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April 29, 2013

Molly C. Dwyer
Clerk of the Court
Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Re: *United States v. Steele*, Ninth Cir. No. 12-30005
Response to Letter Submitted Under Fed.R.App.P. 28(j)

In a letter submitted on March 28, 2013 pursuant to Fed.R.App.P. 28(j), the government cited *United States v. Raymond Ruiz, Jr.*, 710 F.3d 1077 (9th Cir. March 26, 2013) (WL 1197945) in support of its argument that the district court in this matter did not commit plain error when it failed to read a specific unanimity instruction as to the “travel” element contained in, or incorporated into, Counts One, Two, and Three of the superseding indictment.

Ruiz does not support the government’s argument. The one-count indictment in that case charged Ruiz with being a felon in possession of a firearm and ammunition based on three alleged acts purportedly evincing a *single* overarching act of possession that occurred, the Court emphasized, “during one ten-minute period on one night in one location.” *Id.*, at 1081. The Court essentially ruled that the underlying conduct simply provided different evidentiary bases for establishing that single and continuous possessory act. *Id.*, at 1081-82. On this point, the Court relied, *inter alia*, on Circuit precedent holding that “possession is presumed continuous absent specific evidence that the defendant lost possession at some point.” *Id.* at 1081 (citing *United States v. Horodner*, 993 F.2d 191, 193 (9th Cir.1993)).

In the present case, by contrast, the superseding indictment did not charge a “possession” offense. Furthermore, the acts that were potentially available to satisfy the “travel” element in counts One, Two, and Three involved different persons acting in different locations at different times. Thus, as a factual matter, the disputed acts of travel in this case were fundamentally distinct and severable, while that addressed in *Ruiz* was unitary and continuing. Accordingly, under *United States v. Anguiano*, 873 F.2d 1314, 1319 (9th Cir.1989) and related precedent, a specific unanimity instruction was required to overcome an obvious risk of juror confusion that did not appear in *Ruiz*.

Sincerely,

RIORDAN & HORGAN

/s/ Dennis P. Riordan
DENNIS P. RIORDAN

Attorneys for Defendant-Appellant
EDGAR J. STEELE

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When All Case Participants are Registered for the
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I hereby certify that on May 1, 2013 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: /s/ Jocilene Yue
Jocilene Yue

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Jocilene Yue