No. 12-30005

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGAR J. STEELE,

Defendant-Appellant.

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

APPELLANT STEELE'S MOTION FOR SUMMARY REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Defendant-appellant Edgar Steele hereby moves for summary reversal of his conviction and for a remand to the district court directing that it consider and decide on the merits his claim of ineffective assistance (hereafter "IAC") of his trial counsel, who was disbarred prior to entry of defendant's criminal judgment of conviction and subsequently indicted for crimes committed while representing Mr. Steele.[1] Defendant requests this extraordinary relief because the Court can readily determine by examining a small portion of the record that (1) the IAC claim was facially viable and properly raised in the district court in Steele's pre-judgment motion for a new trial (Fed.R.Crim.P. 33), but (2) denied on the clearly erroneous ground that IAC claims can only be decided in post-appellate section 2255 proceedings. The lower court's procedural ruling would divide Mr. Steele's IAC claim between two proceedings when it plainly can and should be decided in one.

Mr. Steele was charged by the United States in a highly publicized indictment in connection with an alleged attempted murder. Unknown to Steele, his lead trial counsel, Robert McAllister — himself a former federal prosecutor — was in the midst of disbarment proceedings and had filed for bankruptcy. In a timely post-trial motion for a new trial brought by successor counsel, Mr. Steele alleged that McAllister, affected by these extraordinary pressures, had rendered constitutionally ineffective assistance on a host of grounds. Chief among these was the failure to present available defense evidence bearing on a key defense — a

[1] Pursuant to Ninth Cir. Rule 27-11(3), the filing of this motion seeking a full remand to the district court operates to stay the present schedule for record preparation and briefing on appeal pending disposition of the motion.

failure for which the trial court expressly had held trial counsel responsible.

The district court denied Mr. Steel's pre-judgment IAC claim in the erroneous belief that it was not cognizable under Rule 33. Remarkable developments bearing further on the nature and quality of trial counsel's representation — and the government's undisclosed knowledge of relevant facts — surfaced immediately following that denial and Steele's sentencing. Specifically, the government publicized the fact that well before the ruling on the new trial motion, Steele's trial counsel had been indicted for a host of federal crimes, including the commission of bankruptcy fraud during the very time that he represented Mr. Steele. Related discovery in the McAllister prosecution indicated that a confidential informant had been secretly and regularly recording his conversations with McAllister in the midst of his representation of Steele.

The serious and troubling questions raised by Mr. Steele concerning the effectiveness of McAllister's performance at trial were, in fact, properly raised prior to judgment under Rule 33. Furthermore, had the district court inquired into the matter prior to judgment, the additional developments bearing on McAllister's conduct — and misconduct — would surely have come to light. The validity of Mr. Steele's conviction can only be fairly considered by this Court after his IAC claim is fully developed at an evidentiary hearing in the district court. This matter should now be remanded to the district court to hold that hearing which it erroneously denied Mr. Steele prior to imposition of sentence.

STATEMENT OF FACTS[2]

A. Procedural History

On June 15, 2010, the United States indicted defendant Steele in connection with an alleged plot to murder his wife and mother in law. *Steele* docket, attached as Exhibit 1, Dkt. 6.[3] On July 20, 2010, based on the same purported events, the United States returned a superseding indictment alleging, as to the period between December 2009 and June 11, 2011: count one, use of interstate commerce facilities in the commission of murder for hire (18 U.S.C. § 1958); count two, use of explosive materials to commit a federal felony (§ 844(h)); count three, possession of a destructive device in relation to a crime of violence (§ 924(c)(1)(B)(ii); and count four, tampering with a victim (§ 1512(b)(3)). Dkt. 25, Exh. 2.

The evidentiary phase of trial began on April 27th and concluded on May 4th, when counsel presented their closing arguments and deliberations commenced.

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[2] Most of the facts presented in the following discussion may be located in the present record on appeal. This Court may take judicial notice of remaining matters involving proceedings in other courts, both within and without the federal judicial system, where, as here, such proceedings are related to matters at issue. *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc*., 971 F.2d 244, 248 (9th Cir. 1992), and citations therein; *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971); *Lopez v. Swope*, 205 F.2d 8, 11 n.2 (9th Cir. 1953). *See also* Fed.R.Evid. 201(b) (describing conditions under which court may judicially notice a fact as not subject to reasonable dispute).

[3] Unless otherwise indicated, all references to the docket are to that generated in *United States v. Steele,* Idaho Dist. Ct. Cr. No. 10-148-N-BLW. Exhibits are identified by the letters assigned them in the accompanying declaration of appellate counsel.

Dkt. 213, 224. On May 5th, the jury returned verdicts finding Mr. Steele guilty on all counts. Dkt. 505. On November 8, 2011, the district court denied Mr. Steele's motion of a new trial. Dkt. 312. The following day, the court announced its judgment sentencing Mr. Steele to a term of 50 years in prison. Dkt. 314.

B. Evidentiary Facts and Trial Counsel's Key Omission

At trial, the prosecution sought to prove that defendant Steele hired a handyman, Larry Fairfax, to kill his wife, Cyndi Steele, and her mother-in-law, Jacqueline Kunzman, by installing a pipe bomb under their vehicle. Neither Cyndi Steele nor her mother were harmed, though a pipe bomb was found strapped underneath Cyndi's car when she took the vehicle for an oil change.

Fairfax told federal investigators about the alleged plot and testified against Mr. Steele. Cyndi Steele, however, believed the evidence against her husband was false and testified in his defense. Furthermore, the credibility of Fairfax was in serious question: as the prosecution acknowledged, he had failed to disclose anything about pipe bombs, much less his own conduct in devising and installing one, when he first contacted investigators. See, e.g., Dkt. 305 (government's new trial response), at 4. Accordingly, the most critical evidence for purposes of the prosecution's case consisted of audiotapes of purported conversations between Fairfax and defendant Steele on June 9 and June 10, 2011, surreptitiously recorded by Fairfax, in which discussion of the plot apparently could be heard. See, e.g., *id*., at 43 (prosecution describes recordings as the "critical pieces of evidence.").

Defendant's chief goal at trial was to discredit the authenticity and

reliability of the June 9 and 10 recordings, the originals of which had not been preserved in the first instance. See RT 360, 386, 390-91. In this connection, the district court ruled in a pre-trial *Daubert*[4] hearing, should the factual predicate be established during trial, proposed defense expert George Papcun, who had a Ph.D. in Acoustic Phonetics in the Linguistics Department at UCLA, would be permitted to provide corroborative opinion testimony challenging the authenticity and reliability of the recordings. 4-21-11 RT at 322-25, Exh. 3; see also 4-21-11 RT *id*., at 45, 49, 60-63, 67, 80, 109-110 (Papcun describes defects and anomalies on recordings and questions their reliability and authenticity).[5]

In their trial testimony, both Cyndi and the Steeles' daughter, Kelsey, questioned the veracity of the audio recordings based on their knowledge of defendant Steele's voice, manner of speaking, and related factors. 5-2-11 RT at 1240-45, 1247-48 (Kelsey Steele), 1274-82 (Cyndi Steele). The trial court ruled the defense had established the factual predicate that would permit expert Papcun to challenge the veracity of the recordings. *Id*., at 1304-09, 1318-21, Exh. 4. However, as the government argued, 5-3-11 RT, Exh. 5, at 1354-60, and the trial court found, *id*., at 1360-65, Mr. McAllister inexcusably failed to take the steps

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

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

needed to produce Papcun for trial.[6] The trial court thereafter refused to permit Papcun's appearance by video-conference. *Id.*, at 1365-67. As a result, McAllister presented no expert testimony in support of the defense theory. During closing argument, the prosecution relentlessly cited and quoted the recordings, playing portions thereof, in urging the jury to convict. 5-4-11 RT at 1469-1501.

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

Mr. McAllister had once been the chief criminal trial deputy of the Colorado United States Attorney's Office. On February 11, 2011, the district court in this matter entered an order approving Mr. McAllister's February 7, 2011 motion for a *pro hac vice* appearance as lead counsel for Mr. Steele, based on McAllister's representation that he was a member in good standing of the Colorado bar. Dkt. 75, 89, Exh. 6 [motion]. Idaho attorney Gary Amendola was retained as defendant's local counsel. *Id.*

McAllister represented Mr. Steele during all pretrial proceedings after February 7th and throughout the trial itself. However, on June 6, 2011 — about a month after the jury's May 5th verdict — McAllister executed a "Stipulation, Agreement and Affidavit Containing the Respondent's Conditional Admission of Misconduct" ("Stipulation") in connection with an investigation and disciplinary

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[6] See 5-3-11 RT, Exh. 5, at 1361 (trial court states that Papcun's unavailability "is a problem of the defense's own making. I think it was very clear from my decision that the door was open to Dr. Papcun's testimony. And I think it was, therefore, the defense's responsibility to make sure that Dr. Papcun was available to walk through that door."); *id.,* at 1360 (court describes Papcun as a "key defense witness.")

proceeding initiated against him in the Colorado Supreme Court. Exh. 7. In the Stipulation, McAllister acknowledged taking $105,255 of client funds without permission or while the money was restricted by court order. Exh. 7, at 3 (describing receipt and personal use in October, 2010 of $100,000 provided by client Vickery but frozen by court order): *id*., at 2-3 (describing receipt and personal use of $5,255 paid by insurer to client MNT Enterprises but taken by McAllister).

The Stipulation described McAllister's misconduct as "knowing," and cited the presence of prior disciplinary offenses, a dishonest motive, and a pattern of misconduct. Exh. 7, at 5. The Stipulation attached the Supreme Court's previous (2004) order of McAllister's public censure arising from his misrepresentations concerning promised payment to a consultant who provided services to McAllister's firm. *Id*. The Supreme Court's concluding order, entered June 6, 2011, directed that Mr. McAllister be disbarred effective July 8, 2011. See Exh. 7.

On June 13, 2011, Idaho attorney Wesley Hoyt was substituted as Mr. Steel's counsel for purposes of further proceedings. Dkt. 244. Mr. McAllister's and Mr. Amendola's representation of Mr. Steele was then terminated. Dkt. 244, 245.

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

On May 12, 2011, prior to their replacement as counsel for Mr. Steele, Mr. McAllister and Mr. Amendola filed a motion for a new trial. Dkt. 234. Having

occurred within 14 days of the jury's May 3rd verdict, the filing was therefore timely under Fed.R.Crim.P. 33. The district court thereafter granted defense counsel additional extensions of time to file a supplement to the new trial motion. Dkt. 239, 261.

Upon Mr. Hoyt's substitution as defendant's counsel, the court granted the defense additional time to supplement the original new trial motion. Dkt. 263 and Exh. 8 (order); Dkt. 269; Dkt. 294. Mr. Hoyt filed a 50 page supplemental motion on August 9, 2011, a filing that the Court expressly found timely in its order issued on that date. Dkt. 291; Dkt. 294 and Exh. 9 (order). The motion raised a host of challenges to the convictions alleging, among other things, jurisdictional defects, insufficiency of the evidence, erroneous instructions, prosecutorial misconduct, and ineffective assistance of counsel. Dkt. 294. As to the IAC claim, the motion relied in part on the acts and omissions of Mr. McAllister and Mr. Amendola. *Id*., Exh. 10 (motion excerpt), pp. 7-17, 38-44.

In a supporting affidavit, Mr. McAllister conceded that he had been enduring a disbarment investigation during his representation of Mr. Steele. Exh. 11, at 4-5. McAllister further revealed that he had been engaged in bankruptcy proceedings throughout this period. *Id*. He claimed that he was required to keep the disbarment matter a secret until its public announcement but before conceding he had been wrong in failing to disclose it. He further averred that, as the motion alleged, the disbarment and bankruptcy so affected his mental and emotional state that he had failed to competently represent Mr. Steele. *Id*. Mr. Amendola

supplied an affidavit attesting to McAllister's failures and his own. Exh. 12.

As to but one of many alleged acts of deficient performance — the failure to present the testimony of expert Papcun — McAllister supplied a second affidavit explaining that Papcun had had a Polynesian vacation scheduled for the time he would be needed at trial; that he failed to serve Papcun with a subpoena beforehand in the belief that Papcun would be "hostile" had he done so; but that he believed the trial court would permit Papcun to testify by video-conference. Exh. 13. This affidavit also attached a note from Steele to McAllister at the end of the *Daubert* hearing in which Steele emphatically expressed the need to subpoena Papcun for trial and further stated, "We must bring Papcun back to trial whatever the cost!" Exh. 13, attachment (emphasis in original).

Additional affidavits, including one submitted by Dr. Papcun himself, indicated that Papcun had been entirely willing to appear for trial so long as he was compensated for the cancellation; that McAllister had erroneously told Papcun such compensation would not be forthcoming; and that McAllister wrongly told Cyndi Steele that Mr. Steele did not wish Papcun subpoenaed and not to compensate him for lost vacation. Exh. 14 (Papcun aff.), at 2; Exh. 15 (C. Steele aff., at 12-13); Exh. 12 (Amendola aff.), at 2-3; Exh. 16 (Edgar Steele affidavit), at 28-29.

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

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

Dkt. 312, at 17-18; Exh. 17 (excerpt from decision).

E. Subsequent Revelations

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

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

Also on July 25, 2011, the trial court issued arrest warrants for all named defendants, including Mr. McAllister. McAllister Dkt., nos. 2, 3, 4, and 5. Again on the same date, the United States moved to seal the case, including the

indictment and individual arrest warrants, until the warrants had been executed and the defendants brought to court. McAllister Dkt. 6; Exh. 20 (motion). Yet again on July 25th, the district court granted the government's motion to seal. McAllister Dkt. 7, Exh. 21 (court's sealing order).

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

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

On the *same* day, i.e., November 14, 2011, a federal agent arrested McAllister pursuant to the warrant issued in the wake of the original sealed indictment that had been returned against him in July, 2011 in the district of Colorado. McAllister Dkt. 19; Exh. 22 (copy of warrant with return). Also on November 14, 2011, Mr. McAllister made his initial appearance in the district court of Colorado and posted a $20,000 release bond. *McAllister* Dkt., Exh. 18, nos. 10, 13, 14.

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

Two days later, on November 16, 2011, the government filed a First Superseding Indictment against Mr. McAllister and the other previously-indicted defendants. *McAllister* Dkt. 23; Exh. 23 (superseding indictment). On this

occasion, however, the government did *not* seek an order sealing the contents of the indictment, as it had successfully done before. To the contrary, the government permitted the filing of the new indictment as a public record and publicly trumpeted its contents in a statement issued by the United States Attorney's Office for the District of Kansas "for immediate release" on November 16, 2011. Exh. 24.

The superseding indictment essentially duplicated the counts alleged in the original indictment and added others. As to the duplicated counts, the indictment alleged that McAllister represented Richard Neiswonger when in 1996 the Federal Trade Commission brought an action against Neiswonger to obtain preliminary and permanent injunctive and other relief from Neiswonger's deceptive business acts. In 2006, the FTC filed a civil contempt action against Neiswonger alleging he violated the injunction by marketing training and business opportunities through misrepresentations. A federal judge in the Eastern District of Missouri ordered Neiswonger's assets frozen. Exh. 23, at 1-11.

Shortly after the assets were frozen, McAllister and the Neiswongers allegedly began to circumvent the restraining order by transferring money to McAllister from accounts over which Shannon Neiswonger had control for the purpose of concealing from the FTC and the court that the restraining order was being violated. McAllister and Whitney allegedly laundered the funds. *Id*.

The new counts in the superseding indictment alleged that McAllister and Whitney entered into a second conspiracy "from 2006 and continuing into 2011"

to embezzle more than $1 million that McAllister received from the Neiswongers and to conceal the theft. Exh. 23, at 11-14. Five related counts against McAllister and Whitney alleged wire fraud between 2007 and 2010. *Id*., at 14-15. Another count against both alleged interstate transportation of stolen property in October, 2010, as to funds derived from McAllister client Vickery (see discussion of disbarment proceedings, above). *Id*., at 16-17. Another new count alleged bankruptcy fraud (18 U.S.C. § 157 and 2) and the final count the concealment of assets in bankruptcy (§ 152(1) and 2) against both McAllister and Whitney "on or about March 11, 2011," — i.e., *after* McAllister had commenced his representation of Mr. Steele — and again in connection with the Vickery funds.

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

Finally, in the course of the McAllister prosecution, Mr. McAllister filed a subsequently-granted motion for a pre-trial continuance in which, among other things, his counsel described the voluminous and complex discovery that had been produced to date. Exh. 25. Counsel further stated that such discovery included "at least 23 surreptitiously recorded conversations of Mr. McAllister, only one of which has been transcribed to date." *Id*., at 4. The motion thereafter stated that:

> The primary government informant who deceived Mr. McAllister to obtain information in the recorded conversations is Gerald Small, a convicted felon and former client of Mr. McAllister. The scope of his relationship with the government is unclear but his work as an informant implicates complex legal and factual issues. *His business relationship with Mr. McAllister during the relevant time period may have allowed him*

> *access to confidential attorney-client material regarding clients not related to this case. . .*

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

Again, all such matters, including Mr. McAllister's alleged commission of federal crimes as well as the surreptitious recording of his conversations by a government informant during McAllister's representation of Mr. Steele, would have come to light had the district court in this matter not erred in declining to inquire into Steele's allegations that McAllister had been constitutionally ineffective. Mr. Steele now turns to legal bases for determining that such legal error occurred.

ARGUMENT

I. IN AN APPROPRIATE CASE, THIS COURT MAY GRANT A MOTION FOR PARTIAL SUMMARY REVERSAL

In an appropriate case, this Court will grant a motion for summary reversal. Thus, in *United States v. Duarte-Higareda*, 68 F.3d 369 (9th Cir. 1995), the Court summarily reversed a case in which the district court ordered an evidentiary hearing on the defendant's § 2255 motion but refused to appoint him counsel. This Court noted that the defendant had been indigent at the time of his trial, and that if he remained indigent at the time of the § 2255 motion, the District Court's

refusal to appoint counsel was clear error. Thus, the Court granted the motion for summary reversal and remanded the matter to the District Court. *Duarte-Higareda,* 68 F.3d at 370. The defendant later appealed challenging the District Court's finding that his jury trial waiver was voluntary. *United States v. Duarte-Higareda*, 113 F.3d 1000 (9th Cir. 1997). *See also United States v. Navarez-Castro*, 120 F.3d 190, 191 (9th Cir. 1997) (Court discusses fact that the instant appeal challenged conviction that followed new trial after the Court had granted a motion for summary reversal).

The standard for summary disposition is whether the merits of [the movant's] claim are so clear as to justify expedited action." *See Walker v. Washington*, 627 F.2d 541, 546 (D.C. Cir. 1980) ("a party who seeks summary disposition of an appeal must demonstrate that the merits of his claim are so clear as to justify expedited action"); *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) (summary disposition necessary and proper where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case").

Finally, the Ninth Circuit Advisory Committee Note to Circuit Rule 27-1 acknowledges the availability of motions for summary disposition and remand when it states that a single judge may not grant them – "[A] single judge may not grant motions for summary disposition, dismissal, or remand." On the power to remand, *see also Underwood v. Commissioner of Internal Revenue*, 56 F.2d 67, 73 (4th Cir. 1932) ("there is the well-established rule that an appellate court has the

power, without determining and disposing of a case, to remand it to the lower court for further proceedings if the case has been tried on a wrong theory, or the record is not in condition for the appellate court to decide the question presented with justice to all parties concerned"). Appellant Steele submits that his present motion satisfies all of the relevant conditions for ordering summary reversal.

II. THE DISTRICT COURT ERRED IN DECLINING TO CONSIDER DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIM, AND THE MATTER SHOULD BE REMANDED FOR A HEARING ON IT

Again, prior to sentencing, Mr. Steele made a timely motion for a new trial pursuant to Fed.R.Crim.P. 33 (b)(2) arguing, among other things, that his trial counsel failed to provide the effective assistance of counsel guaranteed by the Sixth Amendment. When defendant brings a timely motion for new trial prior to sentencing, he is entitled to raise an ineffective assistance of counsel claim in the district court and develop the record in support of that claim. "[W]hen a claim of ineffective assistance of counsel is first raised in the district court prior to the judgment of conviction, the district court may, and at times should, consider the claim at that point in the proceeding." *United States v. Brown,* 623 F.3d 104, 113 (2nd Cir. 2010). *See also United States v. Cobas*, 415 Fed. Appx. 555 (5th Cir. 2011); *United States v. Woods*, 812 F.2d 1483 (4th Cir.1987); *United States v. Jensen*, 2010 WL 380998, (9th Cir. 2010); *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984); *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996); *United States v. Howard*, 2010 WL 276236 (9th Cir. 2010); *United States v. Moses*, 2006 WL 1459836 (9th Cir. 2006); *US v. Smith*, 62 F.3d 641, 650 (4th Cir.

1995).

In response to Mr. Steele's Rule 33 motion, the district court, citing *United States v. Ross*, 2011 WL2678832 (9th Cir. 2011)(unpublished), erroneously refused to consider his argument, holding that the proper procedure for challenging the effectiveness of counsel is by a post-sentencing collateral attack on the conviction under 28 U.S.C. § 2255, after a full record can be developed. In *Ross*, as in *United States v. Hanoum*, 33 F.3d 1128, 1129 (9th Cir.1994), the defendant did not bring a timely Rule 33(b)(2) motion, but rather moved post-sentencing under Rule 33(b)(1),[7] claiming on the basis of newly discovered evidence that he had been deprived of his Sixth Amendment right to counsel. In *Hanoum*, where defendant alleged that counsel had a conflict of interest which only became known after sentencing, this Court ruled the defendant's use of Rule 33(b)(1) to be improper, stating that newly discovered evidence must relate to elements of the crime charged, not to claims of ineffective assistance of counsel. *Hanoum* relegated the defendant to his post-appellate remedies under section 2255.

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

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

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

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

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

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

In the instant case, the claim of ineffective assistance of counsel was timely

brought under Rule 33(b)(2)'s "other grounds" prong, and was not based on Rule 33(b)(1)'s "newly discovered evidence" prong. The district court clearly erred in refusing to hear the claim.

Furthermore, trial counsel's failure to present expert witness testimony itself constitutes constitutionally deficient performance where, as here, it is needed to support the defense theory. See, e.g., *Duncan v. Ornoski*, 528 F.3d 1222, 1236 (9th Cir. 2008). And the failure to present the available evidence from Dr. Papcun was demonstrably prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984), particularly given the parties' recognition that the validity of the June 9 and 10 recordings constituted the critical issue in the case.

Mr. Steele's new trial motion thus contains allegations of Mr. McAllister's ineffective assistance which, if true, would entitle him to relief, which entitled him to an evidentiary hearing in the first instance. *United States v. Howard* 381 F.3d 873, 877 (9th Cir. 2004) This Court, therefore, should summarily reverse and remand to district court for a hearing on the timely raised claim of IAC. That hearing is required to make an evidentiary record on the following issues:

- The degree, if any, to which the disbarment and bankruptcy proceedings affected Mr. McAllister's representation of Mr. Steele;
- Whether Mr. McAllister breached his duty of competent and diligent representation by failing to disclose his disbarment and bankruptcy proceedings to Mr. Steele and to the court;
- Whether McAllister's failure to present critical evidence from defense expert Papcun can be deemed a defensible tactical choice on the one hand or the indefensible product of ignorance on the other;
- Whether and to what specific extent the taping of McAllister by a

confidential government informant in connection with the McAllister prosecution concerned matters relating to the representation of Steele;

- Whether McAllister's alleged criminal conduct while representing Mr. Steele, and the ongoing federal investigation of that conduct, affected Mr. McAllister's representation of Mr. Steele;

- Whether McAllister knew of the federal investigation and/or his indictment at any time during his representation of Mr. Steele. That fact, if shown, would establish a disqualifying conflict of interest as to McAllister, particularly if the federal investigation was aided by the United States Attorney for the District of Idaho. See *Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000); *Briguglio v. United States*, 675 F.2d 81, 82 (3d Cir. 1982); *United States v. McLain*, 823 F.2d 1457, 1464 (11th Cir.1987), overruled on other grounds, *United States v. Watson*, 866 F.2d 381, 385 n. 3 (11th Cir.1989).

- Why the United States chose to seal the federal indictment of Mr. McAllister while defendant Steele's post-trial proceedings were in progress and to publicize charges against him only after the judgment against Mr. Steele had been entered;

- Whether there is reasonable probability that a different verdict would have obtained in the absence of any deficient performance arising from the Papcun matter and other alleged failures.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant this motion for summary reversal, and remand the matter for a hearing at which Mr. Steele may litigate on the merits his claim of ineffective assistance of counsel.

Dated: April 4, 2011

Respectfully submitted,

DENNIS P. RIORDAN
DONALD M. HORGAN

By /s/ Dennis P. Riordan
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Attorneys for Appellant Edgar Steele

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

I hereby certify that on April 5, 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
When Not All Case Participants are Registered for the
Appellate CM/ECF System

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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature: _____
Jocilene Yue