically filed the foregoing ANSWERING BRIEF OF THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for Ninth Circuit by using the appellate CM/ECF system on November 30, 2012.

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