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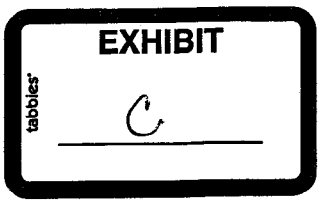
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO



UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal Case No. 10-CR-148-BLW

EDGAR STEELE,
Defendant.

AFFIDAVIT OF ROBERT T. McALLISTER
(Ineffective Assistance of Counsel)

State of Colorado)
ss.
County of Arapahoe)

I, Robert T. McAllister, the Affiant, a resident of the State of Colorado, being over the age of 18 years and competent to testify according to my own personal knowledge, upon oath, state, allege and aver under penalty of perjury pursuant to 28 USC §1746 as follows:

1. I am an attorney engaged in the private practice of law who represented that I was capable of serving as lead counsel for Edgar J. Steele in the trial of the above mentioned criminal proceeding which ended May 5, 2011 with a jury verdict of conviction on all four felony counts of the indictment in the above criminal case.

2. I was unable to effectively represent my client during analysis phase before trial preparations began for the reasons set forth below:

A. Because of prosecutorial misconduct by intrusion into what was attorney/client privileged communications that should have been protected as confidential but which were recorded by the Spokane County Jail and listened to by the prosecutor, AUSA Traci Whelan, as follows:

a. Before entering my appearance for Mr. Steele in the above case, I was informed by attorney Roger Peven of the Federal Public Defender's Office (the attorney assigned to Mr. Steele's case, and thus the "attorney of record" for Mr. Steele until February 7, 2011) that AUSA Whelan advised him of the following:

i) that she had been listening to jail house recordings of communications between Mr. Steele and me and between Mr. Steele and other private lawyers;

ii) that, from my discussions with Mr. Steele, she became aware that I was planning to enter a "late" appearance and ask for a continuance of the March 7, 2011 trial date; and

iii) that, she knew I had talked with Mr. Steele about using some type of diminished capacity or insanity defense.

iv) All of these items were attorney/client privileged matters.

b. The prosecution filed a motion to determine if Mr. Steele had "waived" his attorney/client privilege (Dkt. #71). Based on the above information from Mr. Peven, a Response was filed seeking to disqualify AUSA Whelan (Dkt. #73) from this case for intruding into the attorney/client privilege communications with Mr. Steele. The ruling of February 11, 2011 (see Dkt. # 90) on the disqualification issue determined only that: "his attorney" (that is, only Mr. Steele's "attorney of record," who was Mr. Peven at the time) would have had the protection of privileged communications with Mr. Steele. This ruling does not include, and thus excludes privileged communications, between the defendant and lawyers who had not entered an appearance for the defendant, such as me and other private attorneys who were being interviewed for representation purposes; however, this ruling was consistent with the directive from the US Marshal's Office of North

Idaho, that provided only communications between the defendant and his "attorney of record" were attorney/client privilege protected. Such a directive from the US Marshal's Office was unconstitutional and inconsistent with the law applicable to the attorney/client privilege.

c. When the trial court ruled (Dkt. 90) that Mr. Steele had "waived" the attorney client privilege because he elected to proceed with a phone call in the face of a recorded warning stating that if he did so, the call would be "monitored and recorded" the Court undermined my effectiveness as Mr. Steele's attorney for the reason that, Mr. Steele had no other means to contact private counsel than to call on the jail phone lines that were subject to being monitored and recorded. Thus, an attorney who had not yet entered an appearance on the inmate's behalf could not, because of this ruling have an attorney/client privileged communication with a private attorney who was not his "attorney of record." This means that this ruling modified the effect of Rule 5(d)(1)(B), Fed. R. Crim. Pro., as it denied Mr. Steele the right to "retain counsel" and modified Rule 5(d)(2) as it denied Mr. Steele the right to "consult with counsel" when, as written, both rules guaranteed a defendant the right to confidential communications with counsel protected by what the U.S. Supreme Court calls "...the oldest of the privileges for confidential communications known to the common law." *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (J. McNaughton rev. 1961)).

d. Said ruling determining that Mr. Steele had "waived" his attorney client privilege (Dkt. #90) by the trial court was made in spite of the fact that such waiver was made under duress and not voluntary. Because the custody of Mr. Steele was entrusted to the US Marshal's Office as a pre-trial detainee, and because the US Marshal's Office had set the policy under which its detainees would be held in the Spokane County Jail; thus, it was the US Government that denied him his right to confidential meetings with private counsel. Such policy dictated that no other phone lines would be available to him as an "in custody" detainee of the Government. Thus, all possible means to have privileged communication with prospective lawyers in the private practice of law being prohibited, his so-called "waiver" could not have been voluntary. The force applied to Mr. Steele as a prisoner prevented him from having other means of communicating with private counsel on either a privilege-protected phone line or in a jail conference meeting place, to consult with private counsel without monitoring.

e. Although I attempted to provide assistance to Mr. Steele, because he was denied his right to be protected by the attorney/client privileged, our communications were restrained and stifled rather than being robust, full, frank and open as permitted by US Supreme Court interpretation, making me ineffective as his attorney.

B. I was also ineffective as the attorney for Mr. Steele because, at the time I was in the process of undertaking his representation and throughout trial, I was under investigation by the Colorado Supreme Court for attorney misconduct in the form of mismanagement of client funds in a pending disbarment proceeding. My ineffectiveness stemmed from the level of my personal remorse, mental anguish, substantial worry and cognitive disruption of my thinking processes occasioned by the pending disbarment proceeding which carried with it the likelihood that I might lose my license to practice law, which license had been in good standing for over 37 years. That Colorado disbarment proceeding was absolutely confidential and until after the Steele trial when the official public word of my disbarment was announced (to take place effective July 6, 2011), I had no right to disclose the fact of the investigation or disclose information about the case against me to anyone not a party to that proceeding. The effect that this disbarment proceeding had upon me was so great that it rendered me ineffective in providing assistance of counsel as I attempted to defend Mr. Steele. I also had put my professional corporation through bankruptcy during the time that I was handling this case which put additional pressure on me.

3. At the time I was representing Mr. Steele I did not recognize the extent to which my mental state had deteriorated as a result of such remorse had impacted my ability to be effective in representing my client because I assumed I could perform as well as I had performed previously, not understanding the full extent that the prospect of a disbarment would have on me.

A. I, as an attorney, owed a duty to Mr. Steele to perform to the best of my ability. I breached my obligation to defend Mr. Steele that came about as a result of my mental, cognitive and perceptual disability all of which was brought on by my mental anguish, cognitive disruption, substantial worry, remorse and personal devastation over the pending disbarment.

B. My actions were wrong in failing to disclose the pending disbarment proceedings, or in the alternative, withdrawing from the case, because my background, knowledge, experience, and demonstrated abilities in other cases

created for my client as well as my co-counsel, a reliance on me to performance at the highest levels when I was incapable of doing so.

Further affiant sayeth naught.

I declare under penalty of perjury that the foregoing is correct on this 28 day of June, 2011.

Robert T. McAllister