**No. 12-30005**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGAR J. STEELE,

Defendant-Appellant.

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

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# APPELLANT STEELE'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR SUMMARY REVERSAL

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Dennis P. Riordan (SBN 69320)
Donald M. Horgan (SBN 121547)
Riordan & Horgan
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472

Attorneys for Appellant
EDGAR J. STEELE

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## INTRODUCTION

In his opening motion ("Mtn."), defendant Steele described how his substitute, post-verdict trial counsel, Wesley Hoyt, made a timely, pre-judgment motion for a new trial under Fed.R.Crim.P. 33(b)(2) based in part on a claim of ineffective assistance ("IAC") of Steele's lead trial counsel, Robert McAllister. In support of the claim, defendant presented specific, detailed allegations and evidence concerning, among other things, the performance of McAllister and local counsel Amendola. Evidence of counsel's failure to present available expert evidence as to the authenticity of the purported Fairfax recordings made out a facially compelling showing. Evidence of McAllister's pending disbarment during the course of the trial likewise raised serious questions concerning the adequacy of counsel's performance and potential conflicts of interest.[1]

In sum, defendant's ineffective assistance allegations, if true, would clearly have entitled him to a new trial under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and related precedent. Notwithstanding defendant's showing, however, the district court denied the motion, not on substantive grounds, but solely on the basis of its belief that "[t]he 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."

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[1] Other evidence raised troubling questions about the government's successful effort to seal its indictment of McAllister in the district of Colorado. That indictment alleged McAllister's commission of serious crimes during the very period McAllister was conducting Steele's trial. The sealing of the indictment ensured the extent of McAllister's criminality and IAC would remain unknown to the district court in this matter until after the judgment against Steele was imposed.

As set forth in the opening motion, 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. (See Mtn. at 16-20.) 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. See *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.") Indeed, given the *pre-judgment* timing of the new trial motion and the serious nature of the allegations concerning McAllister's deficient performance, there was no valid reason for the court's refusal to further develop the record and rule on the motion instead of postponing the issues for post-appeal proceedings under Rule 2355.

The presence of the district court's error in refusing to exercise its discretion to hear the IAC claim is sufficiently clear that summary reversal and remand for further consideration of the IAC issue is in order. (See Mtn., at 14-16.) The Government's Response in Opposition to Appellant's Motion for Summary Reversal ("Opp.") rests on two fundamental propositions, each of which is either misguided or demonstrably false.

*First*, the government asserts that the district court did not abuse its discretion in denying the IAC claim because the court actually considered and disposed of the claim on the *merits*. That assertion is demonstrably false, as the district court's written order shows, rendering the government's defense of the court's ruling on this ground wholly unpersuasive.

*Second*, the government acknowledges the precedent establishing that a district court may consider a defendant's IAC claim in the context of a defendant's pre-judgment new trial motion, but contends that such consideration should occur only in "extreme" circumstances. This argument implies a concession, contrary to the government's prior argument, that the district court did indeed refuse to dispose of the IAC claim on the merits. The statement that consideration of an IAC claim prior to judgment turns on an "extreme circumstance" test is baseless; to the contrary, such consideration is appropriate and the better practice where, as here, the parties and district court have an ample opportunity to develop the record.

Finally, further developments in the McAllister prosecution raise substantial additional questions concerning ineffective assistance in the present matter and weigh heavily in favor of granting the present motion for reversal and remand.

## I. THE RECORD REFUTES THE GOVERNMENT'S STATEMENT THAT THE DISTRICT COURT DISPOSED OF DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIM ON THE MERITS

The government's primary argument rests on a repeated claim that the district court ruled on the IAC as a *substantive* matter, and properly exercised its discretion in doing so. See, e.g., Opp., at 7 ("[The district court] carefully considered defendant's assertions of ineffective assistance of counsel on the part of McAllister, just as it did his assertions against his other two trial counsel, Amendola and Peven."); *id*. ("In short, the district court acted reasonably, carefully considering the issues before it, and ruled on them. It properly exercised its discretion."); Opp., at 5 ("The district court considered and ruled upon the defendant's motion for a new trial, which included ineffective assistance of

counsel claims against all three of defendant's prior attorneys."); Opp., at 7 ("[The district court] addressed and rejected the specific allegations of ineffective assistance the defendant raised."); Opp., at 9 ("Defendant appears to argue that the disbarment and investigation of Mr. McAllister established the ineffectiveness of Mr. McAllister and Mr. Amendola. The district court disagreed.")

The government's representation as to the basis for the district court's ruling is false. The entirety of the ruling on the IAC issue states:

> 6. Ineffective Assistance of Counsel
>
> 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*.

(See Exh. 26, the district court order, attached to this Reply, at 17-18.) Indeed, the remaining portions of the order addressing defendant's other new trial claims do not allude to anything having to do with defendant's IAC claim, or even so much as mention the term ineffective assistance of counsel.

Again, however, the primary abuse of discretion that appears here arises from the district court's refusal, based on its fundamental error of law, to exercise its discretion in the first instance vis-a-vis the IAC claim. *Koon, supra; United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983) ("As a general rule, the existence of discretion requires its exercise" [citing *Dorszynski v. United States*, 418 U.S. 424, 443 (1974) and condemning district court's adherence to

"categorical" rules where exercise of discretion is warranted]); *United States v. Mancinas- Flores,* 588 F.3d 677, 683 (9th Cir. 2009) (holding a discretionary decision must show proper consideration of all factors). Cf. *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991) (stating as to new trial allegations of jury misconduct, "Unless the court is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing must be held.")[2]

Finally, as a logical matter, the notion that the district court issued a substantive decision on the ineffective assistance claim is nonsense; had that court done so, the court would have had no reason to direct defendant to seek a substantive resolution of the claim under section 2255.

## II. THE GOVERNMENT EFFECTIVELY CONCEDES THAT THE TRIAL COURT RETAINED THE DISCRETION TO CONSIDER THE INEFFECTIVE ASSISTANCE CLAIM ON SUBSTANTIVE GROUNDS, SUCH THAT THE DISTRICT COURT'S REFUSAL TO EXERCISE THAT DISCRETION WARRANTS SUMMARY REVERSAL

Defendant's opening motion established that while a district court may not have the discretion to consider a *post*-judgment IAC claim presented in the guise

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[2] After noting defendant's assertion that the district court "clearly erred" in denying the IAC claim on erroneous procedural grounds, the government asserts that defendant has "urge[d] . . . the wrong standard of review" because the clearly erroneous standard purportedly applies only to factual findings, while the denial of a new trial motion is reviewed for an abuse of discretion. Opp., at 8. This is simply misdirection: as the *government* observes, a district court abuses its discretion when the reviewing court is left with a "'definite and firm conviction that the district court committed a *clear error of judgment* in the conclusion it reached upon [a] weighing of [] relevant factors.'" Opp., at 7-8, quoting *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001). See also *United States v. Duarte-Higareda*, 68 F.3d 369 (9th Cir. 1995)(applying clear error as standard for summary reversal).

of "newly discovered evidence" under Fed.R.Crim.P. 33(b)(1), the court does retain the discretion to reach such a claim where, as here, it is presented *prior* to judgment under Rule 33(b)(2). (Mtn., at 17-19; cf. *United States v. Hanoum*, 33 F.3d 1128 (9th Cir.1994) [cited by the district court in *United States v. Ross*, above, and setting forth the rule as to IAC claims presented under Rule 33(b)(1).)[3]

Significantly, the government's opposition effectively concedes defendant's argument on this point. The government now contends that while the district court may consider the claim in the new trial context, the court should only do so in "extreme circumstances." (Opp., at 10-11.) In this connection, the government ignores most of the decisions cited in defendant's opening motion and instead cites only *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996) and *United States v. Jensen*, 2010 WL 380998 (E.D.Wash. 2010). (Opp., at 10-11.)

Neither *Del Muro* nor *Jensen*, however, purports to set out any such "extreme circumstance" test as the predicate requirement for hearing an IAC claim presented in a pre-judgment motion for a new trial. As those cases make clear, the primary factor bearing on the decision to hear such a claim on the merits is instead whether it presented initially in a setting that permits an evidentiary hearing and other timely factual development of the claim. See also 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.7(e) (3d ed. 2007 & Supp.2011) (identifying new trial motion as available vehicle for presenting such a claim).

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[3] *United States v. Ross,* 2011 WL 2678832 (9th Cir. 2011), the case on which the district court relied, 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.

Indeed, the chief reason why IAC claims are seldom adjudicated in response to a pre-judgment new trial motion is that the defendant can rarely retain substitute counsel in sufficient time to thoroughly prepare and present such a motion in the time allotted. *Id*. But where, as here, substitute counsel have been afforded sufficient time to prepare and present a viable IAC claim prior to judgment, there is no defensible reason for denying the defendant the opportunity to litigate the claim on the merits. To the contrary, disposition of the IAC claim at the new trial stage under these circumstances can render moot the remaining issues the defendant may otherwise raise on appeal. As stated by the court in *Jensen*:

> While it is true that ineffective assistance of counsel is often raised in collateral proceedings, in the infrequent instances where such is apparent from the trial 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, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) to proceed to sentence a Defendant who was convicted in violation of the right to effective assistance of counsel.

*Jensen*, 2010 WL 3809988 at *9. Indeed, *Jensen* held a presentencing evidentiary hearing on an IAC claim raised by a motion filed outside the time limit set by Rule 33(b) (2).

Remarkably, the government itself supplies the reasons why the district court in this matter should have exercised its discretion, and, having done so, heard defendant's IAC claim on the merits:

> The district court was in an ideal position to review counsel's actions during pretrial and pretrial proceedings. The district court had reviewed defense counsel's extensive briefing in pretrial motions and presided over a *Daubert* hearing and a trial. The court

> had before it the affidavits of Mr. McAllister and Mr. Amendola which were filed months before the court issued it's [sic] order denying the motion for new trial.

Opp., at 9-10.

All this being so, and given that substitute counsel presented a compelling IAC claim to the district court three months prior to its new trial order and entry of judgment, there was no viable reason for that court's refusal to reach the claim. But the overriding point is that whatever the factors that should have guided the court's discretion to consider the new trial motion, the district court refused to exercise discretion here, and for this reason alone committed clear legal error.

Apparently recognizing this problem, and squarely contradicting its initial position (see section I, above), the government at one point seems to argue that the district court affirmatively recognized its discretion to address the IAC claim on the merits but properly declined to do so. The government states:

> Just because [the district court] declined to hold a hearing does not mean it did not understand it could hold a hearing. The district court [i.e, the same district court judge who presided over the trial proceedings in the present matter] has recognized its authority to hold [an evidentiary] hearing when the circumstances warrant it. *See United States v. Moses*, 2006 WL 1459836 (D. Idaho 2006) (citing *United States v. Logan*, 861 F.2d 859 (5th Cir. 1988).)

Opp., at 9. Of course, the claim that the district court recognized its discretion to issue a substantive decision is irreconcilable with the order's language, which unambiguously evinces the misconception that "proper procedure" required defendant to proceed under section 2255. See also *United States v. Mancinas-Flores,* 588 F.3d at 683 (discretionary decision must show proper consideration of

all factors). And the fact that the same district judge recognized and thereafter employed his discretion to reach an IAC claim presented in a new trial motion five years earlier (see *Moses*, 2006 WL 1459836 at *1-*5) only emphasizes the depth and scope of the court's error in deeming itself bound by a rule depriving him of such discretion in *this* case.

## III. FURTHER DEVELOPMENTS IN THE McALLISTER MATTER RAISE ADDITIONAL QUESTIONS CONCERNING INEFFECTIVE ASSISTANCE IN THE PRESENT MATTER

Finally, since defendant filed his opening motion in the present matter, in his own criminal case Mr. McAllister has submitted motion raising additional questions concerning both the government's efforts to conceal counsel's criminality while he was representing Mr. Steele and the breadth of McAllister's deficient performance. Specifically, McAllister moved to dismiss his indictment on the grounds that the government improperly secured the sealing of the indictment and delayed the serving of the arrest warrant, in part to facilitate post-indictment questioning of McAllister and additional investigation into the case. (See Exh. 27 [motion to dismiss], at 4, citing *United States v. Watson*, 599 F.2d 1149 (2d Cir. 1979) and *United States v. Gigante*, 436 F.Supp. 647 (S.D.N.Y. 2006). As to the latter, Mr. McAllister alleged that the government had relied upon a confidential informant (Small) who, among other things, had searched McAllister's office; copied McAllister's files; and obtained confidential information concerning McAllister's clients. (Exh. 27, at 3, par. 8)

These allegations indicate that, as a direct result of McAllister's criminal acts, the government, through Small, may have secured confidential information

concerning McAllister's representation of Mr. Steele in this very matter. Such a development would substantially advance Mr. Steele's allegations of IAC. Competent counsel would not have engaged in acts that would lead to such disclosures. The potential prejudice arising from such events is obvious. But for the district court's refusal to reach defendant's IAC claim on the merits, all such matters would have been exposed at the new trial hearing and subject to consideration in the district court's ultimate resolution of the IAC claim. Such matters can and should be considered by the district court following this Court's order for summary reversal and remand.

## CONCLUSION

For the foregoing reasons and those stated in the opening motion, defendant Steele respectfully requests that this Court grant the present motion and remand the matter for a hearing before the district court.

Dated: May 7, 2012

Respectfully submitted,

DENNIS P. RIORDAN
DONALD M. HORGAN

By /s/ Dennis P. Riordan
DENNIS P. RIORDAN

Attorneys for Defendant-Appellant
EDGAR STEELE

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on May 7, 2012 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /s/ Jocilene Yue
Jocilene Yue

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CERTIFICATE OF SERVICE
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I hereby certify that on_____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Signature: _____
Jocilene Yue

# EXHIBIT 26

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>EDGAR J. STEELE,<br><br>Defendant. | Case No. 2:10-cr-000148-BLW<br><br>**MEMORANDUM DECISION AND ORDER** |

## INTRODUCTION

The Court has before it Defendant Edgar J. Steele's Motion for a New Trial (Dkt. 234) and Supplemental Motion for a New Trial (Dkt. 291). For the reasons sets forth below, the Steele's request for a new trial is denied.

## ANALYSIS

On May 5, 2011, a jury convicted Defendant Edgar J. Steele on four counts: (1) use of interstate commerce facilities in commission of murder for hire, in violation of 18 U.S.C. § 1958; (2) aiding and abetting use of explosive material to commit a federal felony, in violation of 18 U.S.C. § 844(h); (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); and (4) tampering with a victim, in violation of 18 U.S.C. § 1512(b)(3).

Steele now moves for a new trial. He argues that he should be granted a new trial or the case should be dismissed because: (1) the evidence did not establish jurisdiction under 18 U.S.C. § 1958 for Counts I and II of the Indictment; (2) the Court incorrectly charged the jury; (3) the Government engaged in prosecutorial misconduct; (4) the FBI agents engaged in misconduct; (5) his counsel was ineffective; (6) the Court was biased against him and in favor of the Government; and (7) he was denied a public trial.

Federal Rule of Criminal Procedure 33 allows a district court to grant a new trial if the interests of justice so require or based on newly discovered evidence. Fed.R.Crim.P. 33. It must be shown that the newly discovered evidence would probably have resulted in the defendant's acquittal." *Gordon v. Duran,* 895 F.2d 610, 614-15 (9th Cir.1990)

### 1. Lack of Jurisdiction

Steele first contends that the government failed to prove beyond a reasonable doubt that jurisdiction existed under 18 U.S.C. § 1958 for Counts I and II of the

Indictment. Steele's argument raises an evidentiary question: whether the government presented sufficient evidence at trial to prove that Steele caused Larry Fairfax to travel across state lines in connection with Steele's plot to kill his wife. 18 U.S.C. § 1958. Interstate travel triggers federal jurisdiction for both Counts I and II, since both require the same nexus to interstate commerce. *U.S. v. Driggers*, 559 F.3d 1021, 1024 (9th Cir. 2009).

Steele argues that the required nexus to interstate commerce did not exist because Fairfax and James Maher travel to Oregon on June 11, 2010 at the behest of the government – not Steele. Therefore, argues Steele, he "has standing to raise intrusion upon the sovereignty of the State of Idaho under the Tenth Amendment as expressed in *Bond*,[1] such that Defendant's intra-state Idaho crimes, if any, must be prosecuted locally." *Def.'s Reply* at 2, Dkt. 308. Steele cites *U.S. v. Coates,* 949 F.2d 104, 106 (4th Cir. 1991) to support his argument. While *Coates* did involve a similar claim that the government manufactured jurisdiction, it is clearly distinguishable from the facts of this case.

In *Coates*, the defendant unwittingly contacted a government informer to carry out the murder of his step-brother. 949 F.2d at 106. The informer worked with the government to collect evidence of a federal crime, but after a month of surveillance the

[1] Steele cites *Bond* as *Bond v. U.S.*, 09-1227 (U.S. June 16, 2011).

government still lacked any evidence of the defendant's use of interstate mail or wire facilities in connection with the murder-for-hire plot. *Id.* To create the needed jurisdictional hook, a government agent involved in the case drove from Maryland to Virginia for the sole purpose of making a telephone call to the defendant across state lines. *Id.* The defendant never traveled across state lines, and he never directed the government agent to travel across state lines. *Id.* The Fourth Circuit therefore concluded that the government could not prosecute the defendant for arranging a murder-for-hire through the use of interstate commerce facilities because the government had contrived jurisdiction based solely on the actions of its own agents. *Id.*

This case, however, is distinguishable from *Coates*. In this case, the jury was entitled to infer from the evidence the following facts: Steele commissioned Larry Fairfax to murder his wife, Cyndi Steele, by placing a pipe bomb under her car; Steele knew his wife would be travelling to see her mother in Oregon, and Steele intended that the pipe bomb would detonate during the course of Mrs. Steele's trip between Idaho and Oregon; when it did not, Steele insisted that Fairfax drive to Oregon to remove the bomb placed under the car because Steele feared it would be discovered during a planned mechanical service on the car; on May 28, 2010, Fairfax drove to Oregon at Steele's behest to facilitate Steele's scheme to kill Mrs. Steele. Jim Maher, Fairfax's cousin, corroborated the date and purpose of Fairfax's trip from Idaho to Oregon.

The pipe-bomb plan failing, Steele devised a new plan. Steele insisted that Fairfax make another trip to Oregon while Steele's wife was visiting her mother and kill Mrs.

Steele in an apparent car accident or, if necessary, with a gun. Steele gave Fairfax $400 to defray the cost of the travel on June 11, 2010. By this time, Fairfax was working with the government, and this conversation between Fairfax and Steele was recorded. The government took the $400 Steele gave to Fairfax as evidence but allowed Fairfax to travel to Oregon to make it appear that Fairfax intended to carry out Steele's plot.

Based on each of these trips, a jury could have found beyond a reasonable doubt that Steele, with a murderous intent, caused Fairfax to travel across state lines. There is no evidence that the government "manufactured" jurisdiction as it did in *Coates*. To the contrary, the evidence showed that on more than one occasion, Steele directed Fairfax to cross state lines to facilitate Steele's plot to murder his wife, and Fairfax did travel across state lines.

Simply because Fairfax was working as a government agent when he travel to Oregon the second time does not bar Steele's conviction. *See, e.g., U.S. v. Smith*, 749 F.2d 1568, 1569 (11th Cir. 1985). Rather, analogous cases suggest that "a government agent or informer must unilaterally supply the interstate element of the offense at the government's behest – e.g., when the agent goes out of state merely for the purpose of making the interstate call and creating the federal jurisdiction – before federal jurisdiction will be deemed to have been improperly manufactured." *Id. See also United States v. Bagnariol*, 665 F.2d 877, 899 (9th Cir. 1981)(sustaining defendant's conviction by causing the use of an interstate facility based on a call from an FBI agent in Oregon to the defendant in Washington).

Steele also argues that the jurisdictional element did not exist because "the evidence was crystal clear that Mr. Fairfax did not have the intent that a 'murder be committed'" when he travel across state lines. *Def's Reply* at 2, Dkt. 308. But Fairfax's intent makes no difference because he was not charged under § 1958. It only matters that Steele – not Fairfax – had a murderous intent when he caused Fairfax to travel across state lines. *U.S. v. Driggers*, 559 F.3d at 1024 ("But the defendant must have intended that a murder be committed, and have caused the travel with this murderous intent.") . The jury found beyond a reasonable doubt that Steele had a murderous intent, and he caused Fairfax to travel across state lines to facilitate his scheme to kill his wife. Therefore, the jurisdictional elements for Counts I and II are satisfied, and Steele has no argument that Section 1958 as applied to him violates state sovereignty.

**2. Erroneous Instruction**

Steele next argues that the Court had no discretion to issue a supplemental instruction to the jury defining the term "cause" as used in 18 U.S.C. § 1958. By issuing the instruction, according to Steele, the Court watered down the standard of proof from "beyond a reasonable doubt" to proof by a preponderance of the evidence.

Steele's first argument that the Court had no discretion to issue a supplemental instruction in response to a jury question does not accurately represent the law. "[A] trial judge, as "governor of the trial,"… enjoys "wide discretion in the matter of charging the jury." *Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003)(quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933) and *Charlton v. Kelly*, 156 F. 433, 438 (9th Cir. 1907)).

"This 'wide discretion' carries over to a trial judge's response to a question from the jury." *Id.* Indeed, "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. U.S*, 326 U.S. 607, 612-613 (1946). Here, the Court found that issuing a supplemental instruction, rather than simply referring the jury back to the original instructions, would better clear away the jury's confusion. Based on this conclusion, this Court acted within its "wide discretion" in issuing the supplemental instruction.

Steele also fails to convince the Court that the supplemental instruction "watered down" the standard of proof from "beyond a reasonable doubt" because it created "a virtual presumption of interstate commerce that [could not] be overcome (almost a strict liability standard)." *Def.'s Supp.Mot.* at 4, Dkt. 291. The Court's supplemental instruction clarified the definition of cause as used in Section 1958: "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." *Answer to Jury Question No. 2*, Dkt. 231. The Court's answer correctly defined cause and in no way lowered the government's burden of proof.

The conduct made criminal by Section 1958, is "caus[ing] another…to travel in interstate or foreign commerce…with intent that a murder be committed…." 18 U.S.C. § 1958. "[A] defendant can violate section 1958 without intending to cause anyone to travel across state lines." *Driggers*, 559 F.3d at 1024. In other words, there is no intent requirement with respect to use of interstate commerce and this element of the crime is

purely jurisdictional. *Id.* In fact, the government need not even establish that the defendant knew interstate commerce was used. *United States v. Edelman*, 873 F.2d 791, 794-95 (5th Cir. 1989). Instead, it is enough that the proof showed Fairfax would not have traveled across state lines either the first or second time 'but for' Steele's request that Fairfax kill Mrs. Steele. *Id.* The Court therefore correctly defined "cause" in this context when it instructed the jury to apply a 'but for' standard.

Steele, however, suggests that the Court's definition of "cause" distracted from the real issues in this case: (1) whether the specific purpose of Fairfax's trip on May 31, 2010 was to kill Mrs. Steele; and (2) whether Fairfax traveled to Oregon on June 11, 2010 at Steele's direction because Fairfax was acting as a government decoy at that time. Steele's argument is flawed.

First, for Steele to be found guilty under Section 1958, Fairfax did not have to travel to Oregon on May 31, 2010 for the specific purpose of killing Steele's wife as long as Steele had already formed a murderous intent when he directed Fairfax to make the trip. *Driggers*, 559 F.3d at 1024. It only matters that Fairfax traveled to Oregon to facilitate the murder-for-hire plot. *U.S. v. Perrin*, 580 F.2d 730, 736 (5th Cir. 1978) ("There is no requirement that the use of interstate facilities be essential to the scheme: it is enough that the interstate travel or the use of interstate facilities makes easier or facilitates the unlawful activity.") And the evidence showed that Steele asked Fairfax to travel to Oregon on May 31, 2011 to keep the plan alive.

Second, as already discussed above, it also makes no difference that Fairfax was acting as a government agent when he traveled on June 11, 2010. The evidence showed that Steele asked Fairfax to travel to Oregon on June 11, 2010 to kill Mrs. Steele – either by an apparent car accident or with a gun. This evidence establishes that Steele caused Fairfax to travel to June 11, 2010. *See*, *e.g.*, *Bagnariol*, 665 F.2d at 899.

Because the Court accurately defined "cause" as used in Section 1958, the Court's supplemental instruction did not degrade the standard of proof from "beyond a reasonable doubt" to "proof by a preponderance of the evidence." This conclusion is further bolstered by the fact that the original instructions stated nine separate times that the government must prove each crime charged beyond a reasonable doubt and five separate times that the government had the burden of proving each element of the crime charged. Therefore, any potential vagueness was mitigated by the final instructions read as a whole, which reiterated multiple times that the government had to prove each element beyond a reasonable doubt. *United States v. Harrison*, 34 F.3d 886, 889 (9th Cir. 1994).

**3. Prosecutorial Misconduct**

Steele argues that the government engaged in prosecutorial misconduct by (1) monitoring Steele's phone calls with a non-retained attorney; (2) monitoring Steele's outgoing "legal mail" sent to non-retained attorneys; (3) monitoring Steele's in-jail attorney booth conferences; (4) failing to disclose a report from co-defendant Fairfax's expert, Jeff Buck; and (5) failing to disclose a draft of a fictional book written by Fairfax.

When prosecutorial misconduct deprives a criminal defendant of a fair trial, the defendant's due process rights are violated, and a new trial may be warranted.

**A. *Phone Calls***

This Court already considered the issue of whether the government improperly invaded Steele's attorney-client privilege by listening to Steele's telephone calls with non-retained counsel and found that Steele waived any privilege that may have existed. *Memorandum Decision and Order Dated February 2, 2011*, Dkt. 90. An inmate's telephone conversation with counsel is not protected by the attorney-client privilege where the inmate is notified at the outset that the calls are recorded and subject to monitoring. *See, e.g., United States v. Lentz*, 419 F.Supp.2d 820, 828-29 (E.D.Va. 2005); *c.f., United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (finding prisoner had no reasonable expectation of privacy in outbound phone calls made from a jail). Therefore, the prosecutor did not engage in prosecutorial misconduct by listening to non-privileged calls with non-retained counsel.

**B. *Legal Mail***

The prosecutor did not violate Steele's due process rights by reading letters that Steele labeled "Legal Mail" and sent to a Mr. David Basker. These letters were opened by the jail and provided to the government. The government, in turn, provided those letters to Steele in discovery. The Court understands that the jail's internal procedures call for them to review all outgoing mail unless it is sent to "an attorney of record," and it is undisputed that Mr. Basker never acted as Steele's attorney of record. Indeed, it does

not appear that Steele ever retained Mr. Basker in any capacity. Critical to any assertion of the privilege is, of course, the existence of an attorney-client relationship. *C.f., United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997). Here, however, Steele failed to show, or even allege, that such a relationship existed and therefore it does not appear that the letters were privileged.

Moreover, there is no evidence that the prosecutors used any information contained in the letter at trial. In his correspondence, Steele just thanked Mr. Basker for his previous letter, and asked Mr. Basker if he wanted to help him in any way by "checking out" Roger Peven or finding qualified experts to testify at trial. Therefore, Steele cannot show that he was prejudiced by the Government's reviewing the letter to Mr. Basker.

**C. *In-Jail Attorney Booth Conferences***

Steele claims that the Government listened to his attorney-client meeting that occurred between Steele and his attorney in the attorney-client booth. As an example of this, Steele refers to a special hearing that occurred on May 3, 2011. In this hearing, the Court reported that it had received information from the US Marshall that Steele had told his attorney, "he may develop a health problem that would cause a continuance of the trial, so that Dr. Papcun would be able to return to America and testify." *Def's Reply* at 10, Dkt. 308. The prosecutor was not present at this hearing and had no involvement in reporting the statement Steele made to his attorney. Steele cites no other examples of the prosecutor listening to attorney-booth conversations. Therefore, there is no evidence that

the prosecutor ever listened to Steele's conversations with his attorney while in the attorney-client booth.

**D. *Fairfax Book***

The prosecutor did not violate *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose the fictional book written by Fairfax while he was imprisoned because the prosecutor never had possession of the book until ordered to obtain it by the Court. *Brady* requires prosecutors to disclose to the defense any evidence favorable to the accused and material to guilt or punishment. This included any information contained within the files or in the possession of these law enforcement officers because knowledge of such evidence is imputed to the prosecutor. *United States v. Sanchez*, 50 F.3d 1448, 1453 (9th Cir. 1995). But information in the possession of third parties is not imputed to the prosecutor. *See United States v. Josleyn*, 206 F.3d 144, 153-54 (1st Cir. 2000).

The prosecutor only learned about the "book" Fairfax was writing during trial when the defense counsel cross-examined Fairfax. Fairfax testified that the book was at his home in north Idaho, and he had never told the prosecution about the book. At the request of the defense, the Court ordered Fairfax's attorney to retrieve the book; Fairfax's attorney turned the book over to the prosecution. The Court later acknowledged that it made a mistake in ordering the prosecution to obtain the book and determined that it was not *Brady* material. The prosecution provided the book to the Court because it believed it could qualify as Jencks Act Material pursuant to 18 U.S.C. 3500. The Court reviewed the book, made redactions, and provided it to the defense after issuing a protective order.

Under these facts, there was no *Brady* violation. The prosecutor never "possessed" the book. Moreover, the Court provided the defense counsel a copy of the book, and defense counsel used it to further cross-examine Fairfax. Therefore, this alleged withholding of the Fairfax book cannot be a basis to order a new trial.

**E. *Jeff Buck Report***

The *Brady* analysis above applies equally to the Jeff Buck report. Steele alleges that the government failed to disclose a report from co-defendant Fairfax's expert, Jeff Buck. But the government never possessed this report. Therefore, there was no *Brady* violation.

Steele also fails to establish that the Jeff Buck report constitutes "newly discovered evidence" warranting a new trial. Steele maintains that the report showed that the pipe-bomb Fairfax constructed would not explode. But this allegation is not new evidence. Fairfax testified on direct that he designed the pipe-bomb so it would not explode from the heat generated from the exhaust pipe of Mrs. Steele's car. And Steele's counsel then questioned Fairfax about the ignition source and the amount of powder in the pipe. Steele then argued during closing that there was no evidence to contradict Fairfax's testimony that the pipe bomb would not have exploded. The questions by Steele's attorneys demonstrate that Steele was aware of potential evidence that the bomb would not explode; thus, Buck's report is not new evidence warranting a new trial. *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 2096 (2011).

**4. Governmental Misconduct**

**A. *Recordings***

Steele contends that he is entitled to a new trial because FBI Special Agent Sotka failed to listen to recordings made on June 9, 10, 11, 2010 on the initial device and therefore could not attest to its authenticity. Steele maintains that the "evidence that the tic tac sound which the Government explained at trial, which was not on any of the copies of the recordings of June 9th and 10th, 2010 shows that there is a very serious question whether the government fabricated these recordings." *Def's Reply* at 12, Dkt. 308. Steele further argues that Special Agent Sotka destroyed the "original" recordings in bad faith. These arguments are flawed for several reasons.

First, the recording device has no speaker. Thus, Special Agent Sotka had no means to listen to the recording on the original device. David Snyder, a Forensic Audio Examiner with the FBI, testified during a Daubert hearing on April 21, 2011 that audio recorded on the recorder cannot be monitored or reviewed until it is downloaded from the recorder to a computer. The audio on the recording device is then erased. This is to prevent tampering. *Daubert Hearing Tr.* at 249-300, April 21, 2011. Because Special Agent Sotka could not listen to the recording on the original device, he downloaded the recording on to a disc, which he duplicated and put into a WAV file. *Id.* at 354. He listened to the recording as it was copying to a WAV file. *Id.* at 354. Special Agent Sotka followed procedure by downloading the recordings to discs in a proprietary format.

These recordings were provided to the defense in the proprietary format with a version of the proprietary player. *Snyder Aff.* ¶ 1, Dkt. 305-3.

In addition, Fairfax testified to the authenticity of the recording. Steele may call him a liar, but it was the jury's job to decide whether Fairfax lied about his recorded conversations with Steele. The jury had the opportunity to weigh Fairfax's testimony against the testimony of Mrs. Steele and her daughter, who both stated that they noticed anomalies with the recordings.

Finally, even if it could be said that Special Agent Sotka "destroyed" evidence by erasing the audio from the recording device after he downloaded it to a proprietary disc, Steele cannot show bad faith. Under *Arizona v. Youngblood*, 488 U.S. 51 (1988), the government's failure to preserve evidence "of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant" does not deny a criminal defendant due process unless the defendant can show law enforcement acted in bad faith. *U.S. v. Heffington*, 952 F.2d 275, 280 (9th Cir. 1991). Here, Steele presents no evidence demonstrating Special Agent Sotka acted in bad faith by erasing the audio from the recording device. To the contrary, the evidence showed that Special Agent Sotka acted in accordance with standard procedures and, in fact, erasing the audio from the recording device actually prevents tampering. *Snyder Aff.* ¶ 5, Dkt. 305-3.

For these reasons, the Court declines to hold an evidentiary hearing on the authenticity of the recording. Steele was given ample opportunity during the Daubert

hearing and trial to test the authenticity of the recordings. And Steele does not prevent any additional evidence to persuade the Court that another hearing on this issue is warranted.

**B. *Witness Tampering***

Steele accuses the government of witness tampering. He says that the FBI tried to persuade Mr. Daryl Hollingsworth not to testify. In *U.S. v. Vavages*, the Ninth Circuit noted: "[i]t is well established that 'substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." 151 F.3d 1185, 1188 (9th Cir. 1998)(internal citations omitted). However, "a defendant alleging such interference is required to demonstrate misconduct by a preponderance of the evidence." *Id.* Yet, Steele cites no evidence even suggesting that the prosecutor interfered with Hollingsworth's decision to testify. Moreover, he did testify, which completely undermines Steele's argument.

**C. *Failure to Report Car Bomb***

Steele also argues that Special Agent Sotka engaged in misconduct by failing to report the car bomb that was attached to Mrs. Steele's car. Special Agent Sotka, however, testified that Fairfax did not tell him that Fairfax had placed a bomb underneath Mrs. Steele's car. Also, Fairfax testified that he did not tell Special Agent Sotka that he had placed a bomb under Mrs. Steele's car. With no evidence that Special Agent Sotka knew that the pipe bomb remained under Mrs. Steele's car, there is no evidence of government misconduct in this respect.

**5. Judicial Bias**

Steele argues that a "new trial is required because of arbitrary judicial action favoring the Government." *Def's Supp. Motion* at 18, Dkt. 291. He maintains that the "record is replete with examples of the trial court's favoritism toward the Government (e.g. arbitrary exclusion of Defendant's expert over a timing problem create by the Court, exclusion of the Government's admissions against interest statements offered by Mrs. Steele, erroneous restrictions on witness examination, and rushing the defendant through trial, to name a few.)." *Id.* Due process requires that trials be conducted free of actual bias as well as the appearance of bias. *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997)). There is a strong presumption that a judge is not biased or prejudiced. *Id.*

The judicial bias about which Steele complains relates to adverse evidentiary rulings. Judicial rulings alone almost never constitute valid evidence of bias. *Liteky v. U.S.*, 510 U.S. 540, 544 (1994). Almost invariably, they are proper grounds for appeal, not for showing bias. *Id.* In this case, nothing about the Court's rulings displayed such a degree of favoritism or antagonism to show actual bias. And Steele will have an opportunity to challenge any adverse rulings on appeal. Thus, the Court finds that a new trial is not warranted based on an allegation of judicial bias.

**6. Ineffective Assistance of Counsel**

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.

## ORDER

**IT IS ORDERED** that Defendant Edgar J. Steele's Motion for a New Trial (Dkt. 234) and Supplemental Motion for a New Trial (Dkt. 291) are **DENIED**.

DATED: November 8, 2011

B. Lynn Winmill
Chief Judge
United States District Court

# EXHIBIT 27

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 11-cr-00283-PAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

**1. ROBERT T. McALLISTER**
2. RICHARD C. NEISWONGER,
3. SHANNON NEISWONGER,
4. ELIZABETH WHITNEY,

Defendants.

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**DEFENDANT ROBERT T. McALLISTER'S MOTION TO DISMISS INDICTMENT**

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Defendant Robert T. McAllister, by and through counsel, moves for an order dismissing the indictments in this matter as set forth herein:

1. Mr. McAllister and three co-Defendants were charged with various offenses relating to financial transactions in the summer of 2006. An indictment was filed in July 2011. (Docket No. 1, 7/25/11). The indictment was sealed, however, and the arrest warrant was purposefully not executed.

2. The government was aware that Mr. McAllister had been a prominent Denver attorney for many years. They knew where he lived. They went to his residence in early October to speak with Ms. Whitney who resided with him. There was no reason to believe that Mr. McAllister or any co-Defendant would flee the jurisdiction, intimidate witnesses or take any other action which would justify sealing the original indictment.

3. In October 2011, the government advised Mr. McAllister that it was investigating him and two of his former clients, Richard and Marie Dalton for various federal offenses including conspiracy, wire fraud and money laundering. The Dalton investigation did not involve the subject matter of this case. Mr. McAllister was told that the government wanted to speak with hm about the Daltons. Later, he was told that he might be asked about other matters beyond the Dalton investigation. Mr. McAllister was not told that he was already the subject of a sealed indictment in this case which had been held, along with an arrest warrant, for three months, and that he would be questioned about the case pending against him.

4. On October 20, 2011, Mr. McAllister met with two AUSAs and several federal agents. He was questioned about the Daltons, particularly his knowledge of the circumstances under which they left the United States. Mr. McAllister denied assisting the Daltons in laundering money. He denied providing assistance to them in leaving the country or during their fugitive status.

5. During this meeting, Mr. McAllister was also interrogated extensively about this case. He admitted that his law firm received money from Shannon Neiswonger in 2006. He was told the money was from her separate funds and was to be used to pay attorney fees and costs to represent her husband, Richard. He admitted using it for other purposes, including real estate investments. He admitted that the Neiswongers were not aware of this at the time. He was questioned extensively about the Kelsie Court transaction, the bankruptcy filings, and the Terry Vickery matter. These transactions were then presented to a second Grand Jury which returned a superceding indictment filed on November 16, 2011. The new counts in the superceding indictment were the fruit of the continuing investigation after the sealing of the original

indictment. This investigation included the deceptive interview of Mr. McAllister on October 20, 2011, and the acquisition of documents, some of which Mr. McAllister believes were obtained by questionable, if not illegal means, through an informant (Small) who was working while on federal supervised release.

7. Small violated many conditions of his supervised release while working for the government to indict Mr. McAllister. It is unknown how much the FBI or the government prosecutors knew about Small's illegal activities or condoned them. It is clear, however, that he was permitted to travel throughout the United States and operate new real estate investment schemes, which were in violation of his supervised release.

8. Despite the FBI's encouragement of Small to obtain confidential information about McAllister's clients and to "set him up" in newly created crimes, McAllister did not participate in Small's activities. Small apparently searched McAllister's office, copied files, and delivered the documents to the FBI. He provided the FBI a copy of a letter dated April 5, 2007, written by McAllister to his accountant and tax preparer, former IRS agent Joe Tincani. Small also took from McAllister's law office, the file relating to the money he had attempted to pay back to the Neiswongers. The stolen documents were used by the government in the October 20, 2011 interrogation. This is one example of government conduct prejudicial to Mr. McAllister in the time period between the sealed indictment and the superceding indictment.

9. The sealing of the original indictment was done without proper cause, in violation of F.R.CRIM.P. 6(e)(4). The statute of limitations ran prior to the unsealing of the original indictment and the filing of the superceding indictment. Evidence obtained in the illegal

investigation subsequent to the sealing of the original indictment was undoubtedly presented to the Grand Jury which returned the superceding indictment.

**THE LEGAL ISSUES**

The government must have valid reasons for sealing an indictment. The need to conduct further or ongoing investigation is not a valid purpose. *United States v. Gigante*, 436 F.Supp.2d 647 (S.D.N.Y. 2006). Even when an indictment is properly sealed, the government must unseal the indictment "as soon as the legitimate need for delay has been satisfied." *United States v. Watson*, 599 F.2d 1149, 1154 (2d Cir. 1979).

When a defendant challenges the government's decision to seal an indictment, the burden is on the government to establish legitimate reasons for sealing. *Gigante, supra*, at 654. In the Tenth Circuit, an indictment is "found" when the grand jury votes to indict and the foreperson signs it as a true bill. When a sealed indictment is unsealed, however, a defendant may challenge the propriety of the sealing under Rule 6(e)(4). The government bears the burden of proving a justification for the sealing. When the government fails to do so, a Rule 6(e)(4) violation is established. *United States v. Thompson*, 287 F.3d 1244, 1252 (10th Cir. 2002). For sealing violations, "the government must demonstrate that the improper sealing did not substantially affect a defendant's ability to defend against the indictment." *Id*. The burden of proof in this harmless error analysis is on the government:

> This court recognizes that the government's burden to show that the error did not substantially affect the defendant's ability to defend against the indictment may be difficult to meet. . . . Whatever the difficulties, however, they were invited by the government when it sealed the indictment for an improper purpose.

*Id*., at 1254-1255.

If the government fails to meet this burden, the indictment must be dismissed. *Id.*

## CONCLUSION

Mr. McAllister requests a hearing on these issues. He believes the government cannot meet its burden under *Thompson* and the indictments must be dismissed.

Respectfully submitted,

s/ Forrest W. Lewis
***Forrest W. Lewis***
FORREST W. LEWIS, P.C.
1600 Broadway, Suite 1525
Denver, Colorado 80202
Telephone: (303) 830-2190
Facsimile: (303) 830-1466
Email: flewispc@aol.com
**Attorney for Robert T. McAllister**

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT ROBERT T. McALLISTER'S MOTION TO DISMISS INDICTMENT** was electronically filed with the Clerk of the Court using the CM/ECF system on this 23rd day of April, 2012, which will send notification of such filing to the following address:

Richard L. Hathaway
U.S. Attorney's Office, District of Kansas
Special Prosecutor
Rich.hathaway@usdoj.gov

Christine E. Kenney
U.S. Attorney's Office, District of Kansas
Special Prosecutor
Christine.kenney@usdoj.gov

Kathryn J. Stimson
Attorney for Defendant Elizabeth Whitney
Kathryn@stimsondefense.com

Jeffrey S. Pagliuca
Attorney for Defendant Shannon Neiswonger
jpagliuca@hmflaw.com

Solomon L. Wisenberg
Attorney for Defendant Richard Neiswonger
swisenberg@btlaw.com

s/Polly Ashley
***Polly Ashley***